

**DRAFT SUPREME COURT
(MISCELLANEOUS AMENDMENTS) RULES 2022**

EXPLANATORY MEMORANDUM

Eight categories of amendments to the *Supreme Court Rules* 2012 are proposed.

1. Amendment of Division 5.2 (*election petition reviews*)

The intention of the present Division 5.2 is evidently to prohibit review of interlocutory decisions of the National Court during the hearing of election petitions (see the definition of “decision” in Order 5, Rule 7) and minimise protracted delays in the hearing of petitions that result from the review by the Supreme Court of interlocutory decisions (eg refusal of an objection to competency or an application to dismiss a petition for abuse of process or refusal of a no-case submission). However, that intention has not been realised as the preponderance of judicial opinion is that in its present form the definition of “decision” in Order 5, Rule 7 amounts to an unconstitutional restraint on the exercise by the Supreme Court of the power to review all decisions of the National Court under s 155(2)(b) of the *Constitution* (see *Powi v Kaku* (2019) SC1856). That view ought to be accepted as correct. The definition of “decision” in Order 5, Rule 7 should be amended, so that it is clear that any decision of the National Court in an election petition is subject to review, upon the granting of leave. This would obviate the need to apply for dispensation with the requirements of Order 5 Rule 7 and make the process of applying for leave simpler and more straightforward than it is at the moment. There are ample authorities to the effect that the discretion to grant leave to review interlocutory decisions ought to be exercised sparingly; it is unnecessary for those principles to be set out in the Rules.

Two other provisions of Division 5.2 require amendment. Order 5, Rule 14 imposes the impractical requirement to have an application for leave filed, served *and heard* within 14 days – the hearing within 14 days requirement should be removed. Order 5 Rule 15 requires personal service of an application for leave, which is considered unnecessary as it provides opportunities for respondents to evade service and this can lead to applicants being required to make time-consuming applications for orders for substituted service.

2. Repeal and replacement of Division 7.1 (*application to extend time and application for leave to appeal*)

There are three problematic provisions in the existing Division 7.1:

- Order 7 Rule 1(c), which requires an applicant for an extension of time to list a matter for ex parte hearing (it is not an applicant’s role to list any matter);
- Order 7 Rule 2, which obliges an applicant to have an application heard within 40 days (again, obliging an applicant to get something done, which is beyond the applicant’s control); and
- Order 7 Rule 3, which requires that there be an oral hearing of an application for leave to appeal (this is unusual as it is the only provision in the existing Rules that calls for an oral hearing, and it is unnecessary as there is no reason that such an application could not be heard on the papers).

Rather than pinpointing these rules and amending each one, it is more convenient to repeal the whole of Division 7.1 and replace it with a new set of rules.

3. Repeal and replacement of Division 7.5 (*objection to competency of appeal*)

There are two provisions within this division that require amendment:

Order 7, Rule 17 requires that the Court, as distinct from a Judge, determines all objections to competency, even when an objection is to competency of a matter, eg an application for leave to appeal, which is within the jurisdiction of a Judge. Objections to competency should be able to be heard and determined by a Judge if the objection is to a matter within the jurisdiction of a Judge.

Order 7, Rule 18 is a curious provision as it puts the burden of establishing the competency of an appeal on “the applicant”, without clarifying who the applicant is. Repeal and replacement is considered necessary.

Less significant amendments of Order 7, Rules 15 and 19 are desirable, making it convenient (as Division 7.5 contains only four rules) to repeal and replace the whole of Division 7.5.

4. Amendment of Division 7.19 (*time, and want of prosecution*)

There appears to be no good reason that the power to dismiss an appeal or any other matter before the Court should not vest in a Judge, as well as the Court. Hence simple amendments to Order 7, Rules 48 and 49 are proposed.

5. Repeal and replacement of Division 13.3 (*file reference*)

Division 13.1 contains only one rule, Order 13 Rule 3, which prescribes file references for all Supreme Court matters. Some file references have been changed under a Registrar’s practice direction issued in 2014. It is best that these changes be reflected in the Rules and the easiest way to do this is to repeal Division 13.3 and replace it with an updated set of file references.

6. Amendment of Division 13.8 (*directions list and directions hearing*)

Interlocutory applications and processes are best heard and determined before the substantive matter to which they relate is set down for hearing. Examples include applications to adduce fresh evidence, to dismiss an appeal for abuse of process or to dismiss a matter for want of prosecution or for failure to comply with directions of a Judge, and objections to competency. A new rule is desirable to ensure that such applications and processes are heard at a separate and distinct hearing and determined before the substantive matter to which they relate is set down for hearing.

7. Amendment of Division 13.16 (*summary disposal*)

As with dismissal for want of prosecution (which is the subject of a proposed amendment to Division 7.19) there appears to be no good reason that the power to dismiss an appeal or any other matter before the Court should not vest in a Judge, as well as the Court. Hence simple amendments to Order 7, Rules 48 and 49 are proposed.

8. New Order 14 (*on the papers matters*)

The Registrar's Practice Direction No 3 of 2020 provides for the listing, hearing and determination of appeals and reviews and other proceedings "on the papers". The new procedures have proved successful and it is appropriate that they be now made rules of court. Such rules would fit naturally in Order 13 (*listings rules*); however the rules are quite elaborate so it is proposed that they should form a new order 14. The new rules are based closely on Practice Direction No 3 of 2020.

JUSTICE CANNINGS
CHAIRMAN, RULES COMMITTEE
