

**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) LTD**

Respondent

In re:

**CCII SYSTEMS (PTY) LTD**

Applicant

and

**M G P LEKOTA N O**

Respondent

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**APPLICANT'S SUPPLEMENTARY HEADS OF ARGUMENT**

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- 1 The Respondent in its Replying Affidavit<sup>1</sup> contends that the Applicant, conveyed by unequivocal conduct, inconsistent with any intention to appeal, that he acquiesced in this Court's judgment an order which are subject of this application for leave to appeal.
- 2 In its Heads of Argument<sup>2</sup> the Respondent makes legal submissions in support of this contention.
- 3 Peremption is to be raised as a point in limine.<sup>3</sup> It is submitted in the first Instance that this point should be raised by way of substantive

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<sup>1</sup> Record p. 83 - 85

<sup>2</sup> Paras 4 - 12

application, *in limine*, so that the relevant issues can be properly canvassed. It is impermissible to raise the issue in a replying affidavit.

4 For the purposes of this argument, it is necessary to highlight the following facts:

4.1 On 8 July 2005 the applicant's attorney informed the respondent's attorney as follows:

*"Upon further consideration of this matter my client has decided, notwithstanding the opinion received, that an application for leave to appeal should be filed. Quite obviously condonation will also be sought for the late filing of such application."*

See; annexure MJT8, page 34 of the bundle.

4.2 On 14 July 2005 the respondent's attorney informed the applicant's attorney as follows:

*"Accordingly, your client is hereby notified that it should ensure that it takes steps now to comply with the order so that in the event that leave to appeal is refused, the documentation will be immediately available to our client."*

...

*Your client is accordingly warned not to endeavour to adopt, as an excuse for the non-immediate delivery of*

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<sup>9</sup> Maclean v Haasbrook 1958(4) SA 577 (A) 886 A - D

*documentation to our client in the event that the application for leave to appeal is refused, the fact that he has now been advised to apply for leave to appeal."*

Accordingly, it is important to note that the respondent itself insisted that the applicant take steps to comply with the order while at the same time making application for leave to appeal. Peremption has not been an issue nor a contention relied upon until the filing of the respondent's replying affidavit.

- 5 Peremption applies where an unsuccessful litigant, by unequivocal conduct inconsistent with any intention to appeal, shows that he acquiesces in the judgment or order.<sup>4</sup>
- 6 The person alleging peremption bears the onus of showing conduct which points "*indubitably and necessarily*" to an acquiescence in the judgment.<sup>5</sup>
- 7 Where an unsuccessful litigant had at first accepted a judgment of the Court and abandoned any intention to appeal therefrom, and then later applies for condonation of the late noting of appeal, it must show: "*very special circumstances to induce the Court to allow them to re-open litigation which they themselves regard as having reached finality.*"<sup>6</sup>
- 8 The majority of the Court found that the following constituted special circumstances warranting the allowing of the application for leave to appeal:

<sup>4</sup> *Gentruco A.G. v Firestone SA (PTY) Ltd* 1972 (1) SA 589 (A) at 600 A-B  
<sup>5</sup> *Natal Rugby Union v Gould* 1998 (1) SA 432 (SCA) at 443 F  
<sup>6</sup> *Michaels v Wells* N O 1987 (1) SA 46 (C) 52 A-B and D

- 8.1 Failure to appeal was forced upon the litigant by reason of his lack of means.
- 8.2 The Applicant for appeal was an old uneducated person.
- 8.3 The Applicant for leave had suffered bodily injuries for which the driver of the car insured by the Respondent may well have been responsible.
- 8.4 The appeal was assured to succeed.<sup>7</sup>

9 In the Natal Rugby Union case the Union had been ordered to hold fresh elections for its president in accordance with its constitution. Gould had been the successful litigant. Subsequent to the judgment, the Union timeously lodged its application for Leave to Appeal but soon thereafter held elections in accordance with Union constitution. The question that arose was whether that conduct was an acceptance of the judgment in the Court below, thereby causing the Union to lose its right to appeal that judgment. The court held that :

*"It is clear that in these circumstances the re-election proceeded subsequent to a decision to appeal which was never rescinded and without regard to whether an appeal would in fact be pursued. In conjunction with that consideration, the evidence on record indicates that the litigation in this case left Union and Council members disturbingly but understandably divided in that their motive in proceeding with the re-election was to terminate dissension if at all possible and to get on with the work of*

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<sup>7</sup> Michaels v Wells at 62 H - 63 A

*administering rugby in what was, with the scheduled holding in Durban of some of the 1995 rugby world cup events, a momentous season in the Union's history.*

*Accordingly I find that the decision to hold the re-election was consistent with administrative considerations and certainly not inconsistent with the intention to appeal. Gould has therefore failed to establish peremption."<sup>9</sup>*

10 In *Cohen v Cohen*<sup>9</sup> it was said that :

*"But a mere statement of intention, unless and until acted upon, is not in my judgment an equivocal act. It may be revoked; there is a locus poenitentiae; and it is not final. I agree with the Judge President in thinking that we ought not to carry this doctrine beyond the limits of the doctrine of election."*

11 It was said further :<sup>10</sup>

*"...since peremption entirely takes away an appellant's right of appeal it is of utmost importance that the Court must be clearly satisfied that an Appellant has abandoned his right. What is, I think, misleading in some of the judgments is the stress placed on the example in the Code, adopted by Voet, that a person who asks for time to pay a judgment has acquiesced in the judgment. I do not think this example should be elevated to a principal; each case must be looked at on its merits."*

<sup>9</sup> Natal Rugby Union case at 444 C - E

<sup>9</sup> 1980 (4) SA 436 (ZAD) at 437 H

<sup>10</sup> *Cohen v Cohen* at 440 A

12 It is submitted that the Respondent has not established an unequivocal acquiescence to the judgment for the following reasons:

12.1 By the time the Applicant filed its Notice of Application for Leave to Appeal that is, on 20 July 2006, he had not acted upon the undertakings made in terms of the extensions of time requested and given to make all the documents available to the Respondent.<sup>11</sup>

12.2 The decision to immediately prepare the documentation that the Applicant had been ordered to disclose was in consideration of the consequences of the Application for Leave to Appeal being dismissed and the Applicant being ordered to immediately make disclosure. This was a factor also considered important by the Respondent.<sup>12</sup> In fact the Respondent insisted that the applicant proceed to comply with the judgement while acknowledging the applicant's right to apply for leave to appeal. Until the filing of the Respondent's reply peremption has not been relied upon by the respondent.

12.3 The Applicant continued to hold several meetings of different senior structures in the department with a view to satisfying himself that that the appeal avenue was closed to it. A second opinion from Counsel was obtained at the meeting held on 30 June 2006 which confirmed the Director-General's opinion that an appeal should be launched taking

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<sup>11</sup> Cohen v Cohen at 437 H and 440 A

<sup>12</sup> Record: p. 86, para 3 - 6

into account the importance and far reaching consequences of the judgment.<sup>13</sup>

- 13 It is submitted that, objectively, the Applicant never accepted that he would never exercise the right of appeal if ultimately advised that the appeal had reasonable prospects of success.
- 14 It is submitted that special circumstances exist, warranting the condonation of the Application for Leave to Appeal even though the Applicant had at a certain stage believed that the appeal avenue was closed to it. These circumstances are the following:
- 13.1 Whereas the Applicant had received an opinion on 10 June 2005 that there were no prospects of success, a second opinion obtained in the course of a consultation on 30 June 2005 confirmed the Applicants Secretary of Defence's view that the matter should be appealed.
- 13.2 The prospects of success on appeal as it is at present framed are more than reasonable.
- 13.3 The matter concerns the defence and security of the country, therefore making it desirable that the matter be resolved by a higher court.
- 13.4 By not giving notice of Application for Leave to Appeal immediately after judgment, and choosing to obtain Counsel's opinion first, the Applicant was acting reasonably.

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<sup>13</sup> Record: p. 63-67

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13.5 The real litigant in this matter is the Minister of Defence and his Secretary of Defence. It is inevitable that in a department such as this various hierarchical structures will be called upon to take decisions at least on an interim basis before the Secretary of Defence or the Minister himself are called upon to take a final decision. Situations such as the present cannot always be reasonably avoided.

14 It is submitted therefore that in the event that this Court finds that there was conduct on the part of the Applicant amounting to an acceptance of the judgment of the Court, there exist special circumstances warranting the condonation of the Application for Leave to Appeal in the circumstances.

**P J PRETORIUS SC**

**P G MALINDI**

6 February 2006