

New Rules of the African Court on Human and Peoples' Rights

Adopted, 1 September 2020 – entered into force, 25 September 2020

Training for lawyers, African Court Coalition

Structure of presentation:

- 1) Scope of changes: amended or new Rules?
- 2) Changes pertaining to improvement of internal operation
- 3) Rules introducing fresh provisions; and novelties
- 4) Changes pertaining to relations with Commission
- 5) Changes of prime relevance to litigants

Scope of changes: new Rules or revised Rules?

Quantitative changes

Changes under this section cover issues that were left uncovered in the previous rules; thus leading to an increase in number of provisions; but also merger of some Rules for restructuring, harmonisation and more coherent sequencing and use of the Rules of Procedure as a whole

- 76 versus 93 Rules: 17 additional Rules –
- however, the inflation is much more significant when one considers the number of new provisions within Rules – eg, Rule 2 on Assumption of duties and terms of office of judges, from 2 to 4 Rules; idem for Rule 31 on Representation, which actually also include Legal Assistance and is also a merger of former Rules 28 and 31 ---
- one of the most extensive change new Rule 44 on time to file pleadings from a single previous provision under Rule 37 to 9 provisions

Qualitative or substantive changes

These changes cover amendment of existing Rules or insertion of new Rules with a significant change to the substance of the Rule

New Rules, freshly inserted

Purposive and seeking to criticise existing practice

Improved or expedited administration of justice

- **pilot judgment:** Rule 66 --- cases involving systemic or structural problem in a Respondent State; Court seeks consent of parties; selection application will follow expedited procedure; applications subject of pilot procedure may be adjourned; adjournment may be lifted in interest of justice; amicable settlement is not suspended;
- **power of Court to derogate from any Rule:** Rule 89; 1) force majeure --- event that is external, unforeseeable, and irresistible; 2) interest of justice – mainly COVID INSPIRED
- **inherent powers of Court:** Rule 90, Court may take any decision as long as it is to meet end of justice
- **transition from Old to New Rules:** Rule 93 ---- how to understand this Rule?

improved implementation of Court decisions

- **compliance with decisions:** Rule 80, restatement of Protocol provisions that Court decisions are not only binding but also enforceable

- **compliance monitoring:** Rule 81 cristalises ongoing process of Executive Council adopting Framework for compliance monitoring; 1) Respondent submit compliance report; 2) report served on applicant for observations; 3) Court may seek further compliance data from third parties; 4) Court may hold compliance hearing and sanction same with a judicial decision; 5) Court may attach compliance rulings to its report to policy organs, Rule 81(5)

improve access to Court and internal management of cases and administration of Court

- **avoid lapses between elections for good judicial administration:** compare Rule 2(2) of the Old Rules with Rule 2(4) of the New Rules;
- **ensure gender and legal system representation in governance of Court:** New Rule 10 on composition of Bureau – same for OTR
- **improve access to Court:** institutionalisation of legal aid scheme under Rule 31(3); and legal aid funds under Rule 31(4)
- **improved and expedited management of cases :** Committees and WGs, Rule 26
- improve access to Court, safety of litigants: new Rule 33(2) Court can request states parties to guarantee security of parties, witnesses, experts and other persons --- compare with Rule 46 of the Old Rules where Court recourses to such stakeholders without providing for their protection

Complementarity, litigating cases through the Commission

- **upgrading complementarity to a chapter in recognition of importance:** Chapter 2, Rules 34 to 38 --- compare with previous Rules where complementarity is under Chapter on general

provisions with a single Rule 29 dealing with relations between Court and Commission

- **being litigants friendly:** new Rule 38(1) expressly provides for parties to be consulted prior to transferring a case to the Commission ---- new Rule 38(2) in cases of lack of ratification and filing of declaration, Court shall not transfer, but will inform applicant of Commission option

Changes of prime relevance to counsel and litigants

- **commencement of proceedings; supporting documents:** New Rule 40(3), application to be accompanied by copies of supporting documents – which may seem obvious – but “in particular decisions relating to the object of application and confirmation of exhaustion of local remedies” ----- this is cristalisation of Court’s practice of prima facie admissibility by Registry, or informal seizure --- this is complemented by New Rule 40(7) to supplement the seizure probe by Registry prior to registering the application --
- NOTE that practice that has not been cristalised is the your application maybe thrown out at Registry level if probe is unsuccessful, that is no jurisdiction or admissibility by administrative letter and not ruling of Court
- **commencement of proceedings; format of Application:** file original or certified copy, or scanned copy or electronic copy ... provided that original shall be delivered subsequently before date to be set by Court ; New Rule 40(5)
- **contents of application:** cristalisation of long standing practice of application form and supplementary information procedure --- very extensive New Rule 41, which provides for use of application form; with some specific directives such designation of a single

counsel in case of multiple ones; clear statement of fulfilment of admissibility conditions; particular focus on exhaustion of remedies which is the most disputed admissibility requirement --- file an “all in one” application from onset, jurisdiction, admissibility, reparations --- not necessarily application to preliminary or provisional action

- **issue of standing:** proof of standing or PoA under Rule 41(3)(d); proof of observer status for NGO applicant;
- **disclosure of identity;** protection of victim and witness; shall be decided by Court and Court will proceed only after applicant agrees in case non disclosure of identity is declined, Rule 41(6) --- but identity shall be disclosed to respondent --- and remember power of Court to request protection by state parties
- **sanction of failure:** rejection, including de plano at Registry level, Rule 41(9)
- **continued interest in/diligent prosecution:** keep Registry informed of change of address, Rule 41(12)
- **time for filing pleadings:** all provisions related to time have been grouped under a single new Rule 44 ---- except transmission of Respondent representatives, which is Rule 42(5)(a) and still 30 days as in previous Rules --- time under New Rule 44 is of 90 days instead of 60 days in previous Rules for Respondent to respond; 45 days instead of 30 in previous Rules for applicant to reply; ---- possible extension of 30 days to either party upon explanation for failure to abide by initial time, by discretion of President --- 15 days for a party to respond to the other party’s request for extension of time
- **default procedure:** improvement based on practice; under previous Rule 55, only parties can activate default procedure; but in practice Court had used interest of justice and its inherent

powers to prompt parties and rule by default suo motu; crystallisation in new Rule 44(7); if a party fails to file pleadings, Registry draws attention to Rule 66 (old Rule 55) with final 45 days after which Court will rule in default ---- to be read jointly with new Rule 63 governing default procedure, novelty is suo motu default by Court --- apparent confusion on requirements under previous Rule 55(2) on jurisdiction, admissibility and application founded in facts and law; which are removed from new Rules arguably because such prerequisites are assumed in judicial examination; ---- further novelty is judgment rendered in default can be set aside 1) upon request of party as understandable under common law on ex parte proceedings; however 2) within 1 year in abidance with principle of legal certainty mainly for the party that obtained orders including reparation in the default proceedings; and 3) the other party being heard with 30 day time

- **computation of time:** not from date of notification, but from date of receipt
- **close of pleadings:** no specific Rule in previous Rules; only indirect reference to close of pleadings under previous Rule 55 --- sequencing of pleadings is Applicant, Respondent, Applicant except otherwise decided by Court, New Rule 46 (hypothesis for further pleadings as under current practice is when facts or issues raised remain unclear after applicant's reply; Registry will address a questionnaire to parties) --- of course pleadings may be reopened upon request by parties or by Court, see new Rule 46(3) which crystallises current practice
- **amendment of pleadings,** Rule 47 speaks for itself with no need for further elaboration

- **de plano dismissal of application:** Rule 48 self explanatory; to be read together with several Rules mainly under commencement of proceedings and contents of application; Registry administrative handling of applications
- **hearing:** previous rules stand; hearing may be in camera for public morality or others; but novelty is child sensitive new Rule 52(3) focusing on best interest of the child
- **conduct of hearing:** new Rule 54 is much more elaborate than previous Rule 44
- **binding nature of decisions:** OPM are binding, new Rule 59(6) sole difference with previous Rule 51
- **intervention:** restatement of previous Rule 53 under new Rule 61 sequenced as follows: 1) request for leave; 2) request transmitted to parties for observations; 3) if leave granted, intervener is requested to file written observations; 4) served on parties; 5) intervener may be allowed to present oral submissions
- **amicable settlement:** New Rule 64 achieves an economy of procedure; but also dispels some possible confusion in the concomitant implementation of old Rules 56 on out of court settlement which is in fact amicable settlement on parties initiative; and old Rule 57 which amicable settlement as prompted by Court; both options have now been merged in new Rule 64 for coordinated reading and proceedings
- **strike out:** new Rule 65 brings about a change in terminology but also clarity and comprehensiveness in terms of processes outlined under single provision old Rule 58; one new condition besides intention not to proceed is failure to diligently prosecute, Rule 65(1)(b); but also any other reasons --- however, there is flexibility to restore struck out application under **exceptional circumstances**

- **interpretation:** new Rule 77 upholds old Rule 66 almost pro verbis – notably, no change in rule that request for interpretation does not stay execution
- **review:** new Rule 78 comes with a slight but maybe determinant alteration of old Rule 67; 1) under Rule 77, terminology is of “new fact and evidence” as opposed only to “new evidence under old Rule” --- because fact may not necessary or always be evidence and vice versa --- AND 2) under new Rule 77 as well an additional cluster of words is fact or evidence (I quote) “which by its nature, has a decisive influence ...” and (I quote further) “could not with due diligence” (end of quote) have been known to the concerned party when the judgment was delivered ---- nota bene here is that new Rule 77 brings about the most liberal approach to review, that is that what can have a decisive influence in a case; and the determination of due diligence fall under the interpretative powers of the Court and may largely depend on the circumstances of each case --- another key is that a comparative reading with Rules of Commission reveals a significant positive development in Court Rules from very restrictive old Rule 67 and new Rule 78 of Court Rules --- another new provision is time bar 5 years of delivery of judgment seeking review --- can be said that flexibility versus time bar ----- **notably**, no change in rule that request for interpretation does not stay execution

END – QUESTIONS