

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)**

CASE NO : 23554/2002

In the matter between :

M G P LEKOTA N.O.

Applicant

and

CCII SYSTEMS (PTY) LIMITED

Respondent

In re:

CCII SYSTEMS (PTY) LIMITED

Applicant

and

M G P LEKOTA N.O.

Respondent

**APPLICANT'S HEADS OF ARGUMENT IN THE APPLICATION FOR
CONDONATION AND IN RESPECT OF THE RESPONDENT'S RULE 30(1)
APPLICATION**

APPLICATION FOR CONDONATION

1. Judgment in the main application was handed down on 15 April 2005.
The application for leave to appeal should have been made on or before
10 May 2005, but was only filed and served on the Respondent on 20

July 2005. The application for leave to appeal is therefore out of time by some 50 days.

2. Uniform Rule 49(1)(b) provides that this Honourable Court may, upon good cause shown by an Applicant, extend the 15 day period within which the application for leave to appeal should have been served.
3. In considering the application for condonation, the Court will look at the following factors:
 - 3.1 the degree of lateness;
 - 3.2 the explanation therefor;
 - 3.3 the prospects of success;
 - 3.4 the importance of the case;
 - 3.5 the convenience of the Court;

3.6 the avoidance of unnecessary delay in the administration of justice; and

3.7 the Respondent's interest in the finality of the matter.¹

4. The overriding consideration in applications for condonation is that the matter rests in the judicial discretion of the Court, which discretion is to be exercised having regard to all the circumstances of the case.²

DEGREE OF LATENESS

5. It is submitted that the Applicant has given an adequate explanation for the degree of lateness.³

¹ **Melane v Santam Insurance Company Ltd 1982 (4) SA 531 (A) at 532 C-F;**

Federated Employers Insurance Company v McKenzie 1969 (3) SA 360 (A) at 362 G

² **Torwood Properties (Pty) Ltd v South African Reserve Bank 1986 (1) SA 215 (W) at 228 B-E**

³ **Application for Condonation, paragraphs 21-37**

6. In short, the explanation for the lateness is that:

6.1 From the date of delivery of the judgment, the Applicant engaged in many slow processes of considering whether to appeal the decision or not.

6.2 It was only on 5 May 2005 that it was decided that the State Attorney be instructed to obtain an opinion from Counsel on the prospects of success on appeal.

6.3 Counsel were instructed on 9 May 2005 and provided their opinion on 10 June 2005. Counsel were unable to provide the opinion earlier as they both were engaged in other urgent matters.

6.4 Between 8 June 2005, 10 June 2005 (the date on which Counsel provided their opinion on the prospects of success) and 29 June 2005, the Applicant engaged in further meetings of its high ranking officials to take a final decision on what

recommendation is to be made to the Minister. This process was in addition affected by the fact that the Secretary of Defence, who is the highest official to advise the Minister on these matters, left on 14 June 2005 for China and Malaysia on official business and a meeting could only be held with him on 29 June 2005 after his return. Upon consideration of the briefing given to him, he immediately arranged a briefing of the Minister and a recommendation was made that leave to appeal should be sought.

6.5 The State Attorney was instructed immediately to convene a consultation with Counsel which happened on 30 June 2005 where an exploratory consultation was held between Counsel, the State Attorney and officials of the department. It was then decided that Counsel proceed with the application for leave to appeal.

7. It is submitted that the Applicant has provided an adequate explanation why the decision to launch an application for leave to appeal was taken when it was, and that the delay, taking into account the decision-making

processes in the Department is not inordinate.

PROSPECTS OF SUCCESS

8. It is generally accepted by our Courts that a reasonable prospect of success on appeal is an important consideration relevant to the granting of condonation.⁴

9. The Court commented that it had given serious consideration to making a qualified order in respect of some of the items. The qualification in question would have been that the Minister should be given another opportunity to consider the question of severance in terms of Section 28 of the Act.⁵

10. It is submitted that the Applicant has reasonable prospects of success

⁴ Herbstein and Van Winsen: *The Civil Practice of the Supreme Court of South Africa* (4th Edition); edited by Dandy, Juta & Company, 1997, at 901-902

⁵ Application for Condonation, paragraphs 46 and 47

on this point alone which would apply to most, if not all, requested items.

11. The Court ordered the Applicant to disclose all the requested information because he had failed to provide full and proper reasons why the requested information was exempt from disclosure in terms of the relevant sections of the Act. The Court was not in a position to make findings that objectively the information that the Applicant was ordered to disclose does not contain matter that is protected from disclosure. It is submitted that another Court on appeal may find that the Court's supervisory role in this regard requires the Court to have referred the matter back to the Information Committee (or exercised its powers in terms of Section 80 of the Act to examine any record itself and to thereafter rule on whether or not it is protected from disclosure).

THE IMPORTANCE OF THE CASE

12. This case concerns the Applicant's decision to purchase very important military equipment in order to secure the defence and security of the country. The disclosure of information which is military sensitive is a matter of importance to the Applicant. The Applicant fears that the

consequence of the Court order would lead to the disclosure of classified information, the disclosure of which will enable any person hostile to the Republic's interests to take steps, or to design systems, to avoid the effectiveness and fighting capacity or otherwise of the military equipment concerned, that is, the Patrol Corvettes.⁶

13. It is submitted that the considerations of the defence and security of the Republic require that the obligations of the Applicant under the Act be finally adjudicated upon by the Supreme Court of Appeal.

RESPONDENT'S INTEREST IN THE FINALITY OF THE MATTER

14. The Respondent is not obliged to give reasons why it made the request for information. However, in the Respondent's founding affidavit it states that it launched the main application in order to compel the Applicant to furnish further information to it in its request to establish that it was excluded as a supplier of certain military components for the

⁶ Application for Condonation, paragraphs 52-54

Corvettes through significant deviations from lawful tender procedures.⁷

15. The Respondent has already instituted action for damages against the Applicant and others and would be entitled to call for discovery in the normal course and would therefore not be prejudiced if this matter is concluded during or after those proceedings.

CONCLUSION

16. It is submitted that if the Court is persuaded that the appeal could reasonably succeed on the merits, condonation should be granted.
17. It is submitted that good cause has been shown that the period within which the application for leave to appeal should have been brought should be extended.

RESPONDENT'S APPLICATION IN TERMS OF RULE 30(1)

⁷ Application for Condonation, paragraphs 64-65

18. Soon after the Applicant had filed its application for leave to appeal, the Respondent brought an application in terms of Rule 30(1) dated 16 August 2005.
19. The Respondent's contention is that because the application for leave to appeal was filed late and without a substantive application for condonation, the application for leave constitutes an irregular step within the meaning of Rule 30.⁸
20. The application and use of the Rule 30 provisions as pertaining to irregular proceedings is dealt with succinctly in Herbstein & Van Winsen⁹.
21. The failure to file an application for condonation for the late filing of any proceeding or pleading is not cited as one of such irregular steps. Of importance is that the learned authors express a view that even if an irregularity is established, the Court has a discretion whether or not to

⁸ Respondent's Application in terms of Rule 30(1), paragraph 14

⁹ at 558-585

grant the application in terms of Rule 30(1). Secondly, the Court may condone the irregularity or allow the party in default an opportunity to cure the defect. Condonation of such an irregularity would be granted if it does not cause substantial prejudice to the other party.

22. It is submitted that if indeed the Applicant's failure to simultaneously file an application for condonation with his notice of application for leave to appeal is an irregular proceeding, it is one that will not cause substantial prejudice to the Respondent and that the Court should condone the irregularity, if established.

23. The Applicant contends that an application for failure to comply with the Rules may be brought at any stage of the proceedings. The Court is empowered to condone any non-compliance with the Rules at any stage of the proceedings.¹⁰

24. Whenever a party realises that it has not complied with a Rule of Court

¹⁰ Applicant's Answering Affidavit to the Rule 30(1) Application, paragraphs 6.2 and 6.3

it is always open to such party, to apply for condonation.¹¹ The Court has inherent jurisdiction to grant relief, even in the absence of any Rules providing for condonation.

25. It is submitted that even if the Court finds that it was an irregular step not to file an application for condonation simultaneously with the notice of application for leave to appeal, the Respondent has not alleged or proved that it has been prejudiced in any manner in this regard.¹²

26. It is submitted that the Applicant has committed no irregular step, alternatively that if it is found that its failure constitutes an irregular step, it is one that the Court should condone.

27. The Respondent's application in terms of Rule 30(1) should be dismissed with costs.

¹¹ See: *Herbstein & Van Winsen at 903*

¹² See *Erasmus, Superior Court Practice, Juta and Company, Commentary on Rule 30(3)*

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to appeal