**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**Case No: 1052/2013**

**2970/2013**

In the matter between:

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|---|---|
| **CASH CRUSADERS FRANCHISING (PTY) LTD** | Applicant |
| v | |
| **LUVHOMBA LEGAL AXE CC** | First Respondent |
| **LUVHOMBA LEGAL EDGE CC** | Second Respondent |
| **LUVHOMBA LEGAL CARE CC** | Third Respondent |
| **LUVHOMBA FINANCIAL SERVICES CC** | Fourth Respondent |
| **GERENDRA CC** | Fifth Respondent |
| **MATHEWS TUWANI MULAUDZI** | Sixth Respondent |

Court: Justice J Cloete

Heard: 10 September 2015

Delivered: 17 September 2015

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**JUDGMENT**

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**CLOETE J:**

**Introduction**

[1] This is an application to set aside two purported notices of appeal by the respondents to the Constitutional Court in terms of rule 30(2) of the High Court Rules, alternatively as an abuse of the court process. It is opposed by the respondents.

**Background**

[2] The sixth respondent (*'Mulaudzi'*) is the sole member of the first to fifth respondents. During 2007 and 2008 the applicant concluded separate but virtually identical franchise agreements with each of the first to fifth respondents. In each instance Mulaudzi bound himself as surety and co-principal debtor to the applicant for the obligations of the contracting respondent.

[3] During 2009 various disputes arose between the parties in relation to the franchise agreements and the applicant eventually instituted arbitration proceedings against the first to fifth respondents. In addition to the arbitration proceedings there was the following litigation:

3.1 The applicant applied to the (then) South Gauteng High Court (now the Gauteng Local Division) in case no. 43320/2010 for the appointment of an arbitrator after the respondents had refused to cooperate. The

respondents subsequently consented to the appointment. It was agreed that the costs of the application would be determined in the arbitration;

3.2 The applicant applied to the (then) South Gauteng High Court in case no. 47666/2010 for an interim order restraining the respondents from breaching the franchise agreements pending finalisation of the arbitration. It was not opposed and the costs were similarly ordered to be determined at the arbitration;

3.3 During the course of the arbitration proceedings the first to fifth respondents repudiated their franchise agreements. The applicant accepted the repudiations and terminated each agreement. The applicant applied to the (then) North Gauteng High Court (now Gauteng Division) in case no. 55359/2012 for an order giving effect to certain post-termination obligations imposed on the respondents in terms of the franchise agreements. Three orders were granted in the same application in the applicant's favour. Two were granted by agreement on 29 July 2013, with the respondents being ordered to pay costs on the scale as between attorney and client in terms of clause 29.2 of each franchise agreement. The third order was granted on 6 November 2013 after the respondents withdrew their opposition. The same costs order was made against the respondents although a certain limitation was placed on counsel's fees;

3.4 The respondents failed to comply with one of the agreed orders and the applicant launched contempt proceedings in the (then) North Gauteng High Court in case no. 65272/2013. These proceedings are still pending, but an interlocutory order was granted on 19 March 2014 directing the respondents to file their answering affidavit and to pay certain wasted costs.

[4] In the interim and on 11 December 2012 an arbitration award was made in the applicant's favour. The respondents were ordered to pay various amounts which for convenience will be referred to as *'capital amounts'*. In addition they were directed to pay the arbitrator's fees as well as costs (including the two reserved costs orders from the South Gauteng High Court matters) on the scale as between attorney and own client.

[5] The respondents refused to comply with the arbitration award and the applicant applied in this division in case no. 1052/2013 for the award to be made an order of court. The respondents opposed the application and also brought their own application in case no. 2970/2013 for the review and setting aside of the award, which was similarly opposed by the applicant. Because the matters were so interlinked they were both argued before Le Grange J who on 2 May 2013 handed down one judgment in which he:

5.1 Made the arbitration award an order of court and directed the respondents to pay costs on the attorney and own client scale; and

5.2 Dismissed the respondents' application with costs.

[6] The respondents applied for leave to appeal Le Grange J's orders and he dismissed their application with costs on 13 June 2013. The respondents then petitioned the Supreme Court of Appeal and their petition was dismissed with costs by that court on 12 September 2013. Although both of the aforementioned orders reflect only case no. 1052/2013, it was confirmed during argument before me by Mr Oosthuizen SC, who appeared for the applicant, and Mr Mulaudzi, who appeared in person and on behalf of the first to fifth respondents, that both of these orders relate to case no. 1052/2013 as well as case no. 2970/2013.

[7] Bills of cost were subsequently taxed in respect of the two South Gauteng High Court matters, the arbitration and the two matters in this division in case nos. 1052/2013 and 2970/2013, and the North Gauteng High Court matter in case no. 55359/2012, as follows:

7.1 R96 726.54 (South Gauteng High Court case no. 43320/2010);

7.2 R66 730.86 (South Gauteng High Court case no. 47666/2010);

7.3 R1 497 618.17 (the arbitration and matters in this division in case nos. 1052/2013 and 2970/2013); and

7.4 R491 786.86 (North Gauteng High Court case no. 55359/2012). According to the applicant this amount is not yet payable because the respondents have applied to that court for leave to appeal the order granted on 6 November 2013, and the application is still pending.

[8] The respondents have apparently settled the capital amounts contained in the arbitration award but failed to pay the three sets of taxed costs due. Warrants of execution were issued against Mulaudzi's movable property, one of which resulted in a *nulla bona* return of service (in respect of case nos. 1052/2013 and 2970/2013). The applicant maintains that Mulaudzi informed the sheriff that he is the owner of immovable property (this is borne out by the sheriff's return) but an extensive search at the various Deeds Registries Offices proved this to be false, although Mulaudzi continues to insist that he indeed owns immovable property. It was also established that four motor vehicles attached by the sheriff in another warrant of execution were not in fact owned by Mulaudzi.

[9] The applicant then launched proceedings in the Gauteng Division in case no. 49047/2015 for the provisional sequestration of the joint estate of Mulaudzi and his wife to whom he is married in community of property. Mulaudzi has opposed that application inter alia on the basis that none of the amounts are due and payable because he has *'instituted appeal proceedings in all these cases'.* Mulaudzi's answering affidavit in the sequestration application was deposed to on 20 May 2015 and, according to the applicant, served on the same day.

[10] On 25 May 2015 the respondents served on the applicant's attorneys six separate purported notices of appeal, all of which are dated 21 May 2015, thus one day after Mulaudzi deposed to his answering affidavit. Those in the South Gauteng High Court matters (under case nos. 43320/2010, although the case no. is incorrectly reflected as 4330/2010, and 47666/2010) are styled *'Notice of Motion (Appeal)'* and are directed to the Supreme Court of Appeal. A prayer for condonation for late filing is included in each notice which further provides that:

> *'TAKE NOTICE FURTHER THAT the affidavit of TUWANI MULAUDZI to be filed later, will be used in support of this application.'*

[11] In respect of the two matters dealt with in this division, being case nos. 1052/2013 and 2970/2013, the notices are styled *'Notice of Appeal'*, are directed to the Constitutional Court, and whilst a prayer for condonation for late filing is included, no reference is made to any affidavit annexed or *'to be filed later'.* It is these notices which are the subject of the application argued before me.

[12] The respondents also served a notice of appeal in respect of the two agreed orders in the North Gauteng High Court matter in case no. 55359/2012, directed to the Constitutional Court, in which they seek condonation for late filing and that the *'order and judgment'* of each of the Gauteng Division (which subsequently refused leave to appeal on 2 September 2013) and the Supreme Court of Appeal (which dismissed a consequent petition on 29 November 2013) be set aside. Similarly, no mention is made in the notice of any affidavit filed in support thereof.

[13] The last notice of appeal pertains to the interlocutory order granted in the pending contempt proceedings in the Gauteng Division in case no. 65272/2013 where the respondents were ordered to file their answering affidavit and pay certain wasted costs. It too is directed to the Constitutional Court and makes no mention of any supporting affidavit.

[14] Each of the notices of appeal in respect of the matters dealt with in this division by Le Grange J and subsequently by the Supreme Court of Appeal merely contain the following:

> *'BE PLEASED TO TAKE NOTICE that the Applicants herein intend to apply on a date to be arranged with the Registrar of the above Court for an order in the following terms:*
>
> 1. *That the extension of the period of the filing of the Applicants' application for leave to appeal* [sic]*;*
>
> 2. *That the delay in the filing of the Applicants' application for leave to appeal be and is hereby condoned;*
>
> 3. *That the order and judgment of the Western Cape Division is hereby appealed and/or set aside;*
>
> 4. *Costs of this application;*
>
> 5. *Further and alternative relief.'*

[15] In response to the purported notices of appeal the applicant served notices in terms of rule 30(2) of the High Court Rules on 4 June 2015 in which it set out its

grounds of complaint and afforded the respondents the requisite ten days to remove them. One of the grounds was that the notices had not been filed with the registrar of the Constitutional Court in terms of its rule 19(2) nor the registrar of the Supreme Court of Appeal in terms of its rule 6(1), as the case might be.

[16] The respondents did not react to the rule 30(2) notices and the applicant launched the present application on 25 June 2015. Similar applications are pending in the Gauteng Division and Gauteng Local Division. For obvious reasons I will hereinafter only refer to the application which served before me.

[17] In response to the applicant's complaint that the notices of appeal had not been filed with the registrar of the Constitutional Court, the respondents annexed what they claimed to be proof that this had been done.

[18] However copies of the notices produced by the respondents reflect only: (a) the stamp of the registrar of this court (i.e. the Western Cape Division) of 26 June 2015; and (b) the stamp of the sheriff, Pretoria South East of 25 May 2015. Mr Alex Tarr, a candidate attorney employed by the firm representing the applicant, deposed to an affidavit on 2 September 2015 in which he confirmed that according to Mr Delano Louw, senior registrar's clerk at the Constitutional Court, no such notices had been filed in that court. Annexed to Mr Tarr's affidavit is an email from Mr Louw of the same date in which he stated that: '[t]*his matter is not before this court'.* During argument Mr Mulaudzi maintained that, not only had the notices of appeal in fact been filed in the Constitutional Court, but the

respondents had also filed affidavits supporting their prayer for condonation. Mr Oosthuizen informed me that no such affidavits had been served on the applicant. Mr Mulaudzi was thus given the opportunity over the lunch adjournment to contact his office in Pretoria (where he said they would be found) and to provide them to the applicant's attorney and the court at the commencement of the afternoon session.

[19] On resumption Mr Mulaudzi stated that his delegated staff member could not locate these documents and suggested that the matter be postponed for this purpose. Instead, given that Mr Mulaudzi was returning to Pretoria that evening, he was afforded a further opportunity to provide the documents by fax or in electronic form to both the applicant's attorney and the court by close of business the following day, 11 September 2015.

[20] On 11 September 2015 at approximately 16h18 Mulaudzi emailed both the applicant's attorneys and my registrar further copies of the notices of appeal, but now bearing the stamp of the registrar of the Constitutional Court of the same day. He also emailed a copy of an affidavit ostensibly deposed to by him on 21 May 2015 but similarly only filed in the Constitutional Court on 11 September 2015. In that affidavit Mulaudzi sought to deal with the *'appeals'* against all of the matters which have already served or are still pending in the Gauteng Division, Gauteng Local Division, Supreme Court of Appeal and this division *'in a consolidated manner as they are related'.*

[21] In respect of the matters dealt with by Le Grange J in this division and subsequently dismissed on petition by the Supreme Court of Appeal, all that is stated is the following:

> *'43. In the Western Cape Division, the Petitioners brought an application for leave to appeal. Same was dismissed with costs. I attach hereto the order, marked **TM2**, to which I respectfully refer the above honourable court. The Petitioners then petitioned the Supreme Court of Appeal. The application for leave to appeal was dismissed with costs on 12 September 2013. I attach hereto an order, marked **TM3**, to which I respectfully refer the above honourable court. I then instructed my attorneys of record at the time to file leave to appeal to the above honourable court. It transpired later that this was not done…*
>
> *46. That the court a quo, in the instance of the SCA erred in confirming the judgment of the Western Cape Division and refusing to set aside order* [sic] *confirming the arbitration award and related costs as this infringes on the appellants' rights as enshrined in the Constitution of the Republic of South Africa.'*

**Whether this court has jurisdiction**

[22] The first question that arises is whether this court has jurisdiction to determine the rule 30(2) application, given the orders of Le Grange J and the dismissal of the respondents' subsequent petition by the Supreme Court of Appeal.

[23] Mr Oosthuizen relied on various authorities in support of his submission that this court has jurisdiction, and pointed out that those authorities draw a distinction between the noting of an appeal on the one hand and the prosecution of an

appeal on the other. Given that the earlier authorities were cited with approval in the later judgment of *South African Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (TPD), a decision of the Full Bench of the former Transvaal Provincial Division, I will focus only on the facts and findings in the *Beecham* judgment.

[24] There a Full Bench had dismissed an appeal by South African Druggists Ltd (SAD) against an order of the Court of the Commissioner of Patents. SAD noted an appeal against the decision of the Full Bench to the (then) Appellate Division, and that appeal was pending when Beecham brought a rule 49(11) application to the Full Bench to put its order into operation pending the decision of the Appellate Division. SAD opposed the rule 49(11) application but it was granted. SAD then delivered an application for leave to appeal against the rule 49(11) order and it simultaneously filed a notice of appeal in respect thereof to the Appellate Division.

[25] Beecham in turn brought two applications. The first, which is the one relevant to the instant matter, was to set aside the notice of appeal to the Appellate Division in terms of rule 30 on the ground that the rule 49(11) order was not appealable; alternatively that it was not appealable without leave.

[26] It is helpful to quote the findings of the Full Bench at some length from 880H – 881H:

*'The answer presented on behalf of SAD was that this Court has no jurisdiction to deal with Beecham's motion under Rule 30(1) since SAD not only filed the notice of appeal but, prior to the service of Beecham's motion, lodged a power of attorney to prosecute the appeal with the Registrar of the Appellate Division in terms of Appellate Division Rule 5(3)*bis*. The result—submits Mr* Plewman*—is that only the Appellate Division has jurisdiction to consider the validity of the notice of appeal. Reliance was placed on the decision in* Campbell and Others v Monto and Another *1952 (3) SA 82 (T) where Murray J held that only the appellate tribunal has jurisdiction to set aside a notice of appeal on the grounds that it is embarrassing and bad in law. The learned Judge concluded as follows (at 84H):*

*"Even though the noting of the appeal may be a matter which is not so intimately connected with the prosecution, once the appeal has been noted and the case has been set down for hearing in this Court it seems to me that no jurisdiction is vested in the Judge in Chambers to deal with the propriety or otherwise thereof."*

*It will be seen from the judgment that it is based on an overall conspectus of the Rules of Court then applicable (at 83* in fine*—84). It has the distinguishing features that the ground of attack on the notice of appeal related to its content, which the learned Judge thought should appropriately be dealt with by the quorum of Judges required for the appeal (at 84G-H); and the appeal itself was due to be heard within a few days (at 83B-C).*

*In my view the jurisdiction of this Court to entertain the application flows from the provisions of Rule 30(1) which gives "any party to a cause in which an irregular or improper step has been taken by any party" the right to apply to this Court to set it aside. The filing of a notice of appeal is a step in the cause in this Court (cf* Afrikaanse Handelaars en Agente (Edms) Bpk v Van Niekerk *1944 TPD 62 at 63;* D and D H Fraser Ltd v Waller *1916 AD 494 at 498), and this Court may deal with it. Different considerations may arise if the appeal is prosecuted (I do not consider the lodging of a power of attorney by SAD with the Registrar of the Appellate Division to constitute a prosecution of the appeal), but until it is prosecuted the following* dictum *by Colman J in* D & H (Pty) Ltd v Sinclaire *1971 (2) SA 157 (W) at 158E-G, with which I respectfully agree, applies:*

*"In the present case the appeal has not yet been prosecuted, still less set down for hearing, and that, to my mind, is a distinguishing feature. The notice of appeal has of course been filed in this Court, and no other Court has as yet become seized with the*

*matter. In view of the fact that the noting of an appeal stays execution, it will sometimes be a matter of importance to the party who has been successful at first instance that he be able to approach some tribunal urgently with an application to set aside the notice of appeal if it is defective. It seems to me that, pending prosecution of the appeal, the only tribunal which can entertain such an application is the Court in which the notice of appeal was filed."*

*I consider that the motion under discussion should succeed.'*

[27] What is important about *Beecham* for purposes of the present matter is that it broadened the scope of *'an irregular step in the cause'* to include, not only a notice of appeal lodged with the court which made the order by which the litigant concerned is aggrieved, but also a notice of appeal lodged to a higher court against such order. I am (of course) bound by that decision unless I am convinced that it is wrong, which I am not.

[28] Furthermore, in the earlier decision of *Participation Bond Nominees v Mouton and Others (3)* 1978 (4) SA 508 at 515C-E it was held that:

*'The second point taken is procedural and arises from the wording of Rule 30(1) under which the present application is brought. The argument is that this Rule is available only to "any party to any cause" (the opening words of the Rule) and that, on a finding that the proceedings between all the parties have come to an end, there can no longer be "any cause" in existence. Mr McCall countered this argument by submitting that the "cause" which was set in motion by the respondent is still in existence, albeit for limited purposes such as for issuing a writ of execution thereon, and possibly for claiming costs against respondent. In my view the words "any cause" are used in the widest possible sense and refer to any judicial proceeding of whatsoever nature (see* Stytler NO v Fitzgerald *1911 AD 295 at 331). I agree with Mr McCall's submissions on this point. In my view*

> *the Rule is wide enough to cover the eventuality that has arisen in this matter and I therefore find against the respondent on the second point as well.'*
>
> [cited with approval in *Olgar v Minister of Safety and Security and Another* 2012 (2) SA 127 ECG at 133I-134B]

[29] The court in *Participation Bond Nominees* proceeded to set aside as an irregular step a notice of bar served on a third party by a defendant in provisional sentence proceedings after the provisional judgment became a final judgment in terms of rule 8(11) of the High Court Rules.

[30] In the instant matter, although the purported notices of appeal were directed to the Constitutional Court, the fact of the matter is that the only court in which they had in fact been filed by the respondents when the matter was argued before me was this court, as is borne out by the stamps of the registrar of this division dated 26 June 2015.

[31] Accordingly, as was held in *Beecham* the only tribunal capable of considering the validity of the respondents' notice of appeal was a court of this division. Mulaudzi clearly misled this court when he maintained during argument that the notices had already been filed in the Constitutional Court, and the filing of the notices by the respondents a day after the matter was argued before me does not assist them, given that no steps were taken in respect of the notices already filed in this division. It should be mentioned that in his covering email to my registrar of 11 September 2015 Mulaudzi claimed that he was *'directed'* by this court during

argument to file the notices of appeal in the Constitutional Court, which is of course patently false and similarly misleading.

[32] It thus follows that this court has jurisdiction to determine the rule 30(2) application.

**Whether the notices of appeal constitute an irregular step(s) for purposes of rule 30**

[33] During argument Mr Mulaudzi made it clear that the respondents do not seek direct access to the Constitutional Court in terms of rule 18 of its rules, but instead rely on the procedure contained in rule 19 of such rules, or, as Mr Mulaudzi put it during argument, as part of the *'natural progression'* in the appeals process against the order of the Supreme Court of Appeal refusing leave in both case nos. 1052/2013 and 2970/2013.

[34] Rules 19(2) and (3) of the Constitutional Court Rules provide as follows:

> *'(2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.*
> *(3) An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—*

*(a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;*

*(b) a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter;*

*(c) such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and*

*(d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—*

*(i) which court;*

*(ii) whether such application is conditional upon the application to the Court being refused; and*

*(iii) the outcome of such application, if known at the time of the application to the Court.'*

[35] It is the applicant's case that the notices of appeal constitute irregular steps in that:

35.1 They were not filed with the registrar of the Constitutional Court (rule 19(2)), at least at the time when the matter was argued before me;

35.2 They are hopelessly out of time beyond the stipulated 15 day period (given the dismissal of the petition by the Supreme Court of Appeal on 12 September 2013) but no explanation is furnished for the inordinate delay (rule 19(2));

35.3 They do not set out the grounds of appeal which is a peremptory requirement (rule 19(3)(a)); and

35.4 They do not contain *'clearly and succinctly the constitutional matter raised in the decision and any other issues including issues that are alleged to be connected with a decision on the constitutional matter'* (rule 19(3)(b)).

[36] The applicant also submits that the respondents have in any event complied with the orders against which they now seek to appeal by having settled the capital amounts contained in the arbitration award which was made an order of court by Le Grange J. To my mind however questions of peremption and whether the respondents effectively only wish to appeal the costs orders in case nos. 1052/2013 and 2970/2013 are not issues which this court should consider within the context of this application. It could be tantamount to entering into the domain of the Constitutional Court in the event that the respondents again approach that court in due course. As such, it would be inappropriate for me to do so. For the same reason I shall steer clear of the condonation issue in respect of the late filing and confine my findings to the actual procedural deficiencies contained in the notices themselves, although I will also, for the benefit of the respondents, refer to the relevant passage in Mulaudzi's affidavit produced only on 11 September 2015.

[37] The notices are silent on the grounds of appeal and merely seek an order that *'the order and judgment of the Western Cape Division is hereby appealed and/or set aside'.* No mention is even made in the notices of the Supreme Court of Appeal's subsequent refusal of the petition for leave to appeal against those orders. In the separate affidavit produced by Mulaudzi the only so-called ground

advanced, with reference to the specific notices before me, is that contained in paragraph [46] in which it is contended (assuming this is what the respondents meant) that Le Grange J as well as the Supreme Court of Appeal erred *'in confirming the arbitration award and related costs as this infringes on* [the respondents'] *rights as enshrined in the Constitution of the Republic of South Africa'.*

[38] Nowhere do the respondents seek condonation for their failure to comply with the peremptory provisions of rule 19(3)(a) or (b), nor is it apparent from either the notices or Mulaudzi's affidavit why these peremptory provisions have simply been ignored.

[39] During argument I was informed by Mr Oosthuizen, and this was not disputed by Mr Mulaudzi, that in the proceedings before Le Grange J the respondents raised no constitutional issues at all. Le Grange J's judgment makes no mention of any constitutional issue that he was asked to consider and determine. No mention is made of any notice having been delivered by the respondents as required by rule 16A of the High Court Rules.

[40] In the respondents' subsequent petition to the Supreme Court of Appeal the grounds of appeal were set out as follows:

*'**GROUNDS OF APPEAL***

16. *It is respectfully submitted that the Honourable Court* a quo *erred in finding that the Arbitrator duly and properly considered the issue of the manner in which the Franchise Agreements were brought to an end, and the effect thereof on the continued operation of the Arbitration Agreement.*

17. *It is submitted that, as a matter of law, the effects of the lawful termination of an agreement upon an arbitration clause are not necessarily the same as those which would follow upon the non-consensual cancellation of such an agreement.*

18. *Accordingly, it is submitted that the facts of Atteridgeville Town Council v Livanos 1992 (1) SA 296 (AD) are distinguishable from those of the present matter in that the above matter dealt with a situation where both parties claimed that the other had repudiated the agreement, and that the Honourable Court* a quo *therefore erred in holding that the legal principles enunciated therein were applicable to the present matter.*

19. *The crucial issue remains whether the lawful termination of a contract (as contended for by Applicants) must necessarily be construed as a form of non-consensual cancellation, or whether the legal effects thereof could possibly be the same as those which would follow upon a consensual termination of same.*

20. *It is respectfully submitted that the Honourable Court* a quo *erred in finding that the Arbitrator was correct in holding that the arbitration agreement between the parties did not perish when the franchise agreements terminated despite the Arbitrator's failure to investigate and pronounce upon the issue of the manner in which the Franchise Agreements were brought to an end, and it is the Applicants' contention that another Court might reasonably come to a different conclusion in this regard.'*

[41] It is clear from the aforegoing that not even when the matters served before the Supreme Court of Appeal did the respondents consider that their disputes with the applicant related to any constitutional issue, or indeed, one that raised an arguable point of law of general public importance which ought to be considered by the Constitutional Court (it being noted that the Constitution Seventeenth Amendment Act came into operation on 3 August 2013).

[42] Having regard to the aforegoing I am persuaded that the notices are defective and that they constitute an irregular step(s) as contemplated in rule 30(1) of the High Court Rules. It follows that it is not necessary to consider the applicant's alternative argument, namely that the notices should be set aside because they constitute an abuse of the court process.

**Discretion**

[43] It does not automatically follow that the notices should be set aside, given the discretion conferred on this court in terms of rule 30(3). However I am satisfied that the notices should be set aside because of the substantial prejudice to the applicant if they are allowed to stand.

[44] The prejudice lies in the following. The respondents have exhibited a flagrant disregard for the peremptory provisions of subrules 19(3)(a) and (b) of the Constitutional Court Rules. This has the consequence that, as matters stand at present, the applicant has no idea of: (a) whether the whole or part of any order,

be it those of Le Grange J or the Supreme Court of Appeal, are sought to be appealed against; (b) the grounds upon which the respondents seek to appeal; and (c) the nature of any alleged constitutional issue or arguable point of law of general public importance which ought to be considered by the Constitutional Court, particularly given that right up until the conclusion of the proceedings before the Supreme Court of Appeal more than two years ago, the applicant was of the view that this was a private commercial dispute which should be dealt with by the courts as such.

[45] In short, the applicant is left entirely in the dark as to what case it has to meet. There is thus no question of any minor technical irregularity which could be cured by a simple amendment. The deficiencies in the notices are fundamental and the consequent prejudice to the applicant is material. The notices must thus be set aside.

**Conclusion**

[46] **In the result the following order is made:**

**1. The respondents' two purported notices of appeal directed to the Constitutional Court in case numbers 1052/2013 and 2970/2013 in this division are hereby set aside as irregular steps in terms of rule 30 of the High Court Rules; and**

**2.** **The respondents shall pay the costs of this application, jointly and severally on the scale as sought by the applicant between party and party, including any reserved costs orders.**

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**J I CLOETE**