

SOUTH AFRICA / JUDGMENT

NC Housing Services and Development Company v Matshoba and Others (1577/2012) [2014] ZANCHC 26 (8 August 2014)

[2014] ZANCHC 26

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

1577/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(Northern

Cape High Court, Kimberley)

Case

No: 1577/2012

Heard: 23/05/2014

Delivered: 08/08/2014
In

the matter between: NC
HOUSING SERVICES & DEVELOPMENT COMPANY APPLICANT
AND
MTHUTHUZELI
JOSEPH MATSHOBA 1st
RESPONDENT
KEITUMETSE
JEANETTE MOTHIBI
2nd
RESPONDENT
SCHOLTZ
JACOB
BABUSENG 3rd
RESPONDENT
SEODI
JULIUS MONGWAKETSI
4th
RESPONDENT

MOSALA
SUPING PHILLIP MORUDI
5th
RESPONDENT
DONALD
JAMES
JACOBS 6th
RESPONDENT
FRANKLIN
ARNOLD GEORGE ADAMS 7
th RESPONDENT
VIVEIROS
ALLEN
GOLIATH 8th
RESPONDENT

Coram: Mamosebo
AJ

JUDGMENT

MAMOSEBO AJ

[1] In an application dated 26 August 2013, which was issued by the Registrar on 26 August 2013, the applicant, NC Housing Services &

Development Company, brought an application on urgency in which it sought the following relief:

1.1 That the meeting that was held on 19 April 2013 at the Kimberley Library purporting to be a shareholders meeting be declared unlawful;

1.2 That all resolutions adopted at the meeting in question purporting to be the resolutions of the Company be declared unlawful and be set aside;

1.3 That the first and second respondents (Joseph Matshoba and Jeanete Mothibi, respectively), be ordered to pay the costs on an attorney and client scale. Matshoba and Mothibi are not directors of the applicant company.

[2] The third respondent, Scholtz Babuseng, is the Chairman of the Company. The fourth to eighth respondents are directors of the Company. They are, respectively, Seodi Mongwaketse, Mosalasuping Morudi, Donald Jacobs, Franklin Adams and Viveiros Goliath.

[3] Morudi (the fifth respondent) is also the deponent on behalf of the applicant Company. He claims to derive his authority from the "Resolution of the Board of Directors: NC Housing Services & Dev Co" dated 16 August 2013 at which the following directors were present: "(1) MrM Morudi; (2) Mr D Jacobs; (3) Mr F Adams". At which It was resolved that:

"1 The meeting held on the 19th of April 2013 purporting to

be a meeting of the shareholders of the company be declared illegitimate and unlawful together with the resolutions[thereof].

2. That the firm TOWELL & GROENEWALDT ATTORNEYS is appointed to represent the company in this matter.

3. That Mosalasuping Phillip Morudi is authorized to
depose to all affidavits in Opposition of this application. "

[4] A brief history of the applicant Company NC Housing Services & Development Company is a registered Public Company. It was acquired

by a group of the present shareholders as a Shelf Company during

1997. It was then converted into a Public Company for purposes of the registration of more than 50 people as shareholders. The underlying acquisition was to create a special purpose vehicle for a broad-based entity for a large group of predominantly poor and historically disadvantaged Black people to acquire and control strategic stakes in mineral and other enterprises.

[5] On 04 January 2002 the Board of Directors passed a resolution to sell shares to an investor to enable the company to purchase an

interest in Meriting Investments (Pty) Ltd. On 08 May 2004 the shareholders passed a resolution to the effect that anyone wishing to increase their stake in the company could deposit money in the Company Bank Account at Standard Bank, Kimberley. The understanding

was that the shareholder would then be issued a commensurate number of shares with the deposit made.

[6] NC Housing Services subsequently acquired an interest in NWC Manganese (Pty) Ltd. The latter had a majority shareholding in

Northern Cape Manganese Company (Pty) Ltd.

The last mentioned company in turn held an interest in a valuable prospecting right for Manganese in the Northern Cape under Department of Mineral Resources Reference Number 52/2005 (PR).

[7] Notwithstanding the foregoing NC Housing Services & Development was deregistered by the Registrar of Companies on 21 September 2007 for failure to submit Annual Statements and/or returns. However, the company was restored to the Register of Companies by Order of Court on 13 April 2012.

[8] The application now before me (Case No 1577/2012) has been referred to as the Interlocutory Application. There is a pending Main Application registered under the same case number on 11

September 2012 in which the parties are as follows:

"Scholtz Jacob Babuseng 1st Applicant

Seodi Julius Mongwaketse 2nd Applicant

And

NC Housing Services & Development 1st Respondent

Company

Mosalasuping Phillip Morudi

2nd Respondent

APJacobs

3rd Respondent

Franklin Arnold George Adams

4th Respondent

Viveiros Alen Goliath 5th Respondent"

[9] In the Main Application, the two applicants seek the following relief:

"1. An order declaring that the list of persons, attached as Annexure "M" to the founding affidavit, to be the list of shareholders of the first respondent.

2. An order declaring that the number of persons allotted to each shareholder listed in annexure "M" shall be in

3. The Board of Directors of first respondent is authorized and compelled to amend the first respondent's Memorandum of Incorporation

to provide for the necessary increase of the number of authorized shares, pro rata to a maximum of 2832 shares and

the issuing thereof as contemplated in section 36 of the Companies Act, 71 of 2008.

4. The Board of Directors of the first respondent shall give effect to the Resolutions passed on 22 February 2012 that are attached as annexure "P" to the founding affidavit.

5. The costs of this application be paid by the first respondent, alternatively by such a respondent opposing this application, jointly and severally with the first respondent;

[10] Pertaining to the Main Application Williams J made the following Interim Order by agreement between the parties on 16 October 2012, which Order is quoted in full because a substantial portion of its terms feature prominently in the

Interlocutory Application I am seized with:

"1. The question whether annexure "M" to the founding affidavit correctly reflects the shareholding in the first respondent and if not what changes should be effected

thereto is referred to trial on a date to be determined.

2. The Parties' affidavits shall stand as pleadings.

3. Each party shall be entitled to call a deponent as well as any other person of whom it gives notice no less than 10 days before the hearing as a witness.

4. The parties shall be entitled to discovery in terms of the

Rules.

5. Pending judgment in the abovementioned trial; the following interim order is made:

5.1 The board of directors as referred to below, is authorized to issue one (1) ordinary par valueshare to each person whose name appears on

annexure "M";

5.2 The board is directed to issue share certificates according to paragraph 5.1 above;

5.3 The board is directed to convene a shareholders

meeting on or before 16 November 2012 for purposes of voting on whether or not to approve the sale of shares in NWC Manganese (Pty) Ltd referred to in annexure "N" to the founding

affidavit and to take a resolution as envisaged in sections 112 and 115 of the Companies Act 71 of 2008 ("the Act");

5.4 The board of directors shall consist of the first applicant [Babuseng] as the Chairperson, and the second to the fourth respondents[Morudi, Jacobs and Adams], and no resolution to the contrary shall be passed.

6. Declaring that upon restoration of the first respondent on 13 April 2012, the board of directors as referred to

in paragraph 5.4 was restored to office and may carry out all functions and obligations in terms of the Act.

7. The proceeds of the sale of shares shall be deposited in equal shares into the trust accounts of the respective attorneys of the parties, viz Towell & Groenewaldt and Van Zyl & Groenewaldt, to be retained until final judgment in this matter subject to paragraph 8 below.

8. The costs of the application to date shall be paid by the first respondent [NC Housing Services & Development Company], such costs to include costs of two counsel in the case of the applicants and the travelling and subsistence costs of the respondents' counsel. "

[11] At the meeting that was held on 19 April 2013 at the Kimberley Library, which is sought to be declared unlawful and the resolutions adopted there be set aside (see para 1 above), the following resolutions were taken:

"RESOLUTION OF THE SHAREHOLDERS OF THE NC HOUSING SERVICES & DEVELOPMENT COMPANY, REGISTRATION NUMBER 1997/005908/06 ("THE COMPANY") TAKEN AT KIMBERLEY ON 19 APRIL 2013

"Now therefore it is resolved that:

5. The mandate of the said Attorneys Towell & Groenewaldt to represent the Company be terminated with immediate effect;

6. The Company immediately withdraw its opposition to the application and henceforward support the application;

7. Mthuthuzeli Joseph Matshoba, the lawful Proxy and Agent 2 0 of Caroline Nonzima Matshoba, a shareholder in the Company, be and is hereby authorized in his capacity as

such to, sign and depose to any necessary documentation or affidavits and to take all necessary steps on behalf of the shareholders and Company to give effect to this Resolution and that any steps he may already have taken in this regard be and are hereby ratified;

8. The powers granted in Paragraph 7 above include but shall not be restricted to

8.1 The appointment of attorneys and advocates to represent the shareholders and company and to appear in the High Court;

8.2 The appointment of Forensic Accountants or other suitably qualified experts to assist the said attorneys and

advocates in the conduct of these proceedings;

8.3 The payment of all fees of the attorneys, advocates and other experts used in these proceedings;

8.4 The making of all other payments which may be necessary and desirable for the proper conduct of the case;

8.5 To proceed to the final end and determination thereof; 8.6 To move the Court to vary the Interim Order granted on

16 October 2012 to provide that:

8.6.1 One third of the proceeds of the sale of the Company's Shares in NWC Manganes (Pty) Ltd be paid into the shareholders' Attorneys Trust Account and that this amount be deducted from the amount payable in terms of the said Order into the Trust Account of Messrs Towel & Groenewalt;

8.6.2 The said Morudi, Jacobs, Adams and Goliath may be suspended as Directors should investigations referred to in paragraph 9 result in criminal charges being brought against them pending the outcome of those proceedings;

8.6.3 Should paragraph 8.6.2 become operative, the shareholders be given the right to elect acting Directors pending election of the new Directors in the normal course.

9. The Company investigate the possibility of commencing criminal proceedings against the said Morudi, Jacobs, Adams and Goliath in relation to irregularities that have been alleged to have occurred in the issue of shares and to mandate the said Matshoba to take such steps as might be necessary to proceed in this regard. Certified a true copy and signed at Kimberley on 19 April 2013 by the following shareholders who were present at the meeting."

[12] Adv W Coetzee, for first and second respondents (Matshoba and Mothibi), has taken two points in limine. The second point, the non-joinder issue, holds no water and will be dealt with in passing at the end. The first objection goes along the following lines:

12.1 The purported authority to lodge the present (the Interlocutory Application) is derived from a meeting dated 16 August 2013 at which meeting the fifth, sixth and seventh respondents (Morudi, Jacobs and Adams, respectively) were present. See para 3 above.

12.2 In this regard it is important to note that in terms of the Order of Court of 16 October 2012, of the Main Application, the third, fifth, sixth, seventh and eighth respondents (Babuseng, Morudi, Jacobs, Adams, and Goliath) were appointed directors. The Court Order in question is quoted in para 10 above. The relevant paragraph (Clause) of the Court Order is 5.4 and reads as follows:

"5.4 The board of directors shall consist of the first applicant [Babuseng] as the Chairperson and the second to fourth respondents [Morudi, Jacobs and Adams], and no resolution to the contrary shall be passed." (Own emphasis)

Mr Coetzee made an error as far as Goliath is concerned. Order/Clause 5.4 does not mention him but he was a director before the Court Order.

12.3 The third respondent (Babuseng), having been appointed as Chairperson of the Board by the Court, did not receive notice of the meeting of 16 August 2013 hence, it is submitted, that no enforceable resolutions could be taken, Mr Coetzee submitted.

[13] The third and fourth respondents (Babuseng: the Chairman and Mongwaketse: a Director, respectively), applied to Court on 11 September 2012 for an order declaring that the list of persons in Annexure "M" appended to the Resolution

taken on 19 April 2013 marked Annexure "B" be the only persons entitled to shares in proportion to the contributions they have made. This situation would obtain until the Board of Directors amend the Company's Memorandum of Incorporation to increase the number of authorized shares to 2832 for proportional distribution to the listed persons.

[14] The following is noteworthy and significant:

14.1 The application referred to in para 13 (above) was opposed by the Company on the authority of a Resolution marked Annexure "MPM

I" dated 12 September 2012. The meeting was attended by Morudi (the deponent),

Jacobs, Adams and Goliath. Conspicuous by his omission or absence is the Chairman (Babuseng).

14.2 Annexure "PMM2" dated 16 August 2013, which initiates the application now before me, demonstrates that Babuseng was once again overlooked because his name is not reflected thereon. (See: para 3 above).

[15] What is unmistakable is that there were clearly two camps amongst the Board of Directors.

15.1 One camp is composed of Babuseng (the Chairperson) who potentially owns 15.67% of the shares in the Company and Mongwaketse, who is a major, if not the major shareholder. They are supported by the first and second respondents (Matshoba and Mothibi) who have been authorized from time to time to guide the directors in the affairs of the

Company

They appear to be very knowledgeable.

15.2 The other camp consists of Morudi, Jacobs, Adams and Goliath. They are all directors and respondents in this application. What is striking about their conduct is that they not only overlooked Babuseng in the meetings referred to paras

14.1 and 14.2 (above) but a lot of correspondence was exchanged between them (the Morudi-faction represented by Towell and Groenewaldt Attorneys) and the Babuseng-faction after 19 April 2013 and meeting that the Morudi-faction called

on 16 August 2013. However, nothing was said by the Morudi-faction to Babuseng about the intended meeting of 16 August 2013 nor, as already mentioned, was he officially notified like all the attendees.

[16] There is no explanation in the Morudi-faction's founding papers or Replying Affidavit for sidelining the Chairman as aforesaid. Mr Kgotlagomang, acting for the Morudi-faction which group masqueraded as the NC Housing Services & Development Company (the

applicant) did not address this issue in his Heads of Argument. This matter should have received their combined attention because Mr Babuseng drew attention to it as follows in his opposing affidavit:

16.1 "8. The Board did not meet prior to 15 March 2013 to authorize Towell & Groenewaldt Attorneys to act on behalf of the Board or the applicant and to send the letter dated 15 March 2013, annexed to the founding affidavit as annexure "PMM4 ". I am the Chairman of the Board and did not receive any notice to attend a Board meeting where resolutions would be taken.

9. The Directors, not including me as Chairperson, purported to mandate the attorney to send the letter. They had no authority to do so and acted ultra vires.

10. On 12 July 2013, Mr Kgotlagomang sent a letter to the first respondent [Matshoba] informing him that the board does not recognize the resolutions taken at the shareholder's meeting. I refer the Court to annexure

"PMM9" appended to the founding affidavit. I was yet again not informed of a Board meeting where this was discussed and decisions taken.

11. A period of approximately three months lapsed between 19 April 2013 (the date of the shareholders meeting) and 12 July 2013 when the letter referred to in paragraph 10 supra was sent. There is no explanation for this delay.

12. On 22 April 2013 Michelle Kock sent an e-mail stating that a Board meeting will be held on 23 April 2013 at which a resolution will be sought to bring an application to have the shareholders meeting declared illegitimate. I refer the Honourable Court to annexure "PMM7" to the founding affidavit. On the same date at approximately 17:00, I received a text message from Morudi informing me that a Board meeting will be held at 16:00 on 23 April 2013 at the offices of Towell and Groenewald. It stated that Mr OC Koikanyang, an attorney who previously acted for NWC Manganese, called the meeting. 13. I replied to Morudi informing him that Mr Koikanyang was not a Director and could not call a Board meeting. If the Board met, it was not properly constituted and any resolutions passed are of no force and effect. force and effect.

14. Annexure "PMM2" purports to prove that a meeting of the Board took place on 16 August 2013. I never received notice of that meeting and Morudi was not duly authorized to bring this application on behalf of the Company. The Resolutions are of no force and effect.

15. It is respectfully submitted that for these reasons no Morudi and the other Directors had no authority to bring this application on behalf of the Company and therefore lacks locus standi.

16. I refer the Court to the time that lapsed between the date of knowledge of the shareholders meeting (15 March 2013), the letter on 12 July 2013, the e-mail on 22 July 2013 and the purported Board meeting on 16 August 2013." (Own emphasis)

[17] It is therefore safe to infer that the Morudi-faction masquerading as the applicant has. no explanation to proffer. They must stand or fall by their founding papers. In

Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1 999

(2) SA 279 (T) at 323 F - 324C Joffe J stated:

"It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (J) SA 464 (D) it was stated at 469C--E that

'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof As was held in *Prokureursorde van Transvaal v Kleynhans* A 1995

(1) SA 839 (T) at 849B in regard to a constitutional issue:

'Dit is myns insiens vir die behoorlike ordening van die praktyk absoluut noodsaaklik dat konstitusionele punte nie deur advokate as laaste debatspunt uit die mou geskud word maar pertinentin die stukke as geskilpunt geopper word sodat dit volledig uitgepluis kan word deur die partye ten einde die Hof in staat te stel om dit behoorlik te bereg.'

The dictum is not only of application to constitutional issues - it applies to all issues. Nor is the dictum only of application in the context of a founding affidavit- it applies equally to answering affidavits and replying affidavits. "

See *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012

(2) SA 542 (SCA) at 550F - 551D.

[18] Adv Zietsman SC was correct in his contention that it is not the case of the applicant Company that the irregularity in excluding the Chairman of the Board (Babuseng) was caused by any subsequent lawful ratification. He submitted that the three Directors (Morudi, Jacobs and Adams) who attended the meeting cannot be said to have acted lawfully. It is a sound principle that an act executed ultra vires cannot be ratified.

18.1 In *African Organic Fertilizers & Associated Industries Ltd v Premier Fertilisers Ltd* 1948

(3) SA 233 (N) at 241 Broome J stated:

"I therefore accept the principles that notice of a directors' meeting must be given to every director who is within reach, and that the question whether a director is within reach depends upon the circumstances, including the nature of the business to be transacted. If the business to be transacted were contentious, the degree of inaccessibility would have to be very

great. "

18.2 In *Damane v Central Energy Fund* 2013 JDR 0915(GSJ) the Full Bench (Sutherland J, with Van Ooster J and Bedhesi AJ concurring) held at paras 32- 33:

"32. The principle in contention is that unauthorised decisions may be ratified with retrospective effect. There is a distinction of importance between:

32.1. the ratification of an authorised decision that could have been validly taken if prior authority had been conferred,

and,

32.2. the impossibility of an attempt to 'ratify' a decision which could not have been taken, even if the decision maker had been notionally authorised.

The difference is between the concept of an 'unauthorised decision' and the concept of an 'incompetent decision'.

33. The decision in *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (I) SA 635 (0) is an illustration of the latter type of decision, ie an incompetent decision: an invalidly constituted board (improperly convened and without a quorum) cannot take a valid decision and nothing exists in law to ratify. The critical point is that the decision maker was incompetent to make the decision (at 638D). Similarly, the basis for the decision in *Mathipa v Vista University and others* 2000 (1) SA 396 (T) was that the initial decision by the rector to appoint a campus director was characterised by the court as ultra vires the statutory regime of the university and that a ratification of an ultra vires act by an organ of the university, ie the council, that did have such power to make an appointment, was not in law possible (see at 401A-E)."

18.3 In *Nyoka v Cricket South Africa*

[2011] JOL 27198 (GSJ) delivered 15 April 2011 at page 35 para 71 Mojapelo DJP held:

"[71] The respondent failed to give proper notice of the meeting to the applicant who was entitled to same. The failure is an irregularity which invalidates the proceedings. Resolutions taken at a meeting where persons who were entitled to receive notice or required to receive notice thereof did not receive such, are ordinarily invalid (see *Mtshali v Mtambo* 1962 (3) SA 469 (G) at 472 (D-E; *Wessels & Smith v Vanugo Construction (Pty) Ltd* 1964 (I) SA 635 (0) at 636 G - 637H; *African Organic & Associated Industries Ltd v Premier Fertilisers Ltd* 1948 (3) SA 233 (N) at 239-241; *Visser v Minister of Labour* 1954 (3) SA 975 (W) at

Based on the stated irregularity the result should be that the application must fail.

WHETHER THE FIRST AND SECOND RESPONDENT WERE AUTHORISED TO CALL THE MEETING OF 19 APRIL 2013.

[19] Mr Morudi, on behalf of the Company, states as follows in para 49 of the founding papers:

"49 I am advised that the business and the affairs of the company must be managed by the directors of the company through the Board of Directors. The Board of Directors has the authority to exercise all the powers and perform all the functions to the extent that same is authorized by the Act and the Memorandum of Incorporation. Nobody but the Board may manage the affairs of the applicant other than the people that constitute the Board. The resolution suspending the Board flies in the face of the provisions of the Act and therefore is unlawful. The first and second respondents are not in a position to manage the affairs of the applicant in this matter. "

[20] The first respondent's (Mr Matshoba's) response is as follows:

"41.2 I aver that I have been advised that the directors hold office at the will of the shareholders and not the other way round and that where directors fail to act in the bona fide interests of the Company, a General Meeting of Shareholders has an inherent and statutory power to remove or override them and that a resolution to suspend

directors is therefore not necessarily unlawful particularly when framed in the form that the written resolution signed by the shareholders on the 19th April 2012 was framed, namely that the above Honourable Court be moved to amend its Order on the 16th October 2012 to provide that the said directors may be suspended in the event that investigations result in criminal charges being brought against them pending the outcome of the criminal proceedings.

41.3 I further deny that I am attempting to manage the Company. I am

only trying to extricate the Company from ruinous and unjustifiable litigation for which I have a Shareholder's Resolution and which litigation has not been pursued in the bona fide interests of the Company but by certain directors in the pursuit of their own interests which are directly in conflict with the interests of the majority shareholders. "

[21] Where a company has an ineffective Board of Directors the shareholders in a General Meeting have the residual right to invoke

the company's powers. Adv W Coetzee, for first and second respondents (Matshoba and Mothibi), has argued that on this principle

Matshoba has been validly authorized to appoint the current attorneys of record for the Company and withdrew the Company's

Opposition to the Main Application for the relief sought therein to be obtained on an unopposed basis.

[22] The withdrawal of the opposition and the appointment of first respondent (Matshoba) referred to by Mr Coetzee are contained in a legal document filed of record by Mr Matshoba's attorneys, Adrian B Horwitz & Associates who, by the way, also represent Babuseng and Mongwaketse. To give the proper context the full document is quoted: "In the High Court of South Africa, Northern Cape High Court,

Kimberley, Case No 1577/2012

Kimberley: The 16th Day of October 2012

Before the Honourable Ms Justice Williams

In the Matter of

Scholtz Jacob Babuseng 1st Applicant

Seodi Julius Mongwaketse 2nd Applicant

NC Housing Services & Development 1st Respondent

MP Morudi 2nd Respondent

DJ Jacobs 3rd Respondent

FAG Adams

4th Respondent

VA Goliath 5th Respondent

NOTICE BY FIRST RESPONDENT OF SUBSTITUTION OF ATTORNEYS OF RECORD AND
WITHDRAWAL OF OPPOSITION TO APPLICATION

Please take notice that pursuant to a Resolution passed at a duly constituted General Meeting of Shareholders at Kimberley on 19 April 2013, first respondent in the above matter, NC Housing Services & Development Company Limited, Registration Number 1997/005908/06

hereby:

- i. Substitutes Attorneys Adrian B Horwitz & Associates, Ground Floor, Barnet House, 45 Du Toitspan Road, Kimberley as its Attorneys of Record in these proceedings in place of Attorneys Towell & Groenewaldt, 28 Roper Street, Kimberley.
- ii. Withdraws its opposition to the Application and will henceforward support the application and file an affidavit to give effect to such support.

A copy of the Resolution and Letter of appointment of first respondent's [the Company's] new attorneys hereunto annexed marked "A" and "B" respectively.

Please take notice further that first respondent will henceforth accept service of all Notices, Affidavits

and other Documents in these proceedings at the offices of its substituted Attorneys. Dated at Kimberley on this the 81 day of August 2013."

The Resolution in question has been set out in full in para 11 of this

judgment.

[23] Mr Willem Coetzee has cited the following authority for his submission made in para 23 above:

23.1 Gohlke & Schneider v Westies Minerale 1970(2) SA 685 (A) at 693 where Trollip JA expounded:

"The articles, therefore, only empower a general meeting to appoint directors to fill vacancies caused by retirement or removal of directors, a situation which did not arise in the present case. I agree however with Mr. Coetzee that the members must have inherent or implied general power to appoint directors to fill other vacancies caused, for example, by resignation, death, incapacity, or disqualification. Usually, as a matter of practice, they would exercise that power by ordinary resolution at a general meeting. But the articles neither require that nor prohibit the power from being exercised by their unanimous assent achieved otherwise than at such a meeting. After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that not be just as effective? Thus in the case of *Salomon v Salomon and Co. Ltd.*, 1897 A.C. 22, one of the questions that arose was whether the agreement whereby the company purchased the vendor's business was valid, since there had been no independent board of directors to render the company bound. No general meeting of members of the company had been held to approve the agreement, but according to the evidence they all knew of its terms and accepted them. "

23.2 *Alexander Ward and Co Ltd v Samyang Navigation Co Ltd*

[1975] 2 AllER 424 (HL) per Lord Hailsham at 428-429 that:

"With respect, however this argument is a non sequitur which would only become cogent if one adopted a false and question- begging meaning to the word "competent." In my opinion, at the relevant time the *679 company was fully competent either to lay arrestments or to raise proceedings in the Scottish courts. The company could have done so either by appointing directors, or, as I think, by authorising proceedings in general meeting, which in the absence of an effective board, has a residual authority to use the company's powers."

[24] As I understood him correctly Mr Zietsman, for Babuseng and Mongwaketse, supported the line of argument presented by Mr Coetzee but he added an aspect that I will address in passing. That Mr kgotlagomang has conceded. First, that the meeting took place without

a Chairperson which resulted in the lack of locus standi by the applicants. He cited s73 (4) (b) of the Companies Act 71 of 2008 which is couched in peremptory terms. The second concession pointed out by Mr Zietsman is that the Board of Directors was

dysfunctional. This, he submitted, resulted in the shareholders having a clear right to intervene in the affairs of the Company.

[25] Mr Kgotlagomang, for the Company and the Morudi-faction, made the following submissions on these aspects. That even though it

is submitted that the Board was dysfunctional, the respondents have failed to comply with

sections 61 (Shareholder's meetings), 62 (Notice of the meetings) and 65 (Shareholder resolutions) of the Companies Act. Mr Kgotlagomang argued that it is the Board that must refer issues to the shareholders and the Board must convene a shareholders' meeting.

[26] Mr Kgotlagomang's argument cuts both ways. If it holds true against the Babuseng-faction for the meeting of 19 April 2013 then it is self-defeating in respect of the applicant in respect of its meeting held on 16 August 2013. Be that as it may, I am satisfied that, on the facts of this case, Mr Coetzee's authorities and argument is in point and must succeed on two fronts, as already discussed.

GOING FORWARD: MATTERS OF CONCERN

[27] The Babuseng and Morudi factions must reconcile. The Company is fighting against itself and will self-destruct. They must agree on

someone neutral, qualified, experienced and competent in commercial/company matters to mediate/arbitrate. The Shareholders and Directors must bear in mind why the Company was formed or

acquired; to improve their socio-economic situation as previously

disadvantaged people. There seem to be signs of a smash-and-grab, get-rich-quick mentality emerging.

[28] Mr Zietsman has dedicated about 12 paragraphs of his Heads of

Argument to alleged incidents of impropriety on the part of attorney Kgotlagomang. Kgotlagomang has elected not to respond to the

allegations merely stating that it is hearsay. It would be undesirable to express myself on this issue on the papers before me.

What I am prepared to say, however, is that an untenable situation for him and his firm has been precipitated.

This includes, leaving aside what Mr Zietsman has contended, on an overview of the entire case, a

potential conflictual situation for the attorney and his firm. Stepping aside may be the best option.

THE COSTS ISSUE

[29] It is unfair for the Company to be mulcted in costs and at the shareholders' expense for the indiscretions of

the directors (Morudi, Jacobs, Adams and Goliath) who seem to have acted in their selfish interests. The exorbitant proposed payout to Directors and some Shareholders and Regional Representatives without proper authorization are not signs that instill confidence.

[30] Notwithstanding the fact that the name of the Company has been used and abused it appears that the Company may have to bear the costs. However, the errant directors are warned to desist. They will in future bear the costs in person, possibly punitively.

[31] In the result, the following order is made:

ORDER

1. The application by NC HOUSING SERVICES & DEVELOPMENT COMPANY (the Applicant) is dismissed with costs on a party and party scale. The costs shall include cost for two counsel for the third and fourth respondents.

MC MAMOSEBO

ACTING JUDGE: NORTHERN CAPE HIGH COURT

On behalf of the Applicant:

Mr Kgotlagomang

Instructed by:

Towell & Groenewaldt Attorneys

On behalf of the 1st& 2nd Respondents: Adv W Coetzee

Instructed by: Adrian B Horwitz & Associates

On behalf of 3rd & 4th Respondent: Adv P Zietsman SC

Assisted by: Adv PR Cronje

Instructed by: Elliot Maris Wilmans & Hay Attorneys

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ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANCHC/2014/26.html>

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