REPORTABLE

CASE NO: SA 15/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

STANDARD BANK NAMIBIA LTD	**First Appellant**
NEDBANK NAMIBIA LTD	**Second Appellant**
SWABOU INVESTMENTS (PTY) LTD	**Third Appellant**
and	
AUGUST MALETZKY	**First Respondent**
WILMA EVELINE HOABES	**Second Respondent**
SALMAAN DHAMEER JACOBS	**Third Respondent**
ANNARINE JACOBS	**Fourth Respondent**
CALISTA ANNA BALZER	**Fifth Respondent**
RONNEY REINHOLD HANGULA	**Sixth Respondent**
SIEGFRIED BROCKERHOFF	**Seventh Respondent**
EVENGELINE EICHAB	**Eighth Respondent**
DORKA VICTORINE SHIKONGO	**Ninth Respondent**
EDUARD PAUL XOAGUB	**Tenth Respondent**
FRANCIS EVELINE XOAGUS	**Eleventh Respondent**
ABRAHAM MAPELA PETRUS	**Twelfth Respondent**
ROMEO MOUTON	**Thirteenth Respondent**
ANTON HERMAN	**Fourteenth Respondent**
JOHANNES NEUAKA	**Fifteenth Respondent**
LISA RHODE	**Sixteenth Respondent**
FILIMON HOXOBEB	**Seventeenth Respondent**
FRANCOIS DARIES	**Eighteenth Respondent**
FRANS NAIBAB	**Nineteenth Respondent**
ISABELLA ISABEAU HURIHES HAUSES	**Twentieth Respondent**
CHRISTOFFEL STEENKAMP	**Twenty-first Respondent**

KATRINA FRANCINA STEENKAMP	**Twenty-second Respondent**
LAZARUS GAROEB	**Twenty-third Respondent**
ANNA MARIE HENDRIKS	**Twenty-fourth Respondent**
VICKSON HANGULA	**Twenty-fifth Respondent**
HAFENI HAIKOTI	**Twenty-sixth Respondent**
PAULINA GARISES	**Twenty-seventh Respondent**
PHILLIPUS GARISEB	**Twenty-eighth Respondent**
JOHANNES HAGGINS AUPAPA NIIGAMBO	**Twenty-ninth Respondent**

Coram: SHIVUTE CJ, MAINGA JA and O'REGAN AJA

Heard: **2 March 2015**

Delivered: **24 June 2015**

APPEAL JUDGMENT

O'REGAN AJA (SHIVUTE CJ and MAINGA JA concurring):

[1] This appeal is brought, with leave of the High Court, against a judgment of the High Court refusing two applications brought in terms of rule 30 of the High Court Rules.[1] The background to the appeal can briefly be described as follows.

[2] On 24 February 2012, Mr August Maletzky (the first respondent in this court and the first applicant in the High Court) and 28 others launched an application in the High Court against 40 respondents including the three appellants in this court. For ease of reference, Mr Maletzky and the 28 others shall be referred to in this

[1]The judgment against which the appeal is brought was handed down on 31 July 2012 before the new High Court Rules came into force in April 2014. Accordingly, the new High Court Rules have no direct relevance to the issues in this case and references in this judgment to the Rules will be to the Rules that were in force in 2012 and not the new Rules, unless otherwise stated.

judgment as 'the applicants in the High Court'. The 40 respondents in the High Court will be referred to as 'the High Court respondents', and the three appellants in this court will be referred to as 'the three appellants'.

[3] The applicants in the High Court were not represented by legal practitioners either in the High Court or in this court. The relief sought in the notice of motion was extremely far-reaching. At its core lie two principal submissions.[2] The first is that it is inconsistent with the Constitution for Clerks of Magistrates' Courts to have the power to issue default judgments, and the second is that no warrant of execution against immovable property should be issued by either the Registrar of the High Court or a Clerk of the Magistrates' Court without judicial oversight.[3] Based on these arguments, the applicants in the High Court seek as relief, amongst other things, a declaration that proceedings in which either the Registrar of the High Court or a Clerk of the Magistrates' Court issued a warrant of execution against immovable property without judicial oversight are null and void with effect from 21 March 1990.[4] They also seek relief declaring the purported registration of transfer of immovable properties as a result of 'the unconstitutional judgments' to be null and void.[5] The papers do not disclose the number of orders and sales in execution that would be affected by the relief sought, but given the 25 years that have elapsed since 1990, it is clear that there would be a very large number. The

[2] The 2nd – 13th prayers for relief (cited in full at para 4 below) are related in some way to these two core issues. There are additional constitutional challenges contained in the 15th, 16th and 17th prayers for relief (see para 4 below), but they do not appear to lie at the core of the applicants' case. For completeness, it should be added that there is also a challenge to the issue of warrants of execution against movable property by the Clerk of the Magistrates' Court (see 5th and 11th prayers for relief).

[3] In addition, prayers 5 and 11 seek relief that is constitutionally impermissible for Clerks of Magistrates' Courts to declare movable property executable and relief that sets aside sales in execution of movable property of the applicants.

[4] See para 3 of the prayers of relief, set out in para 4 below.

[5] See para 10 of the prayers of relief, set out in para 4 below.

consequence of the relief sought may well affect the validity of the title of every owner of a property that has been sold in execution following the issue of a warrant of execution either by the Registrar of the High Court or a Clerk of the Magistrates' Court since March 1990.

[4] The prayers in the notice of motion read as follows –

> '1. Condoning non-compliance with the Rules of this Honourable Court insofar as it is necessary in terms of Rule 27(3) of the Rules of the Honourable Court.
>
> 2. Declaring it unconstitutional of the Registrar of the High Court to declare immovable property specially executable.
>
> 3. Declaring proceedings in terms of which the 11th and 12th respondents issue warrants of execution against immovable property without judicial oversight by the High Court are null and void with retrospective effect from 21 March 1990 and that all warrants of execution against applicants' immovable property are null and void.
>
> 4. Declaring s 27A of the Supreme Court Act 1959[6] unconstitutional insofar as it authorises the Registrar of the High Court to declare immovable property specially executable when ordering default judgment under rule 31(5)(a) of the Rules of the High Court to the extent that it permits the sale in execution of the home of a person. Such order to be retrospective to the inception of the Constitution.
>
> 5. Declaring it unconstitutional for the Clerk of the Magistrates' Court to grant default judgments and to declare movable and immovable property executable in terms of such default judgment.

[6] This Act was repealed by s 38 of the Supreme Court Act 15 of 1990.

6. Declaring s 66(1)*(a)* of the Magistrates' Court Act of 1944 to be unconstitutional and invalid for failure to provide judicial oversight over sales in execution of immovable property.

7. Declaring that in light of judgment being granted in terms of prayers 2, 3, 4 and 5 *supra*, the default judgments granted by the Registrar of the High Court and the Clerk of the Court of the Magistrates' Court against the applicants to be unconstitutional, alternatively unlawful and set aside.

8. Declaring that in the light of the above judgments in prayers 2, 3 and 4 the default judgments granted by the Registrar of the High Court and the Clerk of the Court of the Magistrates' Court against the applicants to be unconstitutional, alternatively unlawful and set aside.[7]

9. Setting aside the sale in execution of immovable properties of the applicants as a result of the judgments issued either by the registrar of the High Court or the Clerk of the Magistrates Court.

10. An order declaring the purported registration of transfer of immovable properties as a result of the unconstitutional judgments issued by either the registrar of the High Court or the Clerk of the Court as null and void *ab initio*, from the inception of the Namibian Constitution.

11. Setting aside the sales in execution of movables of the applicants as a result of the judgments complained of in 2, 3, 4 and 5 *supra*.

12. Setting aside the sale and transfer of the immovable property situated at erf 455, Dominicius Bohitile Street, Katutura, Windhoek in favour of the 19th respondent.

13. Declaring the sale and transfer of the immovable property situated at erf 455, Dominicius Bohitile Street, Katutura, Windhoek in favour of the 19th respondent null and void.

[7]Paras 7 and 8 are in almost identical terms.

14.1 Declaring all transactions between 16th and 21st and 22nd respondents fraudulent *vis-à-vis* the loans advanced to 21st and 22nd respondents using applicant's property as surety;

14.2 Setting aside the judicial attachment of the property erf 3713 Heideweg, Khomasdal, alternatively setting aside the sale of same;

14.3 Ordering 13th respondent to reverse the transfer of erf 3713 Heideweg, Khomasdal, Namibia to 21st and 22nd respondents and restoring ownership in the name of the 16th Applicant.

15. Declaring eviction from residential property which leads to homelessness without provision of alternative accommodation or shelter to be unconstitutional.

16. Declaring it illegal to levy legal costs to mortgage bond accounts.

17. Declaring it illegal to levy untaxed legal costs on mortgaged bonds of applicants.

18. Costs of this application be paid by those respondents who elect to oppose it jointly and severally, the one paying the other to be absolved.

19. Further or alternative relief.'

[5] The first, second, fifth, sixth and eighteenth respondents[8] in the court below gave notice of their intention to oppose the application. All five of them lodged applications in terms of rule 30 to have the notice of motion and founding affidavits set aside on the basis that they were irregular. The applications identified eight irregularities in the notice of motion and founding affidavits. Following the lodging of the rule 30 applications, various of the applicants in the High Court lodged

[8] Respectively Standard Bank Namibia Ltd, Nedbank Namibia Ltd, Windhoek Municipal Council, Swabou Investments (Pty) Ltd and South West African Building Society.

notice of their intention to oppose the rule 30 applications and also lodged a notice entitled 'Request for Documentary Proof of Authority' which elicited further rule 30 applications from the first, sixth and eighteenth respondents in the High Court. Miller AJ heard argument on the two sets of rule 30 applications jointly. His reasoning is brief. He observed that there is no obligation in motion proceedings for a power of attorney to be lodged by respondents authorising their legal practitioners to act on their behalf and he dismissed Mr Maletzky's submissions on this score. He did not expressly uphold the second set of rule 30 applications brought by the first, sixth and eighteenth respondents. As to the objections raised in their rule 30 applications by the five respondents in the High Court to the notice of motion and founding affidavits, his cursory reasoning reads as follows:

> '[11] I do not deem it necessary to deal exhaustively with each of the steps taken by the applicants which the respondents contend are irregular. I am prepared to accept that individually and collectively, the steps taken and complained of are to a greater or lesser degree irregular thus rendering the papers filed by the applicants less than perfect.
>
> [12] However when looking at the papers as a whole imperfect as they may be, none of the respondents who complain about them, can show that they are prejudiced by these irregularities.
>
> [13] In the result, the applications are dismissed with costs, such costs to be limited to necessary expenses and disbursements.'

[6] The three appellants (the first, second and sixth respondents in the High Court) then applied for leave to appeal against the decision to dismiss the rule 30 applications and leave to appeal was granted.

[7] The Rules of this court do not require respondents in appeals to lodge a notice of opposition to an appeal, so it is not clear to the court whether all the original applicants in the High Court matter oppose the appeal. The first respondent in this appeal (Mr Maletzky) lodged written argument opposing the appeal, but no written argument was received from the other 28 respondents who were the applicants in the High Court. At the hearing of the appeal, the Chief Justice, who was presiding in the appeal, called out the names of these 28 respondents to determine whether they were in court, whether they were opposing the appeal and whether they wished to make oral submissions to the court. Excluding Mr Maletzky, ten of the other 28 respondents were present in court.[9] All ten indicated they wished to oppose the appeal, and all ten associated themselves with the submissions made by Mr Maletzky. The court was informed from the Bar that three of the other 18 original applicants were deceased.[10] No affidavits were placed before the court to confirm this. The court was not informed of the attitude of the remaining 15 of the original applicants.

The three appellant's submissions

[8] The three appellants submitted that the High Court had erred in finding that they were not prejudiced by the irregularities in the notice of motion and founding affidavits. They persisted with the arguments they had presented to the High Court that the notice of motion and founding affidavits were irregular in eight respects,

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[9]The 2nd respondent (Ms W E Hoabes), the 5th respondent (Ms C A Balzer), the 7th respondent (Mr S Brockerhoff), the 9th respondent (Ms D V Shikongo), the 10th respondent (Mr E P Xoagub), the 13th respondent (Mr R Mouton), the 16th respondent (Ms L Rhode), the 17th respondent (Mr F Hoxobeb), the 21st respondent (Mr C Steenkamp) and the 22nd respondent (Ms K F Steenkamp).
[10]The 15th respondent (Mr J Neuaka), the 23rd respondent (Mr L Garoeb) and the 24th respondent (Ms A M Hendriks).

and submitted that they had suffered or would suffer prejudice as a result of each of the irregularities. The eight irregularities can be summarised as follows:

(a) defective service;

(b) defective attestation of affidavits by the commissioner of oaths;

(c) incomplete founding papers, especially missing annexures;

(d) misjoinder of parties and issues;

(e) incorrect remedies pursued;

(f) non-joinder of essential parties;

(g) failure to comply with rule 18(6) in failing to annex contracts relied upon; and

(h) failure to comply with rule 6(1), in that the founding affidavit contains a confusing and incomplete account of the relevant facts.

[9] In the light of these eight irregularities, the three appellants submitted that the notice of motion and founding affidavits were irregular proceedings and should be set aside.

Respondents' submissions

[10] As mentioned above, the only respondent to lodge written argument and make oral submissions was the first respondent, Mr Maletzky. Mr Maletzky is not an admitted legal practitioner and represented himself. Perhaps not surprisingly, his submissions did not address many of the legal arguments raised on behalf of the three appellants. In brief, his main submissions were that the High Court order should be upheld, and that the relief sought by the respondents in the court below was based on the Namibian Constitution.

In limine objection raised by first respondent

[11] At the hearing, Mr Maletzky, without notice, raised an objection to the powers of attorney lodged on behalf of the three appellants. His objection was based on the fact that the three appellants had failed to annex board resolutions to the powers of attorney they had filed with this court. Rule 5(4)(a) of the Supreme Court Rules regulates the lodging of powers of attorney. It provides that –

> 'If the notice of appeal or of cross-appeal is lodged by an attorney, he or she shall within 21 days thereafter lodge with the registrar a power of attorney authorising him or her to prosecute the appeal or the cross-appeal.'

[12] This rule does not require an attorney to lodge a resolution authorising the signatory of the power of attorney to sign it. All three appellants lodged signed powers of attorney authorising their legal practitioners of record to act on their behalf in the prosecution of their appeal. As each of the three appellants is a corporation, officials employed by the appellant in each case, signed the power of attorney on the appellant's behalf. In the case of the first appellant, the head of

the legal department signed the power of attorney, and his authority to sign was recorded in a document annexed to the power of attorney entitled ‘Certificate of Authorised Signatories of Standard Bank Namibia Ltd’. This document referred in turn to a resolution of the Board of Directors of the appellant dated 15 March 2011. In the case of the second appellant, two officials of the second appellant signed the power of attorney. The officials were duly authorised in terms of a resolution of the Board of Directors that was annexed to the power of attorney. In the case of the third appellant, the power of attorney was signed by the manager of a legal department of the third appellant that was accompanied by a resolution of the Board of Directors dated 31 January 2013. These powers of attorney were compliant with Rule 5(4)(a). The point *in limine* raised by Mr Maletzky therefore must be dismissed as it has no merit.

Issues to be considered

[13] It is not necessary to consider all the challenges raised by the three appellants. However, we will consider the following questions:

(a) Was the service of the founding papers defective?

(b) Has there been a misjoinder of appellants and respondents?

(c) Has there been a non-joinder of necessary parties?

(d) Has there been material non-compliance with rule 6?

(f) May this court interfere with the exercise of the discretion of the High Court on appeal in relation to the rule 30 applications?

Defective service

[14] The three appellants argued that the notice of motion and founding affidavits were not properly served on the 40 respondents in the High Court, and in particular, not properly served on the first and second appellants. In their rule 30 applications, the appellants sought to have the service declared to be 'irregular and improper . . . and consequently, the application is set aside, alternatively struck out'. In their written heads of argument, and in oral submissions, however, counsel for the appellants submitted that if service on first and second appellants had not been proper, the court should order that the applicants in the High Court be ordered to effect proper service on the first and second appellants.

[15] At the hearing, Mr Maletzky disputed the contention of defective service, and repeatedly asserted that there had been proper service within the terms of the rules on all 40 respondents in the High Court. However, the returns of service that form part of the record indicate otherwise. The following defects are apparent from the returns of service:

(a) No return of service was provided at all in the case of seven of the respondents – 8th respondent (Mr A Hoveka), 11th respondent (the Registrar of the High Court), 16th respondent, (Van Der Merwe-Greeff Inc), 19th respondent (Mr Risto Shikulo), 35th respondent (National Housing Enterprise), 38th respondent (Ms C Mbapaha), and

39th respondent (Mr S Halupe). None of these respondents lodged notices of intention to defend, and it may be that at least some of them remain unaware of the application.

(b) In the case of two respondents (24th respondent (Mr B T Van Wyk) and the 37th respondent (Woermann Brock Inc.)), the returns of service indicate that the deputy-sheriff was unable to serve the process. Again neither of these respondents lodged notices of intention to defend and it may be that they are unaware of this litigation.

(c) A further at least 15 respondents in the High Court (including the first and second respondents, now the first and second appellants)[11] appear to have been served not personally at their place of residence or business,[12] place of employment,[13] registered office[14] or business[15] as rule 4 requires, but at firms of legal practitioners. It is not apparent from the record that the respondents had appointed these firms of legal practitioners as their agents to receive service of

[11] 1st respondent (Standard Bank Namibia Ltd), 2nd respondent (Nedbank Namibia Ltd), 7th respondent (VSV Enterprises No Sixty CC and/or its nominee Mr J P Van Staden or Mr L J Van Staden), 9th respondent (Mr H G Foelscher), 17th respondent (Bank Windhoek Ltd), 25th respondent (Mr M M Luswenyo), 26th respondent (Builders' Warehouse (Pty) Ltd), 27th respondent (Mr A Abrahams), 29th respondent (Ms M Geingos), 31st respondent (Mr D J Werner), 32nd respondent (Mr W Karuoombe), 33rd respondent (Ms E Karuoombe), 34th respondent (Mr I J C Drotsky), 36th respondent (Mr R Kapuuo), 40th respondent (Mr A M Basson). It is not clear whether the 3rd respondent (described as HES Shikongo) was properly served. No particulars are given concerning this respondent who was served at Shikongo Law Chambers.

[12] In terms of rule 4(1)(a)(i), now rule 8(2)(b).

[13] In terms of rule 4(1)(a)(ii), now rule 8(2)(c).

[14] In terms of rule 4(1)(a)(v), now rule 8(3)*(a).*

[15] In terms of rule 4(1)(a)(v) or new rules 8(2)(b) or 8(3)(a).

process in this matter[16] and it is clear that the notice of motion could not properly be described as 'interlocutory' or 'incidental' in relation to pending proceedings where any of the respondents had appointed legal practitioners.[17] Only two respondents out of this group (the first and second respondents) filed notice of their intention to oppose, which suggests that the remaining respondents amongst this group may remain unaware of the litigation.

[16] There are thus material defects in the service of the founding papers in the case of at least 24 of the 40 respondents in the High Court, including the first and second appellants. Moreover, to the extent that the respondents have real rights in immovable property that has been sold in execution following the issue of a warrant of execution by the Registrar of the High Court or a Clerk of the Magistrates' Court, they will have a direct and substantial interest in the relief sought by the applicants in the High Court. Although the founding affidavit is unclear in many respects, a matter returned to later in this judgment, it appears that the relief sought by the applicants would affect the interests of many of the respondents in the High Court.

[17] It is a fundamental principle of fairness in litigation that litigants be given proper notice of legal proceedings against them.[18] Defective service can be raised in different ways during the litigation process. In two recent decisions, somewhat different outcomes were reached by the Namibian High Court in determining the

[16] In terms of rule 4(1)(a)(vi)or new rule 8(2)*(e)*.

[17] In terms of rule 4(1)(b) or new rule 8(6).

[18] See, for example, *Steinberg v Cosmopolitan National Bank of Chicago* 1973 (3) SA 885 (RA) at 892B-C.

effect of defective service in the initiation of proceedings. In *Knouwds NO v Josea and Another*, Damaseb JP had to consider the adequacy of service of a *rule nisi* in sequestration proceedings. Damaseb JP found that on the record before him that the respondent the sequestration of whose estate was sought (Mr Josea) had not been served with a copy of the *rule nisi* and the founding papers and he held that the proceedings were accordingly null and void. The High Court held that –

> 'Where there is complete failure of service it matters not that, regardless, the affected party somehow became aware of the legal process against it, entered appearance and is represented in the proceedings. A proceeding that has taken place without service is a nullity and it is not competent for a court to condone it.'[19]

[18] An apparently different outcome was reached in *Witvlei Meat (Pty) Ltd and Others v Disciplinary Committee for Legal Practitioners and Others.* The case concerned the question whether the Disciplinary Committee for Legal Practitioners had been properly served with the application. The Disciplinary Committee had originally entered an appearance to defend but then withdrew its opposition to the application. Counsel for another respondent argued as a point *in limine* that service on the Disciplinary Committee had been defective because it had been effected on the Office of the Government Attorney, when service should have been on the Chairperson of the Committee. Smuts J held that the rule in the *Knouwds* matter should be confined to the facts of that case which had concerned an application that affected status. He held that –

> 'The present circumstances are different and distinguishable. There was service on the Government Attorney in respect of a committee whose secretary is an

[19] 2007 (2) NR 792 (HC) para 23.

> employee of the Ministry of Justice. But any defect as far as that was concerned would in my view be cured by the entering of opposition by the committee. The fundamental purpose of service is after all to bring the matter to the attention of a party, including having the benefit of an explanation as to the meaning and nature of the process. If a party then proceeds to enter an appearance to defend or notice to oppose through legal representatives, the fundamental purpose has been met, particularly where the legal representative in question had been served with the process (and was thus in possession of the papers and would appreciate their import)'.[20]

[19] The two cases turned on different facts and neither of them involved an application to set aside a pleading or notice of motion as an irregular step in terms of rule 30 of the High Court Rules on the basis of defective service and accordingly neither can provide firm guidance as to the manner in which defective service should be addressed in this appeal.

[20] In addressing the appellants' arguments in this regard, it will be helpful to address four issues briefly: (a) what is the purpose of service? (b) does defective service always constitute a nullity, or may irregular forms of service, short of a nullity, be condoned? (c) is it necessary for an applicant to show prejudice in addition to defective service in a rule 30 application? and (d) what is the effect of a decision in a rule 30 application that there has been defective service – is the irregular service set aside, or is the pleading or process that has been served set aside?

<u>What is the purpose of service?</u>

[20] 2013 (1) NR 245 (HC) para 17.

[21] The purpose of service is to notify the person to be served of the nature and contents of the process of court and to provide proof to the court that there has been such notice.[21] The substantive principle upon which the rules of service are based is that a person is entitled to know the case being brought against him or her[22] and the rules governing service of process have been carefully formulated to achieve this purpose and litigants should observe them. In construing the rules governing service, and questions whether there has been compliance with them, this fundamental purpose of service should be borne in mind.

Does defective service always constitute a nullity, or may irregular forms of service, short of a nullity, be condoned?

[22] Appellants argued that improper service constitutes a nullity relying, amongst other authorities, on the dictum in *Knouwds* cited above at para 17. Yet the court in *Knouwds* clearly considered there to have been 'a complete failure of service' in that case that could not be condoned, which suggests a distinction between a nullity and a less serious form of non-compliance in relation to service, which may be condoned. This is a distinction that has been drawn by the South African courts, which have held that irregular service may be condoned, where the service is not so irregular as to constitute a nullity.[23] The line between 'a complete

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[21]In this regard, see the reasoning in *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions* 2012 (5) SA 267 (GSJ) para 21.

[22]See, for example, *Steinberg v Cosmopolitan National Bank of Chicago* cited above at n 18 at 892.

[23]See, for example, *Scott and Another v Ninza* 1999 (4) SA 820 (E) at 828F–G; *Federated Insurance Co Ltd v Malawana* 1984 (3) SA 489 (E) at 495I, and, on appeal, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) at 762G–I; *Prism Payment Technologies (Pty) Ltd v Altech Information Technologies (Pty) Ltd t/a Altech Card Solutions,* cited above n 21 para 23. For a recent case where service was found to constitute a nullity, see *Concrete 2000 (Pty) Ltd v Lorenzo Builders CC t/a Creative Designs and Others* 2014 (2) All SA 81 (KZD) paras 29 – 30.

failure of service' and 'irregular service' is not always easy to draw but will be a 'question of degree'.[24]

[23] Acknowledging the possibility that irregular service may be condoned where there has not been a 'complete failure of service' will avoid an over-formalistic approach to the rules, for an approach that precludes condonation whenever there has been non-compliance with the rules regulating service may prejudice the expeditious, cost-effective and fair administration of justice.[25] The possibility of condonation of irregular service that falls short of a nullity, would also accord with the approach to civil procedure evident in the new Rules of the Namibian High Court that came into force in April 2014, and with the recently introduced practice of judicial case management that seeks to ensure expedition, fairness and cost-effectiveness in the administration of justice.

Is it necessary for an applicant to show prejudice in addition to defective service in a rule 30 application?

[24] Applications to set aside process that has been served irregularly in terms of rule 30 will ordinarily only succeed if the defendant can show he or she has suffered prejudice in relation to the proceedings as a result of the defective service.[26] The requirement of showing prejudice accords with the well-known dictum of Schreiner JA in *Trans-Africa Insurance Co Ltd v Maluleka* –

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[24]See the remarks of Nestadt J in *Krugel v Minister of Police* 1981 (1) SA 765 (T) at 768D–E (which concerned the question whether a summons was a nullity, not the issue of service). See also, *Concrete 2000 (Pty) Ltd,* cited above n 23 para 29.

[25] See also *Prism Payment Technologies*, cited above n 21, para 23.

[26]For South African authority on the requirement of prejudice, see, for example, *Federated Insurance Co Ltd v Malawana* 1986 (1) SA 751 (A) at 763B–C; *Scott and Another v Ninza,* cited above n 20, at 828G; *Consani Engineering (Pty) Ltd v Anton Steinecker Maschinenfabrik GmbH* 1991 (1) SA 823 (T) at 824G–J and 825G-H.

> 'No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules which are an important element in the machinery for the administration of justice. But on the other hand technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and if possible inexpensive decision of cases on their real merits.'[27]

[25] In many cases, the issue of prejudice will traverse similar considerations to those that will be relevant to the question of condonation of irregular service.[28] Accordingly, if prejudice is not established, and the service of a summons is not 'patently bad'[29] but condonable, it is likely that condonation of the irregular service will be granted, and the rule 30 application will not succeed.

What is the effect of a decision in a rule 30 application that there has been defective service?

[26] The effect of a finding in a rule 30 application that service has been irregular, is that the irregular service will ordinarily be set aside, and leave will ordinarily be given to the relevant party to cause proper service to be effected within the terms of the rules.[30] In this case, the relief initially sought by appellants in their rule 30 application was an order that the service on them had been 'irregular and improper . . . and consequently, the application is set aside, alternatively struck out'. However, in their written and oral submissions, counsel for

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[27]1956 (2) SA 273 (A) at 278.

[28]See, for example, *Federated Insurance Co Ltd v Malawana,* cited above n 26 at 762H–763C.

[29]This was the formulation adopted in *Concrete 2000 (Pty) Ltd*, cited above n 23, para 29. See also *Greathead v Slabbert* 1964 (2) SA 771 (T) at 772E.

[30]In this regard, see the order made in *Concrete 2000 (Pty) Ltd,* cited above n 23, para 39.

the appellants appeared to accept that an order setting aside the application would not follow from a finding that the service was irregular or void.

[27] What is clear is that the relief sought by the three appellants when they launched their rule 30 application was the setting aside of the notice of motion and founding affidavit. However, that is not relief that will ordinarily follow from a conclusion that service has been irregular, or even void.[31] Given this court's conclusion in this appeal on the other grounds raised by the appellants, the question of whether condonation should be granted for the defective service or whether the service constituted a nullity need not finally be decided here. Accordingly beyond noting that there was defective service on two of the appellants, as well as on at least 28 of the other respondents in the High Court, nothing further will be said on this score.

Has there been a misjoinder of applicants and respondents?

[28] Rule 10(1) of the Rules of the Namibian High Court, as it read at the time of the initiation of these proceedings in the High Court, provided that -

> 'Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he or she brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of the same question of law or fact which, if separate actions

[31] See *Concrete 2000 (Pty) Ltd,* cited above n 23, para 39.

were instituted, would arise on each action, and provided that if there may be a joinder conditionally upon the claim of any other plaintiff failing.[32]

[29] Rule 10(3) provided that –

'Several defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon substantially the same question of law or fact which, if such defendants were sued separately would arise.'[33]

[30] Rule 6(14) provided that rule 10 will apply to motion proceedings.[34]

[31] The question thus arises whether the issues between the different applicants and respondents in the High Court 'depend upon the determination of substantially the same question of law or fact'. As set out at para [3] above, the notice of motion and founding affidavit in this matter seek wide-ranging relief including both general declarations of constitutional invalidity and specific declarations of invalidity in relation to the applicants in the High Court as well as certain named properties.

[32] The general constitutional relief sought includes prayers for a declaration that the power of the Registrar of the High Court to declare immovable property 'specially executable' is unconstitutional;[35] a declaration that the issue of warrants

[32]The equivalent rule under the new Rules of the Namibian High Court is rule 40(1).
[33]The equivalent rule under the new Rules of the Namibian High Court is rule 40(3).
[34]The equivalent rule under the new Rules of the Namibian High Court is rule 70(2).
[35]Para 2 of the notice of motion.

of execution by the Registrar of the High Court without judicial oversight is unconstitutional;[36] a declaration that section 27A of the Supreme Court Act, 1959 is unconstitutional;[37] a declaration that the power of Clerks of Magistrates' Courts to grant default judgments and to declare movable and immovable property executable is unconstitutional;[38] a declaration that s 66(1)*(a)* of the Magistrates' Court Act is unconstitutional;[39] a declaration that registration of transfer of property; as a result of unconstitutional orders is null and void;[40] a declaration that eviction from residential property which leads to homelessness without provision of alternative accommodation is unconstitutional;[41] and a declaration that it is 'illegal' to levy legal costs on mortgage bonds.[42]

[33] The specific relief sought by the applicants in the High Court relates to 25 individual cases involving the 29 applicants. Only a few of the prayers in the notice of motion relate to specifically identified properties or litigants.[43] For the rest, the relief in the notice of motion related to specific relief for the applicants is not directed at individual cases or applicants but is formulated in a general manner in relation to all the applicants. An example is that contained in para 9 of the notice of motion, which seeks the following relief: 'Setting aside the sale in execution of immovable properties of the applicants . . .'.[44]

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[36]Para 3 of the notice of motion.
[37]Para 4 of the notice of motion.
[38]Para 5 of the notice of motion.
[39]Para 6 of the notice of motion.
[40]Para 7 of the notice of motion.
[41]Para 15 of the notice of motion.
[42]Para 16 of the notice of motion.
[43]Paras 12, 13, 14.1, 14.2 and 14.3 which relate to the 12th applicant and 19th respondent, and the 16th applicant and 21st and 22nd respondents.
[44]See para 9 of the notice of motion. See also paras 3, 7, 8 and 11.

[34] It would appear that the prayers for specific relief are mostly dependent, in the first place, on the success of the general constitutional claims, set out in para [32] above. However, even if the constitutional claims were to be successful, it does not follow as a matter of course that the specific relief in the individual cases would succeed. First, the specific claims could only succeed if a declaration of constitutional invalidity were to have retrospective effect. Article 25(1) of the Constitution makes plain that where a court concludes that a law or action 'abolishes or abridges' a fundamental right in the Constitution, the court need not declare the law or action to be invalid with retrospective effect, but 'shall have the power and discretion in an appropriate case to allow Parliament . . . to correct any defect in the law or action within a specified period'. Pending the correction by Parliament, the law will be deemed to be valid. It may be that this is a case, given the potential harm that could be occasioned to innocent third parties by an order of constitutional invalidity with full retrospective effect, in which a court would consider a suspended order of invalidity as contemplated by Art 25(1). This is not an issue we need decide to now and we express no further view on it. What is clear, however, is that it may well be that the specific relief sought by the applicants in the High Court would not be granted unless the constitutional relief was granted with at least some retrospective effect.

[35] Secondly, it may be that even if the constitutional relief were granted with retrospective effect, that disputes would arise in each specific case as to whether the circumstances of each of the specified properties were such as to fall within the terms of the constitutional relief granted. Given the lack of clarity and

specificity in the founding affidavit, it is not easy fully to comprehend the facts upon which the applicants rely in relation to each of the 25 individual cases, a matter to which I return later in this judgment. Nevertheless, it is clear that even if constitutional relief were to be granted, relief would not necessarily follow in many of the individual cases. For example, four of the 25 cases appear to arise in circumstances where the individual applicants transferred their property to family members or acquaintances, allegedly under a misapprehension as to what they were doing,[45] prior to the property being sold in execution. Whether any relief would lie in these cases, even were constitutional relief to be obtained, is questionable and would depend on the facts that were established in each case. What is clear is that each of these cases will turn on its own facts, and cannot be described as turning on 'substantially the same questions of law and fact' as either the claims for general constitutional relief or the other 21 individual cases.

[36] In another of the individual cases, concerning the 18th applicant, the default judgment appears to have been granted by a judge, and not by the Registrar of the High Court or a Clerk of the Magistrates' Court. Although the warrant of execution is annexed to the founding affidavit, there is no evidence or averment that a sale in execution followed. It is not clear therefore that any relief would follow even were the general constitutional relief to be granted with retrospective effect. In a number of other cases, there is no explicit averment that suggests that

[45]The father of the 12th applicant allegedly transferred his property to the 19th respondent under a misapprehension; the 15th applicant transferred his property to the 20th respondent similarly; the 16th applicant transferred her property to her son-in-law who does not appear to be cited allegedly under a similar misapprehension; and the 17th applicant transferred his house allegedly under a misapprehension to the 24th respondent.

a sale in execution of property of the applicants has taken place[46] so it is not clear what relief would be sought in the absence of any averment that the properties have in fact been sold.

[37] The three appellants argue that they have been prejudiced by the misjoinder of issues in that it will be necessary for them to traverse all the allegations in the founding affidavit and respond to them. Given that in many cases, they have no direct interest in the specific claims for relief, this will cause them unnecessary time and expenditure both in preparation of their answering affidavits and in preparing and submitting argument.

[38] Given that many of the individual cases do not turn on 'substantially the same questions of law and fact', it cannot be said that all the individual cases have been properly joined. Accordingly, the three appellants' argument that there has been a misjoinder must succeed in part, at least in relation to the specific prayers for relief for all the applicants contained in paras 7, 8, 9, 11, 12, 13, 14.1, 14.2,14.3 and 17.

Non-joinder

[39] The three appellants also argue that the notice of motion and founding affidavits should be set aside because the applicants in the High Court have failed to join all parties who have a direct and substantial interest in the relief sought. The general constitutional relief sought, were it to be granted with full retrospective

[46]There is no averment that there was a sale in execution of property belonging to the applicants in the following individual cases: the 1st applicant; the 3rd and 4th applicants; the 18th applicant; 19th applicant; and 21st and 22nd applicants.

effect, would affect many third parties who have not been cited as respondents. Indeed, the applicants in the High Court have in several cases not even identified or cited the persons who purchased applicants' properties at the sales in execution which they seek to have set aside.[47] These are blatant examples of non-joinder.

[40] Given the fact that, amongst other relief, the applicants in the High Court seek a declaration that all proceedings since March 1990 in terms of which the Registrar of the High Court issued warrants of execution without judicial supervision are null and void,[48] it is difficult to know how many people, and who, may have a direct interest in the relief sought. This court was not informed of the number of warrants of execution that have been issued by the Registrar of the High Court since 1990. It is plain that there will have been many.

[41] Not only would all judgment creditors in those cases have a direct interest in such relief, but so would everyone who has purchased a property at any affected sale in execution, as well as all their successors in title. In addition, the applicants in the High Court did not join all the Clerks of the Magistrates' Courts in Namibia, despite the fact that the relief they seek directly affects all Clerks of Magistrates' Courts. All these people and institutions would have a direct and substantial interest in the relief sought by the applicants in the High Court.

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[47] See, for example, the case of the 8th applicant, the case of the 9th applicant, the case of the 14th applicant, and the case of the 20th applicant.

[48] See prayer 3 of the notice of motion.

[42] Rule 30 may be used to object to a notice of motion that does not join all necessary parties.[49] The failure to join necessary parties may result in the proceedings being challenged and set aside. As was argued by the three appellants, the non-joinder of necessary parties may well result in the proceedings subsequently being set aside, which will cause them prejudice, not least because they may incur unnecessary costs. The effect of the non-joinder, given the prejudice to the three appellants, must be that the notice of motion and founding affidavits must be set aside as an irregular step in their entirety.

Non-compliance with rule 6

[43] Rule 6(1) of the High Court Rules provides, in relevant part that 'every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief'.[50] The purpose of identifying the key facts in the founding affidavit is to enable a respondent to know what case must be met.[51] The founding affidavit must thus contain all the essential factual averments upon which the litigant's cause of action is based in sufficiently clear terms that the respondent may know the case that must be met.[52] Although a litigant may attach annexures to the founding affidavit, it is not sufficient for a litigant to attach an annexure without identifying the facts contained in the annexure upon which the

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[49]See *Skyline Hotel v Nickloes* 1973 (4) SA 170 (W) at 171H. See the different views expressed in *De Polo v Dreyer and Others* 1989 (4) SA 1059 (W) at 1062–1063, in relation to proceedings instituted by way of action, in which the court held that a special plea was the proper procedure to raise non-joinder. This reasoning clearly has no application to this case which is concerned with motion proceedings.

[50]See rule 65(1) of the new Rules.

[51]See *Derby-Lewis and Another v Chairman, Amnesty Committee of the Truth and Reconciliation Commission and Others* 2001 (3) SA 1033 (C) at 1052C–D; *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the RSA and Others* 1999 (2) SA 279 (T) at 324G–H;

[52]In this regard, see *Moleah v University of Transkei and Others* 1998 (2) SA 522 (Tk) at 533E–F.

litigant relies.[53] Clarity in the founding affidavit is necessary for the expeditious and fair adjudication of the dispute between the parties. Where founding affidavits lack that clarity not only will respondents struggle to determine the case that is to be met, but judges too will be hampered in their task of administering justice fairly to all litigants.

[44] The three appellants argued that the founding affidavits were inconsistent with rule 6 in several respects: first, they contained an incomplete and confusing account of the material facts, secondly, many of the material facts were not contained in the founding affidavit but in annexures to the founding affidavit and thirdly, several annexures, or pages of annexures were missing from the founding papers. The three appellants referred to the annexures as 'a confusing morass of documents which are not properly and clearly marked or in any chronological order'.

[45] The general principles of pleading require that the founding affidavit set out the key facts in a chronological or other logical sequence, and that the relevant documents be annexed in logical order.[54] A clear and logical sequence will enable a respondent to prepare an answering affidavit in a similarly clear manner.

[46] Lay litigants, such as the applicants in the High Court, cannot be expected to 'fully appreciate the finer nuances of litigation'.[55] Accordingly, where lay litigants

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[53]See *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA) para 43.

[54]See the helpful guidance provided in the South African case of *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78G–79H.

[55] See remarks of M T Steyn J in *Van Rooyen v Commercial Union Assurance Co of SA Ltd* 1983 (2) SA 465 (O) at 480G–H.

are concerned, a court should overlook minor irregularities and seek to identify the substance of the case brought by the lay litigant. As Maritz JA commented in this court in *Christian v Metropolitan Life Namibia Retirement Fund and Others* –

> 'Bearing in mind that lay litigants face significant hurdles due to their lack of knowledge and experience in matters of law and procedure and, more often than not, financial and other constraints in their quests to address real or perceived injustices, the interests of justice and fairness demand that courts should consider the substance of their pleadings and submissions rather than the form in which they have been presented'.[56]

[47] However, there is a limit to the extent to which a court should overlook irregularities in proceedings brought by lay litigants. That limit must be determined by the duty of the court to act fairly in relation to all litigants before the court. Accordingly, a court will not permit lay litigants to pursue a cause of action or defence in a manner where the substance of their pleadings is so unclear or uncertain as to render it difficult or impossible for their opponents to mount a meaningful response to the lay litigants' case.[57]

[48] That limit has been reached in this case. The founding affidavit does not contain the essential factual averments upon which the litigant's cause of action is based in any logical order or in clear terms. Instead the facts upon which the 25 individual cases are based are incomplete, confused and hard to comprehend. For example, in many of the cases, there are no averments as to who took transfer of

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[56]2008 (2) NR 753 (SC) para 8.

[57]See *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (in Liq) and Others* 2014 (1) NR 234 (SC) para 17.

the relevant applicant's property following upon the sale in execution.[58] Nor is there any clear indication as to why many of the individual respondents in the High Court have been cited in the proceedings. Given the relief sought these are necessary factual averments that may not be omitted without explanation.

[49] A further problem is that the affidavit incorporates in its body (not as annexures) the verbatim text of letters and affidavits from other proceedings in their entirety without any clear explanation provided as to what aspects of those letters or affidavits are relevant to the relief claimed in the notice of motion.[59] In addition, it incorporates by reference a range of annexures without any indication in the founding affidavit as to what aspects of those affidavits are relied upon for relief.[60] As stated above, it is not sufficient for a litigant to attach an annexure without identifying in the founding affidavit the key facts upon which the litigant relies.[61] In some cases, the situation is compounded by the fact that no annexures are provided,[62] or annexures are missing or incomplete.[63]

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[58]For example, the following individual cases do not contain any averments as to who took ownership of the property following upon the sale in execution – that of the 8th applicant, the 9th applicant, the 14th applicant and the 20th applicant.

[59]For example, the founding affidavit contains the complete text of affidavits in other proceedings relating to the 16th applicant and states that 'the averments necessary to sustain the cause of action in respect of the 16th Applicant are, save for the heading and citations which should be read insofar as it is necessary in conjunction with the citations of this application, contained in annexure . . . '. A similar inclusion in the founding affidavit is made in relation to the 15th applicant.

[60]For example, the founding affidavit incorporates by reference an affidavit made in support of a rescission application by the 3rd and 4th applicants 'and verif[ies] and confirm[s] that the allegations in the affidavit . . . support the cause of action in this matter (application)'. No further explanation is provided in the founding affidavit. A letter written by 14th applicant is annexed 'and the content of which is incorporated herein' to state the circumstances which allegedly led to a default judgment against 14th applicant.

[61]See, for example, the case of the 3rd and 4th applicants and that of the 14th applicant.

[62]See, for example, the case of the 23rd applicant and that of the 25th applicant.

[63] See, for example, the case of the 20th applicant (Missing XB and XC) and that of the 21st and 22nd applicant (missing 'STE 1').

[50] Accordingly, the respondents cannot tell what case they are to meet. Leeway must be afforded to lay litigants, but that leeway cannot extend to a situation where respondents cannot know what case is being made against them. Given the material defects in the founding affidavit, it must be concluded that it does not comply with rule 6 in a range of material respects that give rise to substantial prejudice on the part of the respondents in the High Court who will not be able to determine with any clarity what case they are to meet. Accordingly, the notice of motion and founding affidavit fall to be set aside on this ground too.

May this court interfere with the exercise of the discretion of the High Court on appeal in relation to the rule 30 applications?

[51] When a court determines whether to set aside 'an irregular step', it exercises a discretion.[64] An appellate court will only interfere with the discretion on narrow grounds where it considers that the court below has not exercised its discretion judicially or put, more colloquially, has made 'a demonstrable blunder'.[65] The reasoning of the court below has been set out above, at para [5]. In sum, although the High Court found that there had been irregularities, it concluded that the three appellants had not established that they had suffered any prejudice as a result of those irregularities. The High Court judgment contains no analysis of the irregularities or their extent. Nor does it provide reasons as to why it concludes that the respondents in the High Court would not experience prejudice as a result of the many irregularities.

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[64] See the South African decision of *Northern Assurance Co Ltd v Somdaka* 1960 (1) SA 588 (A) at 594H–595B. Although concerned with an earlier rule, it was in similar, though not identical, terms.

[65] See *Northbank Diamonds Ltd v FTK Holland BV and Others* 2003 (1) SA 189 (Nm SC) at 196E–H, citing *Bookworks (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council and Another* 1999 (4) SA 799 (W) at 804G– 808B.

[52] The High Court was correct to conclude that there were irregularities in the notice of motion and founding affidavits as the preceding paragraphs have shown. However, it was incorrect to conclude that the appellants had not suffered prejudice. As appears from the reasoning above, the appellants rightly assert prejudice arising from both misjoinder and non-joinder as they may incur unnecessary costs in opposing the relief sought, only to find that those costs are wasted. As prejudicial to the appellants are the difficulties caused by the lack of clarity and precision in the founding affidavit which means that it is impossible for them fully to understand the case they must meet. All these irregularities indeed occasion prejudice to the three appellants. As mentioned above, the High Court did not explain why it concluded that the three appellants had not suffered prejudice. Accordingly it is difficult to understand on what it based its conclusion. Given the fact that there is material prejudice to the three appellants, which appears to have been entirely overlooked or not appreciated by the High Court, the decision of the High Court may be interfered with on appeal. Accordingly, the decision will be set aside.

Conclusion

[53] In summary, this court has identified three sets of irregularities in the notice of motion and founding affidavit lodged by the applicants in the High Court. First, the notice of motion seeks wide-ranging relief: some of it of a general constitutional nature and some of it very specific in character affecting individual respondents. Although the specific relief may be dependent to some extent on the general relief, it cannot be said that the various prayers for specific relief will

depend on ‘substantially the same’ issues of fact and law and accordingly there has been a misjoinder of issues in terms of rule 10. The misjoinder of causes of action will cause the appellants prejudice as they will be required to participate in proceedings concerned with a wide range of issues of fact and law of which they have no knowledge.

[54] Secondly, it appears that the general constitutional relief sought, especially in relation to retrospective declarations of invalidity in relation to sales in execution of immovable property authorised either by the Registrar of the High Court or a Clerk of a Magistrates’ Court as well as the setting aside of the registration of transfer of properties sold at such sales in execution, will affect many people and institutions that have not been joined in these proceedings. There appears to have been no comprehensive attempt by the applicants in the High Court to identify all the parties who may have an interest in such relief. Indeed in several cases the applicants have not identified or cited the persons who purchased their properties at sales in execution, despite the fact that they are seeking to set aside those sales in execution and subsequent transfer of the properties.[66] The failure to join necessary parties is a fundamental flaw in the proceedings and will inevitably prejudice both the three appellants but also the administration of justice itself.

[55] Thirdly, the founding affidavit does not comply with rule 6. It contains an incomplete and confusing account of the material facts. Many of the material facts are to be found not in the founding affidavit but in annexures without any explanation in the founding affidavit of the specific aspects of the annexures relied

[66]See cases of individual applicants mentioned in footnote 58 above.

upon. Moreover, several of the annexures are incomplete or missing. The absence of a clear account of the key facts upon which relief is sought prejudices the three appellants in their ability to mount a meaningful response to the allegations in the founding affidavit. The effect of that prejudice may well result in further difficulties as the litigation progresses. The purpose of the founding affidavit is to enable the respondents to know the case they have to meet so that they can present their response. Where that case is not complete or clear, the ability of the respondents to present a clear and comprehensive response will be threatened.

Costs

[56] There are circumstances in which litigants who unsuccessfully seek constitutional relief will not be ordered to pay costs.[67] In such cases, the court permits a departure from the ordinary costs rule that stipulates that successful litigants should recover their costs. Such a departure, however, will only be permitted where the litigants have conducted their litigation in a reasonably proper manner. In this case, the applicants in the High Court pursued materially flawed litigation against a wide range of respondents. Although it is important that this court should seek to enable litigants to bring cases before it, it would not be in the service of justice to grant an exception to the ordinary costs rule where litigants have pursued constitutional relief in a materially flawed manner. Accordingly, the eleven applicants in the High Court[68] who appeared at the hearing of this appeal

[67]See, for example, *Minister of Home Affairs v Majiedt and Others* 2007 (2) NR 475 (SC) para 53.

[68]The 1st applicant (Mr A Maletzky), the 2nd applicant (Ms W E Hoabes), the 5th applicant (Ms C A Balzer), the 7th applicant (Mr S Brockerhoff), the 9th applicant (Ms D V Shikongo), the 10th applicant (Mr E P Xoagub), the 13th applicant (Mr R Mouton), the 16th applicant (Ms L Rhode), the 17th applicant (Mr F Hoxobeb), the 21st applicant (Mr C Steenkamp), and the 22nd applicant (Ms K F Steenkamp).

and indicated that they supported the appeal are ordered to pay the costs of the three appellants in this court on the basis of joint and several liability. The costs should include the costs of two instructed and one instructing counsel.

[57] A final word should be added. Although this judgment has upheld the rule 30 application of the three appellants, it does not serve as a bar to the applicants seeking to air the constitutional issues they raised in this case in a future case so long as they do so in a manner that is compliant with the Rules.

Order

[58] The following order is made:

1. The appeal is upheld.

2. The order of the High Court is set aside and replaced with the following order:

‘(a) The applicants’ notice of motion and founding affidavits, and the annexures thereto, are set aside as irregular proceedings.

(b) The applicants’ document entitled “Request for Documentary Proof of Authority” delivered on 18 April 2012 is set aside as an irregular proceeding.

(c) The applicants are ordered to pay the costs of the first, second, sixth and eighteenth respondents on the basis of joint and several liability, the one paying, the others to be absolved. Costs shall include the costs of one instructing and two instructed counsel.'

3. The first, second, fifth, seventh, ninth, tenth, thirteenth, sixteenth, seventeenth, twenty-first and twenty-second respondents are ordered to pay the costs of the three appellants on appeal on the basis of joint and several liability, the one paying, the others to be absolved, such costs to include the costs of two instructed and one instructing counsel.

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O'REGAN AJA

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SHIVUTE CJ

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MAINGA JA

APPEARANCES

APPELLANTS:	R Tötemeyer (with him E M Schimming-Chase) Instructed by Behrens & Pfeiffer (for

	the First Appellant) Koep & Partners (for the Second Appellant) Fisher, Quarmby & Pfeiffer (for the Third Appellant)
RESPONDENTS:	In person