



IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

CASE NO: 1735/2014

In the matter between:

MORUDI M.P. & 70 OTHERS

Applicants

And

**N C HOUSING SERVICES & DEVELOPMENT
CO LTD**

Respondents

APPLICATION FOR LEAVE TO APPEAL JUDGMENT

CORAM: LEVER AJ

1. This is an application for leave to appeal a judgment of mine, given under case number 1735/2014 and handed down on the 5 February 2016, where I refused the applicants' application for rescission of an Order made by the Judge President on the 1 September 2014 under case number 1577/2012 (the main application). I also refused to grant the fifth to the seventy first applicants leave to intervene and be joined in the main application. Applicants seek leave to appeal to the Supreme Court of Appeal against the whole of my judgment as handed down on the 5 February 2016.

2. The applicants filed 5 pages of grounds upon which they sought leave to appeal my judgment of the 5 February 2016. No purpose will be served by repeating them verbatim herein. In my view they may be distilled into seven main issues, which are:

- 2.1. Whether or not the first to the fourth applicants were cited as directors in the first respondent in the main application or put differently whether or not they were cited, not as officers of the first respondent but as shareholders or potential shareholders of the first respondent;
- 2.2. Whether the first to fourth applicants had properly explained their default in the rescission application;
- 2.3. Whether the fifth to seventy first applicants had properly explained their default in the rescission application;
- 2.4. Whether or not the judgment of my sister Mamosebo AJ (as she then was) in an urgent application brought under case number 1577/2012, which was delivered on the 8 August 2014, effectively settled all of the disputes in the main application;
- 2.5. Whether or not a share register had been opened and share allocations recorded in such register at the time of the meeting of shareholders that was the subject of the urgent application before Mamosebo AJ;
- 2.6. Whether or not my interpretation of Rule 42(1)(a) of the Uniform Rules of Court, being that such rule contemplated the

physical absence of the affected party at the material time, was too narrow and technical; and

2.7. Whether or not I was correct in finding that the rights of the applicants contemplated by s 34 of the Constitution of the Republic of South Africa had not been infringed by the Judge President on the 1 September 2014, when the main application came before him.

3. The factual background to this matter is comprehensively set out in my judgment, the subject of this application for leave to appeal. None of the parties have taken issue with my summary of the background or my statement of the facts. In these circumstances, it is not necessary to traverse these issues again.

4. The test of what needs to be established in order to be granted the necessary leave to appeal is now set out in s 17(1) of the Superior Courts Act¹, the relevant provisions of which read as follows:

- “17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-*
- (a) (i) the appeal would have a reasonable prospect of success; or*
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
 - (b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and ...”*

¹ Act 10 of 2013.

5. With this test in mind, turning to the first and second grounds summarised above. In the circumstances of the present case, these two grounds run together in respect of the first to the fourth applicants. If the first to the fourth applicants were indeed cited in their capacities as shareholders or potential shareholders, then they were not in default and were properly before court on the 1 September 2014 when the main application served before the Judge President.
6. If however, they were cited in their capacity as directors of the first respondent, then when the first respondent withdrew its opposition to the main application the first to fourth applicants were no longer parties to the proceedings in the main application. In those circumstances they would be required to seek leave and intervene in the main application in their capacities as shareholders or potential shareholders in the first respondent.
7. As can be seen from my judgment in the rescission application there was evidence to support both positions. I reached my conclusion by analysing each argument and the evidence to support it and finally taking a look at the evidence overall to conclude that on the probabilities the applicants were cited and acted as directors of the first respondent.

8. In these circumstances, another court might reasonably take a different view of the probabilities and I would have to conclude that the applicants would have a reasonable prospect of success on the first two grounds of appeal as summarised above.
9. Turning now to the third ground of appeal as summarised above. This ground of appeal was not formally set out in the Notice of Application for Leave to Appeal filed on applicants' behalf. However, at the hearing hereof the following ground was inserted by consent. "7A The court erred in finding that the fifth to seventy first applicants have not set out and explained their default satisfactorily."
10. The fifth to seventy first applicants explained that they were informed that first to fourth applicants were protecting their interests in the main application. They accepted the position as such. Apart from certain individuals who were singled out, it could not be seriously disputed that the majority of the fifth to seventy first applicants had limited means. It also cannot be disputed that they are laypersons. It appears from the papers that they come from different geographical areas throughout the province. I directed certain criticisms at the case that they made out, but my criticisms in the main were directed at those who purported to be acting in their interests.
11. In the circumstances of the case it is reasonably possible that another court might interpret the facts differently. On this ground as well I

have to conclude that there is a reasonable prospect of success on appeal.

12. Turning now to the fourth ground of appeal as summarised above, being whether or not the judgement of Mamosebo AJ effectively settled the disputes in the main application. The judgment of Mamosebo AJ dealt with the urgent application brought by the present first to fourth applicants purporting to act on behalf of the first respondent company. The object of the said urgent application that served before Mamosebo AJ was to set aside the resolution adopted by the general meeting on the 19 April 2013 in terms of which the first respondent withdrew its opposition to the main application.

13. The urgent application was dismissed by Mamosebo AJ and the consequence that flows from that judgment is that the resolution of the general meeting of 19 April 2013 stands. In these circumstances, the respondents argued that granting leave to appeal would have no practical effect and that on that ground alone I should refuse leave to appeal.

14. This is the ground of appeal that causes me some difficulty. However, on reflection I do not believe this fourth ground of appeal should be considered in isolation from the fifth ground of appeal. This fifth ground of appeal is to the effect that on the 19 April 2013 there were no shareholders in the first respondent. It must be remembered that

one of the Orders made by Williams J on the 16 October 2012 was that the Board of Directors of the first respondent were authorised and directed to issue one ordinary par value share to each person whose name appeared on annexure “M”.

15. If the Board of Directors did not open a share register and issue the share certificates as directed in the Order of Williams J the consequence that would flow from that would be that there was no general meeting of the first respondent as there were no shareholders to convene in general meeting. If that was the case, there could be no resolution of the first respondent to withdraw its opposition to the main application. It goes without saying that if there was no resolution then applicants would not be required to set anything aside and in that context the judgment of Mamosebo AJ would not be a bar to the relief the applicants sought.

16. I reached my conclusion that applicants had not raised this issue pertinently in their founding papers by reading the relevant passages in the founding affidavit in a particular context. On reflection, I believe this may be open to interpretation. I criticised the applicants' credibility on the issue of the shares on the basis of what is set out in applicants' replying affidavit. Again, on reflection I believe this may be open to interpretation. In these circumstances, I have to conclude that another court may reach a different decision and consequently, in the

circumstances I believe that the appeal would have a reasonable prospect of success.

17. In regard to the sixth ground of appeal, being that I followed a narrow and technical approach to the application of Rule 42(1)(a) of the Uniform Rules of Court. In the context of the fact that I could find no South African authority directly in point and neither Counsel could refer me to any such authority and the fact that I followed the reasoning of a court in the Republic of Botswana on a similarly worded provision in their Rules, I believe that it would be reasonable to conclude that another court might follow a different approach. In these circumstances the applicants would have a reasonable prospect of success on this ground of appeal.

18. Turning to the last ground of appeal, being the question of whether or not the Judge President had infringed the applicants' rights under s 34 of the constitution when the matter came before him on the 1 September 2014. In reaching my conclusion that the rights of the applicants had not been infringed, I interpreted the record of proceedings in a particular context. It is reasonably possible that another court may interpret the context differently. In my view, there is a reasonable prospect of success on appeal.

19. The next question is whether this matter should be referred to the Full Bench of this Division or if the matter should be referred to the

Supreme Court of Appeal. This question is governed by the provisions of s 17(6)(a) of Superior Court Act. This section requires that I weigh-up two broad considerations. Firstly, whether the issues involve important questions of law. Secondly, whether the interests of justice, either generally or in the particular case, require that the matter be heard by the Supreme Court of Appeal.

20. Mr Van Niekerk SC who appeared on behalf of the applicants submitted that the matter should be referred to the Supreme Court of Appeal on the basis that generally the interests of justice required that it be referred to the SCA. Mr Van Niekerk motivated this submission on the basis that the matter was of major importance to all of the parties; it related to questions of access to justice; and that my interpretation of Rule 42 was literal and simplistic. After considering these issues, I believe that generally it is in the interests of justice that the matter be heard by the Supreme Court of Appeal. In these circumstances s 17(6)(a)(ii) requires me to direct that the matter be heard by the Supreme Court of Appeal.

21. The final issue for consideration is the issue of the costs of this application for leave to appeal. In the circumstances, I believe that the appropriate order is that such costs be costs in the appeal.

Accordingly, the following Order is made:

- 1) The applicants are granted leave to appeal.

- 2) Such appeal is to be heard by the Supreme Court of Appeal.
- 3) The costs of the application for leave to appeal are to be costs in the appeal.

Lawrence Lever
Acting Judge
Northern Cape Provincial Division

On behalf of the Applicant: Attorneys on record:	Adv J Van Niekerk SC Towell & Groenewaldt
On behalf of the Respondent: Attorneys on record:	Adv P R Cronje A B Horwitz
Date of Hearing:	05 May 2016
Date of Judgment:	12 August 2016