**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 903/2016

In the matter between:

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| **MOSALASUPING PHILLIP MORUDI** | **FIRST APPELLANT** |
| **FURTHER 70 APPELLANTS** | **SECOND TO 71 APPELLANTS** |

and

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| **NC HOUSING SERVICES & DEVELOPMENT CO LTD** | **FIRST RESPONDENT** |
| **SCHOLTZ JACOBS BABUSENG** | **SECOND RESPONDENT** |
| **SEODI JULIUS MONGWAKETSI** | **THIRD RESPONDENT** |

**Neutral citation:** *Mosalasuping & others v NC Housing & others* (903/2016) [2017] ZASCA 121 (22 September 2017)

**Coram:** Cachalia, Tshiqi and Mathopo JJA and Molemela and Mbatha AJJA

**Heard:** 18 August 2017

**Delivered:** 22 September 2017

**Summary:** Rescission – a court of appeal may only interfere if power not properly exercised – no bona fide defence which prima facie carries prospects of success.

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**ORDER**

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**On appeal from:** Northern Cape Division of the High Court, Kimberly (Lever AJ sitting as a court of appeal):

The appeal is dismissed with costs, which shall include those of two counsel.

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**JUDGMENT**

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**Tshiqi JA (Cachalia and Mathopo JJA and Mbatha AJA concurring):**

[1] This is an appeal against an order of the Northern Cape Division of the High Court, Kimberley, in terms of which Lever AJ refused an application for rescission of an earlier order granted by that court, by consent between the first respondent (NC Housing Services & Development Co Ltd) on the one hand and the second and third respondents (Messrs Scholtz Jacob Babuseng and Seodi Julius Mongwaketsi) on the other, per Kgomo JP (the main application).

[2] The matter has a protracted litigation history and the facts relevant to these proceedings are summarised succinctly in the respondents' heads of argument. During 1997 a group of individuals from previously disadvantaged communities obtained a shelf company to use as a vehicle to exploit commercial opportunities in the Northern Cape for the benefit of the members of these communities. It was converted into a public company to enable registration of more than 50 people as shareholders and its name was changed to that of NC Housing. As a public company

there were no pre-emptive rights in favour of its existing shareholders in respect of the shares taken up in its Memorandum of Incorporation and there was no limitation on the number of shares an individual shareholder could hold. Capital was acquired by way of subscription for shares from members of the targeted communities.

[3] On 4 January 2002, the Board of Directors passed a resolution to sell shares to an investor to enable NC Housing to purchase an interest in Meriting Investments (Pty) Ltd (Meriting), a substantial shareholder in Teemane (Pty) Ltd, a joint venture company between Meriting and Sun International Limited, which owns the Flamingo Casino in Kimberley. Pursuant to this resolution and in February 2002, Mr Schalk Junior Van Rensburg invested R191 000 in the former and this enabled NC Housing to purchase eight shares (equivalent of eight per cent equity) in Meriting. Mr Van Rensburg later sold these shares to the third respondent (Mr Mongwaketsi) for R300 000.

[4] On 8 May 2004, the shareholders passed a resolution providing that any shareholder wishing to increase their stake in NC Housing could deposit money into its bank account at Standard Bank, Kimberley. The understanding was that the shareholder would then be issued with additional shares commensurate with the deposit made. The second respondent, Mr Babuseng, says that he made deposits totalling R50 000 over a period into the bank account and to Meriting on behalf of NC Housing entitling him to the issue of additional shares. Eight years elapsed after the resolution was passed and the money invested was used towards the general funding of NC Housing and the acquisition of further equity in Meriting. NC Housing subsequently acquired a 20 per cent interest in NWC Manganese (Pty) Ltd, which had a right to mine manganese but did not have the capital to exercise the right itself. It therefore entered into a joint venture agreement with a Chinese registered entity known as AML wherein NWC held 51 per cent and AML 49 per cent of the equity respectively.

[5] On 21 September 2007, NC Housing was deregistered by the Registrar of Companies due to its failure to file annual tax returns. The full import of the deregistration was apparently not appreciated by the board and the management of NC Housing at the time but the need to restore the registration became apparent

when difficulties arose between the shareholders in the NWC joint venture in approximately 2011. The only possible resolution of the dispute was for the shareholders in NWC to sell their shares to a third party for R250 million. NC Housing's shares in NWC represented its major asset and a special resolution was required to approve the sale. This in turn required the restoration of NC Housing to the Register of Companies to facilitate the convening of a special general meeting for that purpose.

[6] An application to restore the registration was launched and an order granted re-vesting NC Housing with its assets. The order was silent on whether or not its board was restored. This led to difficulties in the management of NC Housing. There was a need to approve the sale of NC Housing's shares in NWC and to increase NC Housing's authorised share capital, but when Mr Babuseng attempted to convene a special general meeting of shareholders to address these issues Messrs Morudi (first appellant), D J Jacobs (the second appellant), F A G Adams (the third appellant) and V A Goliath (the fourth appellant), (hereinafter referred to as the Morudi group) questioned Mr Babuseng's entitlement to the additional shares he had previously acquired and the previous sale of shares to Mr Van Rensburg. The Morudi group brought an urgent application in the name of NC Housing for an interdict and were granted an order interdicting the holding of this meeting. Messrs Babuseng and Mongwaketsi launched the main application, (which became the subject of the rescission application) , in which they sought inter alia an order declaring:

a) that the persons whose names appeared in an annexure to the application marked as annexure 'M' be the list of the prospective shareholders of NC Housing pending a decision of the board to increase the number of authorised shares pro rata to a certain maximum and for the board to authorise the issuing of such shares accordingly;
b) that the said prospective shareholders be authorised to vote for the appointment of a new board of directors; alternatively
c) that the board that existed prior to de-registration be reinstated and the board of directors be authorised to convene a meeting of shareholders for the purpose of considering a special resolution to sell NC Housing's main asset

[7] In the founding affidavit, Messrs Morudi, Jacobs and Adams were cited as major businessmen and directors of NC Housing and Mr Goliath was cited as a major businessman and former director. The main application was initially opposed by Mr Morudi and he stated that he was acting in his capacity as a director of NC Housing and was authorised through a resolution passed by the NC Housing's Board of Directors comprising of himself, and Messrs Jacobs, Adams and Goliath. In terms of this resolution Mr Morudi was authorised to depose to all affidavits in opposition to the application and the firm Towell & Groenewald Attorneys was appointed to represent NC Housing in the matter.

[8] On 16 October 2012 the main application came before Williams J who made an order, by agreement between the parties, referring the contentious issue of whether annexure 'M' correctly reflected NC Housing's shareholding to trial. Pending the outcome of the trial, she made an interim order by agreement, which would regulate the future conduct of the affairs of NC Housing. The order authorised the issue of one ordinary share par value to each person whose name appeared in annexure 'M', directed that the board, which would consist of Mr Morudi and his group and Mr Babuseng, as chairperson, to convene a meeting to consider a resolution to sell NC Housing's main asset: its shares in NWC. It further directed that should the main asset be sold, the proceeds of the sale would be divided equally and deposited into the trust accounts of the respective attorneys of the parties pending judgment in the trial.

[9] Pursuant to the order, the persons listed in annexure 'M' were assembled on 16 November 2012 at a general meeting arranged for the purposes of approving the sale of the shares in NWC. Consensus could not be reached at this meeting and it was adjourned and reconvened on the 1 December 2012 where those present, who formed a quorum of NC Housing's shareholders as identified in William J's order, passed the resolution for the sale of the shares in NWC. They also established a subcommittee of shareholders to examine the disputes between Messrs Babuseng and Mongwaketsi on the one side and the Morudi group on the other. Ultimately, at a shareholders' meeting held on 19 April 2013, it was resolved that NC Housing would withdraw its opposition to the main application. To give effect to the resolution, the mandate of NC Housing's original attorney was withdrawn and a new attorney

appointed. The new attorney, A Horwitz from the firm of attorneys Adrian B Horwitz and Associates served and filed a notice of substitution as attorney of record and on 12 August 2013 served and filed a withdrawal of NC Housing's opposition to the main application.

[10] On 26 August 2013, the Morudi group, purporting to act on behalf of NC Housing, launched an urgent application to declare the shareholders' meeting of 19 April 2013 and all resolutions passed thereat to have been unlawful. On 8 August 2014, the urgent application was dismissed by Mamosebo AJ. It is common cause that the Morudi group did not appeal against the dismissal of their urgent application and took no further steps to set aside the 19 April 2013 resolution. In the meantime, on 8 February 2014, the attorney representing Messrs Babuseng and Mongwaketsi, filed a notice setting the main application down for trial from 1 to 5 September 2014.

[11] On 28 August 2014 a pre-trial conference took place at the chambers of Kgomo JP, the Judge President, Northern Cape Division of the High Court (the JP). On 29 August 2014, Towell and Groenewaldt served a notice to withdraw as attorneys of record in the main application. On 1 September 2014, notwithstanding the firm's delivery of the notice to withdraw, Mr Kgotlagomang, an attorney at the firm, appeared in court before the JP claiming to be representing the Morudi group in the main application. Mr Kgotlagomang was in the company of a group of some of the appellants. The following debate ensued between the JP and Mr Kgotlagomang:

'Mr Kgotlagomang: . . . I appear on behalf of the second, third and the fourth Respondents in the matter My Lord.
Court: Mr Kgotlagomang, I don't quite follow, I am a bit lost now. They appear in their individual capacities?
Mr Kgotlagomang: Indeed My Lord. The Court would have noted that – or the Court was informed that the Towel & Groenewaldt Attorneys has withdrawn as Attorneys of record in respect of the first Respondent My Lord, which will be the company in the matter My Lord.
Court: Yes
Mr Kgotlagomang: I provided the Court with a copy of the notice of withdrawal.
Court: Yes, I am a bit at a loss now and you then say you appear on behalf of?
Mr Kgotlagomang: The 2nd, the 3rd and the 4th Respondents My Lord.
Court: Mr Morudi, 2nd, 3rd Mr Jacobs and the 4th?

Mr Kgotlagomang: Indeed My Lord.

Court: Mr Adams?

Mr Kgotlagomang: Indeed My Lord.

. . .

Court: What capacity now?

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. . .

Mr Kgotlagomang: My Lord, in the beginning they [Messrs Morudi, Jacobs, Adams and Goliath] were acting as Directors but it appears that they have always been holding dual positions because their names appear on Annexure M to the proceedings My Lord and as a result they are shareholders as or as interest holders as contemplating in this application My Lord.

. . .

Court: Mr Kgotlagomang are you representing them as Directors or as individuals?

Mr Kgotlagomang: As individuals.

. . .

Court: Well, tell me what does the 1st – sorry the 2nd, 3rd and 4th Respondent wish to do today because there is a draft agreement between the 1st, 2nd, and – 1st and 2nd Applicants and the 1st Respondent the company. We know their position is clear, there is no lis or issue between them. They . . . have an order – draft order which they wish to make an order of court. So . . . (incomplete).

Mr Kgotlagomang: My Lord, with regards to the 2nd, the 3rd and the 4th Respondents they are intending on opposing and since the matter was referred for oral evidence, the matter may proceed in respect of the 2nd, the 3rd and the 4th Respondents My Lord, on the grounds that they are indeed shareholders as appears in Annexure M My Lord.

. . .

Court: Mr Kgotlagomang, let me hear you. Look, you are not properly before the Court . . . your clients were cited in their capacity as Directors and not as individuals. If you . . . persist that they would want to oppose the application, it would mean that…you will have to apply for a postponement and… they will have to pay the costs because this application comes at such a late stage . . . .

. . .

. . . I must adjourn so that you could speak to them. You [are] not on record, they are not on record. But I could adjourn for what it is worth, so that you can speak to them.'

[12] After the adjournment, Mr Kgotlagomang did not apply for the postponement but withdrew from the matter. He however informed the court that the group wished to address the court, but the JP refused on the basis that they were not before the court. Thereafter the draft agreement between Messrs Babuseng, Mongwaketsi on the one hand and NC Housing on the other hand, was made an order of court by the JP. Subsequently Mr Morudi and 70 others brought an application to rescind this order under the common law and in terms of rule 42(1)*(a)* of the Uniform Rules of Court. The subject of this appeal is the refusal by Lever AJ to rescind this order, on the basis that Mr Morudi and 70 others failed to establish grounds for rescission.

[13] The grounds upon which the appeal are based are that:

a) The high court misdirected itself in finding that Mr Morudi and 3 other appellants were cited in the main application in their representative capacities as directors of NC Housing and therefore did not properly explain their default
b) The high court misdirected itself in finding that the 5th to 71st appellants did not properly explain their default
c) The high court misdirected itself in finding that the appellants had not shown 'a bona fide defence that has some prospects of success'.
d) The high court misdirected itself regarding the interpretation of rule 42(1)*(a)* of the Uniform Rules of Court
e) The high court misdirected itself in finding that it has not been shown that the appellants' rights as enshrined in s 34 of the Constitution[1] were infringed.

[14] A court, when considering whether to rescind a judgment or order, either in terms of the common law or rule 42, is exercising a discretion. '[A court of appeal] may interfere with the exercise of a discretionary power by a lower court only if that power had not been properly exercised. This would be so if the court has exercised the discretionary power capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts . . . .' (See *Ferris & another v FirstRand Bank Ltd* [2013] ZACC 46; 2014 (3) SA 39 (CC) at para 28 and 29. An applicant applying for rescission in terms of the common law must show sufficient cause which requires a reasonable and acceptable explanation for the default and also that they have a bona

[1] The Constitution of the Republic of South Africa, 1996.

fide defence which prima facie carries some prospects of success. (See *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 SCA para 11).

[15] The four grounds of appeal are inextricably linked to each other and it is not necessary to deal with each one separately. The order which the appellants sought to set aside was obtained by agreement between Messrs Babuseng and Mongwaketsi on the one hand and NC Housing on the other, through the 19 April 2013 resolution. The order by Williams J certainly did not prohibit the parties from resolving their disputes amicably.

[16] The fundamental flaw in the application for rescission is that the urgent application, which sought to set aside the 19 April 2013 resolution was dismissed by Mamosebo AJ. Because there was no appeal against this order, the resolution stands. The consequence is that the appellants have no bona fide defence to the main application, which prima facie carries some prospects of success. Counsel for the appellants contended that the urgent application was dismissed on a technicality and that its dismissal should be ignored. This submission fails to take into account the legal consequences of the order. The order sought in the urgent application was that the meeting held on 19 April 2013 and the resolutions taken thereat be declared unlawful and set aside. Mamosebo AJ dismissed this application and the reasons she advanced for dismissing it were irrelevant for the purposes of the rescission application.

[17] As is apparent from the debate between the JP and Mr Kgotlagomang, the JP was at pains to enquire from Mr Kgotlagomang in what capacity he and the group of appellants were appearing in court on 1 September 2014, as NC Housing's opposition to the main application had been withdrawn and as Towell and Groenewaldt, a firm to which Mr Kgotlagomang was an attorney, had earlier served a notice to withdraw as attorneys of record in the main application. Therefore even if the appellants had seized the opportunity offered by the JP, to apply for a postponement in order to ask for leave to intervene in the matter, it seems to me that this would have been a fruitless exercise as they were bound by the resolution taken on 19 April 2013. In the premises I conclude that the requirements for rescission were not met.

[18] I have read the dissenting judgment of and am constrained to emphasise the following: Contrary to what she says in para 32 of her judgment, para 7 of the main judgment specifically points out that in the main application the Morudi group was not acting in their personal capacities. In para 10 the main judgment also states that when the Morudi group launched the urgent application seeking to declare the 19 April 2013 resolution unlawful, they purported to act on behalf of NC Housing. The import of these findings is simply that throughout the protracted litigation the Morudi group acted as either directors or shareholders or in both capacities but not in their personal capacities. What the dissenting judgment overlooks is that the dispute that was withdrawn by agreement was between Mongwaketsi and Babuseng on the one hand and NC Housing on the other, and not between the former and any of the shareholders in their personal capacities. There was therefore no lis between Mongwaketsi and Babuseng against the individual shareholders or any of the appellants in their personal capacities. When the appellants appeared before the JP they could only have done so as directors or as shareholders of NC Housing and not in any other capacity. However, the fundamental problem was that their opposition to the main application, which concerned NC Housing had been withdrawn. Their attempt to challenge this withdrawal had failed.

[19] I make the following order:

The appeal is dismissed with costs, which shall include those of two counsel.

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Z L L Tshiqi

Judge of Appeal

**Molemela AJA:**

[20] I have read the first judgment and regrettably cannot agree with its reasoning and conclusion. The background to this matter has already been sketched in the first judgment. Before addressing myself to the issues in this appeal, I will mention a few additional facts which are important for purposes of this dissenting judgment. As correctly pointed out in the first judgment, the first respondent (NC Housing Services & Development Co Ltd) (the company) in the application that served before Williams J on 16 October 2012 (the main application) was initially a private company, which was converted into a public company for use as a vehicle to access opportunities for the benefit of members of the previously disadvantaged communities. Capital for the company had been acquired by way of subscription of shares from members of previously disadvantaged communities.

[21] Furthermore, before the main application was launched, Mr Morudi had previously succeeded in interdicting the holding of an annual general meeting due to the first applicant, Mr Babuseng's failure to give the shareholders adequate notice of the meeting. Instead of issuing a proper notice, Mr Babuseng, together with the second applicant, Mr Mongwaketsi (herein after referred to as the applicants), approached Williams J for a declaratory order in the main application. A reading of the set of affidavits filed in the application reveals various factual disputes. The main bone of contention seems to be directed at the number of shares the applicants in the main application purported to be entitled to. The ancillary bone of contention pertains to the validity of a contract which purported to allot 500 shares (50 per cent of the company's issued shares) to a certain 'investor', allegedly without the board's approval.

[22] According to the Morudi group, the aforesaid transaction was not sanctioned by the board of directors and was in direct contrast to the achievement of the purpose for which the company was acquired. It is common cause that the investor subsequently sold the shares in question to the second applicant, Mr Mongwaketsi, which transaction increased his shareholding in the company to 57 per cent. The latter's entitlement to this shareholding is disputed. Suffice it to say that given the number and nature of factual disputes raised in this matter, it is not surprising that, by

agreement between the parties to the dispute, the primary issue of whether annexure 'M' reflected the correct shareholding in the company was referred to trial.

[23] I turn now to address myself to the issues in the appeal. The central issue in the appeal is the court a quo's refusal to rescind the judgment of the JP. Since the consideration of an application for rescission of judgment entails the exercise of a discretion, I must also consider whether the court a quo, in reaching its decision, judicially exercised its decision.

[24] It is trite law that an applicant in an application for rescission of judgment must show that he or she has a direct and substantial interest that clothes him / her with locus standi in that application.[2] In *Bowring N O v Vrededorp Properties CC & another*[3] it was held that the enquiry relating to non-joinder of a party is one of substance rather than one of the form of the claim. This Court reiterated that the substantial test is whether the party which alleges to be a necessary party for purposes of joinder has a legal interest in the subject matter of the litigation that may be prejudicially affected by the judgment of the court in the proceedings concerned. In the interests of brevity of this dissenting judgment, I will consolidate the considerations applicable to the determination of the existence of locus standi with a discussion on the capacity in which the Morudi group were cited in the main application, which is the essence of the first ground of appeal.

[25] It is appropriate to precede the determination of whether the Morudi group had direct and substantial interest in the matter, with a brief analysis of salient statutory provisions. At the risk of stating the obvious, it bears mentioning that in terms of the common law and various provisions of the Companies Act 61 of 1973 (the 1973 Act) and the Companies Act 71 of 2008 (the Companies Act) company violations may, in certain circumstances, be imputed to directors on account of breach of their duties, which may result in them incurring personal liability. For purposes of clarity, I must point out from the outset that I do not consider the applicants in the main application to have brought the main application as a 'derivative action'.

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[2] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651.
[3] *Bowring N O v Vrededorp Properties CC & another* 2007 (5) SA 391 (SCA) para 21.

**Legal framework**

[26] Section 96 of the 1973 Act provides as follows:-

'**96 Limitation of time for issue of share certificates**

(1) Every company shall within two months or within such extended time, not exceeding one month, as the Registrar on good grounds shown and on payment of the prescribed fee, may grant, after the allotment of any of its shares, debentures or debenture stock, complete and have ready for delivery the certificates of all shares, the debentures or the certificates of all debenture stock allotted.

(2) If default is made in complying with the requirements of subsection (1), any person entitled to the certificates of shares, the debentures or the certificates of debenture stock in question may by notice in writing call upon the company to make good the default, and if the company fails to comply with the notice within ten days after service thereof, the Court may on the application of such person make an order directing the company to make good the default within such time as may be specified in the order, and if it thinks fit direct that any costs of or incidental to the application shall be borne by the company or by any director or officer of the company responsible for the default.

(3) If default is made in complying with the requirements of subsection (1), the company, and every director or officer thereof who knowingly is a party to the default, shall be guilty of an offence.'

[27] In terms of s 36(2) of the Companies Act, the authorisation and classification of shares and other terms associated with each class of shares, as set out in a company's Memorandum of Incorporation, may be changed only by an amendment of the Memorandum of Incorporation by special resolution of the shareholders or the board of the company, except to the extent that the Memorandum of Incorporation provides otherwise.

[28] Section 77 of the Companies Act provides as follows:-

'**77 Liability of directors and prescribed officers**

(1) In this section, director includes an alternate **'director'**, and—

*(a)* a prescribed officer; or

*(b)* a person who is a member of a committee of a board of a company, or of the audit committee

of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company may be held liable ─

*(a)* in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76 (3)(a) or *(b);* or

*(b)* in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of─

(i) a duty contemplated in section 76 (3)*(c);*

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation.

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having─

*(a)* acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

*(b)* acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);

*(c)* been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

*(d)* signed, consented to, or authorised, the publication of─

(i) any financial statements that were false or misleading in a material respect; or

(ii) a prospectus, or a written statement contemplated in section 101, that contained─

*(aa)* an 'untrue statement' as defined and described in section 95; or

*(bb)* a statement to the effect that a person had consented to be a director of the company, when no such consent had been given, despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104 (3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or

*(e)* been present at a meeting, or participated in the making of a decision in terms of section 74, and failed to vote against─

(i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36;

(ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41;

(iii) the granting of options to any person contemplated in section 42 (4), despite knowing that any shares—

*(aa)* for which the options could be exercised; or

*(bb)* into which any securities could be converted, had not been authorised in terms of section 36;

(iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company's Memorandum of Incorporation;

(v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company's Memorandum of Incorporation;

(vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46, subject to subsection (4);

(vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or

(viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4.

. . . .

. . . .

(6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.

. . . .

[29] Section 157 of the Companies Act provides:

'**157 Extended standing to apply for remedies**

(1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person—

*(a)* directly contemplated in the particular provision of this Act;

*(b)* acting on behalf of a person contemplated in paragraph *(a)*, who cannot act in their own name;

*(c)* acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or

*(d)* acting in the public interest, with leave of the court.

(2) The Commission or the Panel, acting in either case on its own motion and in its absolute discretion, may—

*(a)* commence any proceedings in a court in the name of a person who, when filing a complaint with the Commission or Panel, as the case may be, in respect of the matter giving rise to those proceedings, also made a written request that the Commission or Panel do so; or

*(b)* apply for leave to intervene in any court proceedings arising in terms of this Act, in order to represent any interest that would not otherwise be adequately represented in those proceedings.

(3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165 (1), other than—

*(a)* on behalf of a person entitled to make a demand in terms of section 165 (2); and

*(b)* in the manner set out in section 165.'

[30] Section 158 of the Companies Act states as follows:

**'158 Remedies to promote purpose of Act**

When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act—

*(a)* a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and

*(b)* the Commission, the Panel, the Companies Tribunal or a court—

(i) must promote the spirit, purpose and objects of this Act; and

(ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.'

[31] Section 161[4] of the Companies Act, allows a holder of issued securities to apply to court for an order determining any of his or her rights in terms of the Act, or the Memorandum of Incorporation or any rules of the company. The shareholder may

[4] **Application to protect rights of securities holders**

(1) A holder of issued securities of a company may apply to a court for—
*(a)* an order determining any rights of that securities holder in terms of this Act, the company's Memorandum of Incorporation, any rules of the company, or any applicable debt instrument; or
*(b)* any appropriate order necessary to—
(i) protect any right contemplated in paragraph *(a)*; or
(ii) rectify any harm done to the securities holder by—
*(aa)* the company as a consequence of an act or omission that contravened this Act or the company's Memorandum of Incorporation, rules or applicable debt instrument, or violated any right contemplated in paragraph (*a*); or
*(bb)* any of its directors to the extent that they are or may be held liable in terms of section 77.
(2) The right to apply to a court in terms of this section is in addition to any other remedy available to a holder of a company's securities—
*(a)* in terms of this Act; or
*(b)* in terms of the common law, subject to this Act.'

also apply to court in order to protect any of his or her rights and may seek an order remedying the harm done to him or her by the company *or any of its directors* to the extent that they are or may be held liable in terms of s 77. (My emphasis).

**Locus standi of the appellants in respect of the rescission application (Capacity in which the Morudi group was cited in the main application)**

[32] The first judgment has made no specific finding with regards to the capacity in which the Morudi group were cited as respondents in the main application. The respondents, in their heads of argument, submitted that "there is, with respect, no evidence that *Morudi et al* acted in any other capacity than as Directors prior to 1 September 2014." Before us, counsel for the respondents contended that the Morudi group had been cited only in a representative capacity and, in any event, only had a financial interest in the main application, as opposed to a legal interest. It is necessary for me to deal with this aspect as it plays a large role in the conclusion that I have reached. I am of the view that all the appellants had a direct and substantial interest in the main application. Contrary to the respondents' contentions, the Morudi group was not cited in the proceedings 'only in a representative capacity'. This conclusion was made based on the reasons mentioned below.

[33] First, the first applicant in the main application, Mr Babuseng, described himself as a businessman, prospective shareholder and director of the first respondent. The second applicant, Mr Mongwaketsi, was described as a major businessman and a 50 per cent shareholder. There is no assertion of the latter being cited in any representative capacity. It is thus plain that the second applicant is cited exclusively as a prospective shareholder. Furthermore, the applicants, in the main application did not merely seek an order sanctioning the holding of a board meeting for purposes of the allotment of shares within the board's powers. They sought to justify why they, in particular, were entitled to a significantly higher allotment of shares than other shareholders. They sought an order of court that would sanction that specific entitlement. The inescapable conclusion is that the applicants pursued this litigation in their personal capacities as shareholders. Given the provisions of s

157 of the Companies Act,[5] there is no logical reason why the Morudi group cannot assert their own rights on the same basis. It follows that the rest of the shareholders must by parity of reasoning, have the same legal interest.

[34] P M Meskin in *Henochsberg on the Companies Act*[6] submitted on the basis of the provisions of s 65(2) of the 1973 Act, which stipulated that the memorandum and articles were binding on the company and the members thereof to the same extent as if they respectively had been signed by each member, that the memorandum and articles in question had contractual force between members inter se in so far as their rights and obligations as members were concerned. Such contractual force, so it was argued, entitled an individual member to enforce his or her personal rights '*qua'* member by means of proceedings for an interdict or a declaration of rights or for specific performance. I agree with the learned author's proposition. On that basis, the applicants and the Morudi group therefore had locus standi in the main application in respect of the allotment of shares. In the Canadian case *John Graham & Co Ltd et al v Canadian Radio-Television Commission*[7], a unanimous bench found that a corporate shareholder had standing to challenge a decision of the CRTC approving the transfer of a majority share interest in a company in which it was a minority shareholder on the basis that the value and earnings for its shares could be affected by the transfer.[8]

[35] Secondly, the first respondent in the main application is a registered company and can therefore sue and be sued in its own name. It is trite that a company is a separate entity from its directors. There is no legal prescript requiring directors of a company to be cited as co-defendants. In any event, on the respondents' own version, Mr Goliath ceased being a director of the company long before the litigation in the main application commenced. Clearly, he could not have been cited in a representative capacity. In all the affidavits filed on behalf of the applicants it was consistently re-iterated that Mr Goliath was not a director. It was suggested in argument before us that the Morudi group were cited in a representative capacity *ex*

[5] See para 28 at 15.
[6] P M Meskin *Henochsberg on the Companies Act* 5 ed Vol 1 at 123 (Service Issue 28).
[7] *John Graham & Co Ltd et al v Canadian Radio-Television Commission* [1975] 68 DLR 110; 1975 CanLII 1061 (FCA).
[8] At 120: 'The values of their shares in terms of earnings, capital appreciation or depreciation and participation in the affairs of the company could well be affected by the decision.'

*abudanti cautela* because of the applicants' uncertainty pertaining to the ruling that the court would make, with regards to the company's directorship. This argument has no merit. If the intention was to sue only the company, it could have been cited as the only respondent and the names of those who held the position of director as at the time of de-registration, could have merely been mentioned in the body of the founding affidavit.

[36] Thirdly, the serious consequences that may result if the allegations made against the Morudi group were to be proven, are also indicative of the direct and substantial interests they have in this matter. The applicants in the main application accused some of the members of the Morudi group of having attempted to allot shares to themselves to the detriment of other prospective shareholders. For their part, the Morudi group considered the relief sought by the applicants as an 'attempt to obtain a benefit for [themselves] to the exclusion of the other shareholders of [the] first respondent'. It is clear that there are many allegations and counter-allegations of impropriety on the part of several directors and shareholders. It is quite evident that a significant number of those allegations amount to a contravention of various provisions of the Companies Act, for which the directors could be held personally liable. It is therefore undisputable that the issues raised in this matter are substantial issues that had to be ventilated in order to avoid an allotment of shares that would be prejudicial to other shareholders, especially considering the purpose for which the company had been created. Given the seriousness of the allegations made and the repercussions stipulated in the Companies Act, I cannot agree with the respondents' contention that the Morudi group's interest in the matter is purely financial and not legal. There is no logical explanation why Messrs Morudi, Jacobs and Adams would not have a legal right to oppose the application in their capacities as the implicated directors so as to refute the allegations made against them with a view to warding off personal liability. This view finds support in *Henochsberg*[9]*,* where it is submitted that in the case of the s 77(3)*(e)* liability, a director may apply to court for an order setting aside the unauthorised transaction.

[9] P Delport *Henochsberg on the Companies Act* first edition, Vol 1 at 303 (Service Issue 13).

[37] Fourthly, the applicants in the main application moved for a costs order in terms of which the Morudi group would be jointly and severally liable with the company for the costs of opposing the main application. The cost order prayed for, which seems to be the one envisaged in s 77(6) of the Companies Act,[10] placed the Morudi group in an invidious position in that if they did not oppose the application, the allegations made against them would stand unchallenged and yet if they opposed, there was a risk of personal liability in respects of costs. I am of the view that the cost order sought by the applicants also gave the Morudi group a legal interest to oppose the application in their individual capacities.

[38] Fifthly, a disproportionate allotment has the potential of prejudicing the interests of all shareholders. This is more so the case because the voting rights in a public company are exercised in proportion to the members' shareholding and a prejudicial allotment may hamstring some shareholders' participation in the affairs of the company. This leads ineluctably to the conclusion that it was imperative to cite or at least serve the application on all those prospective shareholders who were offered shares and thus stood to be prejudiced by the board' decision pertaining to the allotment of shares.

[39] Sixthly, it is of significance that the resolution taken on 19 April 2013 did not remove or suspend the Messrs Morudi, Jacobs and Adams' appointment as directors. The risk that the directors are faced with were thus still extant even after the passing of the resolution. They did therefore, in their capacity as directors, retain the legal right to ventilate issues of company violations in the main application *'qua'* directors.

[40] Lastly, it is worth mentioning that the respondents by their own admission recognised that a dispute pertaining to the entitlement to the allotment of shares is of direct and substantial interest to all prospective shareholders. The following averment in their Founding Affidavit at para 16.6 is quite telling:-

'I have already dealt with the urgency of this matter and reiterate same. The Honourable Court will also note that the Second Applicant and I are presently the majority of prospective shareholders in First Respondent, and have there for a clear interest and urgency to obtain

[10] See para 27 at 15.

an order as set out in the Notice of Motion. *We also recognise all the other prospective shareholders as listed in annexure **"M"**, and will an order in terms of the Notice of Motion be in the interest of such prospective shareholders as a whole too.* I pause to mention that it is impossible, because of the urgency of this matter, to cite all the prospective shareholders in this application, or to serve this application beforehand upon all of them. Annexure **"M"** will make this averment clear.' (My emphasis)

[41] It is therefore not surprising that the applicants in the main application of their own volition undertook to serve the rule nisi they were applying for

'4.1 upon the Respondents and;

4.2 upon the persons listed in annexure **"M"** to the founding affidavit by way of one (1) advertisement in the Diamond Field Advertiser and by way of registered post;

. . . . '

[42] For all the aforementioned reasons, I conclude that the Morudi group had a legal interest in the main application and were cited as respondents in a dual capacity, i.e. as shareholders and as directors. The same reasons form the basis for my conclusion that the appellants' locus standi to bring the rescission application was beyond question. For the same reasons, I also conclude that the rest of the appellants had a direct and substantial interest that entitled them to have intervened in the same proceedings.

**Requirements for rescission of judgment**

[43] The question is whether the court a quo correctly decided that the requirements for rescission of judgment were not satisfied or met. The appellants applied for rescission of judgment both under the common law and in terms of rule 42(1)*(a)* of the Uniform Rules of Court. As correctly set out in para 14 of the first judgment, an applicant applying for rescission in terms of the common law must show sufficient cause[11], which requires a reasonable and acceptable explanation for the default and a bona fide defence which prima facie carries some prospect of success.

***Explanation for not participating in the proceedings***

[11] *Chetty v Law Society, Transvaal 1985 (2) SA 756 (A).*

[44] In *De Wet & others v Western Bank Ltd*[12], Trengrove AJA stated as follows in relation to an application for rescission of judgment brought under the common law:

'Thus, under the common law….[b]roadly speaking the exercise of the Court's discretionary power [to rescind judgments] *appears to have been influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case*'. (Emphasis added).

[45] In *Harris v Absa Bank Ltd t/a Volkskas*[13]*,* Moseneke J stated that:

'[6]. . . an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in wilful disregard of Court rules, processes and time limits.

[9] *The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the court must weigh in determining whether sufficient or good cause has been shown to exist*.' (Emphasis added.)

[46] In this matter, it is undisputable that the merits of the matter were not considered by the JP on the acceptance that the main application was no longer opposed due to the company having withdrawn its opposition and the Morudi group having been cited only in a representative capacity. Once it is accepted, as I have done, that the Morudi group were respondents that were entitled to oppose the main application in their own right because of the legal interest they have in the matter, it ineluctably follows that they ought to have been given a hearing on the date the main application was enrolled to be heard.

[47] The full transcript of those proceedings speaks for itself. The long and the short of it is that the Morudi group was not given a hearing. It is evident from the transcript that by the time the proceedings were adjourned, a finding had already been made that the Morudi group were not parties in the matter. They were not granted an opportunity to address the court despite a specific request that was made on their behalf. This request was repeated after the adjournment, but failed to yield any fruit as it was ruled that they were not before the court. It follows that the failure to give them a hearing, despite them being respondents who had a legal interest in

[12] *De Wet & others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042H.
[13] *Harris v Absa Bank Ltd t/a Volkskas* 2006 (4) SA 527 (T) at 529-560.

the application, constituted a procedural irregularity. Their failure to participate in the proceedings is not of their own making. The Morudi group has thus advanced a reasonable and acceptable explanation for their non-participation in the proceedings, which is borne out by the record.

[48] I am unable to agree that the position the Morudi group found themselves in on the date of the hearing of the main application is analogous to a situation where shareholders demand to be heard by a court whenever the company in which they hold shares is a party to the proceedings. That analogy does not take into account that in this particular matter, the Morudi group was actually cited as respondents in the matter and thus had a legal interest in the main application.

***Bona fide defence***

[49] In para 16 of the first judgment it is stated that:

'The fundamental flaw in the application for rescission is that the urgent application, which sought to set aside the 19 April 2013 resolution was dismissed by Mamosebo AJ. Because there was no appeal against this order, the resolution stands. The consequence is that the appellants have no bona fide defence to the main application, which prima facie carries some prospects of success.'

I disagree with this finding. My approach on this aspect is obviously from the premise that the Morudi group was cited in a dual capacity. The reasons for my disagreement are set out hereunder.

[50] It must be borne in mind that the only issue raised before Mamosebo AJ was the validity of the resolutions taken at an allegedly improperly constituted meeting which was held on 19 April 2013. None of the issues raised in the main application were raised as issues for her determination and neither did she make any findings with regards to such issues. Once it is accepted that the Morudi group was cited in a dual capacity and had a legal interest that entitled them to oppose the application, it then follows that the company's decision to withdraw its opposition did not detract from the Morudi group's entitlement to oppose the application in their own right. Mamosebo AJ's order dismissing the application to declare the meeting invalid and to set aside its resolutions therefore cannot be a stumbling block in respect of the Morudi group's opposition of the main application.

[51] The reason for the afore-going conclusion is twofold: first, the shareholder resolution taken on 19 April 2013, which was implicitly sanctioned by Mamosebo AJ's order, merely authorised the withdrawal of the opposition of the main application by the company. The withdrawal that was subsequently filed was thus on behalf of the company as the first respondent in the main application. The Morudi group never withdrew its opposition of the main application and was therefore entitled to participate in the proceedings and to place evidence before court in their capacity as the affected shareholders who were specifically cited as the second, third and fourth respondents. This is more so the case in respect of Messrs Morudi, Jacobs and Adams, whose directorship was never terminated by the resolution of 19 April 2013.

[52] The Companies Act enjoins us to follow an approach that interprets its provisions in a manner which would advance the remedies provided by the various sections instead of limiting them. This is quite evident from the provisions of s 158 of the Companies Act[14]. In this regard, it must be borne in mind that the applicants did not withdraw the main application. Instead, the company filed a 'withdrawal of opposition to application'. Subsequent to that, the applicants filed an amended notice of motion which inter alia sought an order in the following terms: 'An order declaring that the number of shares allotted to each shareholder listed in annexure "M" shall be in accordance with the allotted shares reflected therein'. In my view, the Morudi group was also well entitled to oppose the main action in their capacities as the affected shareholders. Given the clear provisions of s 161[15] of the Companies Act, which empowers a shareholder to approach a court for an order determining any rights of that shareholder pertaining to shares, the Morudi group's entitlement to oppose the main application on its merits did not end merely because the company decided to abandon its opposition of that application. Sight must not be lost of the essence of the dispute: the opposition of the declaratory order was on the basis of allegations of various non-compliances with the Memorandum of Incorporation and the Companies Act pertaining to the allotment of shares, hence the dispute relating to the accuracy

[14] See para 29 at 16.
[15] See para 30 at 16. Also see *Du Plooy NO & others v De Hollandsche Molen Share Block Ltd & another* [2015] ZAWCHC 173; 2017 (3) SA 274 (WCC).

of Annexure “M” in relation to the exact proportion of shareholding. At no stage did the Morudi group, as the affected shareholders, withdraw their opposition of the application. In my view, a proposition that proffers that a company’s abandonment of its opposition puts paid to the other respondents’ right to assert their rights in relation to the exact proportion of shareholding amounts to a negation of the very remedies granted to shareholders in terms of section 161 and various other provisions of the Companies Act.

[53] Secondly, the resolution taken on 19 April 2013 did not make any pronouncement on the contentious issue of the proportion of shareholding. This much was acknowledged by Mr Matshoba in an opposing affidavit filed some five months after the resolution of 19 April 2013 was adopted. He conceded that the question of the exact proportions in which the individual shareholders were entitled to hold shares had still not been resolved. This means that the dispute pertaining to the exact shareholding remained unresolved despite the resolution taken on 19 April 2017. For the aforementioned reasons, Mamosebo AJ’s order, confined as it was to the validity of the resolution that authorised the company to withdraw its opposition, could not have served as a bar to the Morudi group from persisting with their opposition of the main application.

[54] Reverting to the main application, the affidavits filed in that application abound with allegations of non-compliances with various provisions of the company’s Memorandum of Association and the Companies Act pertaining to the issuance or allotment of shares; the failure to open a share register; purported agreements being entered without the Directors’ Resolutions and resolutions not being borne out by minutes of meetings. Significantly, it is not disputed that the company issued shares in excess of the share capital without the special resolution of shareholders. The averment pertaining to the first applicant’s claim of having acquired more shares than other shareholders by virtue of a board resolution taken by previous board members is also disputed. The Morudi group pointed out that the first applicant’s claim was not supported by any minutes of a board meeting.

[55] The allegation that the investor could acquire the 500 shares allocated to him allegedly entitling him to 50 per cent of the issued shares has also been placed in

dispute. Whereas the applicants averred in the founding affidavit that the investor's entitlement to 50 per cent shareholding was on the strength of a sale agreement entered into between the company and the investor in February 2002, (annexure I), the Morudi group denied that the company had ever authorised such a sale. They furnished minutes of the board meeting which was held in December 2003. The minutes reflected that the investor was offered shares in respect of the Casino deal only and that it was resolved that a certain firm of attorneys would attend to the drafting of the relevant agreement. The minutes in question bear Mr Babuseng's signature. In the replying affidavit, Mr Babuseng did not deny that the signature appearing on the minutes is his, but merely stated that the resolution in question 'was not executed'. He mentioned further that the date in annexure I was a typographical error. Given the parties' responses to each other's averments in the various affidavits filed, it seems to me that the major disputes raised are not those that can summarily be brushed aside as being plainly without merit or fanciful.

[56] Considering the statutory provisions already canvassed earlier in this judgment, the averments made and the documents annexed to the various affidavits that have been filed, it seems to me that the applicants' entitlement to the shares mentioned in the afore-going paragraphs is not cut and dried, and is something that would have to be decided upon with the benefit of cross-examination. The referral of the matter to trial was thus not misplaced. Furthermore, the serious light in which the alleged disputes must be seen is evident from the fact that the resolution of 19 April 2013 enjoined the company to investigate the conduct of the Morudi group with a view to instituting criminal proceedings against them 'in relation to irregularities that have been alleged to have occurred in the issue of [s]hares . . .'. The Morudi group's unwillingness to back off from their stance in respect of the opposition of the main application must also be seen against that light. All these aspects are, in my view, weighty considerations that form part of the equation in the determination of whether the Morudi group has shown a bona fide defence that meets the requirements of a rescission application. All things considered, the Morudi group has indeed shown a bona fide defence which carries prospects of success. Insofar as the court a quo found that they had not done so, it erred.

[57] With regards to the rest of the appellants, it is clear from what has already been set out above, that they too, had a direct and substantial interest in the matter. The Morudi group's averment that the other appellants had mandated them to represent their interests is evidently permissible in terms of s 157(1)*(c)* of the Companies Act.[16] Even if it is accepted that they were not cited as respondents and therefore not parties to the matter on the date of the hearing, they nevertheless, had a direct and substantial interest which entitled them to apply to intervene in the proceedings at the commencement of the trial. Their direct and substantial interest is undeniable, especially considering that the draft order which was subsequently made an order of court has prejudicial consequences. The order had the effect of endorsing the second applicant's alleged entitlement to 57 per cent of the company's share capital, thus validating a contract that was allegedly entered into contrary to the board's resolution. The first applicant's alleged entitlement to an additional 17 per cent shareholding has similarly been confirmed. This has permanent and far-reaching consequences impacting on all prospective shareholders, as the proportion of the shareholding would be deemed to be in accordance with annexure "M" notwithstanding the disputes about the validity of the contract that formed the basis of the applicants' increased shareholding. The basis for the participation of the remaining 67 shareholders as intervening parties in the main application has therefore been made. In my view, the requirements for the granting of rescission of judgment have been satisfied.

**Decision of the court a quo**

[58] The court a quo took the view that the JP had correctly considered the Morudi group not to be parties in the main application on the basis that they were merely cited in their representative capacities as directors. Significantly, the court a quo did not address itself to any of the statutory provisions referred to earlier in the judgment on the question of locus standi. The court a quo also concluded that due to the fact that the appellants were physically present in court, the draft order that was made an order of court was not issued in their absence. It accordingly held that they had not properly explained their default under the common law and in terms of rule 42 of the Uniform Rules of Court. It further concluded that because Mamosebo AJ's order had

[16] See para 28 at 15.

not been set aside, it impacted the appellants' bona fide defence. All these aspects have already been canvassed in detail earlier in the judgment. To suggest, as the court a quo has done, that the order granted was not made in the absence of the Morudi group purely because they were physically present in court when the decision was made, fails to adequately take into account that in an application for rescission of judgment, the court's discretionary power must be '*influenced by considerations of justice and fairness, having regard to all the facts and circumstances of the particular case*'[17] (Emphasis added).

[59] It is well-established that the scope for a court of appeal to set aside an order made by a lower court in the process of exercising a discretion is limited. It is equally trite that such an order can indeed be interfered with by an appellate court if the lower court's discretion was not exercised judicially, or where the decision of that court was 'influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'[18] For all the reasons I have already mentioned above, I am of the view that the court a quo's discretion pertaining to its determination of whether sufficient cause was shown was not properly exercised, because it was influenced by a wrong appreciation of the facts and was moved by a wrong principle of law.

[60] I would therefore uphold the appeal with costs.

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M B Molemela

Acting Judge of Appeal

[17] See *De Wet* fn 10 *at 1042H*. See also *Bowring* fn 2 para 21.
[18] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

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