IN THE NORTH WEST HIGH COURT

(MAFIKENG)

CASE NO.: 1010/12

In the matter between:

BETHUEL OFENTSE PEELE	**APPLICANT/RESPONDENT**
and	
CORNE VAN DER SCHYFF	**1ST RESPONDENT/1ST APPLICANT**
EXPRO PRODUCTIONS CC	**2ND RESPONDENT/2ND APPLICANT**
T/A PHOKENG BUILD IT	
JOHAN VAN DEN BERG	**3RD RESPONDENT/3RD APPLICANT**

JUDGMENT

LANDMAN J:

[1] This is an application for rescission of judgment. The applicant in this application is Bethuel Ofentse Peele who is the respondent in the main application. I shall refer to him as the respondent. The respondents in this

application are Corne van der Schyff, Expro Productions CC t/a Phokeng Build It and Johan van den Berg who are the applicants in the main application and I shall refer to them as the applicants.

[2] It is common cause that the applicants alleged that the respondent resided at a certain address in Phokeng. The summons was served at that address by delivering it to one Harmony, described as the respondent's daughter. It is now common cause that the address where service was affected was not the respondent's residence. It is on this basis that the respondent has resorted to Rule 42(1)(a) which provides that:

> "The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> 1. An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
> 2. . . . ."

[3] There are only three requirements which must be met for an application, brought on the basis of Rule 42(1)(a), to succeed. These are:

(a) The order was granted in the absence of a party;
(b) The order affects the party concerned; and
(c) The order was erroneously sought or erroneously granted.

[4] In deciding whether an order was erroneously granted a court hearing an application for rescission is not restricted to the record before the court that granted the order. In so far as an alleged procedural error is concerned a court may have regard to the true facts.

[5] Streicher JA said the following in **Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd** 2007 (6) SA 87 (SCA) at para 24:

> "Where notice of proceedings to a party is required and judgment is granted against such party in his absence without notice of the proceedings having been given to him such judgment is granted erroneously. That is so not only if the absence of proper notice appears from the record of the proceedings as it exists when judgment is granted but also if, contrary to what appears from such record, proper notice of the proceedings has in fact not been given. That would be the case if the sheriff's return of service wrongly indicates that the relevant document has been served as required by the rules whereas there has for some or other reason not been service of the document. In such a case, the party in whose favour the judgment is given is not entitled to judgment because of an error in the proceedings. If, in these circumstances, judgment is granted in the absence of the party concerned the judgment is granted erroneously. See in this regard *Fraind v Nothmann* 1991 (3) SA 837 (W) where judgment by default was granted on the strength of a return of service which indicated that the summons had been served at the defendant's residential address. In an application for rescission the defendant alleged that the summons had not been served on him as the address at which service had been effected had no longer been his residential address at the relevant time. The default judgment was rescinded on the basis that it had been granted erroneously."

[6] As far as substantive defences are concerned Streicher JA said the following at para 17:

> "In any event, a judgment granted against a party in his absence cannot be considered to have been granted erroneously because of the existence of a defence on the merits which had not been disclosed to the judge who granted the judgment."

[7] It is clear that the applicants has met the requirements of Rule 42(1)(a) as neither the court nor the applicants were aware of the fact that the respondent did not reside at the address where service was effected.

[8] The applicants, however, points to various circumstances which indicate that the respondent may have become aware of the application but declined to receive it. This may be true but it does not detract from the fact that no service was effected at the respondent's residence.

[9] In the premises I make the following order:

1. The judgment granted by the Court on 16 August 2012, under the above case number, in favour of the above-named respondent's is rescinded.
2. The respondents are directed to restore the status *quo* ante by signing all documents necessary in order to retransfer the applicant's membership interest in the second respondent back to him within 15 days from the date of this order.
3 The respondent is to file an answering affidavit within 15 days of this order.
4. The applicants are to pay the respondent's costs occasioned by their opposition to the application jointly and severally the one paying the others to be absolved.

A A LANDMAN
JUDGE OF THE HIGH COURT

APPEARANCES:

DATE OF HEARING	: 28 NOVEMBER 2013
DATE OF JUDGMENT	: 5 DECEMBER 2013
COUNSEL FOR APPLICANT	: ADV N ALLI
COUNSEL FOR RESPONDENTS	: ADV W J BEZUIDENHOUT
ATTORNEYS FOR APPLICANT	: SMIT & STANTON INC
ATTORNEYS FOR RESPONDENTS	: VAN ROOYEN TLHAPI & WESSELS