**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 270/17

In the matter between:

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| **MOSALASUPING PHILLIP MORUDI AND SEVENTY OTHERS** | 1st to 71st Applicants |
| and | |
| **NC HOUSING SERVICES AND DEVELOPMENT CO LIMITED** | First Respondent |
| **SCHOLTZ JACOB BABUSENG** | Second Respondent |
| **SEODI JULIUS MONGWAKETSI** | Third Respondent |

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| **Neutral citation:** | *Morudi and Others v NC Housing Services and Development Co Limited and Others* [2018] ZACC 32 |
| **Coram:** | Mogoeng CJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ, and Theron J |
| **Judgment:** | Madlanga J (unanimous) |
| **Heard on:** | 08 May 2018 |
| **Decided on:** | 25 September 2018 |

## ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Northern Cape Division, Kimberley) the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal and High Court of South Africa, Northern Cape Division, Kimberley (High Court) are set aside, and replaced with the following:
   "(a) The order of the High Court granted on 1 September 2014 in case number 1557/2012 (main application) is rescinded.
   (b) The fifth to 71st applicants are granted leave to intervene in the main application."
4. The respondents must pay the applicants' costs, including costs of two counsel, in the High Court, the Supreme Court of Appeal and in this Court.

## JUDGMENT

MADLANGA J (Mogoeng CJ, Dlodlo AJ, Froneman J, Goliath J, Jafta J, Khampepe J, Petse AJ, and Theron J concurring):

*Introduction*

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal that upheld a refusal of rescission and dismissal of an application for leave to intervene by the High Court of South Africa, Northern Cape Division, Kimberley

(High Court). The question before us is whether rescission and leave to intervene should have been granted.

*Background*

[2] In 1997 a group of individuals in the Northern Cape acquired a so-called shelf company to use as a vehicle to exploit commercial opportunities in the province for the benefit of black people. Many of those interested in participating in this venture contributed at least R100 towards the purchase of shares in the company. The shelf company was converted into a public company in order to open up the shareholding to more than 50 persons. It was renamed NC Housing Services and Development Co Limited (company). Although quite a long time has since elapsed, the company is yet to compile a register of members and issue shares and share certificates.

[3] In September 2007 the Registrar of Companies removed the company from the Companies Register for failure to file annual company returns. Four years later the company wanted to sell its major asset which was shares in NWC Manganese (Pty) Ltd (NWC Manganese) for R250 million. Those behind the company took the view that in order for it to do that, it had to be re-registered. An application to re-register the company was launched and subsequently granted.

[4] A dispute arose between Mr Mosalasuping Morudi, the first applicant, and 70 others (the second to 71st applicants), on the one hand, and Mr Scholtz Babuseng and Mr Seodi Mongwaketsi, the second and third respondents respectively, on the other.[1] The dispute was about who were entitled to shareholding in the company and in what proportion. The second and third respondents claimed that between the two of them their shareholding was supposed to be 67.67%, the second respondent being entitled to 17.67% and the third to 50%. According to these respondents, the 71 applicants were entitled to the remaining 32.33%.

[1] The first respondent is the company.

[5] Briefly here is how the dispute arose. Long before its deregistration, the company resolved to purchase an 8% shareholding in Meriting Investments (Pty) Ltd (Meriting). Meriting is a substantial shareholder in Teemane (Pty) Ltd. Teemane is a joint venture company between Meriting and Sun International. It owns the Flamingo Casino in Kimberley. The company did not have funds to purchase the Meriting shares. There is a dispute as to some crucial detail on how the purchase was to be funded. The first and second respondents claim that the company resolved to sell 500 shares and to fund the purchase from the proceeds of the sale. The applicants aver that an investor that would help fund the purchase was to acquire 50% of the shares that the company was to purchase from Meriting. They deny that the investor would get a shareholding in the company. What is not in dispute is that a Mr Van Rensburg provided R191 000 for the purchase of the 8% shareholding in Meriting.

[6] According to the second and third respondents Mr Van Rensburg later sold his equity interest in the company to the third respondent for R300 000. It is this purchase that – according to the second and third respondents – caused the third respondent's claim to shareholding to shoot up to 50%. Needless to say – and for the reasons set out in the preceding paragraph – the applicants dispute this. They also say from inception the idea behind the creation of the company was broad-based black economic empowerment; it was never the intention of those who formed the company, the applicants and second and third respondents included, to permit the disproportionate enrichment of any one individual. The applicants also raise this against the second respondent's claim of being entitled to a substantial shareholding. The second respondent claims that over time he made payments totalling R50 000 into a banking account of the company and that it is this amount that now entitles him to the 17.67% shareholding in the company. In short, the applicants aver that every contributor towards the purchase of shares in the company is entitled to roughly the same amount of shares.

[7] Amongst all concerned there was lack of clarity on whether the board of directors that was in place at the time the company was deregistered had been revived with the re-registration of the company.

[8] The second and third respondents launched an application in the High Court (main application). In the main, they sought an order declaring that—

(a) persons entitled to shareholding in the company were as listed in an annexure to the founding affidavit, annexure "M"; and

(b) the respective shareholding of those people was to be as reflected in this annexure.

[9] In that application the company was the first respondent. The founding affidavit referred to the first to third applicants as businessmen and directors of the company. They were cited as the second to fourth respondents. The fourth applicant was referred to as a businessman and former director of the company. The rest of the applicants were not cited as parties at all. Crucially, in the founding affidavit the second respondent averred that it was his and the third respondent's intention to cite these applicants as well, but that it was not practical to do so at the time the proceedings were launched. He made the point that these applicants would be cited in due course. For reasons that have not been explained, that was never done.

[10] The first applicant opposed the application. In doing so, he purported to act on behalf of the company. The factual contest in the application was as detailed above. The second to fourth applicants filed confirmatory affidavits in which they confirmed facts that related to them in the first applicant's opposition on behalf of the company.

[11] By agreement Williams J referred the main application to trial for the determination of the question whether annexure "M" correctly reflected who was entitled to shares and in what proportion. This was on the basis that there was a

genuine dispute of fact. Pending the outcome of that trial, the Court made an interim order. This too was by consent. First, it authorised the issuing of one ordinary par value share to each person whose name appeared in annexure "M". This was necessitated by the fact that strictly speaking the company had no shareholders as (a) it had no share register and (b) no shares had been issued. Second, the Court directed that a board of directors comprising the first, second and third applicants and the second respondent convene a meeting of the shareholders to consider a resolution to sell the company's major asset – its shares in NWC Manganese. Third, the Court directed that should the NWC Manganese shares be sold, the proceeds of the sale should – pending the determination of the trial – be deposited in equal parts into the trust accounts of the parties' respective attorneys.

[12] Pursuant to the interim order, the shareholders resolved to sell the NWC Manganese shares. At a later meeting held on 19 April 2013, a resolution to withdraw the company's opposition to the main application was taken (19 April 2013 resolution). One week later the first applicant, purporting to act on behalf of the company, instituted an urgent application to have the shareholders' meeting of 19 April 2013 and all resolutions passed at it declared unlawful. The urgent application was dismissed by Mamosebo AJ on the basis that the first applicant lacked authority to bring the application.[2]

[13] Subsequently the issue referred to trial came before Kgomo JP. A Mr Kgotlagomang, an attorney, appeared before him. When placing himself on record, he announced that he was representing the first to third applicants[3] in the main application in their capacity as potential shareholders in the company. The Court asked what Mr Kgotlagomang's clients wished to do as there was no longer a dispute between the second and third respondents, who were the first and second applicants before that Court, and the company. He responded that as the company had

[2] *NC Housing Services and Development Company v Matshoba* [2014] ZANCHC 26 at para 24.

[3] Those were the second to fourth respondents before the High Court. There is no clarity as to why there was no appearance for the fourth applicant (the fifth respondent before the High Court).

withdrawn its opposition, the trial could go on as between his clients and the second and third respondents. Crucially, he explained that this was because in accordance with annexure "M" his clients, whom he was representing "as individuals", were potential shareholders. The Court took the position: that Mr Kgotlagomang was not properly before it as the first to third applicants were cited as directors of the company; and that since the company had withdrawn its opposition, these applicants could no longer advance the company's interest, nor could they act in their personal capacities. The three applicants too were thus not properly before Court.

[14] A transcript of the exchanges between the Court and Mr Kgotlagomang forms part of the record before us. In the transcript the Court repeats a number of times that Mr Kgotlagomang and his clients are not before Court and that, therefore, the Court will not give them audience. The factual reality was that not only Mr Kgotlagomang and his three clients were before Court, but so were many other potential shareholders listed on annexure "M". The Court went on to say that if the first to third applicants wished to oppose the application as shareholders, they would have to apply for a postponement. The Court added that if the postponement were to be granted, the applicants would have to bear the costs occasioned by the postponement and that those costs might have to be paid before the next hearing.

[15] Mr Kgotlagomang requested that the matter be stood down for a short while, to which the Court acceded. On his return, he announced that he was withdrawing as the first to third applicants' attorney of record. However, he informed the Court that the many other potential shareholders present in Court wished to address it. The Court addressed these potential shareholders first in Setswana and said:[4]

> "You understand that you got your shares in the company. Now, if you have shares you cannot speak for yourselves. There are decisions that have been taken and these decisions are binding. You, each and every one of you has a share. You cannot come

[4] I am quoting what was translated in Court.

> by yourself. It is not a court procedure. Furthermore, if a decision has been taken [by a] majority it binds you."

[16] It continued in English and said "[y]ou see, whether you like it or not but if the resolution has been taken, it binds even if you are against the resolution of the company". Without giving this group of potential shareholders audience, the Court immediately granted an order in terms of a draft order agreed to by counsel for the second and third respondents and the company. The effect of the order was that persons entitled to shareholding in the company were as listed in annexure "M" and that their respective shareholding was as reflected in this annexure.

[17] Citing as respondents the company[5] and the second and third respondents, all 71 applicants brought an application for the rescission of this order. They invoked the common law and rule 42(1)(a) of the Uniform Rules of Court. In addition, the fifth to 71st applicants sought to be joined as respondents in the main application. They had not been cited in that application.

[18] Rule 42(1)(a) provides:

> "The court may . . . *mero motu* [of its own accord] or upon the application of any party affected, rescind or vary:
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> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby . . ."

[19] Lever AJ held that the applicants could not succeed under rule 42(1)(a) because they were present in Court when the order was granted. The Court reasoned that the rule envisaged the *physical* absence of a party affected by the order concerned.[6] It also held that the applicants had to fail even under the common law. This was so

[5] The company was cited as the first respondent.

[6] *Morudi v NC Housing Services and Development Co. Ltd* [2016] ZANCHC 88 (High Court judgment) at para 88.

because they had failed to: show the existence of a *bona fide* defence; and provide a satisfactory explanation for their default.[7]

[20] The applicants appealed to the Supreme Court of Appeal. A majority judgment in that Court upheld the High Court's order and reasoning. This it did whilst holding – on the facts – that the first to fourth applicants were cited in dual capacities; in addition to being cited in a representative capacity, each was cited as a shareholder. The Court reasoned that – because the applicants had failed in their quest to have the 19 April 2013 resolution set aside – the continued existence of that resolution had the effect of barring the applicants from participating in the litigation in their personal capacities. This is how Tshiqi JA articulated the reasoning of the majority:

> "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.
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> . . .
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> As is apparent from the debate between [Kgomo 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 . . . as the [company's] opposition to the main application had been withdrawn. . . . 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."[8]

[21] In a separate judgment Molemela AJA disagreed with the majority. For a variety of reasons she would have upheld the appeal.

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[7] Id at para 61.

[8] *Morudi v NC Housing Services and Development Co Ltd* [2017] ZASCA 121; (2017) JDR 1614 (SCA) (Supreme Court of Appeal judgment) at paras 16-7.

*Jurisdiction and leave to appeal*

[22] This matter raises important questions implicating the applicants' right of access to court in terms of section 34 of the Constitution. We have jurisdiction. There are reasonable prospects of success. Based on this and the fact that – as will appear later – there may well have been a total failure of justice occasioned by what may prove to have been a denial of the applicants' right of access to court, it is in the interests of justice to grant leave to appeal.

*The appeal*

[23] Effectively the applicants contend that the High Court should not have shut the door in their faces and denied them justice. On the other hand, the respondents contend that – in the face of the 19 April 2013 resolution – the applicants have no business seeking to participate in the main application in their personal capacities and that, therefore, the order sought to be rescinded was granted properly.

[24] The applicants seek rescission in their personal capacities. I will first address the question whether, in that capacity, they were each a "party affected" by the order sought to be rescinded as envisaged in rule 42(1)(a). On the facts, the majority of the Supreme Court of Appeal held that throughout the protracted litigation "the Morudi group acted as either directors or shareholders or in both capacities".[9] The minority accepted that the first to fourth applicants were cited as shareholders. It went further and held, correctly, that this meant they were cited in their personal capacities. The majority disagreed on the latter. I do not understand how – as a matter of law – an individual potential shareholder cited as a "shareholder" is not cited in her or his personal capacity.

[25] On the authority of *Makate*[10] we interfere with factual findings of a lower court only under exceptional circumstances. I see no exceptional circumstances here and

[9] Id at para 18. The reference to "the Morudi group" in the quotation is a reference to the applicants.

[10] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at paras 38-40.

the respondents did not suggest any. All that they did was to make submissions why we should accept their view on the contested factual issue. That is, we must not accept that, in addition to being cited in representative capacities, the first to fourth applicants were also cited in their personal capacities. That is not enough for us to depart from the *Makate* principle.

[26] Thus I must accept the factual finding by the majority and minority of the Supreme Court of Appeal that the first to fourth applicants were also cited as shareholders. They are thus parties in their personal capacities to the main application. As such, they are entitled to seek rescission under rule 42(1)(a). As will become apparent later, it is not necessary to decide this question in relation to the fifth to 71st applicants.

[27] I next consider the question whether the order sought to be rescinded was granted erroneously as envisaged in rule 42(1)(a). Amongst others, an order is granted erroneously if there was an irregularity in the proceedings.[11] Was there an irregularity when the High Court granted the order sought to be rescinded?

[28] What the 19 April 2013 resolution did was to withdraw the company's own opposition of the main application. The core issue for determination in the main application was whether annexure "M" correctly reflected the potential shareholders in the company and the proportion of the potential shareholding of each of them. Central to that was the financial contribution each potential shareholder had made. By its very nature, the dispute about the shareholding was between the second and third respondents, as potential shareholders, on the one hand, and the applicants, on the other. The second and third respondents may have purported not to cite the company nominally, but in reality it was not a true disputant. It is a determination of the true dispute – that is the dispute between the potential shareholders – that would then have

[11] Erasmus, *Superior Court Practice* RS 5, 2017, D1-569; *National Pride Trading 452 (Pty) Ltd v Media 24 Ltd* 2010 (6) SA 587 (ECP) at paras 26-7.

set the scene for the normal operation of the company in accordance with the will of the majority.

[29] Surely, that makes each potential shareholder listed in annexure "M" to have a direct and substantial interest in the outcome of the dispute. More specifically, a determination of who the shareholders were, and in what proportion, would have a direct impact on the individual rights of each potential shareholder; it could even be prejudicial to those rights. That made them necessary parties and they were thus entitled to joinder of necessity.[12] Brand JA writing for a unanimous Court in *Cape Bar Council* said:

> "It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one."[13] (References omitted.)

[30] In *Amalgamated Engineering*, Fagan AJA states:

> "Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests."[14]

[31] I have sought to demonstrate that here there was a risk of the applicants' rights being prejudicially affected by an order issued in the main application. This and the

[12] See *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* [2012] ZASCA 115; 2013 (1) SA 170 (SCA) (*Cape Bar Council*) at para 12.

[13] Id.

[14] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) (*Amalgamated Engineering*) at 659.

authority of *Amalgamated Engineering* notwithstanding, the High Court determined the main application without any regard to possible prejudice to the applicants' rights. On the contrary, it held that they were not entitled to be given audience as the company – in withdrawing its opposition – had spoken on their behalf. On the authority of *Amalgamated Engineering* and *Cape Bar Council*, the High Court could not validly grant an order in the main application without the applicants having been joined or ensuring that they would not be prejudiced. It was incumbent upon that Court *mero motu* to insist on their joinder.[15]

[32] The agreement between the representatives of the parties – that is, the second and third respondents and the company – did not excuse the High Court from its duty to enquire whether the order these parties were agreed on would prejudice potential shareholders.[16] Again, *Amalgamated Engineering* instructs that—

> "[t]he fact, however, that, when there are two parties before the Court, both of them desire it to deal with an application asking it to make a certain order, cannot relieve the Court from inquiring into the question whether the order it is asked to make may affect a third party not before the Court, and, if so, whether the Court should make the order without having that third party before it. . . . The third party's position cannot be prejudiced by the *consensus* of the two litigants that they do not wish that party to be joined."[17]

[33] It must follow that when the High Court granted the order sought to be rescinded without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court. In *Twee Jonge Gezellen* Brand AJ explains the gravity of the right to a fair hearing:

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[15] Id.

[16] Id at 649.

[17] Id.

> "There can be no doubt about the importance of the fundamental right which is guaranteed by section 34. As stated by this Court in *De Beer N.O. v North-Central Local Council and South-Central Local Council*:
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> > 'This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.'"[18]

[34] The irregularity committed by the High Court satisfies the requirement of an error in rule 42(1)(a). The second and third respondents – with the support of the company – pushed for the granting of the order and the High Court granted it. In the circumstances, the order was erroneously sought and erroneously granted as envisaged in rule 42(1)(a).

[35] If a party has plainly acquiesced to the granting of an order without her or his participation, a court may not insist on joinder which is otherwise necessary.[19] Is there a basis for saying that the first to fourth applicants acquiesced to the order and thus cannot now complain against it? The exchange between Mr Kgotlagomang and the Court on the date of hearing plainly demonstrates that, rather than acquiesce to the granting of the order, at least the first three applicants whom Mr Kgotlagomang said he was representing were desirous of contesting the proceedings. Mr Kgotlagomang's persistence in this regard puts this beyond question. He said he was representing the three applicants as "individuals" and wanted the issue referred to trial to be heard on that basis.

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[18] *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* [2011] ZACC 2; 2011 (3) SA 1 (CC); 2011 (5) BCLR 505 (CC) at para 57 (*Twee Jonge Gezellen*).

[19] *Amalgamated Engineering* above n 14 at p 652. See Cilliers et al *Herbstein and Van Winsen*: *The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa* 5th ed (Juta & Co. Ltd, Cape Town 2009) volume 1 at 215-6.

[36] Coming to the fourth applicant, at best what can be said is that there was no appearance on his behalf on the date of hearing. To me that does not – without more – translate to acquiescence. At the very least the Court should have enquired as to why there was no representation or appearance by him. That it never did.

[37] Has the requirement of "absence" in rule 42(1)(a) been satisfied? The respondents argue that the applicants were not "absent" since they were physically present in the courtroom on the date of hearing. One difficulty facing the respondents in this regard is that they could not show which applicants were, in fact, present in Court. On the available evidence it seems not to be contested that only some of them were present. Even if I focus only on the first four applicants, it is so that before he was effectively sent packing by the Court, Mr Kgotlagomang was present in Court on behalf of the first three. There is no evidence whatsoever on whether the fourth applicant was in Court. So, the respondents' argument cannot stand as against him.

[38] All that aside, Mr Kgotlagomang was repeatedly told that he, and therefore his clients, were not before Court and that it would thus not give him audience whatsoever. For all intents and purposes these applicants were in no better position than a litigant who was physically not in court.

[39] Section 39(2) of the Constitution enjoins courts to interpret legislative provisions in a manner that promotes the spirit, purport and objects of the Bill of Rights. The interpretation of "absence" that I adopt better accords with this injunction. The respondents' interpretation, on the other hand, has the effect of denying the applicants their section 34 right and thus exposing them to a serious injustice.

[40] In sum, the first to fourth applicants are entitled to rescission in terms of rule 42(1)(a). It becomes unnecessary to deal with rescission under the common law.

[41] Thus far my focus has been on the first four applicants. I do not find it necessary to decide whether the rest of the applicants are also entitled to rescission. Once rescission is granted, the main application will be revived. It suffices if the fifth to 71st applicants are granted leave to intervene in that application. I have already clarified why – as potential shareholders – they have a direct and substantial interest in the outcome of the main application.

*Conclusion*

[42] The appeal must succeed with costs.

*Order*

[43] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Supreme Court of Appeal and High Court of South Africa, Northern Cape Division, Kimberley (High Court) are set aside, and replaced with the following:
   "(a) The order of the High Court granted on 1 September 2014 in case number 1557/2012 (main application) is rescinded.
   (b) The fifth to 71st applicants are granted leave to intervene in the main application."
4. The respondents must pay the applicants' costs, including costs of two counsel, in the High Court, the Supreme Court of Appeal and in this Court.

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| For the Applicants: | M A Albertus SC and G G M Quixley instructed by Towell & Groenwaldt Attorneys. |
| For the Respondents: | P Zietsman SC and P R Cronje instructed by Adrian B Horwitz & Associates. |