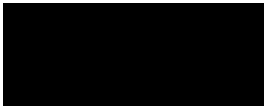


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO.: 4337/2022

|            |                                                                                    |
|------------|------------------------------------------------------------------------------------|
| (1)        | REPORTABLE: NO                                                                     |
| (2)        | OF INTEREST TO OTHER JUDGES: NO                                                    |
| (3)        | REVISED:                                                                           |
| 15.03.2024 |  |
| DATE       | SIGNATURE                                                                          |

In the application between:

**MR ERNEST KETCHA NGASSAM**

Plaintiff/respondent

and

**MTN GROUP MANAGEMENT SERVICES (PTY) LTD**

Defendant/applicant

*This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on*

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**JUDGMENT**

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**MEIRING, AJ:**

## INTRODUCTION

- [1] This is an application under rule 30.
- [2] MTN Group Management Services (Pty) Ltd, the defendant in the action under the above case number, to which I refer below as MTN, seeks an order under rule 30(1) declaring the delivery on 25 April 2022 by the plaintiff, Mr Ngassam, of the document described below an irregular step and directing that it be set aside.
- [3] The document in question is headed “Plaintiff’s Notice of Replication to the Defendant’s Notice of Intention to File Exceptions to the Plaintiff’s Replication to the Defendant’s Special Pleas”. Whether it is in fact a notice properly so-called is doubtful. For this reason, I call it a document. Discursively and even argumentatively, it seeks to engage with the complaint that MTN raised in a notice under rule 23(1)(a) to Mr Ngassam’s replication.
- [4] Yet, as appears below, the document of 25 April 2022 ranges far beyond addressing only the complaint framed in the respondent’s notice under rule 23(1)(a). It deals also with the issues up for determination in the action itself.

## THE FACTS

- [5] On 4 February 2022, the plaintiff, Mr Ngassam, instituted action against MTN seeking damages of R541,192,544.98 for the latter’s termination of his employment under section 189 of the Labour Relations Act, 1995.
- [6] On 10 February 2022, MTN indicated its intention to defend the action. On 10 March 2022, it delivered a plea, in which, over and above pleading over, it raised two special pleas, namely one premised upon the plaintiff’s alleged non-compliance with section 191 of the Labour Relations Act and the other challenging the jurisdiction of this court.
- [7] On 26 March 2022, Mr Ngassam replicated both to the special pleas and to the plea proper.
- [8] On 8 April 2022, MTN delivered a notice under rule 23(1)(a), complaining that the plaintiff’s replication was vague and embarrassing.

- [9] On 25 April 2022, the plaintiff delivered the document to which I refer above, headed “Plaintiff’s Notice of Replication to the Defendant’s Notice of Intention to File Exceptions to the Plaintiff’s Replication to the Defendant’s Special Pleas”. The first part of it – which I quote to convey the tenor of the document – reads:

**“BE PLEASED TO TAKE NOTICE THAT,** Ernest Ketcha Ngassam (hereinafter called the Plaintiff) herewith intends raising some replication on the grounds set out hereunder as clarities and most certainties as to what is meant by ‘Right’, ‘inherent jurisdiction’ and ‘general jurisdiction’ enjoyed by the High Courts and Labour Courts with regard to the Plaintiff’s decision to pursue this cause of action:

**A. INTRODUCTION:-**

- 1.1. Plaintiff has, in the main cause of action, on the most recent Replication to the Defendant’s special pleas for both sections 191(1) and lack of jurisdiction by this Court, and now in this Replication, in a not so subtle manner, as it is always within the realm of plausibility, that by virtue of both sections 191(1), 191(2), 191(3), 191(4), 191(5), section 157(1) and 157(2) of the Labour Relations Act, 66 of 1995 as amended, that section 157(1) does not afford Labour Court general jurisdiction, in employment matters by virtue of section 157(2). High Court and Labour Court share concurrent jurisdiction in respect of employment related disputes, over which the Labour Court does not have exclusive jurisdiction. This means that High Court’s jurisdiction should not be ousted simply because a dispute falls within the overall sphere of employment disputes.
- 1.2. In an nutshell, Plaintiffs challenge of lawfulness of the termination of employment contract for more obvious reasons called into question the procedural and substantive aspects related to unlawful breach of contract. The procedural and substantive aspects of the challenge of the lawfulness are predicated on the interpretation of relevant statutes read together with the Constitution of the Republic of South Africa, Act 108 of 1996, as amended; and annodated.
- 1.3. Plaintiffs challenge of lawfulness of termination of employment contract has the potential to found a claim for the relief for the infringement of the Labour Relations Act, 66 of 1995, and also a contractual claim for the enforcement of a right that does not emanate from the Labour Relations Act, 66 of 1995.
- 1.4. This is amplified in the fact that Plaintiff has in the main cause of action, made it clear that, the Defendant through its Board of Directors negligently failed to comply with the provision of section 76 of the Companies Act, 2008, which

*simply states that, Defendant should through its Board of Directors act in good faith and for proper purpose, in the interest of both the Plaintiff and the Defendant, with the degree of care, skill and diligence that may reasonably be expected of a person who carries out the same functions as a Director in relation to the Defendant and Plaintiff and who has knowledge, skill and experience of that Director, and act with duty of utmost care to ensure the reasonable safeguards of the interests and fundamental rights of the Plaintiff during consultation process in terms of section 189(3) of the Labour Relations Act, 66 of 1995.*

- 1.5. *Section 76 of the Companies Act, 71 of 2008, helps outline in blunt terms the procedural and substantive aspects of termination of the Plaintiff's employment contract, as to what the Defendant ought to do before in order to comply with the procedural requirements as enshrined in section 189(3) of the Labour Relations Act, 66 of 1995.*
- 1.6. *It is clear that sections 189, and 189(3) for the purpose of proper and effective consultation for the employer's operational requirements should not be read in isolation but must be read with sections 66 and 76 of the Companies Act, 71 of 2008.*
- 1.7. *Therefore, Plaintiff's claim for procedural and substantive aspects of the unlawful termination of his employment contract, is a claim which is not predicated on the Labour Relations Act only, but it is also premised upon the provisions of Companies Act, 2008. This is in line with the legal principles as ventilated much more clearly in the LOUISAH BASANI BALOYI VERSUS PUBLIC PROTECTOR AND OIBERS CCT01/20[2020] ZACC 27, in which it was held that termination of contract of employment has the potential to found a claim for the relief for the infringement of the Labour Relations Act, 66 of 1995, and also a contractual claim for enforcement of a right that does not emanate from the Labour Relations Act, 66, of 1995, as amended.*
- 1.8. ***IT IS NOTEWORTHY THAT*** *the Plaintiff's contractual claim for enforcement of the Plaintiff's employment contract, that got unlawfully terminated under the ruse of retrenchment, does not only emanate from the Labour Relations Act, 66 of 1995, but also from the operation of section 66 and 67 of the Companies Act, 71 of 2008, which were intended to create procedural legal obligations on the Defendant, to act both procedurally and substantively fair, observing the duties to act with honesty and utmost care when to disclose relevant information in the instances of consultation process as envisaged under version of section 189, not least to the*

*provisions of section 189(3) of the Labour Relations Act 66 of 1995.*

- 1.9. *Plaintiff challenges the lawfulness of the termination of his employment contract in that invoking the provisions of section 66 and 76 of the Companies Act, 71 of 2008 read together with the provisions of section 191 and with relevant sections of the Labour Relations Act, 66 of 1995 giving effect to the provisions of section 23 of the Constitution of the Republic of South Africa, 108 of 1996.”*  
[sic passim]

- [10] These are the first 4.5 pages of a 15-page document. In the next section of the document, the plaintiff responds *seriatim* to the notice under rule 23(1)(a). The document also revisits the plaintiff's claim as framed in the particulars of claim and replication and contains generous references to statutes and case law. Perhaps not surprisingly, given its novelty, the defendant construed the delivery of that document as an irregular step.
- [11] Accordingly, on 20 May 2022 MTN delivered a notice under rule 30(2)(b), calling upon the plaintiff, within 10 days, to withdraw the document of 25 April 2022. What is not ventilated in the papers in this application is that that notice under rule 30(2)(b) was some days out of time. It ought to have been delivered within ten days of MTN having become aware of the delivery of the document of 25 April 2022. No condonation is sought for the lateness of that notice. I address this below.
- [12] The ten days that MTN thus granted the plaintiff to withdraw the document of 25 April 2022 ran out on 3 June 2022. On that date, the plaintiff delivered another document, this time headed “Plaintiff's Notice of Intention to Oppose Defendant's Notice of Intention in Terms of Rule 30 of the Uniform Rules”.
- [13] Thereupon, on 21 July 2022 MTN brought this application under rule 30(1), seeking an order declaring the plaintiff's document of 25 April 2022 an irregular step and directing that it be set aside. This application was some seventeen days out of time. The applicant seeks condonation for its lateness.
- [14] At the hearing, the plaintiff appeared in person. While in various documents he emphasises the fact that he is not represented in these proceedings, at previous

junctions he has had the benefit of legal counsel. In fact, on the court file there are a practice note of the applicant dated 30 October 2023, a fortnight before this hearing date, and an undated set of heads of argument in this rule 30 application. There is an unmistakable similarity in style, linguistically and typographically, between the documents so delivered under Mr Ngassam's name and those authored by counsel.

## **THE LAW**

### **The problem**

[15] As I say above, MTN seeks condonation for the late delivery of this application. Yet, it does not similarly seek condonation for the late delivery of its notice under rule 30(2)(b).

[16] This creates the paradoxical situation that MTN complains of non-compliance with the Uniform Rules, while, in doing so under rule 30, itself breaching that very rule.

[17] The question, therefore, arises how a court is to respond, the more so in circumstances where the document of 25 April 2022 is obviously inapposite, eccentric, and unhelpful. Akin to heads of argument, it does the opposite of what pleadings are supposed to do: rather than narrow the issues, it aids in proliferating them. Indeed, far from addressing the notice under rule 23(1)(a) only, it ranges far and wide over the pleaded issues. One wonders what the court that in due course hears any exception that might be brought is to do with this document, especially if the plaintiff insists on centring the conduct of his case upon it.

[18] Accordingly, this court must grapple with how to balance the two infractions of the Uniform Rules before it, namely the one complained of by MTN and the one that MTN itself committed in mustering and advancing that very complaint.

### **The role of the Uniform Rules**

[19] This necessitates a consideration of the object of the Uniform Rules of Court and how they should be applied.

[20] The starting point of this enquiry is section 34 of the Constitution. It confers upon everyone the right of access to the courts. That includes the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court.

[21] In *Mukaddam v Pioneer Foods (Pty) Ltd and Others*,<sup>1</sup> the Constitutional Court observed:<sup>2</sup>

*“Access to courts is fundamentally important to our democratic order. It is not only a cornerstone of the democratic architecture but also a vehicle through which the protection of the Constitution itself may be achieved. It also facilitates an orderly resolution of disputes so as to do justice between individuals and between private parties and the State.”*

[22] The *Mukkadam* court went on to draw upon the reasoning of the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another*:<sup>3</sup>

*“The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.”*

[23] To realise this right of access to the courts, empowered by section 173 of the Constitution, the High Court uses the Uniform Rules of Court to regulate its process and to determine how disputes that it hears are both to be readied for hearing and to be heard.

[24] In *Mukaddam*, after the above statements about the fundamental principle of access to the courts, the Constitutional Court said this:<sup>4</sup>

*“However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the High Courts. The Supreme Court of Appeal and this Court have their own rules. These rules confer procedural rights on litigants and also help in*

creating certainty in procedures to be followed if relief of a particular kind is sought.

It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice. But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process."

[emphasis added]

[25] The Uniform Rules regulate the practice and procedure of the courts. Their object is to ensure the inexpensive and expeditious completion of litigation before the courts, without their being an end in and of themselves.<sup>5</sup>

[26] In *Arendsnies Sweefspoor CC v Botha*,<sup>6</sup> the SCA observed:<sup>7</sup>

*"It is trite that the rules exist for the courts, and not the courts for the rules (see Republikeinse Publikasie (Edms) Beperk v Afrikaanse Pers Publikasie (Edms) Bpk 1972 (1) SA 773 (A) 783 A-B; Mynhardt v Mynhardt [1986] 3 All SA 197; 1986 (1) 456 (T) also Ncoweni v Bezuidenhout, 1927 CPD 130), where it was pertinently observed that:*

*'the rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where the Rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the Rule one is bound to follow this Rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.'*

*Courts should not be bound inflexibly by rules of procedure unless the language clearly necessitates this – see Simons v Gibert Harner & Co Ltd 1963 (1) SA 897 (N) at 906. Courts have a discretion, which must be exercised judicially on a consideration of the facts of each case, in essence it is a matter of fairness to both parties (see Federated Employers Fire & General Insurance Co Ltd v McKenzie [1969] 3 ALL SA 424; 1969 (3) SA 360 (A) at 363 G–H).*

*With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rules as ensuring a fair trial or hearing. 'rules of court are delegated legislation, having statutory force, and are binding on the court, subject to the court's power to prevent abuse of its process.' And*

*rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice (see LAWSA, third Edition Volume 4 – paragraph 8–10 page 10 et seq) (see also Kgobane & another v Minister of Justice & another [1969] 3 ALL SA 379 or 1969 (3) SA 365 (A) at 369 F–H). Considerations of justice and fairness are of prime importance in the interpretation of procedural rules (see Highfield Milling Co (Pty) Ltd v A E Wormald & Sons [1966] 3 ALL SA 27; 1966 (2) SA 463 (E) at 465 F–G)."*

[27] In sum, in the light of the excerpts from the *locus classici* collected above, and the earlier authorities upon which they rest, it is fair to say that, while the Uniform Rules serve to impose a form of discipline on the steps that litigants take to have their disputes resolved, their ultimate object in our constitutional democracy is to promote access to the courts and to ensure that the right is realised to have disputes resolved by the application of the law in a fair public hearing before a court.

### **The Uniform Rules on pleadings**

[28] Several of the Uniform Rules contain the principles governing the pleadings in an action.

[29] Upon a proper understanding of the Uniform Rules and their role, it seems the preferable position that they are definitive of litigants' procedural rights. It is not for a litigant to create their own process, as it were to reinvent the wheel at every stage of the process.

[30] So, for instance, rule 23 provides what a litigant might do when it is minded that the other party's pleadings is objectionable for being vague and inscrutable or not making out a case or defence. Accordingly, in appropriate circumstances, the delivery of a notice under rule 23(1)(a) or an exception are two cognisable responses to any of the series of pleadings listed above, also in response to a replication, like on these facts.<sup>8</sup>

[31] Once a notice under rule 23(1)(a) is delivered, as occurred here, what one would expect of a litigant is one of two responses. Either they will respond to one or more of the complaints in the notice by seeking leave to amend the offending

pleading, or they will stick to their proverbial guns and invite the complaining party to proceed to deliver the threatened exception (or effect the latter by doing nothing). As is by now plain, the plaintiff took neither of those steps. Rather, it delivered the document of 25 April 2022.

- [32] The Uniform Rules do not provide for a litigant to respond through the delivery of a notice or another document. Doing so, would be irregular: it would be a step not provided for in the Uniform Rules.

### **Rule 30**

- [33] In the Uniform Rules, too, there are provisions that might be called policing provisions. Central among those is rule 30, which is available where a party has irregularly taken a step that advances the proceedings one stage nearer to completion. In Latin, a *regula* is a rule. An ir-regular [*sic*] step is one that is not in conformity with the Uniform Rules.

- [34] Rule 30 applies both to actions and applications. It does not apply to omissions, namely the failure to take steps. Under rule 30, the innocent party is entitled to apply to court to have the complained-of irregular step set aside. Naturally, the innocent party is not obliged to set in train the process envisaged in rule 30. It might refrain if the irregular step in question did not occasion it any prejudice.

- [35] Cheek by jowl with rule 30, rule 30A is another policing provision. It provides a general remedy for non-compliance with *inter alia* the Uniform Rules. It empowers the innocent party to place the defaulting party on notice that, if the complaint is not rectified within ten days, an application will be made for an order from the Court for compliance or striking out of a claim or defence. Rule 30A expressly empowers the Court in such an application to “*make such order thereon as it deems fit*”. The interplay between rules 30 and 30A is not now in issue.

- [36] In an application under rule 30, a court will set aside the complained-of irregular step only if it would cause prejudice to the complaining party.<sup>9</sup> On the other hand, even if a case is made out for the relief sought, a court has a discretion not to yield to the aggrieved party's request. In the exercise of that discretion, the court

must give due regard to any possible prejudice to either party. It must do a balancing exercise.

### **Non-compliance with rule 30(2)(b) where no condonation is sought**

[37] How, then, the question arises, is this problem to be resolved: MTN seeks to put in motion the policing powers in rule 30, while itself having fallen in breach of it.

[38] In section 173, the Constitution recognises that the High Court “*has the inherent power to protect and regulate [its] own process*”. Naturally, this does not give it free rein capriciously to disregard the Uniform Rules. Yet, it should also not get unnecessarily entangled in formalistic technicalities. On the one hand, a court must guard against abuse of the Uniform Rules through their disregard. On the other, it must guard against pedantry that does not serve a legitimate end like protecting litigants against prejudice.

[39] It is helpful to consider the allied enquiry undertaken in *Pangbourne Properties Ltd v Pulse Moving CC and another*.<sup>10</sup> This division considered whether affidavits delivered out of time were properly before the court even where there was no condonation application:<sup>11</sup>

*“On the facts of the present matter I deem it unnecessary for either of the parties to have brought a substantive application for condonation.”*

[40] The papers were before the Court, the matter was ready to be adjudicated. No party alleged prejudice. On this, the court observed:<sup>12</sup>

*“The failure of the respondents to utilise the provisions of rule 30 regarding the setting-aside of irregular proceedings strengthens my view that neither party was prejudiced by the late filing of the affidavits.”*

[41] The court went on to say:<sup>13</sup>

*“It is in the interests of justice that the affidavits be taken into account and that this matter be finalised and unnecessary additional costs be avoided. Insofar as it may be necessary and within my discretion to allow the late filing of the answering affidavit and the late replying affidavit, I do so in order to decide the merits of the dispute between the parties unfettered by technicalities.”*

[42] Contrariwise, if non-compliance with the Uniform Rules might adversely affect legal rights, a court should ensure compliance, not for its own sake, but to serve the object of the Uniform Rules: to facilitate access to the courts.

[43] The point of departure in respect of condonation in the High Court is rule 27(3), which provides:

*“The court may, on good cause shown, condone any non-compliance with these rules.”*

[44] The authors of *Erasmus Superior Court Practice* point out that the courts have refrained from formulating an exhaustive definition of what constitutes “*good cause*” since that might hem in the exercise by the court of its discretion. They observe that two principal requirements have emerged from the cases. First, an applicant should deliver an affidavit satisfactorily explaining the delay in complying with the rules (or other non-compliance). Second, the applicant should satisfy the court on oath that they have a *bona fide* claim or defence.<sup>14</sup> They go on to observe that certain authorities impose a third requirement, namely that the granting of the indulgence sought must not prejudice the opposing party in a way that cannot be compensated or cured by a suitable costs order.<sup>15</sup>

[45] Moreover, a litigant who asks for an indulgence should act with reasonable promptness and be scrupulously accurate in his statement to the court. Other neglectful acts in the history of the case are relevant to show that party’s attitude and motives.<sup>16</sup>

[46] The Constitutional Court has held that the test is fundamentally whether condonation is in the interests of justice.<sup>17</sup>

[47] This body of principles that has crystallised out on condonation presupposes that the offending party makes application for condonation. Yet, here no condonation is sought for the lateness of the applicant’s notice under rule 30(2)(b).

[48] In *Brumloop v Brumloop*,<sup>18</sup> the former Orange Free State Provincial Division held in a passing *obiter dictum* that the court is empowered not only to condone non-compliance with the Uniform Rules but is also empowered to waive compliance with them.<sup>19</sup> This position is also adopted in *Mawire NO and another v Somo*,<sup>20</sup>

where it was held that the court is empowered to raise condonation *mero motu*.<sup>21</sup> In my view, this position is consistent with the inherent power that the court has under section 173 of the Constitution to regulate its own process.

- [49] Yet, at first blush, a contrary position appears to have been adopted in *Msimango v Peters*.<sup>22</sup> It concerned an appeal from the Randburg Magistrates' Court, where the magistrate had dismissed an application under Magistrates' Court Rule 60A(1), the equivalent of Uniform Rule 30(1). The Court addressed a question similar to the instant one: both the notice under Magistrates' Court Rule 60A(2)(b), equivalent to the notice under rule 30(2)(b), and the application under Magistrates' Court Rule 60A(1) had been delivered outside the prescribed periods.
- [50] Ossin AJ (with Malindi J concurring) reasoned that compliance with Magistrates' Court Rule 60A(2)(b) was necessary to render the application under Magistrates' Court Rule 60A(1) procedurally competent. Since the notice had been delivered out of time, as had the application itself, without condonation being sought, the application fell to be dismissed. The appeal failed. However, *Msimango* is distinguishable. It concerned an application in the Magistrate's Court, which is a creature of statute and is not endowed with the powers endowed by section 173 of the Constitution.
- [51] Likewise, the contrary decision in *Lekwa Local Municipality and another v Afra-Infra Group (Pty) Ltd* bears mention.<sup>23</sup> Having delivered their respective notices under rule 30(2)(b) outside the ten-day period, the two applicant municipalities both brought an application under rule 30(1) to set aside the amended particulars of claim of Afra-Infra Group (Pty) Ltd. In dismissing both applications, Mashile J held:<sup>24</sup>

*"It was only twenty-five days after service of the particulars of claim that Gert Sibanda Served the Rule 30(2)(b) Notice alerting Afri-Infra of the alleged irregular step. Quite evidently, the service of the notice was well out of time constituting an impermissible step especially in circumstances where it was not accompanied by an application seeking to condone the unpunctuality. As though that was not sufficient, the Rule 30(2)(c) Application was launched on 15 December 2021, almost 15 days out of time."*

...  
*Also before this Court is an application for condonation of the late filing of the Rule 30(2)(c) by Gert Sibanda. I find myself in agreement with Afri-Infra that the condonation application is hollow if it, as it does, seeks to condone the Rule 30(2)(c) Application without a condonation of the first irregular step – service of the Rule 30(2)(b) Notice outside of the 10-day period. In this sense the Rule 30(2)(c) Application is unsustainable as it has no anchor. Thus, an order condoning its late service will be meaningless.*

[emphasis added]

[52] This court is not bound by that decision. To the extent that the above passages frame a statement of principle on rule 30(2)(b), I respectfully disagree with it.

[53] The preferable position is that, in the light of the principles set out above, the court, which is not there for the rules and which has an inherent power under section 173 of the Constitution to regulate its own process, has the power in appropriate cases to waive compliance with the Uniform Rules or to raise the question of condonation *mero motu*.

[54] Much will depend on the facts of a given case. The above statement should certainly not be construed as licence for litigants to overstep the Uniform Rules only in due course, condonation not having been sought on oath, to fall upon the mercy of the court in argument. Yet, in my view, the position adopted in *Lekwa Local Municipality* goes too far in the other direction.

## ANALYSIS

[55] Accordingly, I am first to decide whether this application is properly before me, despite condonation not having been sought for the late delivery of MTN's notice under rule 30(2)(b). Next, I am to decide whether a case has been made out for the relief the applicant seeks, namely the setting aside of the delivery of the document of 25 April 2022 as an irregular step. The latter includes whether a case has been made out for the condonation that is indeed explicitly sought, namely the late bringing of this application.

[56] As I say above, in my view, under the inherent power of this court to regulate its own process, it can indeed waive compliance with a rule or consider *mero motu*

whether condonation ought to be granted, which are different ways of saying essentially the same thing.

[57] On these facts, I am inclined to exercise that power. MTN's notice under rule 30(2)(b) was delivered only about nine days out of time. The plaintiff did not take issue with the late delivery of the notice (either under rule 30 or in his answering affidavit). Even if he had, it is hard to imagine any cognisable prejudice he might have raised.

[58] What is more, the papers in this application were exchanged and all the other steps had been taken to obtain a hearing from this court, at the considerable expense of both parties and also to the public purse. In the words of Wepener J in *Pangbourne Properties*, I am thus inclined "*in order to decide the merits of the dispute between the parties unfettered by technicalities*".

[59] At this stage of my analysis, I also take account of the fact that, by any standard, the document of 25 April 2022 is of such a singular nature that it falls far outside anything the Uniform Rules might at this juncture countenance. Far from advancing the principle of access to the courts that the Uniform Rules serve, its delivery works against it, making it harder for the parties and for this court properly to adjudicate the very claim that the plaintiff as *dominus litis* wants to see resolved.

[60] It is for these reasons that I consider it appropriate and necessary for this court to exercise its inherent power *mero motu* to condone the lateness of the rule 30(2)(b) notice. It is in the interests of justice to do so.

[61] I now turn to the question of the condonation that is sought for the late delivery of the application. It was seventeen days out of time.

[62] MTN explains that it required time to consider the voluminous documents delivered by the plaintiff on 25 April and 3 June 2022, which "*contained voluminous annexures in which numerous judgments were referred to.*" And: "*Upon their receipt, the Defendant had to carefully consider its response to these Notices.*" (While not directly relevant for present purposes, it is not clear to me

whether any steps have been taken in respect of the plaintiff's document of 3 June 2022.)

[63] MTN goes on to say that it had not objected previously to the lateness of the plaintiff's replication to its special pleas and plea. It says that it chose not to do so since, after consideration, it *"concluded that it would suffer no prejudice as a result of the late filing"*.

[64] MTN adds:

*"A similar approach and assessment preceded the final decision to proceed with this application. The Defendant had to consider, amongst others, the various notices and processes that have been served on it by the Plaintiff to determine whether this application would still be proceeded with. The fact that the Plaintiff is not legally represented and that some errors in processes filed by him may be explicable required the Defendant to carefully consider whether to proceed with this application.*

*The process included consultations between our office, client and Counsel. I assert that the nature of the papers filed by the Plaintiff are not ordinarily filed in action proceedings and they are at times convoluted and indeed confusing. All processes required careful consideration before being actioned upon.*

*In the end, a decision was taken to proceed with the application. The decision to ultimately proceed with the application was taken at a consultation held with Counsel on Thursday 14 July 2022. This affidavit was drafted by counsel and availed to me on the evening of 19 July 2022, and it would be commissioned on 20 July 2022."*

[65] As to prejudice, MTN adds:

*"If the condonation application is not granted and the Rule 30 application is thereby not considered, the Defendant will have to conduct the trial in circumstances where the Plaintiff has filed two replications both of which deal with the merits of the case. The first Replication, save for the excipiable parts of it, is regular. The second one is not. Such an eventuality, where an irregular Replication is allowed to stand, will visit incurable prejudice on the Defendant."*

[66] Among much invective-laden language, in answer the plaintiff says this on the condonation that MTN seeks:

*"I am opposed to the attempt by the Applicant to seek an order condoning the lateness or dilatoriness which is so deliberate,*

*inexcusable, most arguably, unbecoming of a practising attorney. Most troubling I am a lay litigant unemployed and under resourced as against the Applicant who has been well resourced in civil armory with all financial and operational capabilities and as a good measure, has been able to choose legal practitioners who rake in huge legal fees and otherwise.”*

[67] He also says:

*“To all appearance, the application intended by the Applicant is way out of turn. It is about thirty-three (33) working days late. This is deliberate dilatoriness, and it is inexcusable. It is over four (4) weeks. A representation that is way prejudicial to my claim.”*

[68] Having considered carefully MTN’s case for condonation and the counter-position of the plaintiff, I make these observations on whether MTN has satisfied the three tenets required of a litigant seeking condonation.

[69] While the explanation that MTN puts up for the delay is certainly not the most detailed one imaginable, in my view it passes muster. The delay, although longer than the delay in the delivery of the notice under rule 30(2)(b), is still within the bounds of reasonableness. It is fair to say that the two documents that the plaintiff delivered on 25 April and 3 June 2022 are indeed voluminous and confusing. It is hard to think that they did not cause some measure of consternation on the part of MTN and its legal team. Indeed, in a sense, they highlight neatly the very object of the Uniform Rules: to set in place standardised litigious steps that are the stock-in-trade of lawyers upon whose shoulders a large part of the functioning of the legal profession rests.

[70] Then, in the light of the extraordinary nature of the document of 25 April 2022, which I sketch in some detail above, in my view, MTN’s case on the merits is strong.

[71] As to prejudice, there is certainly no prejudice to the plaintiff in condoning the delay in the bringing of this application. Over and above his strongly worded critique of the motive he ascribes to MTN and its lawyers, the plaintiff has not pleaded any.

- [72] In all the circumstances, it is in my view appropriate and necessary to condone the late delivery of this application. This condonation would also be in the interests of justice.
- [73] Lastly, I turn to the question of whether the plaintiff's delivery of the document of 25 April 2022 is an irregular step that falls to be set aside.
- [74] As I say above, in my view the Uniform Rules provide the entire box of tools that a litigant might use. Far from unduly curtailing a litigant, they have been carefully devised to facilitate access to the courts. What is more, as I demonstrate above, they are no straitjacket. In appropriate cases, the court has the power to condone non-compliance. In particular cases, like this one as far as the notice under rule 30(2)(b) is concerned, the court might even condone non-compliance *mero motu*.
- [75] Yet, in the ordinary course the Uniform Rules do not allow litigants to invent the wheel as they go along, by delivering all manner of documents, whether styled as notices or otherwise, that they think might advance their case. Were this to be countenanced, it would make litigation nothing short of chaotic.
- [76] For all these reasons, I find that the plaintiff's delivery of the document of 25 April 2022 was indeed an irregular step.
- [77] Yet, even if I am wrong and the Uniform Rules must be read to be flexible enough to allow a litigant on occasion to deliver, for example, a notice for which the Uniform Rules do not provide, the document of 25 April 2022 did not fall into that notional category. It is possible to imagine a crisp and tightly framed notice that a litigant might deliver in response to a notice under rule 23(1)(a), for instance indicating to the other party that there is an authority that puts paid to the intended exception. While it is possible to imagine such a notice not being inherently offensive, this is more properly the stuff of an attorney's letter.
- [78] Be that as it may, even if my statement above is too wide and such a notice is cognisable, the document of 25 April 2022 is far removed from it. The document of 25 April 2022 is a long, complicated, discursive document that responds to the notice under rule 23(1)(a) expansively. Yet, it goes much further, dealing in

argumentative terms and with reference to statutes and case law with the issues in the action proper.

[79] Furthermore, there can be no doubt that there would be prejudice were the document of 25 April 2022 to be allowed to stay. That prejudice would redound to MTN that would somehow have to deal with its contents, much of it irrelevant to the dispute created by the delivery of the notice under rule 23(1). What is more, it would redound to the prejudice of the court that would waste time and resources dealing with a document upon which the plaintiff will no doubt rely but that largely speaks to irrelevant matters.

[80] Ironically, it is probably not unfair to say that it would also prejudice the plaintiff in his attempt, as a litigant who is at times assisted and at other times not, to focus on what is expected of him in the hearing on the exception, were it to follow.

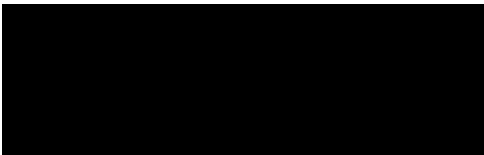
[81] For all these reasons, I find that a proper case has been made out for the relief that MTN seeks.

## **COSTS**

[82] I see no reason why the costs should not follow the result.

## **ORDER**

1. The late delivery of the defendant's notice under rule 30 (2)(b) and its late delivery of this application are condoned.
2. The plaintiff's document entitled "*Plaintiff's Notice of Replication to the Defendant's Notice of Intention to File Exceptions to the Plaintiff's Replication to the Defendant's Special Pleas*" and dated 25 April 2022 is declared an irregular step and is set aside.
3. The respondent is to pay the applicant's costs.



**J J MEIRING**  
**ACTING JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

Date of hearing: 17 November 2023

Date of judgment: 15 March 2024

## APPEARANCES

For the plaintiff/respondent: Mr E K Ngassam in person

For the defendant/applicant: Advocate M Khosana

Instructed by: Mashiane Moodley Monama Attorneys

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- 1 2013 (5) SA 89 (CC).
  - 2 See para 29.
  - 3 2000 (1) SA 409 (CC). This quotation, which appears in para 30 of *Mukkadam*, is drawn from para 22 of *Chief Lesapo*.
  - 4 See paras 31–32.
  - 5 *Centre for Child Law v Fochville* 2016 (2) SA 121 (SCA), at para 17.
  - 6 2013 (5) SA 399 (SCA).
  - 7 See paras 18–19.
  - 8 *Faischt v Colonial Government* (1903) 20 SC 211; *De Beer v Minister of Posts and Telegraphs* 1923 (AD) 653.
  - 9 In *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 (TPD).
  - 10 2013 (3) SA 140 (GSJ).
  - 11 See para 18.
  - 12 See para 19.
  - 13 See para 19.
  - 14 *Erasmus Superior Court Practice*, RS 22, 2023, D1 Rule 27-4.
  - 15 *Erasmus Superior Court Practice*, RS 22, 2023, D1 Rule 27-5.
  - 16 *Duncan t/a San Sales v Herbor Investments (Pty) Ltd* 1974 (2) SA 214 (T), at 216E–H.
  - 17 *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC), at 43G–44A.
  - 18 1972 (1) SA 503 (O).
  - 19 At 504F.
  - 20 2023 JDR 3053 (GP).
  - 21 See para 43.
  - 22 [2022] ZAGPJHC 418 (21 June 2022).
  - 23 [2022] ZAMPMBHC 65 (8 August 2022).
  - 24 At paras 12–13.