NOT REPORTABLE

CASE NO: A 332/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

WILLY GOSEB	**1st APPLICANT**
HEWAT BEUKES	**2nd APPLICANT**
ERICA BEUKES	**3rd APPLICANT**
WILLY SWARTZ	**4th APPLICANT**
FREDERICK WILLY SCHROEDER	**5th APPLICANT**
APOLLUS HOCHOBEB	**6th APPLICANT**
TERENCE NOBLE	**7th APPLICANT**
JACOBUS JACOBS	**8th APPLICANT**
REGINA JOHANNA BARKER	**9th APPLICANT**
WILHELMINA SWARTZ	**10th APPLICANT**
HEINZ THIRO	**11th APPLICANT**
GENOVIVA GOSEB	**12th APPLICANT**
LISA RHODE	**13th APPLICANT**
JOSEF KAROOLS	**14th APPLICANT**

MITCHELL VAN WYK	**15th APPLICANT**
LEILANI VAN WYK	**16th APPLICANT**
ILONA YA NANGOLOH	**17th APPLICANT**

and

MINISTER OF REGIONAL AND LOCAL GOVERNMENT AND HOUSING	**1st RESPONDENT**
BANK OF NAMIBIA	**2nd RESPONDENT**
NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY	**3rd RESPONDENT**
NATIONAL HOUSING ENTERPRISE	**4th RESPONDENT**
THE REGISTRAR OF DEEDS	**5th RESPONDENT**
FIRST NATIONAL BANK OF NAMIBIA LTD	**6th RESPONDENT**
STANDARD BANK OF NAMIBIA	**7th RESPONDENT**
BANK WINDHOEK	**8th RESPONDENT**
FISHER, QUARMBY & PFEIFER	**9th RESPONDENT**
MUNICIPAL COUNCIL FOR THE MUNICIPALITY OF WINDHOEK	**10th RESPONDENT**
MINISTER OF JUSTICE	**11th RESPONDENT**
NEDBANK NAMIBIA LIMITED	**12th RESPONDENT**
THE REGISTRAR OF THE HIGH COURT	**13th RESPONDENT**
THE SHERIFF OF THE HIGH COURT	**14th RESPONDENT**
THE DEPUTY SHERIFF FOR WINDHOEK	**15th RESPONDENT**
THE DEPUTY SHERIFF FOR WALVIS BAY	**16th RESPONDENT**

CORAM: **SCHIMMING-CHASE, AJ**

Heard on: 17 and 18 May 2011

Delivered on: 31 May 2011

JUDGMENT

SCHIMMING-CHASE, AJ:

1. This matter was referred back to this court by the Full Bench on 24 February 2011 for a decision on the merits of identical Rule 30 applications launched by the 6th, 9th, 7th and 10th respondents. In this judgment they will interchangeably be referred to as the respondents, or in their separate capacities where context requires it.

2. The hearing of the Rule 30 application was the set down for 17 May 2011 at 10h00. In respect of the 6th and 9th respondents a notice of set down was delivered to the applicants by service on the address nominated by them in their notice of motion. *Ex facie* the notice of set down, service was accepted on behalf of the applicants at 15h52 on 6 April 2011.

3. In respect of the 7th and 10th respondents, an affidavit deposed to by a messenger employed by their instructing legal practitioner alleges that an attempt was made to serve the notice of set down at the addressed nominated by the applicants on 20 April 2011 but he was informed by an adult male person, who refused to give his name, that he would not accept any documents. These facts will be referred to in more detail below.

4. At the commencement of the hearing of the Rule 30 application on 17 May 2011, only the 5th and 6th applicants appeared. The 5th applicant informed the court that he was not aware of these Rule 30 proceedings, and that he had first heard about it in the corridor. He further informed the court that it no longer has jurisdiction to hear the Rule 30 application as an appeal had been noted to the Supreme Court against the judgment and order of the Full Bench. The 6th applicant aligned himself with the submissions of the 5th applicant. The notice of appeal dated 30 March 2011 was signed by the 1st, 2nd, 3rd, 5th, 6th, 8th, 10th and 15th applicants only.

5. The 5th and 6th applicants were however constrained to accept that they had knowledge of the set down date by virtue of the notice of set down delivered by the 6th and 9th respondents. The notice was served on the address nominated by the applicants in the notice of motion and there was signature of acceptance of the document on behalf of all applicants at the given address.

6. In response to these submissions, counsel for the respondents submitted that the judgment and order of the Full Bench was interlocutory in nature, and that the applicants had to apply for leave to appeal in terms of section 18(3) of the High Court Act, 16 of 1990. As a result, it was argued, the notice of appeal is a nullity and should accordingly be ignored without the necessity of an application to set aside the notice as irregular.

7. Section 18(3) of the High Court Act, 16 of 1990 as amended, provides that no judgment or order where the judgment or order sought to be appealed from is an interlocutory order or an order as to costs only left by law to the discretion of the court shall be subject to appeal, save with leave of the court which has given judgment or has made the order, or in the event of such leave to appeal being granted by the Supreme Court.

8. Counsel relied *inter alia* on an unreported judgment of the Supreme Court of Namibia delivered on 15 July 2010 in the matter of The Minister of Mines and Energy and Another v Black Range Mining where it was held that interlocutory orders are not appealable as of right, as they lack the attributes required for a judgment or order which is appealable in terms of section 18(1) of the High Court Act (see paragraph 57 of the judgment).

9. The general principle is that if the decision is not definitive of the rights about which the parties are contending in the main proceedings and does not dispose of any of the relief claimed, such decision is not a judgment or order as intended in section 18 of the High Court Act and is not appealable as of right. In Minister of Mines and Energy *supra* it was held that if the interlocutory order was final in effect, although it may lack some of the attributes of a judgment or order, required for an appeal as of right, it may nevertheless have a definitive and final bearing on the rights of the parties, in which instance, it would be appealable as of right.

See also: Zweni v Minister of Law Order 1993 (1) SA 523 (AD) at 533G-H and 536A-C, cited with approval in Aussenkehr Farms (Pty) Ltd v Minister of Mines and Energy 2005 NR 21 (SC) at 29A-E

10. In respect of the submission that the notice of appeal can be ignored without the necessity for an application to set it aside as irregular, reliance was placed on the case of China State Construction Engineering Corporation (Southern Africa) (Pty) Ltd v Pro Joinery CC 2007 (2) NR 675 (HC) where Silungwe J considered whether a nullity can be condoned in terms of Rule 27(3) of the High Court Rules. After referring to a number of South African decisions, he held at paragraph 27 that:

> *"The fact that the Court enjoys unfettered discretion to condone a procedural irregularity does not, in my view, perforce mean that all procedural irregularities (without any exception whatsoever) are, per se, capable of being condoned. In other words, not every single procedural irregularity is capable of being condoned. Whereas it is probable that a large number of procedural irregularities may be capable of being condoned, it is, nevertheless, conceivable that there may well be occasional procedural irregularities of such gravity as to constitute a nullity. A nullity has no legal effect and, as such, it cannot be condoned."*

11. In Namibia Development Corporation v Aussenkehr Farms (Pty) Ltd, an unreported judgment of this court delivered on 6 November 2009, Heathcote AJ, after approving the reasoning of Silungwe J in China State Construction Engineering Corporation *supra* further held at paragraph 33 that:

> *"Obviously a null and void process can be ignored with impunity, and even if a party has taken a further step in the proceedings, the taking of a further step cannot blow life into a legally dead step or procedure."*

12. Subsequent to counsel for the respondents' arguments, I invited the 5th and 6th applicants to contact the other applicants in this

application to appear in court after lunch, to address this court on their non-appearance at the hearing of this application, as well as to respond to the submissions on the status of the notice of appeal which they filed. The matter was accordingly adjourned for this purpose.

13. After reconvening, the 5th and 6th respondents were accompanied by the 1st and 2nd applicants. The 1st applicant aligned himself with the submissions made by the 2nd applicant. The 2nd applicant stated from the bar that he had not managed to contact all the applicants, and submitted that the reason for their non-appearance was that the notices of set down filed by the respondents were a nullity and accordingly could be ignored. From my understanding of the 2nd applicant's submissions, support for his argument was based on the following:

13.1. the applicants ignored the notice of application for a trial date in terms of Rule 39(2) read with Practice Directive No 1 of 2011 and 3 of 2006 delivered on behalf of the 7th and 10th respondents, inviting the applicants to appear at the Office of the Registrar for the allocation of a trial date on 6 April 2011. They also ignored the letter emanating from the legal practitioners of the 6th and 9th respondents, also inviting them to appear at the Office of the Registrar on the same date and for the same reason, because this

issue was to be dealt with as part of the appeal to the Supreme Court. It was not disputed that these notices were served at the address nominated by the applicants for service of process in terms of Rule 6(5)(b) of the Rules of Court;

13.2. the notice of set down filed on behalf of the 6th and 9th respondents delivered in terms of the Rules of Court at the nominated address for service referred to above, for which receipt was signed on behalf of the applicants on 6 April 2011 at 15h52, is a nullity because the notice of set down is dated 5 April 2011. This also shows, so the argument went, that the date for hearing was allocated before the date on which the allocation was to take place, namely 6 April 2011 at 10h00 at the Registrar's office;

13.3. the notice of set down of the 7th and 10th respondents was never served on the applicants. Only a copy of the notice of set down was left on the doorstep and this was not proper service in terms of Rule 4 of the High Court Rules. In this regard, an affidavit deposed to by the messenger of the legal practitioners for the 7th and 10th respondents alleges that on 20 April 2011 at approximately 11h00 whilst he was attending at the nominated address, he was informed by a male person who refused to give his name that he

would not accept any documents for the applicants. He therefore left a copy of the notice of set down on the doorstep.

14. I pertinently requested the applicants to address me on the argument raised by counsel for the respondents that the notice of appeal against the Full Bench decision was a nullity. The 2nd applicant submitted that he had not been informed about this argument, nor was he prepared to address me on this issue. This response came notwithstanding the adjournment of the proceedings for approximately 3 hours so that this court could be addressed on this issue.

15. On the basis of the submissions of the 5th applicant (with which the 6th applicant aligned himself) referred to earlier, as well as the additional submissions of the 2nd applicant (with which the 1st, 5th and 6th applicants also aligned themselves) made when court reconvened, I ruled that the notice of appeal was indeed a nullity and that it would be ignored. I also ruled that the hearing on the merits of the Rule 30 application would proceed on 18 May 2011 at 10h00. Costs were stood over, to be determined at the end of the hearing of the Rule 30 application. I provide the reasons for my ruling in what follows.

16. In terms of Rule 49 of the Rules of Court, an appeal as of right is noted by the delivery of a notice of appeal within 20 days after the date upon which judgment was given or order made. I am in agreement with the principle enunciated in the decisions referred to above that an appeal as of right only lies if the effect of the judgment or order has a final or definitive result on the rights of the parties. If the result is not final or definitive, the decision is interlocutory in nature and leave to appeal must be applied for in terms of section 18(3) of the High Court Act.

17. The judgment and order of the Full Bench is clearly interlocutory in nature. The judgment and order of that court, against which an appeal was noted, is that it is not a prerequisite for an applicant to give notice in terms of Rule 30(5) before bringing a Rule 30(1) application. The Full Bench referred the decision on the merits of the rule application back to this court. This is the application that is to be heard in terms of the notices of set down. The effect on the applicants is simply that they need not be given prior notice of the Rule 30 application and that they must now ventilate their opposition to this application.

18. In fact, as counsel for the respondents submitted, the Full Bench decision was an interlocutory order made within an interlocutory application. It is pointed out that the notices in terms of Rule 30 were delivered by the respondents on 22 and 24 October 2009, in

respect of the 6th, 9th and 7th and 10th respondents respectively. Considering that it is now over 1½ years later, more than sufficient "notice" has been provided in any event showing that the applicants had ample opportunity to prepare their response to the notices.

19. Accordingly, at the very best for the applicants, leave to appeal was required in terms of Rule 18(3) of the High Court Act if the applicants wanted to appeal against the judgment and order of the Full Bench of this court. In fact I doubt that this decision is even appealable, however I need not decide this issue in this instance. No application for leave to appeal was launched. Instead, some of the applicants filed a notice of appeal on 30 March 2011.

20. In the absence of an application for leave to appeal, the notice of appeal is a nullity. I respectfully agree with Silungwe J's reasoning in China State Construction Engineering Corporation *supra* and Namibia Development Corporation *supra*, and find that I have no discretion to condone a nullity, and I therefore will have no regard to the notice of appeal.

21. As regards the submissions by the applicants that appeared that the notices of set down for the hearing of the Rule 30 application are a nullity that this court should ignore, it is firstly not disputed

that the applicants had received written requests from the 6th, 9th, 7th and 10th respondents to attend at the Office of the Registrar at 10h00 on 6 April 2011 for the allocation of a trial date for the hearing of the application and that they were aware that they had to appear at the Office of the Registrar for the allocation of a hearing date for the Rule 30 application. Incidentally it appears, *ex facie* the documentation, that the invitations to appear were received by the applicants, even before they filed their notice of appeal. The submission that these notices are part of the appeal is not an acceptable reason for the applicants' non-appearance at the Office of the Registrar for the allocation of the dates, which the applicants did at their own peril.

22. With regard to the submission that the notice of set down of the 6th and 9th respondents, was a nullity, it was submitted by their counsel that the date of the notice, namely 5 April 2011 could only be a typographical error.

23. What is important to note is that the notice of set down was served on the applicants at their nominated address on 6 April 2011 at 15h52. Notwithstanding the incorrect date it was properly delivered in terms of the Rules of Court. By no stretch of the imagination can this notice of set down be a nullity, and it can also not be compared to a notice of appeal being filed when leave to appeal is required by law. The only "irregularity"

contained in this document is the date of 5 April 2011. The applicants in this regard did not even file a Rule 30 application. They just decided not to appear.

24. It is well established that this court has a discretion to overlook any irregular procedure that does not occasion any substantial prejudice.

See: Gariseb v Bayerl 2003 NR 118 (HC) at 121I-122A/B, cited with approval in China State Construction Engineering Corporation *supra* at paragraph 15

25. I do not believe that the incorrect date on the notice caused any prejudice to the applicants. It is not disputed that the applicants had received the notice of set down of the 6th and 9th respondents at the very least. They were accordingly aware of the date on which this matter would be heard. The typographical error can be, and is condoned. Incidentally, I am also inclined to believe the allegations contained in the affidavit referred to above, but this does not form the main basis of my ruling. In any event, the submission that there was non-compliance with Rule 4 with regard to service of the notice of set down of the 7th and 10th respondents is also rejected. Rule 4 deals with service of process by the Deputy Sheriff, when an action or application is instituted, and not service after notices to oppose or defend with a nominated address have been filed in terms of Rule 6.

26. I therefore find that the matter was properly set down and that the applicants had knowledge of the date for hearing of this Rule 30 application.

See: Workers Advice Centre and Others v Mouton 2009 (1) NR 357 (HC) at paras 2 and 3

27. For these reasons, I ruled that the notice of appeal was a nullity and could be ignored, and that the Rule 30 application would proceed on 18 May 2011.

28. Against this ruling, the applicants again noted an appeal before the hearing of the application was set to continue. After the matter was called, the same applicants appeared. It was argued by the 2nd applicant (with which the other applicants aligned themselves) that this hearing could not proceed as a notice of appeal was filed against my ruling. It was also argued that the notice of appeal filed against the Full Bench decision was not a nullity because the result of that order was final in effect. I again ruled that this new notice of appeal is not competent and that the hearing of the Rule 30 application would proceed. The reasons for this second ruling are the same as those for my first ruling.

29. I also ruled that the Rule 30 proceedings would proceed, after which the applicants excused themselves from participating with

the hearing. The applicants' names were then called out, and the matter proceeded.

30. I now deal with the merits of the Rule 30 application.

31. The applicants launched an application seeking a broad and diverse range of declaratory relief against 16 respondents in total. The 2nd applicant deposed to the founding affidavit. Attached to the founding affidavit were a number of annexures which will be referred to in more detail below.

32. The 6th and 9th respondents (represented by one firm of legal practitioners) as well as the 7th and 10th respondents (represented by another firm of legal practitioners) filed identical Rule 30 notices , seeking to set aside the applicants' application as irregular on a number of grounds.

33. In the first ground the respondents allege that the notice of motion commencing the applicants' application purports to be signed by 15 applicants however, when comparing the signatures appended by these applicants it is evident that:

33.1. the 1st applicant signed a notice *per procurationem* the 12th applicant;

33.2. the 2nd applicant signed a notice *per procurationem* the 4th applicant as well as the 7th applicant;

33.3. the 15th applicant signed a notice *per procurationem* the 6th applicant.

34. By virtue of a supporting affidavit of the Director of the Law Society it is stated under oath that the 1st, 2nd and 15th applicants are not duly enrolled legal practitioners.

35. Rule 6(5)(a) read with Form 2(b) and Rule 16(2)(b) requires that a notice of motion must be issued and signed by a legal practitioner if a party is not litigating personally. Form 2(b) expressly provides for the signature of the applicant or his / her counsel.

36. Section 21(1)(c) of the Legal Practitioners Act further provides that:

> *"(1) A person who is not enrolled as a legal practitioner shall not - …*
>
> *(c) issue out any summons or process or commence, carry on or defend any action, suit or other proceeding in any court of law in the name or on behalf of any other person, except in so far as it is authorised by any other law;"*

37. A person who contravenes the above provision is guilty of an offence and liable on conviction to a view not exceeding N$100,000.00 or to imprisonment for a period not exceeding to both such time and such imprisonment.

38. I respectfully agree with the reasoning of Shivute J in the matter of August Maletzky and 14 Others v The Attorney-General and 33 Others, an unreported judgment delivered on 29 October 2010 in which objection was made to the notices of motion in that matter having been signed by a person who was not a legal practitioner on behalf of the other applicants. It was held that the notice of motion insofar as it was signed on behalf of the applicants by a person who was not a legal practitioner was a nullity.

39. I accordingly find that with respect to the 4th, 7th, 12th and 16th applicants, the application is irregular and falls to be set aside.

40. In respect of the second ground raised by the respondents, it was pointed out that the notice was not signed by or on behalf of the 13th applicant. I agree with counsel for the respondents that as the notice is, as regards the 13th applicant, falls foul of the provisions of Rule 6(5)(a) read with Form 42(b) and Rule 16(2)(b) and should also be set aside as an irregularity.

41. I deal with the third and fourth grounds together as it appears from a perusal of the application that the following papers littered with different and disjointed annexures containing affidavits deposed to by various applicants in applications lodged against some of the respondents only and that these are purportedly affidavits by some of the applicants in confirmation of the applicants" application. It also appears that the title of the affidavits of the 5th, 6th, 8th, 9th, 10th, 11th, 14th, 15th and 17th applicants is not the same title as the founding affidavit deposed to by the 2nd applicant, as well as the 1st and 15th applicants.

42. It was also pointed out that it is apparent *ex facie* the papers that only the affidavits of 1st, 2nd and 15th applicants are deposed to in support of the applicants' application.

43. By way of further examples, an affidavit is, deposed to by one Emmanuel Hochobeb. who does not appear to be a party in this application. The affidavits of the 14th applicant, as well as the 15th applicant are filed late with no explanation or application for condonation. Furthermore, in respect of the 4th, 7th and 13th applicants there appears to be no affidavit at all. There are some affidavits that do not even appear to confirm the allegations of the 2nd applicant. In respect of the 16th applicant, a completely different case number is referred to. It would appear that the

only affidavits that appear to be proper confirmatory affidavits are of the 1st, 2nd, 3rd (belated) and 15th applicants.

44. It is clear that in respect of the above affidavits, there is non-compliance with Rule 6(1) of the Rules of Court. Apart from the 1st, 2nd and 15th applicants, these affidavits do not support the facts upon which the applicants rely for relief, either in the title or the body of the affidavits.

45. It is contended by the respondent that the founding affidavit concerns an incorporation of various annexures which are attached willy nilly without any identification of the portions relied on in these annexures. It is also argued that the founding affidavit indiscriminately incorporates two annexures, namely "HB2" and "HB3" which appear to be assessments of Parliamentary public enquiries on the misadministration of housing loans previously held as well as a submission by the Aggrieved Home Owners Association. The issue with these two annexures is that they contain broad, sweeping and vague statements which are simply incorporated without identifying the portions relied on for purposes of the relief sought. It was also submitted that these two documents do not even comply with the provisions of Rule 62(3) of the Rules of Court which provides that petitions and the like shall be divided into concise paragraphs which shall be consecutively numbered.

46. The following examples are given:

46.1. paragraph 42 of the founding affidavit of the 2nd applicant contains the following statement:

> *"I attach hereto copies of two submissions to the National Council on the issue of the abuse of home loans by the respondents and mark it "HB1" and "HB2" and I incorporate the factual contents therein in this affidavit as duly affirmed."*

46.2. in paragraphs 40 and 53, annexures attached to the affidavit of second applicant are simply incorporated and regarded as supporting the cause of action *per se*, without any indication of how they support the cause of action;

46.3. further reference was made to the affidavit of the 8th applicant where he stated:

> *"I attach hereto a copy of an extract of my account with the fourth respondent."*

It was argued that there was no indication on which parts of his account he relies for his cause of action;

46.4. further the 17th applicant in paragraph 3 stated:

> *"I attach hereto an extract of my account and mark it "A". I have been debited with legal fees and life insurance illegally and I had not been [in] arrears at no time relevant to this matter."*

It was argued that no part of this annexure "A" is highlighted and explained as evidence on which the Honourable Court should rely to find the illegalities complained of;

46.5. the 15th applicant in paragraph 3 of his confirmatory affidavit stated:

> *"I attach hereto a copy of my supporting affidavit in case number (P) I 1954/2008 and I incorporate the contents thereof into this affidavit as true and correct."*

It was argued that no reliance was placed on any part of the said affidavit (which consists of 46 pages in total) to sustain the applicants' cause of action.

47. The respondents allege that they are prejudiced by these irregularities because it is not clear in which manner and in respect of which applicants the respondents have allegedly acted

unlawfully. The respondents are at a complete loss as to what case exactly to answer. They are unable to discern on which parts of the allegations in the founding papers or the annexures they are required to respond.

48. It was accordingly argued that the applicants' reliance on annexures which were simply incorporated into their affidavits without identification of the portion on which reliance was placed, results in a failure to indicate what case is sought to be made out and that the application as a whole should be set aside as irregular on this basis.

49. In support of these arguments, counsel for respondents referred to the well established principle that the annexures to an affidavit are not an integral part of it and that an applicant cannot justify his case by relying on facts which emerge from annexures to the founding affidavit, but which have not been alleged in the affidavit and to which the attention of the respondent has not been specifically directed. This is in the line with the rule that the applicant must make out a case in the founding affidavit.

See: Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality 1991 (3) SA 98 (C) at 111B-I quoted with approval in Otjozondu Mining (Pty) Ltd v Minister of Mines and Energy and Another 2007 (2) NR 469 (HC) at 475A-C

50. In Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 324F-G, the court held as follows:

> *"Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe* (sic) *to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."*

See also: Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa, 5th ed, p 443

51. In Minister of Land Affairs and Agriculture v D & S Wevell Trust 2008 (2) SA 184 (SCA) at 200 the court observed the following:

> *"It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. … Trial by ambush cannot be permitted."*

52. I am in respectful agreement with the principles enunciated in the above authorities that in motion proceedings, an applicant must when annexing documentation in support of the relief sought, identify the portions thereof on which reliance is placed and indicate the case that is sought to be made out on the strength thereof, and that without this, a party would not know what case must be met. Without compliance with these requirements, an impermissible trial by ambush takes place.

53. In light of the above authorities and on the facts, I am of the view that the manner in which the annexures were attached to the affidavits without any indication on which part of the annexures reliance is placed, and without any indication of what cause of action relates to which respondent, renders the application irregular. Almost none of the annexures referred to in the founding affidavit even provide the remotest indication of exactly which portion of the annexures reliance is placed upon. In most cases the annexure is not even identified.

54. The question for me to determine now is whether I can condone these irregularities. As previously stated, I am able to condone an irregularity if there is no prejudice to the respondent (see: China State Construction Engineering Corporation *supra*). If however, there is prejudice, the irregularity should be set aside.

55. The question to be determined, is whether the respondents have any idea of the case that must be met with regard to the whole application. It is clear that the irregular manner that the annexures were annexed to the founding affidavit, without any indication or direction as to what portions thereof are relied upon by the applicants, show that the respondents simply would not know where or how to even start responding to the allegations. There is no way on the facts in the founding papers as they stand, that they can know what case they would have to meet and what answer needs to be provided. In essence it is a trial by ambush. I am accordingly of the view that the respondents are indeed prejudiced. I therefore exercise my discretion not to condone this irregularity.

56. In the result the application in terms of Rule 30 succeeds and the entire main application launched by the applicants set aside as irregular.

57. An issue that is a cause for concern is the fact that the notice of motion in the applicants' application was not signed personally by all the applicants but by other persons who are not legal practitioners. I have dealt with this aspect above. This is in conflict with section 21(1)(c) of the Legal Practitioner's Act, and it would appear therefore, that a criminal offence has been committed. I accordingly have decided to refer this issue to the Prosecutor-General for further investigation and action.

58. What remains is the question of costs. With regard to the costs stood over from my previous ruling it was submitted by counsel for the respondents, that one cannot punish all the applicants, due to one day being wasted on argument on a number of preliminary points as opposed to the hearing of the Rule 30 application. I am in agreement with these submissions. These points were taken by the 1st, 2nd, 5th and 6th applicants. Therefore in respect of the costs of 17 May 2011, I find that the wasted costs of that day are to be paid jointly and severally, by the 1st, 2nd, 5th and 6th applicants, the one paying the other to be absolved. These costs are to include the costs of one instructing and two instructed counsel in respect of the 6th and 9th applicants, and one instructing and two instructed counsel in respect of the 7th and 10th applicants.

59. In respect of the costs of the hearing of the Rule 30 application, the notice of opposition to the Rule 30 application was not signed by the 7th applicant. I therefore find that the costs of that hearing should be paid by all the applicants (except the 7th applicant), jointly and severally, the one paying the other to be absolved.

60. In the result the following order is made

(a) The applicants' application in case number A 332/2009 is set aside in its entirety as irregular.

(b) The 1st, 2nd, 5th and 6th applicants are directed to pay the wasted costs for the proceedings on 17 May 2011 jointly and severally the one paying the other to be absolved. These costs are to include the costs of one instructing and two instructed counsel in respect of 6th, 7th, 9th and 10th respondents.

(c) The applicants (excluding the 7th applicant) are directed to pay the costs of the Rule 30 application jointly and severally, the one paying the other to be absolved. These costs are to include the costs of one instructing and two instructed counsel in respect of 6th, 7th, 9th and 10th respondents.

(d) The signing of the notice of motion in the applicants' application by persons who are not admitted legal practitioners is referred to the Prosecutor-General for further investigation and action.

SCHIMMING-CHASE, AJ

ON BEHALF OF THE APPLICANTS

In person

ON BEHALF OF 6TH AND 9TH RESPONDENTS

Adv Tötemeyer SC

Assisted by: Adv Denk

Instructed by: Fisher, Quarmby & Pfeifer

ON BEHALF OF 7TH AND 10TH RESPONDENTS

Adv Tötemeyer SC

Assisted by: Adv Denk

Instructed by: Etzold-Duvenhage