



REPORTABLE

CASE NO: SA 49/2011

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JASON MUKAPULI

First Appellant

MARTHA MUKAPULI

Second Appellant

and

SWABOU INVESTMENTS (PTY) LIMITED

Respondent

Coram: MARITZ JA, MAINGA JA and STRYDOM AJA

Heard: 3 April 2012

Delivered: 23 June 2017

Summary: In the High Court, the respondent (plaintiff) instituted action against the appellants (defendants), alleging that the appellants were indebted to it in the amount of N\$131 707,38 the said amount being the balance on the loan advanced to the appellants as a result of a written agreement between the parties. In support of its claim, the respondent attached a copy of the mortgage bond to its pleadings. The respondent alleged that the appellants failed to pay the monthly instalments in terms of the agreement as a result of which the full outstanding amount on the loan became due and payable.

The appellants defended the action and denied any liability to the respondent. The appellants in the main denied that the respondent was the holder of the mortgage bond. The appellants also pleaded that they have repaid the loan amount including interest. The appellants, further pleaded that any amount plus interest that might still be owed, was a less than the amount claimed.

The matter went to trial, and after evidence had been presented by both parties, the respondent was successful and obtained the relief of an amount of N\$177 743,46 plus interest on that amount at the rate of 13,75 per cent per year. Aggrieved by this outcome, the appellants noted an appeal to this court.

On appeal, the respondent took a point *in limine*, arguing that the appeal had been set down irregularly as the appeal was deemed to have lapsed and that condonation should have been obtained before the appeal could have been set down for hearing. The court *held* that this was not an instance where the appeal had lapsed and granted condonation.

The appellants on appeal raised various grounds, which were directed at some alleged irregularity on the part of the trial judge.

As regards the claim, the court *held* that the evidence established, on a preponderance of probabilities, the agreement between the parties which had not been put in dispute on the pleadings, except in regard to the interest to be paid on the amount borrowed. The appellants did not deny the fact that money had been borrowed from the respondent. The court further *held* that the balance still remaining after such payments by the appellants was established during the trial.

The court *held* that although irregularities had been committed during the trial that prejudice to the other party was a requirement to have the effect contented for. The court *held* that the appellants had not been prejudiced by the irregularities and dismissed the appeal.

APPEAL JUDGMENT

STRYDOM AJA (MAINGA JA) concurring:

[1] Argument in this matter was heard on 3 April 2012 by three judges, namely Maritz JA, (presiding) Mainga JA and myself. The judge presiding was designated to write the judgment. The learned judge retired during 2014 without writing the judgment. I was now informed by the learned Chief Justice that for medical reasons the learned judge presiding was no longer available to write the judgment and I was requested to do so in his stead. In the case of *Wirtz v Orford* 2005 NR 175 (SC) it had been decided that the remaining two judges could still hand down a valid judgment provided they were in agreement on the outcome of the case.

[2] The two appellants had been employed by the Municipality of Windhoek, the first appellant as a settlement officer and the second appellant as a cleaner. With the assistance of the Municipality they were able to buy a house in Katutura for N\$9000. A first bond was registered in favour of the Municipality as security for the payment of the purchase price.

[3] Then in 1998 the appellants decided to extend their house by adding two further rooms as well as outbuildings and a swimming pool. To enable them to do so they applied to the South West African Building Society (Swabou) for a loan. They

were successful and a first mortgage bond was registered over the property in the amount of N\$151 950 after the bond in favour of the Municipality had been redeemed.

[4] How the respondent figures in this set up is set out in its particulars of claim and in the evidence. It seems that Barclays Bank Limited acquired all the shares in Swabou. It then converted Swabou into a bank, then changed its name and then converted it into an investment company and later further converted it from a public company to a private company, which is the respondent herein.

[5] At the time the bond was registered the first appellant was 52 years old and only had 8 years to go before retirement.

[6] Re-payment of the loan was spread over a period of 30 years at an interest rate of 21,25 per cent. Any arrear interest was to be calculated daily and capitalised monthly. The loan was repayable at monthly instalments of N\$2731. In terms of the written agreement between the parties, the respondent could vary the rate of interest from time to time. It seems that the rate of interest eventually came down, and when the respondent issued summons, the rate was down to 13,75 per cent per year. The changes of the interest rate were adjusted in favour of the appellants.

[7] The appellants initially paid altogether an amount of N\$30 000 more than what was required in terms of their agreement. At a later stage they, however, re-claimed this amount which was then paid out to them.

[8] However, after August 2005 the appellants failed to pay the monthly instalments as a result of which the respondent issued a combined summons in which it claimed payment of the amount of N\$131 707,36, interest on that amount at the rate of 13,75 per cent per year, calculated daily and compounded monthly as well as costs on a scale as between attorney and client and that the property, subject to the bond, be declared executable.

The pleadings

[9] After the combined summons had been served on the appellants they gave notice to defend the claim instituted by the respondent. The respondent thereupon applied for summary judgment. This application was also defended by the appellants and the first appellant filed an affidavit in which he set out various defences to the claim. It was then agreed between the parties to let the matter run its course and that the costs of the summary judgment be costs in the cause.

[10] Paragraphs 1, 2, 3 and 4 of the particulars of claim set out a description of the parties and the marital status of the appellants. The appellants admitted these allegations.

[11] In para 5 the respondent alleged that Swabou Bank Limited (the Bank) acquired, in terms of s 52A(1)(b) of Act 2 of 1986, all the rights, title and interest in Swabou which then transferred all its assets and liabilities to the Bank. In their plea, the appellants put the respondent to the proof that it fully complied with the provisions

of s 52A(1)(b) of Act 2 of 1986. The remaining allegations, contained in the paragraph, were admitted.

[12] In paras 6 and 7 the respondent alleged that the Bank changed its name to Swabou Investments Limited and was thereafter converted from a public company into a private company under the name of Swabou Investments (Pty) Limited. The appellants pleaded that they had no knowledge of these changes and put respondent to the proof thereof.

[13] The respondent's cause of action is contained in paragraphs 8, 9 and 10 of the particulars of claim. It is alleged that the appellants were indebted to the respondent in the amount of N\$131 707,38 together with compound interest currently at 13,75 per cent per year up to and including 1 April 2007 and a copy of the mortgage bond was attached to the pleadings as exhibit 'A'. It was further alleged that the loan had been advanced by a predecessor of the respondent. It was furthermore alleged that the loan was repayable at instalments of N\$2731 per month. In terms of the agreement between the parties, failure to pay the monthly instalment would result in the full outstanding amount becoming due and payable. Lastly, it was alleged that the appellants failed to pay the monthly instalments as a result of which the full outstanding amount on the loan became due and payable.

[14] The appellants pleaded firstly that they have repaid the loan amount including interest. In the event that any amount plus interest might still be owed, the appellants

pleaded that the amount claimed by respondent was too high. Appellants then put plaintiff to the proof of their indebtedness and the amount thereof. The appellants further alleged that they have paid more monthly than what had been required of them and they therefore deny that they are in default.

[15] In paras 11 and 12, the respondent alleged that it was the holder of a first mortgage bond passed by its predecessor over the appellants' property as security for the due fulfilment of their obligations towards it and it alleged that it was entitled to have the property declared executable. Also, in terms of their agreement, the respondent alleged that it was entitled to claim its costs on a scale as between attorney and client.

[16] In answer to these allegations the appellants denied that the respondent was the holder of the mortgage bond and stated that if the court should find that there was a transfer of assets to the respondent from Swabou then it pleaded that the bond was not so transferred and that it remained with Swabou who is not a party to the present proceedings. Consequently, the respondent was not entitled to have the property declared executable.

[17] The plea of the appellants is not an example of clear and elegant pleading and is, to say the least, confusing. In para 1 of the plea, the appellants admitted that the respondent was the plaintiff in this matter. This was done without qualification on the part of the pleader. Ordinarily this conveyed the impression that the respondent was indeed the correct party to have instituted these proceedings. This impression is

further strengthened by the appellants' plea, set out in paras 2, 3 and 4 thereof, where it is stated that plaintiff (according to the admission in para 1 of the plea that is Swabou Investments (Pty) Ltd) is put to the proof that it had complied with the requirements of s 52A(1)(b) of Act 2 of 1986. In paras 3 and 4 of the plea the plaintiff is again put to the proof that the various conversions and changes of name did occur.

[18] The suggestion by the pleaders that the respondent was not the correct party to have instituted the proceedings is, if successful, a complete answer to the respondent's claim and should, in my opinion, have been the subject of a special plea. As to the nature of a special plea see *Brown v Vlok* 1925 AD 56 at 58. (See also Herbstein and van Winsen: *The Civil Practice in the High Courts of South Africa* 5 ed, p 604).

The grounds of appeal

[19] The matter went to trial, and after evidence had been presented by both parties, the respondent was successful and obtained the relief as claimed in its particulars of claim. The appellants were not satisfied with this outcome and launched an appeal to this court. Written grounds of appeal were filed which provided as follows:

- '1. The learned acting judge erred in law and on the facts by failing to postpone the hearing on 22 September 2009 to enable appellants to obtain legal aid in order to secure the services of a legal practitioner to represent them in the action by Respondent. In light of the inherent complexity of the case, the inability of the

appellants to fend for themselves and the gravity of the case and the possible consequences of judgment being entered against them it was imperative for the learned acting judge to do so.

2. In the circumstances substantial injustice occurred to Appellants who had to conduct their civil defence without the aid of counsel. In order to ensure the effective determination of their civil rights and obligations, the assistance of counsel was necessary. The lack of it violate Arts 12(1)(a) and 12(1)(e) of the Namibian Constitution, (the Constitution).

3. Quite apart from the failure of the learned acting judge described above, the principle of "equality of arms", which is an integral part of the right to a fair trial, especially in an adversarial system, was not observed. Respondent enjoyed the assistance of experienced counsel, while appellants who are lay person with modest education had to fend for themselves. The absence of "equality of arms" between the litigants resulted in a violation of Art 12 of the Constitution.

4. The conduct of the proceedings on 22 and 23 September 2009 was generally unfair and fell short of a fair trial, contained in Art 12 of the Constitution, for the following reasons:

4.1 Counsel appearing for respondent tendered evidence from the bar and asked leading questions to the witnesses;

4.2 An Amendment to the pleadings of appellants was unreasonably refused.

4.3 Second appellant was unable to conduct cross-examination without the assistance of counsel;

4.4 Second appellant was unable to submit effective closing arguments based on the law and the evidence led during the trial without the assistance of counsel.

5. The learned acting judge erred in not dismissing the claim of respondent despite the evidence that was led during the trial which was to the following effect:

5.1 The loan agreement between appellants and respondent's predecessor was not concluded freely and voluntarily. The material terms of the loan agreement were not brought to appellants' attention. The loan form was not completed by appellants and they were simply told to sign at the end of the form. Appellants were not informed that the loan was repayable over 30 years. Given appellants advanced age at the time of 52 and 50 respectively, they would not have agreed to the conclusion of the loan had they been informed of the fact. In the circumstances appellants did not consent to the loan agreement.

5.2 Given the conduct of respondent, judged in accordance with its own policies, the conclusion of the loan agreement was in the circumstances contrary to public policy, and the terms of the agreement should not have been enforced."

The trial

[20] At the start of the proceedings in the High Court, counsel for respondent applied to amend the amount claimed to a lesser amount namely N\$126 466,29. The amendment was granted without objection by the appellants.

[21] Counsel for the respondent decided to begin by leading evidence notwithstanding the fact that the onus to prove payment rested on the appellants. The first witness called was one D L van Rooi, the Process Manager of the respondent at their Administration Centre.

[22] The witness testified that the documents to be handed in, and which have originated from Swabou, were under his control. He said that the appellants applied to Swabou for a home loan for building purposes.

[23] The witness further explained a document which seemingly had been prepared by the appellants and in which they had set out what, according to them, the amounts paid by them were and what interest should have been charged. Van Rooi pointed out that the interest calculated by the appellants had been simple interest instead of compound interest as required by the agreement and that it was only calculated for a year (in my bundle this document appears under exhibit 'C', p 94).

[24] On occasion the witness and others had explained to second appellant the difference between compound interest and simple interest and a full set of statements reflecting what was owed had been made available to the legal representative of the appellants who undertook to do his own calculation.

[25] The witness was cross-examined by the second appellant who it seems was the spokesperson for both of the appellants. The witness agreed that the payments reflected on this statement, as made by the appellants, were correct. He, however, pointed out that all those payments have been included on all the relevant statements of Swabou and First National Bank. Second appellant also queried various amounts appearing in statements or letters but the witness was able to explain what those amounts were for and how they had been calculated. The differences which existed in

regard to the outstanding balances were caused by the arrear interest calculated and added each month as well as payments made by the respondent in regard to an insurance policy which, in terms of the agreement, was necessary to cover the value of the buildings on the premises.

[26] The next witness called by the respondent was Christian Johan Gouws. The witness testified that he is a legal practitioner practicing in partnership with the firm Theunissen, Louw and Partners. The respondent, as well as its predecessors, were long time clients of the firm. He personally was involved and attended to the transfer of the assets and liabilities of Swabou to the City Investment Savings Bank. The witness confirmed that he drafted many of the documents which were necessary to complete the transfer and that he had personal knowledge of the Minister of Finance's approval to go ahead with the scheme. The witness handed in a letter from the Minister to that effect. From that it was clear that the Minister had also considered the recommendations of the Registrar of Building Societies as required by law.

[27] The witness was also aware that City Savings Investment Bank, seemingly an asset of Swabou, changed its name to Swabou Bank Limited during the process of transfer to Swabou Bank Limited. The witness handed in a certificate confirming such change. Once all this had been done, the Registrar of Building Societies was satisfied that everything required by the Building Society Amendment Act 1994 had been completed and a letter to that effect was handed in by this witness.

[28] The witness further confirmed that this change had been published in the Government Gazette and he handed in a copy of the gazette. The witness further testified that Swabou Bank Limited changed its name in 2004 to Swabou Investments Limited and still later converted into a private company with the name Swabou Investments (Pty) Limited, the present respondent and plaintiff in this action.

[29] Gouws testified that after the completion of these procedures he, in his capacity as conveyancer, informed the Registrar of Deeds and in discussions with the latter a way was determined as to how to deal with bonds and cancellations of bonds and other documents. After further procedures were put into place Mr Gouws was satisfied to declare that there had been full compliance with the provisions of s 52A(1)(b) of Act 2 of 1986 as amended.

[30] Once it was explained to the second appellant that the witness had nothing to do with the registration of the bond and the agreements and dealings in regard thereto, she did not have any questions to ask in cross-examination.

[31] Without objection by the appellants, the respondent was allowed to recall van Rooi only on the issue whether the bond had been paid off in December 2003. This issue had been introduced by second appellant who, during cross-examination of van Rooi, stated that when she made enquiries in December 2003 she had been told that the bond was fully paid up. Van Rooi testified that it had been the bond registered in favour of the Municipality of Windhoek which had been fully paid. Second appellant, when cross-examining the witness stated that there could be no bond in existence

once they had become the owners of the house. The witness then explained to her that the respondent had only been willing to give a loan if they could be the first bondholders. Because there was a first bond registered to the Municipality, that bond had to be paid before the respondent could register a first bond in regard to the loan extended to the appellants.

[32] During further discussions, the second appellant said that it was the Municipality which told them that they had fully paid the Municipality so how could there still remain an amount payable by them. However, van Rooi was in possession of the original title deeds which bore out the fact that money was still owed to the Municipality at the time when the new loan had been extended to the appellants.

[33] The last witness called by the respondent was Terrence Foster Potter. He was previously employed by First National Bank but was then retired. He testified that the bank requested his services from time to time to do recalculations for it in order to establish the correctness of balances on accounts. That was his function when he had been employed by the bank. The witness said that he had also been requested by the respondent to recalculate the balance of the account of the appellants. He did so by setting up a program on his computer which automatically did the interest calculations and the debits and credits necessary to do such calculation. The source for these inputs and interest calculations the witness got from the bank statements of the appellants. He had also been requested not to include any legal costs which may have been debited to the account of the appellants.

[34] These calculations were made up to 1 March 2009. Copies of these calculations were handed in as exhibits 'Q' and 'R'. The witness explained why there were two sets of calculations. The first batch dealt with statements whilst Swabou had still been in existence and the second batch when the statements switched over to First National Bank. The witness further explained that whilst the loan had been financed through Swabou some calculations of interest were not correctly made and this had been corrected by the calculations made by the witness. These, so it seems, were in favour of the appellants. Also, when the account had been with the respondent some slight mistakes were picked up by the witness which were then corrected by him. These were the reasons for the amendment of the amount claimed as at 1 April 2007, namely N\$126 466,39. Calculated up to 1 March 2009 the outstanding balance on this account was N\$177 743,46.

[35] The witness was cross-examined by the second appellant regarding the amounts paid by the appellants and the balances still remaining after such payments. Particularly the second appellant wanted to know how much of the amount paid went to the payment of interest and what part to reducing the capital of the debt. The witness, on questions by the court, did a calculation on the amount of N\$36 000, which amount closely resembled what the appellants had to pay off at the rate of N\$3013 per month and over a period of twelve months. It was illustrated that out of the payment of N\$36 000 an amount of N\$33 000 went to payment of interest so that only a very small amount was left to redeem the loan.

[36] This was the case for the respondent. The second appellant indicated that the first appellant would not be called to testify as his rights and her rights were the same because of their marriage in community of property.

[37] In cross-examination of various witnesses, and giving evidence, the second appellant stated that the amount paid back by the appellants over a period of time was N\$249 882,07, whereas the loan amount was only N\$151 950. The witness stated that she could not understand that there was still an outstanding balance of N\$126 731,35. She went on to say that, in her view, the debt had been fully paid. In support of her contention she stated that when furniture is bought on hire-purchase the purchase price of the furniture plus interest were calculated and this total amount then appeared on the hire-purchase contract and that was then the amount to be repaid. She further said that she had never been told that so much of the amount paid would go towards the payment of interest. If she had been told that that was what would have happened she would not have taken up the loan. At the time the first appellant was already 52 years old with only 8 years left before retirement. They receive, according to the witness, a pension grant of N\$450 per person per month which they use to buy necessities and pay for electricity and water.

[38] During cross-examination, she admitted that it was her signature and that of the second appellant appearing on annexure 'A', ie the application form for the loan. When it was pointed out to her by counsel that the loan had to be paid back over a period of 360 months she answered that it might have been that she and first

appellant signed the document without knowing what they were signing. She stated that it was only now that she became aware that the loan had to be repaid over 30 years. She said that she had not read the document and was only told to sign it.

[39] Various other documents were shown to the witness and although she admitted that it was her signature and that of the first appellant appearing on these documents, she maintained that nothing had been explained to her. In regard to annexure 'A', she could not remember whether this document had been completed at the time of signing it.

[40] The witness testified that when the case started she was given all these documents and she handed all these documents to her lawyer and told him everything that she had now been telling the court. In regard to the various bank statements, the witness stated that she only saw them in 2007.

Findings by the court *a quo*

[41] A reading of the learned judge's reasons showed that he had accepted the evidence of the respondent's witnesses. He therefore, by implication, accepted the agreement as pleaded by the respondent, the amount of the appellants' indebtedness to the respondent and that the respondent was the correct plaintiff to have issued summons against the appellants. He thereby also accepted that this particular asset became an asset which had been transferred to the respondent and that there had been due compliance with the provisions of s 52A(1)b of Act 2 of 1986, as amended,

at the time the shares had been acquired by respondent's predecessor. By the same token the court *a quo* rejected the stance of the appellants that interest on the loan had to be calculated as simple interest and not compound interest and that the respondent was not the correct party to claim payment of the loan, and interest thereon, from the appellants.

The appeal

[42] The appellants were, during the pleading process, always assisted by legal practitioners. At the start of his argument, Mr Marcus, on behalf of the appellants, conceded, correctly in my opinion, that the grounds of appeal, set out in para 5 of the notice of appeal, had not been pleaded and could not now be raised for the first time on appeal.

[43] There is ample evidence to justify the above findings by the learned judge *a quo*. The agreement between the parties had not been put in dispute on the pleadings, except in so far as set out hereunder. Second appellant, who conducted the trial proceedings on her own behalf and that of the first appellant, acknowledged her signature, and that of the first appellant, on all the relevant documents. The only issues regarding the agreement were the calculation of the interest on the loan and hence the amount of the indebtedness and if any small balance still remained, what such balance would have been. There was no direct appeal against any of the other findings by the learned acting judge *a quo* and such findings, therefore, must be accepted.

[44] When giving evidence, second appellant did not deny the fact that money had been borrowed from Swabou. In this regard, her evidence was that she had laboured under the impression that the interest had already been included in the sum reflected in the mortgage bond on the same basis as happened in loans based on hire-purchase contracts.

[45] This evidence by the second appellant is, in my opinion, significant. It constitutes an admission of the terms of the mortgage bond and the agreement between the parties except in so far that she had calculated and added simple interest and not compound interest. This, so it seems, is where the parties parted company. Also did second appellant in her calculations not provide for the payment of certain costs as stipulated for in the agreement and the mortgage bond. (See eg para 12 of the addendum to letter of advice, exhibit 'B6' and also exhibit 'B3' in which they, *inter alia*, accepted the terms of the mortgage bond.)

[46] It is trite law that the onus to prove payment rests on the appellants. (See R H Christie *The Law of Contract in South Africa* 5 ed p 432, and the cases there cited.) I am also satisfied that para 3 of the mortgage bond stipulates that any arrear interest shall be calculated daily and capitalised monthly and shall be added to the outstanding loan amount. There is, in my opinion, no uncertainty contained in this provision.

[47] The first issue concerns the application for condonation of the appellants' failure to file a notice of appeal within 21 days after judgment had been handed down and their failure to lodge copies of the record of the proceedings within three months of the judgment and orders appealed against by them.

[48] In their application for condonation, the appellants explained that they, at all times, acted on the advice of their legal practitioner. (That was not Mr Marcus. He only became involved once the appeal in the present matter had been launched.) On the advice of their then legal practitioner they applied for rescission of the judgment given against them. This application was dismissed. Again on advice, they launched an appeal to this court appealing against the dismissal of their application for rescission. Only at a much later stage were they advised to appeal the judgment in this matter. The appeal against their unsuccessful application for rescission was heard shortly before the present appeal and was again dismissed.

[49] Mr Oosthuizen, assisted by Ms Schneider, who appeared for the respondent, took a point *in limine* that the appeal had been set down irregularly as the appeal was deemed to have lapsed and that condonation should first have been obtained before the appeal could have been set down for hearing. I agree with what had been stated in the case of *Ondjava Construction CC v HAW Retailers t/a Ark Trading* 2010 (1) NR 286 (SC). The circumstances in the present instance are somewhat exceptional. The matter was set down for trial on 22 and 23 September 2009. Judgment was given on 23 September 2009. An appeal to this court was launched on 17 June 2011, that was

after they had been unsuccessful in their bid for rescission of the judgment in the High Court. The appeal of this judgment had been heard on 3 April 2012 but until now no judgment had been forthcoming. It seems to me that to put the parties again to go through all these steps would not be in the interest of justice. There was also an inordinate delay of almost a year before their application for legal aid was granted.

[50] The present instance can, in my opinion, be distinguished from the *Ondjava*-case. Because the appellants, on the advice of their legal representative at the time, launched and prosecuted an appeal against the unsuccessful rescission judgment, they were late in giving notice of appeal in the present instance and so was the filing of the record in this matter. There is no question of the lapsing of the appeal after notice of appeal had been filed. They had to file a notice of appeal in order to come before the Court of Appeal and, in regard to the lateness of the notice, they had to apply for condonation.

[51] Bearing in mind what had been said in the matter of *Namib Plains Farming and Tourism (Pty) Ltd v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) at 476B, I am of the opinion that the explanation given by the appellants, namely that the cause of their delay had been that, they all the time acted on the advice of their legal representative, the importance of the matter for both parties, the fact that this is not a hopeless case for the appellants and that there may be some prospect of success and the consequences for the appellants should the case be decided against them, have convinced me that this is a proper instance where the court should grant

condonation. In the circumstances of this case this court can hardly blame the appellants for causing unnecessary delay in the administration of justice.

[52] Regarding the merits of the appeal, it seems to me that Mr Marcus incorrectly accepted that the role of the judge in a civil case is the same as the role of the judge in a criminal case. He then accepted that it was within the powers of the judge to force the appellants, who have decided to act personally, to obtain the services of a legal representative through legal aid. Counsel submitted that the judge should, in the light of the complexity of the case, have postponed it in order for the appellants to obtain legal aid to appoint a legal representative. Two of the cases relied on by Mr Marcus were criminal cases, namely *S v Khanyile & another* 1988 (3) 795 (N) and *S v Luboya* 2007 (1) NR 96 (SC). Mr Marcus also relied on the case of *Government of the Republic of Namibia & others v Mwilima & others* 2002 NR 235 (SC). Although this matter was brought to court on application it again concerned the appointment of legal representatives for accused persons in a criminal matter, namely *S v Mwilima & others*. The facts in the *Mwilima*-case, also differ substantially from the present case. In that case, some 128 accused persons faced charges such as high treason and conspiracy to commit crimes. In the *Mwillima*-case the parties specifically asked for legal representatives to represent them. In the present instance that is not the case.

[53] The fact of the matter is that in the present instance there was no application for a postponement of the case by the appellants in order to obtain the services of a legal representative. In fact what was said by them, which had been conveyed to the

court by counsel for the respondent, and apart from stating that they could not afford a legal representative, suggested that they would rather not appoint a legal representative because legal representatives were inclined to always withdraw their services once the matter was ready to go to trial. This had been said whilst they were also aware that they could apply for a postponement because of the late withdrawal of their counsel as that was what had happened on a previous occasion when, for that reason, the matter had been postponed. It also seems that they had come to court fully prepared to defend themselves. See for example exhibit 'C94' where they had done certain calculations in support of their defence that they had paid the loan and interest. It is also clear that they had decided beforehand that second appellant would speak, also on behalf of first appellant, that she would cross-examine witnesses and generally conduct all proceedings during the trial.

[54] A party's right to appear personally, and whether he/she appears as a plaintiff or a defendant, is as strong as his/her right to appoint a legal representative of his/her own choice. In my opinion, where parties decide to claim or defend themselves personally, the rule of 'equality of arms' is subject to the wishes of a party and must give way to accommodate those wishes. I also agree with Mr Oosthuizen that the issues to be tried were not difficult. If the appellants had been able to prove payment of the loan that would have been the end of the matter and the second issue, whether the correct plaintiff was before the court, would have become irrelevant. In regard to the defence that the respondent was not the correct party, most of the evidence was contained in documents which could easily have been checked by the appellants.

[55] It is correct, as was submitted by Mr Marcus, that they were not informed by the learned acting judge of their right to apply for legal aid. However, on two previous occasions their legal representatives had withdrawn shortly before the matter was to go on trial. It seems obvious that their stance that they were only required to pay simple interest on the loan, instead of compound interest as provided for by the mortgage bond, would have made it difficult, if not impossible, for the appellants to obtain counsel to support their plea in this regard.

[56] Whether the fact that the learned acting judge failed to inform the appellants of their right to apply for legal aid has the same effect on the civil proceedings which it may have on criminal proceedings, had not been argued before us. In this regard, there are differences between criminal and civil proceedings. In criminal proceedings, the State is, except in private prosecutions which seldom occur, always a party and is represented by its prosecutors to look after its interests and costs are not an issue. In a civil trial, the State is mostly not a party to the proceedings and is not represented in disputes between private individuals or companies. Costs is an issue and would have to be borne by one or both of the parties who are not responsible for the failure of the judge. In these circumstances, it seems to me that this is not a proper instance where I can make a finding, one way or the other, and that this issue will have to stand over until a proper occasion arises. However, I will accept for purposes of this case that it was an irregularity not to have informed the appellants of their right to apply for legal aid.

[57] As far as payment was concerned, the appellants utilised Exhibit 'C94' to prove their case. It is a document emanating from the appellants setting out the bond details, and their calculations in this regard. The bond amount was the same as the loan amount namely N\$151 950 and the document further set out the initial amount held back in relation to retention namely N\$142 750.

[58] In their attempt to prove payment of the loan, the appellants started with the amount of N\$142 750 and added to that a single amount of simple interest at the rate of 21.5 per cent. This calculation, as was pointed out by the witness van Rooi, was incorrect as the amount of N\$142 750 bore no relationship to the amount borrowed by appellants and only reflected the initial amount to be retained as retention money in regard to the building operations. The witness furthermore testified that the calculation of the interest had been incorrect as the agreement between the parties provided for compound interest to be calculated daily and capitalised monthly in the event of interest running into arrears, and not simple interest.

[59] The same exercise was repeated by appellants but this time the once-off payment of simple interest was added to the sum of N\$151 950. In each instance the sum total was less than the amount already paid by the appellants towards the loan namely N\$249 882.07. However, the calculations were palpably incorrect for the reasons set out herein before as the agreement provided for compound interest and not simple interest.

[60] The onus to prove payment rested on the appellants. (See *Abraham v Cassiem* 1920 CPD 568 and *Standard Bank of South Africa Ltd v Sacks & another* 1928 TPD 352.) In my opinion, and taking into consideration that the calculations by the appellants, were incorrectly made, I am satisfied that the appellants did not acquit themselves of the onus of proof. In contrast to this evidence, there is the evidence of witness Potter who established what was still indebted by the appellants to the respondent. This evidence now stood uncontested as a result of the appellants' wrong calculation. See in this regard the case of *Millman NO v Klein* 1986 (1) SA 465 (CPD). This was an application for summary judgment. The defendant, Klein, defended the matter but his defence was based on facts which had been shown, by other documentation before the court, to have been wrong. At p 471D to G the learned judge stated as follows:

'Plaintiff has testified in his verifying affidavit that he does have full knowledge of the facts set out in the summons and particulars of claim. Defendant denies this, but does so by stating a conclusion of fact based upon facts which he alleges, but which are incorrect, as is demonstrated by the admitted facts in the affidavits and documents of record in the application. In effect, defendant's denial is contradicted by facts which he himself admits, and this circumstance, in my view, deprives his denial of any weight or consequence.'

[61] Similarly, the wrong calculation of the appellants in regard to their plea of payment deprived their plea, in this instance, of 'any weight or consequence'. This was, in my opinion, their main defence against the claim of the respondent.

[62] A further issue between the parties was whether the respondent had been the correct plaintiff to have sued the appellants. This issue had first been raised by first appellant in his affidavit opposing the summary judgment proceedings.

[63] I must confess that I do not quite follow this argument. Be it as it may, except for appellants' plea, nothing further was made of this. There is no ground of appeal covering this issue, nor had any evidence been led to refute the evidence presented by respondent nor had this issue been argued before us on appeal. In evidence the chain of events leading to the respondent holding all those rights and interests were fully set out and there can be no doubt that the respondent was the correct party to have issued summons in this instance.

[64] I agree with Mr Marcus that there were some instances where leading questions were asked by counsel for the respondent. However, some of these questions were, in my opinion, unnecessary. An example was the question whether the witness Gouws was satisfied that there had been full compliance with the provisions of s 52A(1)(b). This was an issue for the court to decide. Furthermore, in other instances the evidence merely introduced documents which confirmed those issues described therein. These were documents which had been discovered and, as far as I could establish, were not in dispute. Instances where counsel quoted from such documents cannot be marked as leading questions.

[65] Another irregularity complained of concerns the learned acting judge's refusal of a possible application for amendment of the appellants' plea. It arose in the following way. The second appellant was cross-examining the witness van Rooi when she stated that the building contractor did not comply with his obligations. Objection was made to this question which was correctly upheld by the learned judge because it did not form part of the plea of the appellants. It was then stated by the learned judge that in order to continue with this line of cross-examination the appellants would have to amend their plea but that he was not going to allow such application. This line of questioning was irrelevant to the proceedings presently between the respondent and the appellants and had therefore correctly been refused. Furthermore, the witness van Rooi testified that the respondent had, on each of these occasions where payment had been claimed by the contractor, acted on the written authorisation of the appellants to make such payment. This seems to me to be an insurmountable obstacle in the way of the appellants.

[66] It was further submitted by counsel for the appellants that the legal representative of the respondent tendered evidence from the bar which swayed the court. I do not agree. The main issue referred to concerned questions asked by the learned acting judge to which counsel had replied. At most the answers given by counsel in the court *a quo* consist of her interpretation of some of the provisions of Act 2 of 1986 as amended. Further issues concerned the document compiled by appellants, exhibit 'C94'. Paraphrasing what is set out in the document or reading excerpts therefrom in order to get the witness to explain or comment thereon cannot

be seen as giving evidence. In regard to the FNB statement of first appellant the situation is different. This document had never been identified and nor was it handed in as an exhibit. However, I do not agree with Mr Marcus that it had swayed the court to make findings adverse to the appellants. That is clear from a reading of the court's judgment.

[67] Lastly, it was submitted by Mr Marcus that some of the evidence given by witness van Rooi amounted to hearsay. He referred the court to two instances which, in my opinion, did not support his submission.

[68] For an irregularity to have the effect on the proceedings, as contended for by Mr Marcus, substantial prejudice to the other party is a requirement. This is, in my opinion, clear from cases in regard to High Court Rule 30. This rule deals with irregular steps taken by a party and provides for the setting aside of such steps. In regard to rule 30 in the Supreme Court of the Republic of South Africa which, before its amendment, had been similar to our rule 30, the courts there had come to the conclusion that prejudice is a requirement although the rule did not state so. (See *SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO* 1981 (4) SA 329 (O) and *Gardiner v Survey Engineering (Pty) Ltd* 1993 (3) SA 549 (SE).) Although the rule is not applicable to the present situation, I am satisfied that prejudice is a requirement also in regard to irregularities committed during the trial of a matter, whether they had been procedural or otherwise.

[69] One aspect which I feel necessary to mention emerged from the evidence of the second appellant, and because it has a bearing on the appellants' plea of payment. She testified that she thought that the interest had been included into the amount for which the bond had been registered. She used the example of hire-purchase contracts where the amount of interest was added to the purchase price and then paid together in equal monthly instalments. This evidence might have given rise to a possible defence of unilateral mistake. However, to be able to rely on such defence it had been necessary to plead so. (See *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A)). Furthermore, the *onus* to prove that such error had been *justus* would have been on the appellants (see *Lake v Caithness* 1997 (1) SA 667 (E)). Unless the mistaken party can prove that the other party knew of the mistake or should reasonably have known so or caused the mistake, the *onus* would not be easily discharged. (See Christie; *op cit* p 315.) The respondent in this case could not have known what the second appellant was thinking, nor did it do anything to cause the appellant to think that the interest had been included in the amount of the bond. That this mistake had solely been made by second appellant is clear from her explanation that she thought that the position regarding bonds was the same as that of hire-purchase contracts. Their signing of documents, or acceptance thereof, without reading or understanding them, had been of their own choice. (See further *Glen Comeragh v Colibri & another* 1979 (3) SA 210 (TPD and *Standard Credit Corporation v Naicker* 1987 (2) 49 (N)). This issue was, to a certain extent, covered by para 5 of the grounds of appeal in regard of which Mr

Marcus, therefore correctly in my view, conceded that he could not now raise these issues for the first time on appeal.

[70] However, generally speaking, to have had the effect contended for by Mr. Marcus, such irregularity must have prejudiced the other party. (See the cases set out above.) In this particular instance I am satisfied that the irregularities complained of did not prejudice the appellants. I agree with counsel that there were some irregularities but not to the extent as had been submitted by counsel. Most of the evidence had been based on documentary evidence. The agreement was in writing, so was the bond. All calculations were set out in statements showing how the calculations were made and payments were made on written certificates whereby the respondent had been authorised by the appellants to pay out such money. None of these documents were refuted by the appellants. The appellants' wrong and incorrect calculation had been their own doing. That was clear from their own evidence. They, after all, bore the onus to prove payment of their loan and interest. None of the irregularities complained of in any way touched upon this issue or are responsible for findings which adversely affected their case. Their wrong calculations favoured the respondent in the sense that it was clear that they had no answer to the claims of the respondent. Mr Marcus found support of his submissions in Art 12 of the Namibian Constitution. However, the Constitution did not do away with a party's right to act personally, nor did it do away with the requirement of prejudice in regard to irregularities.

[71] In deciding whether the appellants were prejudiced by any of the irregularities, the following circumstances must be added to those set out in the previous paragraph:

- (i) The appellants did not deny the agreement between them and the respondent, except to the extent set out herein before;
- (ii) In terms of exhibit 'C94', they accepted that the amount so borrowed had been the same as the amount reflected in the mortgage bond; and
- (iii) There is no appeal against the other findings by the court *a quo*.

[72] Although Mr Marcus conceded that the learned judge assisted the appellants in their conduct of the proceedings counsel was of the opinion that more should have been done in this regard, especially as far as the asking of questions were concerned. In my opinion there is a fine line between assisting an unrepresented litigant and interfering with such litigant's conduct of the trial. Asking questions and getting the wrong answers may be regarded as interference with such conduct. For the reasons set out herein before I am satisfied that it cannot be said that the irregularities rendered the trial unfair to the extent that it vitiated the proceedings.

[73] In the result, I have come to the conclusion that the appeal cannot succeed and it must be dismissed.

[74] We were informed that the appellants have been granted legal aid and in regard to the costs of appeal my attention was drawn to s 18 of the Legal Aid Act, Act 29 of 1990, which forbids the granting of any order of costs against the State in regard with any proceedings in respect of which legal aid had been granted. See further *Charmain Theresia Mentoor v Lukas Usebiu Nairobi* (SC), unreported, delivered on 19 April 2017, a judgment by the Honourable Chief Justice in which the other Honourable judges of appeal concurred.

Order

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

1. The appellants' late filing of the notice of appeal and filing of the record is hereby condoned.
2. The appeal is dismissed.
3. No order as to costs is made.

STRYDOM AJA

MAINGA JA

APPEARANCES

APPELLANTS:

N Marcus

Instructed by the Director of Legal Aid

RESPONDENT:

G H Oosthuizen (with him H Schneider)

Instructed by Theunissen, Louw & Partners