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 JOSOB	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 & PFEIFFER	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**:** VAN NIEKERK J, SWANEPOEL, J *et* SHIVUTE, J

Heard on: 29 November 2010

Delivered: 24 February 2011

JUDGMENT

SWANEPOEL, J: [1] Since 19 September 2008 conflicting decisions subsist on the question whether or not it is a pre-requisite to make a request or give a notice in terms of Rule 30(5) before an application in terms of Rule 30(1) of the High Court Rules is launched as to an alleged irregular step or proceeding. On the one hand there are the decisions requiring a notice namely *Standard Bank of Namibia Limited v Nationwide Detectives and Professional Practitioners cc,* (case no.I 811/2007, an unreported judgment delivered on 11 July 2008) and *Hendrik Christian t/a Hope Financial Services and Hewat Samuel Jacobus Beukes v Namibia Financial Institutions Supervisory Authority* (case no. A 273/2009, an unreported judgment delivered on 07 October 2009). In the latter judgment the interpretation and

application of rule 30 as found in *Arlene Beukes v Erica Beukes and Another* Case No A 22/2009 (Unreported) were reiterated and followed. On the other hand there is the judgment of *Ondjava Construction CC & Others v HAW Retailers t /a Ark Trading* 2008 (1) NR 45 (HC) delivered on 19 September 2008 wherein it was decided that no notice is required prior to a rule 30(1) application.

[2] In proceedings in this matter before Hoff, J on 20 April 2009 the presiding judge inter alia said the following:

> *"Also in the light of legal certainty I think it is imperative at this stage that a full bench of this Court decides this matter once and for all. I have discussed it with the Judge President as well as with the Registrar of this Court….."*

[3] The matter was then referred to the Full Court as provided for in section 10(1) of the High Court Act, Act No. 16 of 1990 ("the High Court Act").

[4] The applicants are not represented by any legal practitioner and all appear in person save for the 4th, 5th, 7th, 12th, 13th, 16th and 17th applicants who were not present in Court when the case was called. The 13th applicant joined after the tea adjournment as well as Terence Noble, the 7th applicant.

[5] None of the applicants filed any Heads of Argument as required by the practice of this Court, but instead filed a "STATEMENT BY APPLICANTS ON RULE 30 APPLICATION(S) BEFORE FULL COURT ON 29 NOVEMBER 2010 at 14h55 ON 24

November 2010 (hereinafter the statement). It was co-signed by the 1ST, 2ND, 3RD, 5TH, 8TH, 9TH, 11TH, 13TH, 14TH, 15TH, and 16th applicants.

[6] Mr Tötemeyer SC together with Mr Denk appear on behalf of the 6th and 9th respondents instructed by legal practitioners Fisher, Quarmby and Pfeiffer as well as for 7th and 10th respondents instructed by legal practitioners Etzold-Duvenhage.

[7] No objection was taken against the aforesaid Statement by the applicants and Mr Beukes, the 2nd applicant, delivered same on behalf of all the applicants with certain amplifications.

[8] The Court order preceding the constitution of this Court reads as follows:

"IT IS ORDERED

1. *That the matter is postponed to the full bench for a date to be arranged with the Registrar and in respect of one issue only, to wit:*
   Whether it is a prerequisite for an applicant to give notice in terms of Rule 30(5) before bringing a Rule 30(1) application?

2. *All those parties who have an interest in the outcome of the matter, when it is argued before the full bench, may join in the proceedings in accordance with the Rules of Court.*

3. *No order as to costs."*

[9] Despite my finding that the Statement is not strictly relevant to the issue presently before court, it was decided to hear arguments thereon and I will briefly touch on some of the issues raised therein:

"1. There is no Rule 30 application before the Court. There is no respondent legally before the Court."

The applicants inter alia made the statement that:

"1.1 Two Rule 30 applications were set down by 6th and 9th Respondents and 7th and 10th Respondents respectively for 13th November 2009.

1.2 On 13 November 7th and 10th respondents failed to appear and counsel for 6th and 9th respondents misinformed the Court that he was appearing for 7th and 10th respondents."

This Statement was probably based on the wording of the Court Order of the proceedings before Silungwe, AJ issued by the Registrar on 13th November 2009 which indicated that Mr Denk appeared only on behalf of the 7th and 10th respondents. However, in his introductory submission Mr Tötemeyer handed up a certified copy of the proceedings of that day where the following inter alia appears:

"Mr Denk: The applicants are before your Lordship, I appear for 7, 10, 6 and 9 respondents my Lord.
Court: 7, 10, 6 and 9?
Mr Denk: It is two different instructing counsels.
Court: That you are representing those?
Mr Denk: Yes.
Court: So you are representing 6, 7, 9 and 10.
Mr Denk: Yes my Lord."

The aforesaid prompted the 2nd applicant to exclaim that same was a fabrication and that fraud had been committed. In the same breath he asked the Court:

"May we be excused?"

The request was granted and the 2nd applicant left the Court together with all the other applicants. Needless to say that Mr Tötemeyer recorded his objections to the serious allegations made. I consequently find in any event that there is no merit based on the aforesaid statement that the 6th, 9th, 7th and 10th respondents were not before the Court.

[10] Before the record of the proceedings was handed up by Mr Tötemeyer, Mr Beukes amplified the Statement and submitted as a further objection that by virtue of the provisions of Act 10 of 2001, the full Court had been "replaced" with the Supreme Court and for that reason this Court has no jurisdiction to hear this matter. This submission is based on an incorrect reading and interpretation of section 3(a) of Act 10 of 2001 which substituted section 2 of the High Court Act, as same only pertains to appeals as follows:

> *"(2) An appeal from any judgment or order of the High Court in civil proceedings shall be –*
>
> *(a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave shall be required;*
>
> *(b) ……. ".*

As such the present application has nothing to do with an appeal referred to in the said section 2 of the High Court Act. In any event, section 10(1)(b) of the High Court Act provides that a "*single judge may at any time discontinue the hearing of any matter being heard before him or her and refer it for hearing to the full court.*"

[11] The aforesaid finding (in paragraph [9] above) on whether all four respondents are before Court, also takes care of the next 3 statements, to wit:

> ***"2. The full Court acted outside its jurisdiction to expel 14 applicants for no express reasons and to embrace all four respondents, who had no application on the roll, had failed to place it on the roll with an application for condonation as required by the rules of Court. It acted outside its jurisdiction to postpone a non-matter.*** (I interpose here to mention that a reading of the Court record in no way supports the statement that 14 applicants were expelled by the Court.)
>
> ***3. The re-enrolment of the matter by the Court mero motu falls rankly outside the jurisdiction of the Court. Nothing in law bestows the power on or remotely suggests that the Court itself may initiate or bring applications on behalf of the party to a dispute.***
>
> ***4. The Full Court acted outside its Constitutional genesis by extending the Bench to include the respondents."***

[12] The last issue in the Statement calling for comment is paragraph 5 which reads as follows:

> ***"The judgment postponing this matter and inviting all and sundry with an interest in the outcome of the matter falls outside the spirit and the letter of the Constitution and the Law. The order is ultra vires the Court's competence."***

[13] Paragraph 2 of the order of Court dated 27 April 2010 referred to in paragraph 8 supra was included as a consequence of Mr Beukes's address to the Court on that day wherein he said the following:

> *"My Lords and My Lords and Lady, a further question of concern is that the number of Rule 30s, even in the ranks of the Applicants, are*

pending and that these people have legal interest in having to be joined in that Application. Surely it is surprising, it is just surprising that this rush to have a Rule 30 Application which obviously need a lot of ventilation and a lot of thought, especially because it is referred to the full bench, it is surprising to us that people who have interest in this matter, that these people are left out in this Rule 30. Surely, those people who are already enrolled and whose matters have been set down, under circumstances like that, as far as I understand the rules, the Court will tend to join this Rule 30s. Because there is a question of law that must be determined. Now to me it seems chaotic to have a full argument now and in two months we have the same argument with a different set of Applicants and two months after that, I know that there are Rule 30s set down right up to September this year. Now, I humbly ask whether the Court will not consider it very chaotic that we are actually descending in the same sort of scenario or setting the stage for the same sort of scenario where we may develop different authorities, on the same question. And where we will have to probably refer the matter somewhere else, when such authorities might be developed. But this is something, I ask the Court's indulgence to make such a remark because it is the Court's decision, it is not mine…."

[14] Furthermore, bearing in mind the many unrepresented applicants in similar matters before the High Court, it was only a re-statement of the law that anyone with an interest may apply in terms of the Rules of Court to join or be joined. In my view the invitation by the Court falls squarely in the spirit and letter of the Constitution. In any event, no person made an application for joinder. Only Mr August Maletsky sought leave to hand up heads of argument to make some submissions, which was refused as he is not a party to these proceedings nor has he formally applied to be joined.

[15] I now turn to the question this Court has to decide as stated before. Rule 30 of the High Court and Rule 30 of South Africa before 1996 are identical and read as follows:

> *"30(1) A party to a cause in which an irregular step or proceeding has been taken by any other party may, within 15 days after becoming aware of the irregularity, apply to court to set aside the step or proceeding: Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application.*
>
> *(2) Application in terms of sub-rule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged.*
>
> *(3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet*
>
> *(4) Until a party has complied with any order of court made against him or her in terms of this rule, he or she shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.*
>
> *(5) Where a party fails to comply timeously with a request made or a notice given pursuant to these rules, the party making the request or giving the notice may notify the defaulting party that he or she intends, after the lapse of 10 days to apply for an order that such notice or request be complied with, or that the claim or defence be struck out, and failing compliance within the 10 days, application may be made to court and the court may make such order thereon as to it seems meet".*

The South African rule 30(5) was subsequently deleted and substituted with the following;

> *''30A (1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice, or request be complied with or that the claim or defence be struck out.*
>
> *(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet."*

[16] Hoff J has in the *Ondjava*-case (*supra*) in a, with respect, well reasoned judgment inter alia analysed and discussed the provisions of rule 30 in detail with inter alia references to South African cases *Khunou and Others v M Fihrer & Son (Pty) Ltd and Others* 1982(3) SA 353 W; *Absa Bank Ltd v The Farm Klippan 490 CC* 2000(2) SA 211 (W) and *Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd* 1968(1) SA 503 T. Aware thereof that same were not binding on the Namibian High Court, he found the reasoning thereof convincing and adopted same as also being applicable to our rule 30. He also found that the *Standard Bank v Nationwide Detectives* case (supra) was wrongly decided because of a misplaced reliance on non-applicable case law and an obvious oversight of existing governing case law (*Hansella* and *Absa Bank* cases *infra*). I content myself with some of the extracts of the *Ondjava* case:

> *"[22] Prior to December 1996 the South African rule 30(5) was worded exactly the same as our rule 30(5) and thus South African case law on the application and interpretation of rule 30(5), although not binding, may be persuasive authority.*

Trollip J (as he then was) considered the applicability of the provisions of rule 30(5) in respect of rule 21(6) in Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd 1968 (1) SA 503 (T) and concluded at 504E – G as follows:

> *"… the general rule in Rule 30(5) was obviously intended to apply in all those cases where a particular Rule did not itself provide for a special sanction for non-compliance with a notice or request, as, for example, in Rules14(5), 14(9), 36(2) and 37(1). But where such special sanction was provided as, for example, in Rules 21(6) and 35(7), that was to apply instead of Rule 30(5). To try to read such Rules with and subject to Rule 30(5) would be not to supplement them but to supercede or destroy them. In fact, if Rule 30(5) does apply then Rule 31(6) would have been quite unnecessary and can be ignored. That could never have been the intention."*

[23] In my view, the reference to rule 31(6) (supra) is erroneous and should read rule 21(6). There was no rule 31(6).

[24] Rule 30(5) was deleted by subsequent legislation in South Africa and substituted with rule 30A which reads as follows:

(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule, notice, or request be complied with or that the claim of defence be struck out.

(2) Failing compliance within 10 days, application may on notice be made to the court and the court may make such order thereon as to it seems meet.

[25] In Absa Bank Ltd v The Farm Klippan 490 CC 2000(2) SA 211 (W) Eksteen AJ supported the reasoning of Trollip J (in Hansella) and stated the following at 213G-H:

> *'Certainly the old Rule 30(5) was out of place in a Rule where all the other subrules of Rule 30 deal with irregular proceedings. It is not an irregular proceeding to fail to comply with a request or notice. It therefore does seem anomalous that the old Rule 30(5) was used to compel compliance with Rules which did not within themselves provide a specific remedy or sanction. What is now clear is that Rule 30A is the procedure to use where a party wishes to compel compliance with a notice or request given in terms of those Rules which have no special remedy for failing to comply or respond thereto.' "*

Hoff J concluded as follows:

> *"[26] I support the passages quoted (supra) in the Hansella and Absa Bank cases and accordingly find that the provisions of our rule 30(5) are not applicable to the rest of the subrules of rule 30."*

[17] The abovementioned finding was in direct conflict with Parker J's finding in the *Christian-Namfisa*-case (*supra*) where he relied on a former judgment by himself in *Arlene Beukes v Erica Beukes and Another* case No. A22/2009 wherein the following was stated:

> *"In my view, the aforementioned second preliminary objection relates to a step that amounts to an irregularity or impropriety of form within the meaning of rule 30 of the Rules of Court, and it is my opinion that it would rather have been more efficacious if the applicant had taken the route open to her by rule30; in which case the respondent would have*

been given the opportunity of removing the cause of the complaint in terms of rule 30 (2). The applicant did not follow this simple procedure whose efficacy lies in the fact that a party which has taken the irregular or improper step complained of is given the opportunity to remove the cause of the complaint without the immediate intervention of the Court. The Court may enter on the scene to set aside the irregularity or impropriety only if the offending party has failed to remove such complaint; and moreover, in that event, that party is not even permitted to take any further step in the matter unless and until that party has complied with any order of the Court in that regard".

[18] Mr Tötemeyer made the submission with which I agree that rule 30(1) and rule 30(5) are mutually exclusive and if rule 30(5) is applied to rule 30(1) - (4) same would lead to absurdities. He further submitted that the reference to rule 30(2) in the abovementioned citation leaves one with the inescapable inference that when the learned judge delivered the two judgments he had the substituted rule 30(2) read with rule 30(1) of South Africa in mind, which was of course not applicable in Namibia. Our rule 30(2) is clear and unambiguous and only prescribes how the irregularity or impropriety in terms of rule 30(1) should be specified in the notice of application.

[19] I am in respectful agreement with the reasoning and finding by Hoff J in the *Ondjava* matter which in my view correctly reflects the law on the interpretation of Rule 30 in Namibia. That said, I am furthermore of the view that there is merit, through the correct channels, to advocate for substituting our present Rule 30(5) on similar lines as in South Africa which would make the rule more readily understood.

[20] In the result the question posed above is answered as follows:

It is not a prerequisite for an applicant to give notice in terms of Rule 30(5) before bringing a Rule 30(1) application.

[21] The following orders are made:

1. The decision on the merits of the rule 30 application is referred back to the court *a quo*.

2. The applicants (save for the 4th and 17th applicants who neither signed the statement nor were present nor have made submissions in Court) are ordered to pay the costs of these proceedings which costs shall include the costs of the two instructing counsel (messrs Fisher, Quarmby & Pfeiffer and Etzold Duvenhage) and their two instructed counsel.

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SWANEPOEL, J

I concur

_____

VAN NIEKERK, J

I concur

_____

SHIVUTE, J

ON BEHALF OF THE APPLICANTS	In Person
ON BEHALF OF THE 6th and 9th RESPONENTS	Adv. Tötemeyer S.C
	assisted by Adv. Denk
Instructed by:	Fisher, Quarmby & Pfeiffer
ON BEHALF OF THE 7th and 10th RESPONENTS	Adv. Tötemeyer S.C
	assisted by Adv. Denk
Instructed by:	Etzold-Duvenhage