

DISPUTE RESOLUTION ALERT

31 JANUARY 2023



CLIFFE DEKKER HOFMEYR

INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

Some rules are meant to be broken, but at what cost in a court of law?

"The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system." – Rampai J in the case of *Louw v Grobler and Another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016).



FOR MORE
INSIGHT INTO
OUR EXPERTISE
AND SERVICES

Some rules are meant to be broken, but at what cost in a court of law?

"The prime purpose of the court rules is to oil the wheels of justice in order to expedite the resolution of disputes. Quibbling about trivial deviations from the court rules retards instead of enhancing the civil justice system." – Rampai J in the case of *Louw v Grobler and Another* (3074/2016) [2016] ZAFSHC 206 (15 December 2016).

It is often said that rules are meant to be broken. However, the consequences of breaking the Uniform Rules of Court (Rules) could be scathing on a litigant. This was evident in the case of *Lekwa Local Municipality and Another v Afri-Infra Group (Pty) Ltd* [2022] JDR 2254 (MN). In this case, two interlocutory applications were brought by the first applicant, being Lekwa Local Municipality and the second applicant, Mr Gert Sibanda respectively, against the respondent, Afri-Infra Group (Pty) Ltd, in terms of Rule 30(2)(c). The common complaint by the applicants was that the respondent had irregularly amended its particulars of claim in terms of Rule 28.

The respondent opposed the applicants' respective applications on the basis that the two applications were brought late without applications for condonation. It was common cause that although Lekwa Local Municipality's condonation application was not properly before the court and could not be adjudicated on, Sibanda had sought condonation for the late filing of his application in terms of Rule 30(2)(c). The crux of the respondent's opposition was that Sibanda had in any event failed to seek condonation for the late filing of the Rule 30(2)(b) notice preceding the Rule 30(2)(c) application. The subsequent condonation application in respect of the application was therefore stillborn.



The Legal 500 EMEA 2022 Results graphic features a dark blue background with white and yellow text. At the top left is the 'The LEGAL 500' logo, and to its right is the text '2022 RESULTS'. Below the logo is the text 'EMEA'. The graphic contains four paragraphs of text, each starting with 'The Legal 500 EMEA 2022 recommended our' followed by a list of names and their respective practice areas.

The Legal 500 EMEA 2022 recommended our **Dispute Resolution practice** in **Tier 1** for dispute resolution.

The Legal 500 EMEA 2022 recommended **Tim Fletcher** as a leading individual for dispute resolution.

The Legal 500 EMEA 2022 recommended **Kgosi Nkaiseng** and **Tim Smit** as next generation lawyers for dispute resolution.

The Legal 500 EMEA 2022 recommended **Rishaban Moodley, Jonathan Witts-Hewinson, Lucinde Rhodie, Clive Rumsey, Desmond Odhiambo, Mongezi Mpahlwa, Corné Lewis, Jackwell Feris** and **Kylene Weyers** for dispute resolution.

Some rules are meant to be broken, but at what cost in a court of law?

CONTINUED

Set period to raise an objection

The contention by the respondent was based on the fact that pursuant to service of the respondent's notice of intention to amend its particulars of claim in terms of Rule 28, Sibanda was afforded 10 days within which to raise an objection to the proposed amendments. The 10-day period lapsed and the amendment to the particulars of claim was perfected. Twenty-five court days after service of the amended particulars of claim, the applicants served separate notices in terms of Rule 30(2)(b), on the basis that the amendment to the particulars of claim was irregular. Sibanda proceeded to serve the Rule 30(2)(c) application on the respondent 15 days out of time.

The central issue in the case was whether the court could condone the late filing of the Rule 30(2)(c) application in circumstances where Sibanda failed to bring a similar condonation application excusing the late filing of the preceding Rule 30(2)(b) notice. Rule 30(2)(b) required that within 10 days of becoming aware of the irregular step, Sibanda ought to have served his Rule 30(2)(b) notice. The court reiterated the principle found in the case of *Klein v Klein* [1993] (2) SA 648 (BGD), that "knowledge" must be distinguished from "appreciation". The knowledge envisaged by the prescripts of the rule is the knowledge that a step has been taken, whether or not it is coupled with an appreciation that the step was irregular or improper.

In any event, in the application of Rule 30, the court found that it must only apply to irregularities of form, and not matters of substance. This principle was recently deliberated by the Constitutional Court in the case of *Afrocentrics Projects and Services (Pty) Ltd t/a Innovative Distribution v State Information Technology Agency (SITA) SOC Ltd and Others* [2023] ZACC 2, where the court *a quo* had found that the applicant's main application was irregular and improper. The Constitutional Court remitted the matter back to the court *a quo* for a proper determination in terms of Rule 30 where the court must satisfy itself that the proceeding or step (not the substance) is in fact irregular or improper.

Some rules are meant to be broken, but at what cost in a court of law?

CONTINUED

Findings

In light of these considerations, the court found that Sibanda's condonation application for the late filing of the Rule 30(2)(c) application was in fact hollow as there was no application for the condonation of the first irregular step, that being the service of the Rule 30(2)(b) notice outside of the 10-day period to anchor the application. Therefore, the court dismissed the applicants' Rule 30(2)(c) applications.

Importantly, the court also granted an order for punitive costs against the applicants for their failure to apply for condonation for the late filing of the respective Rule 30(2)(b) notices. It was the opinion of the court that *"this should not have happened and borders on gross negligence and therefore extravagant on the time of the court and litigants"*.

As was pronounced in *Louw v Grobler & Another*:

"The rules set the parameters within which the course of litigation has to proceed. The rules of engagement, must, therefore, be obeyed by the litigants. However, dogmatically rigid adherence to the uniform court rules is as distasteful as their flagrant disregard or violation. Dogmatic adherence, just like flagrant violation, defeats the purpose for which the court rules were made."

The rules therefore act as anchors in the tides of injustice, to keep the principles of law afloat.

**Nomlayo Mabhena-Mlilo and
Buhle Duma**

2022 RESULTS

CHAMBERS GLOBAL 2011 - 2016, 2022 ranked our Dispute Resolution practice in Band 2: dispute resolution.

Tim Fletcher ranked by **CHAMBERS GLOBAL 2022** in Band 2: dispute resolution.

Clive Rumsey ranked by **CHAMBERS GLOBAL 2019 - 2022** in Band 4: dispute resolution.

Jonathan Witts-Hewinson ranked by **CHAMBERS GLOBAL 2022** as a Senior Statesperson.

Tobie Jordaan ranked by **CHAMBERS GLOBAL 2022** in Band 4: restructuring/insolvency.



Cliffe Dekker Hofmeyr

OUR TEAM

For more information about our Dispute Resolution practice and services in South Africa and Kenya, please contact:



Rishaban Moodley

Practice Head & Director:
Dispute Resolution
Sector Head:
Gambling & Regulatory Compliance
T +27 (0)11 562 1666
E rishaban.moodley@cdhlegal.com



Tim Fletcher

Chairperson
Director: Dispute Resolution
T +27 (0)11 562 1061
E tim.fletcher@cdhlegal.com

Timothy Baker

Director:
Dispute Resolution
T +27 (0)21 481 6308
E timothy.baker@cdhlegal.com

Eugene Bester

Director:
Dispute Resolution
T +27 (0)11 562 1173
E eugene.bester@cdhlegal.com

Jackwell Feris

Sector Head:
Industrials, Manufacturing & Trade
Director: Dispute Resolution
T +27 (0)11 562 1825
E jackwell.feris@cdhlegal.com

Thabile Fuhrmann

Joint Sector Head:
Government & State-Owned Entities
Director: Dispute Resolution
T +27 (0)11 562 1331
E thabile.fuhrmann@cdhlegal.com

Claudette Dutilleux

Director:
Dispute Resolution
T +27 (0)11 562 1073
E claudette.dutilleux@cdhlegal.com

Anja Hofmeyr

Director:
Dispute Resolution
T +27 (0)11 562 1129
E anja.hofmeyr@cdhlegal.com

Tiffany Jegels

Director:
Dispute Resolution
T +27 (0)11 562 1388
E tiffany.jegels@cdhlegal.com

Tobie Jordaan

Sector Head:
Business Rescue, Restructuring & Insolvency
Director: Dispute Resolution
T +27 (0)11 562 1356
E tobie.jordaan@cdhlegal.com

Corné Lewis

Director:
Dispute Resolution
T +27 (0)11 562 1042
E corne.lewis@cdhlegal.com

Vincent Manko

Director:
Dispute Resolution
T +27 (0)11 562 1660
E vincent.manko@cdhlegal.com

Richard Marcus

Director:
Dispute Resolution
T +27 (0)21 481 6396
E richard.marcus@cdhlegal.com

Burton Meyer

Director:
Dispute Resolution
T +27 (0)11 562 1056
E burton.meyer@cdhlegal.com

Mongezi Mpahlwa

Director:
Dispute Resolution
T +27 (0)11 562 1476
E mongezi.mpahlwa@cdhlegal.com

Kgosi Nkaiseng

Director:
Dispute Resolution
T +27 (0)11 562 1864
E kgosi.nkaiseng@cdhlegal.com

Desmond Odhiambo

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E desmond.odhiambo@cdhlegal.com

Lucinde Rhoodie

Director:
Dispute Resolution
T +27 (0)21 405 6080
E lucinde.rhodie@cdhlegal.com

Clive Rumsey

Sector Head: Construction & Engineering
Director: Dispute Resolution
T +27 (0)11 562 1924
E clive.rumsey@cdhlegal.com

Belinda Scriba

Director:
Dispute Resolution
T +27 (0)21 405 6139
E belinda.scriba@cdhlegal.com

Tim Smit

Director:
Dispute Resolution
T +27 (0)11 562 1085
E tim.smit@cdhlegal.com

Roxanne Webster

Director:
Dispute Resolution
T +27 (0)11 562 1867
E roxanne.webster@cdhlegal.com

Kylene Weyers

Director:
Dispute Resolution
T +27 (0)11 562 1118
E kylene.weyers@cdhlegal.com

Joe Whittle

Director:
Dispute Resolution
T +27 (0)11 562 1138
E joe.whittle@cdhlegal.com

Roy Barendse

Executive Consultant:
Dispute Resolution
T +27 (0)21 405 6177
E roy.barendse@cdhlegal.com

Jonathan Witts-Hewinson

Executive Consultant:
Dispute Resolution
T +27 (0)11 562 1146
E witts@cdhlegal.com

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

©2023 11880/JAN