
*REPORTABLE*

**SUMMARY:** **CASE NO. I 3330/2006**

**ONDJAVA CONSTRUCTION CC** **1ST APPLICANT/DEFENDANT**
**VELISHAVO MARTIN KAUTWIMA** **2ND APPLICANT/DEFENDANT**
**BEATHA HAIDUWA** **3RD APPLICANT/DEFENDANT**
**AUGUSTUS KANDUME SHIVANENE** **4TH APPLICANT/DEFENDANT**
**MARTHA NGHHAUNYE** **5TH APPLICANT/DEFENDANT**

vs

**H.A.W RETAILERS CC T/A**

**ARK TRADING** **RESPONDENT/PLAINTIFF**

**HOFF, J**

**2008/09/19**

Rule 30 application couched in the form of a notice – not an application as the term is meant to be understand in terms of the Rules.

Rule 30(5) not requiring a party to afford an opponent an opportunity to remove the cause of complaint.
Rule 30(5) intended to apply in all those cases where a particular Rule did not itself provide for a special sanction for non-compliance with a notice or request.
Rule 30(5) out of place in a Rule where all the other sub rules of Rule 30 deal with irregular proceedings.
Rule 30(5) is not applicable to the rest of the sub sections of Rule 30.
Irregular set down of notice – no provision in Rules or Practice Directives that a mere notice may be set down as an application – neither may the Registrar set down such notice nor may a Judge give directions in that regard.

**CASE NO. I 3330/2006**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

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| **ONDJAVA CONSTRUCTION CC** | **1ST APPLICANT/DEFENDANT** |
| **VELISHAVO MARTIN KAUTWIMA** | **2ND APPLICANT/DEFENDANT** |
| **BEATHA HAIDUWA** | **3RD APPLICANT/DEFENDANT** |
| **AUGUSTUS KANDUME SHIVANENE** | **4TH APPLICANT/DEFENDANT** |
| **MARTHA NGHHAUNYE** | **5TH APPLICANT/DEFENDANT** |

and

| | |
|---|---|
| **H. A. W RETAILERS CC T/A ARK TRADING** | **RESPONDENT/PLAINTIFF** |

**CORAM:** HOFF, J

Heard on: 2008.08.07

Delivered on: 2008.09.19

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**JUDGMENT:**

**HOFF, J:** [1] This is an application in terms of Rule 30 of the Rules of the High Court of Namibia for an order in the following terms:

*"1. declaring the notice filed by the plaintiff/respondent in terms of Rule 30, dated 6 May 2008 and served on 8 May 2008 to be an irregular step and/or proceeding as envisaged in Rule 30 (1) of the Rules of the above Honourable Court;*

*2. directing that the respondent's aforesaid notice in terms of Rule 30 therefore be set aside and/or be struck out as an irregular step and/or proceeding as envisaged by Rule 30 of the above Honourable Court;*

*3. that the respondent to pay the costs of this application."*

[2] It is necessary at this stage to refer to the *notice* of the respondent served on the applicants on 8 May 2008.

[3] This *"notice in terms of Rule 30"* reads as follows:

*"Kindly take notice that the respondent/plaintiff intent (sic) to apply to the above Honourable Court to set aside the notice of motion dated 28 April 2008 as being an irregular step taken by the applicants/defendants.*

*Kindly take further note that the irregularities complained about are the following:*

*1.*

*Non-compliance with Rule 6(5).*

*2*

*Prayer 2 not competent in terms of Rule 44 (1) (c).*

*3.*

*Prayer 3 not competent in terms of Rule 44 (1) b).*

*4.*

*Prayer 1 not competent in terms of Rule 44 (1)(a).*

*Kindly take further notice that the respondent/plaintiff intend to apply to the above Honourable Court to set aside the application of the applicants/defendants if this notice is not complied with, within 10 days after receiving same."*

[4] In my view it is also necessary to have regard to the notice of motion dated 28 April 2008 in order to view the *notice in terms of Rule 30* and the Rule 30 application in perspective.

[5] This notice of motion reads as follows:

*"Be pleased to take notice that application will be made on behalf of the above named 1st, 2nd and 3rd applicants on the 9th of May 2008 at 10h00 or as soon thereafter as counsel may be heard for an order in the following terms:*

1. *Rescinding and/or setting aside the default judgment granted by the Honourable Mr Acting Justice Swanepoel on 28 March 2008 under case nr. (T) I 3339/2006 against 1st to 3rd applicants/defendants in favour of the respondent/plaintiff in terms of Rule 44 (1)(a) of the Rules of Court;*

2. *Rescinding and/or setting aside the orders granted by the Honourable Mr Acting Justice Manyarara on 11 March 2008 and under case nr. (T) I 3339/2006 in terms of Rule 44 (1)(c) of the Rules of Court;*

3. *Alternatively correcting and varying the orders granted by the Honourable Mr Acting Justice Manyarara on 11 March 2008 under case nr. (T) I 3339/2006 in terms of Rule 44 (1)(b) of the Rules of Court;*

4. *For the costs of this application on the attorney own client scale;"*

[6] The Rule 30 application now before Court was opposed by the respondent.

[7] The applicants raised four points *in limine*. Firstly, that the respondent's notice in terms of Rule 30 does not constitute an application; secondly, that the Namibian Rules of High Court do not envisage the giving of a notice in terms of Rule 30 as the South African Rules of Court do; thirdly, that the respondent's notice in terms of Rule 30 was irregularly set down; and fourthly, that the respondent has not met the prerequisite proof of prejudice.

[8] It was submitted by Mr Grobler who appeared on behalf of the respondent, that the applicants must have been aware of the alleged irregularities since 8 May 2008 (when respondent's notice in terms of Rule 30 was served on them) and since applicants filed their Rule 30 application on 20 June 2008 (i.e. 30 days after respondent had filed his notice), applicants' Rule 30 application should, in the absence of an application for condonation for non-compliance with the time period set out in Rule 30 (1),

be set aside. In addition it was submitted that the applicants failed to oppose the notice in terms of Rule 30 filed by the respondent.

[9] Rule 30 (1) reads as follows:

> *"A party to a cause in which an irregular step or proceeding has been taken by any other party may, within 15 days after becoming aware of the irregularity, apply to Court to set aside the step or proceeding: Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application."*

[10] The crucial question is when did the applicants became aware of the *irregularities* ? and could the applicants have ignored the notice of the respondent in which he had made known his *intention to apply* to have the rescission application of applicants set aside as an irregular proceeding ?

[11] In deciding this question I shall simultaneously consider the points *in limine* since the determination of those points *in limine,* have a bearing on the question when the applicants had become aware of the irregularities,.

[12] It is trite law that a party who is prejudiced by an irregular step should not treat it as a nullity, but must apply to set it aside under Rule 30 as being irregular.
(See *Theron v Coetzee 1970 (4) SA TPD* 37).

[13] I shall now in turn deal with the points *in limine*.

[14] First point *in limine*: Respondent's notice in terms of Rule 30 does not constitute an application.

[15] An application in terms of Rule 30 is an interlocutory application brought on notice to all parties. There is authority that where an application is brought on notice the short form (Form 2(a) ) to the First Schedule to the Rules of the High Court should be utilized.
*(See Government of the Islamic Republic of Iran v Berends 1998 (4) SA 107 NmHC at 123 C).*

[16] A comparison of the notice of the respondent with Form 2 (a) reveals the following deviation. Form 2(a) gives notice that an application will be made on a specific day for a specific order or orders requesting the registrar to place the matter on the roll for a hearing whereas the notice of the respondent gave notice that the respondent *intended to apply* for an order (i.e. for the setting aside the rescission application of applicants) as an irregular step *"if this notice is not complied with, within 10 days after receiving same"*. Respondent's notice is silent on the date on which the intended application was to be brought.
(Emphasis provided).

[17] In my view what the respondent in his notice *(supra)* was hoping to achieve, was to move the applicants to rectify the alleged irregularities complained of within a period of 10 days after having received the notice. What else could the phrase *"if this notice is not complied with, within 10 days"* have meant ?

[18] Having regard to the form of the respondent's notice such a notice fell far short of the prescribed form in which interlocutory applications should be coached and in my view the apparent purpose of the *"notice in terms of Rule 30"* was never intended to be a substantive application in the sense the term *"application"* is meant to be understood in terms of the Rules of this Court. The notice by the respondent, in my view, is simply not an application in terms of the Rules.

[19] The second point *in limine*: the Namibian Rules of the High Court do not provide for the giving of a notice in terms of Rule 30.

[20] The respondent purportedly acted in terms of the provisions of Rule 30(5) of the Rules of this Court when notice was served on 8 May 2008.

[21] Rule 30(5) reads as follows:

> *"Where a party fails to comply timeously with a request made or notice given pursuant to three rules, the party making the request or giving the notice may notify the defaulting party that he or she intends, after the lapse of 10 days to apply for an order that such notice or request be complied with, or that the claim or defence be struck out, and failing compliance within 10 days, application may be made to court and the court may make such order thereon as it seems meet."*

[22] Prior to December 1996 the South African Rule 30(5) were worded exactly the same as our Rule 30(5) and thus South African case law on the application and interpretation of Rule 30(5), although not binding, may be persuasive authority.

Trollip J considered the applicability of the provisions of Rule 30(5) in respect of Rule 21(6) in *Norman & Co. (Pty) Ltd v Hansella Construction Co. (Pty) Ltd 1968 (1) SA 503 TPD* and concluded on 504 E – G as follows:

> *"... the general rule in 30(5) was obviously intended to apply in all those cases where a particular Rule did not itself provide for a special sanction for non-compliance with a notice or request, as, for example, in Rules 14(5), 14(9), 36(2) and 37(1). But where such special sanction was provided as, for example, in Rules 21(6) and 35(7), that was to apply instead of Rule 30(5). To try to read such Rules with and subject to Rule 30(5) would be not to supplement them but to supercede or destroy them. In fact if Rule 30(5) does apply then Rule 31(6) would have been quite unnecessary and can be ignored. That could never have been the intention."*

[23] In my view the reference to Rule 31(6) *(supra)* is erroneous and should read Rule 21(6). There was no Rule 31(6).

[24] Rule 30(5) was deleted by subsequent legislation in South Africa and substituted with Rule 30(A) which reads as follows:

> *"(1) Where a party fails to comply with these rules or with a request made or notice given pursuant thereto,, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days, to apply for an order that such rule; notice, or request be complied with or that the claim or defence be struck out.*
>
> *(2) Failing compliance within 10 days, application may on notice be made to the Court and the court may make such order thereon as to it seems meet."*

[25] In *ABSA Bank Ltd v The Farm Klippan 490 CC Ekenhof Plastics Bottling Co (Pty) Ltd and Others v BOE Bank Ltd (formerly known as NBS Boland Bank Ltd) 2000 (2) SA 211 WLD, Eipstein AJ* supported the reasoning of Trollip J (in Hansella) and stated the following at 213 G – H:

> *"Certainly the old Rule 30(5) was out of place in a Rule where all the other sub rules of Rule 30 deal with irregular proceedings. It is not an irregular proceeding to fail to comply with a request or notice. It therefore does seem anomalous that the old Rule 30(5) was used to compel compliance with Rules which did not within themselves provide a specific remedy or sanction.*
> *What is now clear is that Rule 30A is the procedure to use where a party wishes to compel compliance with a notice or request given in terms of those Rules which have no special remedy for failing to comply or respond thereto."*

[26] I support the passages quoted (supra) in the *Hansella* and *Absa Bank* cases and accordingly find that the provisions of our Rule 30(5) are not applicable to the rest of the subsections of Rule 30.

[27] A recently unreported decision of this Court in *Standard Bank of Namibia Ltd v Nationwide Detectives and Professional Practitioners CC* case number (P) I 811/2007 and delivered on 11 July 2008 was brought to the attention of this Court in which Silungwe AJ ruled that a party should in terms of Rule 30(5) give notice to an opposing party in order to afford such opposing party an opportunity to remove the cause of complaint within ten days of becoming aware of the irregularity and that non-observance of Rule 30(5) may result in an award of costs against the defaulting party or dismissal of an application.

[28] Paragraph 16 of the Standard Bank of Namibia case (supra) *inter alia* reads as follows:

> *"In terms of sub rule (5), a party that invokes Rule 30 against another party should give notice to his opponent to afford him an opportunity to remove the cause of complaint within ten days of becoming aware of the irregularity. Although the sub rule is not peremptory, it should, nevertheless be complied with for the reason that non-compliance will, in the ordinary course, result in an award of costs against the defaulting party and probably a dismissal of the application. One of the purposes of the sub rule is to prevent unnecessary applications being brought and to put a defaulting party on notice as to the consequences of his default.*
> *(See Khunou and Others v Fihrer & Sons 1982 (3) SA 353 at 361 A – B."*

[29] In my respectful view *Khunou (supra)* does not support the finding that a notice in terms of Rule 30(5) should be given to an opponent in order to afford such opponent an opportunity to remove an alleged irregularity.

[30] In the *Khunou* case *(supra)* one of the litigants gave notice in terms of Rule 35 for the compliance of notices in respect of the inspection and reproduction of certain documents after eight requests for copies of the required documents had been ignored by the opposing litigant. The Court made an order regarding the provision of the relevant documents and reserved judgment in respect of the question of costs of the application.

At 360 E – F the Court *inter alia* stated as follows:

> *"The respondent's counsel argued that the application was ill-founded because there had been a non-compliance with Rule 30(5) …*
> *He submitted that the effect of this Rule is to preclude an application of the present kind unless and until a notice in terms of the Rule has been given. In support of this proposition, he referred me to Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W). I do not however read that authority or any of the other cases to which it refers as supporting his submission. Neither it nor the other authorities in question express the view that the Rule is peremptory and that no order can be made on application compelling compliance with the Rules (in a case where there is no specific sanction for a non-compliance with a particular Rule built into such Rule) unless a notice has first been given in terms of Rule 30(5)."*

[31] It is clear from the judgment in the Standard Bank of Namibia, unreported case, *(supra)* that the governing judicial authority (i.e the *Hansella Construction and Absa Bank* cases *(supra)* had not been brought to the attention of the Court and such authority was accordingly not considered by the Court.

[32] It is my respectful view that this Court is thus not bound to follow the *Standard Bank of Namibia* case *(supra)* because of a misplaced reliance on non-applicable case law and an

obvious oversight of existing governing case law (*Hansella Construction and Absa Bank* cases *(supra)* ).

[33] The third point *in limine* relates to the irregular set down for hearing of a notice.

[34] It is not disputed that the instructing legal practitioner of the applicants, Ms Petherbridge, in an effort to prosecute the rescission application initiated set down procedures in order to obtain a date for the hearing of such application.

It appears from an uncontested affidavit filed by Ms Petherbridge that on 28 May 2008 at a meeting held in the offices of the Registrar, the 5th of August 2008 was initially identified as a suitable date on which the rescission application could be argued. Mr Grobler, at that meeting indicated that he wished to obtain that date for the hearing of respondent's Rule 30 proceedings.

Ms Petherbridge stated that she indicated to the Registrar that there was no application to obtain a date for the hearing of the so-called Rule 30 application in terms of the provisions of Rule 6 (5)(f) of the Rules of this Court and that she also expressed the view that respondent's notice in terms of Rule 30 was not an application but constituted a mere notice.

The Registrar subsequently refused to grant a date for the hearing of the rescission application as well as a hearing of the so-called application in terms of Rule 30.

[35] Once the parties had left the office of the Registrar, Mr Grobler stated to her, that he continued to be of the view that his notice in terms of Rule 30 was actually a substantive application, that he had complied with the requirements of Rule 30, and that he would revert back to the Registrar in order to explain this.

[36] Subsequently on Friday 30 May 2008 to her surprise she received a telephone call from the Registrar, who then indicated to her that the Judge-President had instructed him to grant Mr Grobler a date by virtue of the decision in the case of *Swarts v van der Walt t/a Sintraten 1998 (1) SA 53 WLD.*

[37] The Registrar telephonically indicated further that the respondent's *"Notice in terms of Rule 30"* would be set down for the 5th of August 2008, the date which had initially been identified, as being suitable for purposes of hearing the rescission application.

[38] According to her this set down was highly irregular since Mr Grobler at no stage gave formal notice nor obtained the so allocated date in accordance with the requirements of Rule 6 (5)(f) and the practice directives applicable thereto.

[39] Mr Grobler's reply to these criticisms was that he had complied with the requirements of Rule 30 and referred this Court to a decision of this Court *(Gariseb v Bayerl 2003 NR 118)* in which this Court held that a Rule 30 application may be set down at a time assigned by the Registrar or as directed by a Judge. The relevant passage appears at 212 G – H where the following was stated:

> *"Rule 6(11) requires that interlocutory and other applications incidental to pending proceedings may be brought on notice (similarly required by Rule 30) and may be set down at a time assigned by the Registrar or as directed by a Judge."*

[40] Mr Grobler submitted that since the Registrar had *in casu* allocated a date for the hearing of the notice which date was confirmed by the Judge-President that there had been a proper set down.

[41] It appears to me, from a perusal of the Rules, that Rule 6(5) deals with applications other than *ex parte* applications. These applications must in terms of Rule 6 (5)(a) be brought on *notice of motion* as near as may be in accordance with Form 2 (b) of the First Schedule.

[42] The provisions of Rule 6 (5)(f) which resort under Rule 6(5) are in my view not applicable to Rule 30 applications which are interlocutory applications brought on notice only.

[43] The *Swartz v van der Walt* case *(supra)* deals with an amended Rule 28(4) (in South Africa) relating to an amendment of a declaration. There it was held that such an application for an amendment should be brought on notice and the notice of motion procedure supported by affidavit as contemplated in Rule 6(1) was not be used.
It is difficult for me to see the relevance of the *Swarts* case *(supra) (*on the assumption that respondent's notice in terms of Rule 30 had been set down by the Registrar by virtue of this decision) to Rule 30 application proceedings.

[44] I have not been referred to any authority that a mere notice (in the form couched by the respondent) may be set down by the Registrar or that a Judge may give directions in that regard. This is not surprising, since it is axiomatic that a notice does not constitute an application in terms of the Rules of Court.

[45] Respondent's *"notice in terms of Rule 30"* in my view, expressly gave notice that it was not the application itself, which application according to the notice would be made at some indeterminate future date, intimating that the applicants would still be able to oppose

the threatened application in the normal course and in accordance with the normally applicable procedures.

[46] I doubt, that the Judge President would have directed the Registrar to set down respondent's notice in terms of Rule 30 had he been appraised of the fact the respondent's notice was not an application in terms of Rule 30, but a notice which is not even sanctioned by the provisions of Rule 30.

[47] I am aware of a rule of practice in this jurisdiction to the effect that interlocutory applications, *inter alia*, are being set down, after the required notice had been given to the opposing party, on a first motion court day without, any involvement by the office of the Registrar. The duty Judge, during motion court proceedings, deals with such interlocutory applications.

[48] The *Consolidated Practice Directions of the High Court of Namibia* issued by the Judge-President which came in force on 3 October 2007, relating to the subject matter of interlocutory applications, *inter alia,* reads as follows:

> *"8 (a) Except where the Rules of Court otherwise provide, there shall be not less than 5 clear court days between the date of service or delivery of notice of interlocutory applications, and the date of set down.*
>
> *(b) All opposed interlocutory applications …will be heard on Tuesday at 10h00 by the duty Judge.*
>
> *(c) When such applications (other than urgent applications) become opposed, the duty Judge presiding in motion court should let those matters stand down until the end of the motion court roll …."*

[49] I refer to this Practice Directive to emphasise the requirement that in an application in terms of the provisions of Rule 30 the opposing party is notified that an application will be made on a *specific date* for certain relief. Respondent in its notice has not complied with this requirement.

[50] The reliance on the fact that the Rule 30 proceedings had been set down by the Registrar and confirmed by a Judge must fail for the reason that there was no *application* in terms of Rule 30 (a *notice* was given).

[51] Mr Grobler, in respect of the afore-mentioned points *in limine* submitted, since they are "technical objections to less than perfect procedural steps", that the points *in limine* should fail.

It was submitted on behalf of the applicants that the objections raised in the points *in limine* are not mere technical objections to less than perfect procedural steps but are objections to a gross abuse of process.

[52] In my view the endeavour to have a *notice* set down as a substantive application in terms of Rule 30 of the Rules of this Court, in the circumstances of this case, is an abuse of process and should not be countenanced.

[53] The submission by Mr Grobler that the applicants should have within 15 days after becoming aware of these irregularities (i.e. 15 days after 8 May 2008) approached the Court to have them set aside, cannot be supported for the reason that a litigant may only apply to Court to set aside such irregularity if such applicant can prove that he or she had been prejudiced by such irregularity.

Thus the applicants could not have applied to court prior to 30 May 2008 since they would not at that stage have been in a position to prove prejudice. Applicants could not at that stage have been prejudiced by a notice which was a nullity as such nullity did not advance the proceedings one step nearer to completion.

(See *Kopari v Moeti 1993 (4) SA 184 BGD at 188* F – H).

However when this notice was elevated to the status of an *"application"* on 30 May 2008 prejudice was imminent since if applicants had ignored the set down of this notice and respondent had been successful in such an *"application",* the applicants would have been precluded from prosecuting their rescission application. If the rescission application is eliminated the default judgment stands and the respondent would be free to execute that judgment.

[54] It is for this reason that applicants' hands were forced to oppose the respondent's *"notice in terms of Rule 30"* in the form of a Rule 30 application.

[55] In *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others 1999 (2) SA 599 TPD Southwood J* considering the requirement of prejudice, said the following at *611 E:*

> *"The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the further conduct of the case is not affected by the irregular step and the irregular step can simply be ignored."*

[56] One should however not loose sight of the intended purpose of respondent's notice (as found by this Court), i.e. a request for compliance within 10 days with the notice failing which an application would be brought to set aside the rescission application. In my view the

applicants were, prior to 30 May 2008, entitled to ignore respondent's notice because they had not been prejudiced by such notice.

(See *Marley Floor Tile Co. (SA) (Pty) Ltd v Geldenhuys 1967 (3) SA 585 (GWLD) at 588* A).

[57] I am of the view that the applicants only became aware (for the purpose of the provisions of Rule 30(1) ) of the irregularity when this notice was elevated to the status of an application on 30 May 2008. The Rule 30 application by the applicant was thus brought within the 15-day period required by Rule 30(1).

[58] I am further of the view that the steps taken by respondent objected to by the applicants in the first three points *in limine*, considered *(supra)*, were irregular steps or procedures taken by the respondent.

[59] I have already *(supra)* considered the question of prejudice as far as it relates to the further conduct of the case by the applicants.

[60] It is also incumbent to consider the prejudice, if any, which may be suffered by the respondent should the applicants be successful in this Rule 30 application.

(See *Minister of Prisons v Jongilanga 1983 (3) SA 47 (E) at 57 C – D).*

[61] It must be stated that the respondent (for obvious reasons) did not address the issue of prejudice in its notice since the notice was never intended to be a substantive application in terms of Rule 30. On this ground alone (i.e. failure to prove prejudice) the *"notice in terms of Rule 30"* of the respondent should be set aside.

[62] In my view the respondent would not suffer substantial prejudice should its *"notice in terms of Rule 30"* be struck out since the respondent would still be left with the opportunity to answer fully to the merits of the rescission application and may even again raise the objections raised under its *"notice in terms of Rule 30"*.

[63] I have indicated *(supra)* that the applicants would suffer much graver prejudice should applicants' application in terms of Rule 30 be refused. For them it could mean the end of litigation.

[64] My finding accordingly is that the *"notice in terms of Rule 30"* of the respondent is an irregular step or proceeding and stands to be struck out.

[65] In the result the following order is made:

The Rule 30 application of the applicants is upheld with costs.

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**HOFF, J**

**ON BEHALF OF THE 1ST, 2ND AND 3RD**

**APPLICANTS/DEFENDANTS:** **ADV. GEIER**

**Instructed by:** **PETHERBRIDGE LAW CHAMBERS**

**ON BEHALF OF THE RESPONDENT/PLAINTFF:** **ADV. GROBLER**

**Instructed by:** **GROBLER & CO.**