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

CASE NO.: 23554/2002

In the matter between:

CCII SYSTEMS (PTY) LIMITED Applicant

and

MGP LEKOTA N.O. Respondent

HEADS OF ARGUMENT FOR CCII SYSTEMS (PTY) LIMITED

INTRODUCTION

1. The respondent in the main case ("the MoD") applies for leave to appeal and for condonation of the late filing of his application for leave.

2. The applicant in the main case ("CCII") opposes both applications. In addition, after the filing of the MoD's application for leave but before the filing of his application for condonation CCII applied in terms of rule 30 to have the application for leave set aside as an irregular step, on the basis that the application for leave was out of

time and not accompanied by a substantive application for condonation. Since an application for condonation was subsequently filed, CCII only persists in the rule 30 application insofar as costs are concerned.

3. Attached to these heads is a chronology of relevant events. References in these heads to the record in the main case are denoted by the letter "M". All other references to the record are to the record relating to the application for leave to appeal.

APPLICATION FOR LEAVE TO APPEAL

Peremption

4. The principle of the common law as adopted by our courts is that a litigant who communicates to the other party that he acquiesces in the judgment loses his right of appeal. The principle and the authorities on which it is based are set out in various judgments of full benches of this Court (see, for example, *Meiklereid v Bank of Africa Ltd* 1905 TS 749; *Bongers v Ekstein* 1908 TS 910; *Clarke v Bethal Co-Operative Society* 1911 TPD 1152; *De Reuck v Christy* 1914 TPD 588; *Blou v Lampert and Chipkin NNO and Others* 1970 (2) SA 185 (T) at 199B-D) and of the former Appellate Division (*Hlatshwayo v Mare & Deas* 1912 AD 242; *Middelburg Coal Agency v Solomon* 1914 AD 417; *Dabner v South African Railways & Harbours* 1920 AD 583 at 594-595; *Standard Bank v Estate Van Rhyn* 1925 AD 266 at 268; *Natal Rugby Union v Gould* 1990 (1) SA 432 (A) at 443F-G).

5. In the *Meiklereid* case Innes CJ stated that the principle was not based on estoppel but on acquiescence (at 751). And in *Hlatshwayo* Solomon J held that in order to show acquiescence it was not necessary to prove an agreement between the parties that the appeal should be abandoned nor that the appellant's conduct was such as to estop him from denying acquiescence nor even that the appellant in fact abandoned any intention of appealing, the question being the inference to which his conduct objectively gave rise (at 254). In *De Reuck* this was adopted by De Villiers JP as a correct statement of the legal position (at 590).

6. Since a party who has expressly acquiesced in the judgment is unlikely to contend that the appeal is not perempted, it is unsurprising that the reported cases have tended to deal with acquiescence by conduct. Nevertheless, it is hardly necessary to make the point that an express statement of intent renders a reference to conduct otiose. As Bristowe J said in the *Bongers* case (at 920-921, our underlining):

> "*Although a man is not bound to make up his mind till the time for appealing has expired, still there is nothing to prevent him from doing so; and if he tells the other side that he has decided not to appeal, or acts in a way which is only consistent with an intention not to appeal, then he has exercised the choice which was open to him and he cannot retract*".

7. As appears from the foregoing *dictum* and from a number of other reported cases, once the acquiescence has been communicated

the right of appeal is lost – the litigant cannot go back on his election (see, for example, *Hlatshwayo* at 253 per Solomon J).

8. One of the forms of acquiescence by conduct dealt with in the old authorities and in the cases is a request for an extension of time to comply with the judgment (Code 7.52.5; Voet 49.1.2; *Meicklereid* at 751-752; *Bongers* at 913; *Hlatshwayo* at 248 and 254-255). In that regard Solomon J observed as follows in *Hlatshwayo* (at 254-255):

> "*Now the example in the Code of a person asking for time for payment of a judgment is a comparatively clear case of acquiescence: for by the Civil Law the mere noting of an appeal has the effect of staying execution, and consequently there was no necessity for a party who intended to appeal to ask for time. Here then we have an act which is not only voluntary but also unequivocal, inasmuch as the only reasonable inference that can be drawn from it is that there has been acquiescence in the judgment, unless, of course, the person asking for time makes it clear that he reserves the right to appeal*".

9. It is submitted that the present matter represents one of the clearest cases for peremption which is ever likely to come before the courts:

9.1 The judgment was delivered on 15 April 2005. In terms thereof the MoD was obliged to deliver various documents to CCII within two months, i.e. by 15 June 2005.

9.2 The period prescribed by rule 49(1)(*b*) for applying for leave to appeal expired on 10 May 2005.

9.3 On 24 and 25 May 2005 Mr Alexander of the DoD telephonically asked CCII for an extension of time to comply with the order (paras 4-10 record 109-110). He did not make this request subject to any reservation of the MoD's right to appeal.

9.4 A formal written request for an extension of time was made by the MoD through his attorneys in letters dated 13 and 14 June 2005 (record 23-24). Once again there was no reservation of the right to appeal.

9.5 In a letter dated 24 June 2005 (record 29) the MoD through his attorneys repeated the request for an extension of time. In this letter the State Attorney recorded that he had been instructed by the MoD to advise CCII's attorneys as follows (our underlining):

> "*On receipt of the judgment in the above matter, client instructed counsel to prepare an opinion on the prospects of success in appealing the judgment. The process to obtain the opinion from counsel took longer than anticipated. Counsel's opinion, which was accepted, was to the effect that there are no prospects of success on appeal and consequently it was decided to comply with the court order*".

9.6 On 8 July 2005 CCII's attorneys replied to the State Attorney (record 31), granting the extension sought (i.e. to 31 July 2005), subject to the delivery of certain specified documents

by 15 July 2005 (being documents which CCII said were readily available for delivery).

9.7 CCII's deponent (Dr Young) merely states the obvious when he testifies in his affidavit that the MoD's initial actions in requesting an extension of time conveyed to the mind of CCII and its attorneys that the judgment was accepted and would be complied with (para 13 record 111). As Dr Young states, the subsequent letter of 24 June 2005 expressed explicitly what had been implicit in the previous communications (para 15 record 111).

10. The requests for extension of time are themselves a classic and clear instance of acquiescence by conduct. However, the letter of 24 June 2005, containing as it does an express statement that the MoD had accepted that he had no prospects of success and had decided to comply with the judgment, places the matter beyond any doubt.

11. The cases are clear that the test for acquiescence is objective, in the sense that one looks at the inference to be drawn objectively from the appellant's conduct (i.e. what it conveyed to the other litigant as a reasonable person) rather than the appellant's subjective state of mind and the mental reservations which he may have entertained. Accordingly, it would not matter if the MoD had subjectively retained some thought that he might still seek leave to appeal. However, and insofar as it may be relevant, there is no reason to doubt that the MoD's communications with CCII up to

(and including) 24 June 2005 accorded with the MoD's subjective state of mind:

11.1 On 8 June 2004 the Defence Staff Council ("DSC") decided, after a full briefing from the Directorate: Legal Services ("DLS") and from the Department's Information Act Advisory Committee ("IAAC"), not to challenge the judgment. This decision, which was taken even before counsel's opinion had been received, was apparently based on certain pragmatic considerations (Masimela para 30 record 91).

11.2 On 10 June 2005 the MoD's counsel furnished their opinion (Masimela para 28 record 91). From the State Attorney's subsequent letter of 24 June 2005 (record 29) it is clear that this opinion was to the effect that the MoD had no prospects of success on appeal.

11.3 It is also clear from the State Attorney's letter of 24 June 2005 that at some stage after 10 June 2005 the MoD considered and accepted counsel's opinion and decided to comply with the order, and that this decision was communicated in a letter to the State Attorney on 23 June 2005.

11.4 It was evidently Mr Masimela who, on his return from overseas some time after 24 June 2005, persuaded the MoD that he should attempt to retract (cf Masimela paras 33-34 record 92-93).

11.5 Accordingly, the letter which the State Attorney wrote on 6 July 2005 (record 31) and which CCII's attorneys received on 8 July 2005 (Tyfield para 11 record 18), and in which the MoD communicated his belated decision to seek leave to appeal, did not give effect to a subjective mental reservation which the MoD had always entertained. It represented a belated change of mind. Indeed, the State Attorney's letter correctly describes the MoD's belated decision as a "*volte face*" reached "*upon further consideration*".

11.6 It is thus plain that the objective construction to be placed on the MoD's actions up to (and including) 24 June 2005 accorded exactly with his subjective state of mind. What he did thereafter was to change his mind. The cases clearly state that such a retraction is not permissible. The election, once made and communicated, is final.

12. We thus submit that by not later than 24 June 2005 the MoD had irretrievably abandoned his right to seek leave to appeal, and that for this reason alone the application for leave to appeal should be refused with costs.

Condonation

Prospects of success

13. The MoD's prospects of success in the proposed appeal are relevant both to condonation and the application for leave to appeal. We shall

thus deal with this aspect under a separate heading. We submit, in summary, that the MoD has no reasonable prospects of success on appeal.

Degree of lateness

14. As to the degree of lateness, we submit that it is substantial. Judgment was delivered on 15 April 2005. The 15-day period for filing an application for leave to appeal expired on 10 May 2005. The application for leave (at that stage unaccompanied by an application for condonation) was served only on 20 July 2005, more than two months out of time.

15. The application for leave was, we submit, defective in the absence of a substantive application for condonation. The latter was served on 15 September 2005. It would thus be more accurate to say that the application for leave to appeal was more than four months late, or at any rate that the delay for which the MoD was required to furnish a satisfactory explanation was a four-month delay. In this regard, the courts have repeatedly held that it is a litigant's duty to seek condonation as soon as he realises that the rules have not been complied with, and any delay in doing so calls for an acceptable explanation (see, for example, *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A) at 138H; *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D-E; *Beira v Raphaely-Weiner and Others* 1997 (4) SA 332 (SCA) at 337C-E; *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I-41D).

16. In the present case there is nothing to suggest that the MoD was not aware from the outset that his application for leave to appeal was out of time and that condonation would be necessary. Indeed, the application for leave to appeal foreshadowed a condonation application (record 10).

17. The degree of lateness should also, we submit, take into account the nature of the relief sought and granted in the main case. CCII was exercising its constitutional right of access to information. One of the objects of the Promotion of Access to Information Act 2 of 2000 is to facilitate access to information "*as swiftly, inexpensively and effortlessly as reasonably possible*" (s9(*d*)). The enforcement of CCII's constitutional right has not only been delayed by the MoD's refusal of access but also his subsequent delays in seeking leave to appeal (and see also para 107 of this Court's judgment, emphasising the object of avoiding delay).

Explanation for delays

18. The exercise of assessing the explanation for the delay is somewhat unusual in the present case, because at least until 29 June 2005 (which was itself about seven weeks after the time for seeking leave had expired) the MoD apparently had no intention of seeking leave to appeal. It is thus hardly surprising that during the period 15 April 2005 to 29 June 2005 he took no steps to seek leave.

19. For this reason, the averments by Mr Masimela concerning the delays in obtaining counsel's opinion are irrelevant. The fact of the

matter is that the resultant opinion from counsel was negative and the advice was accepted. The opinion played no part in the MoD's belated decision to seek leave to appeal.

20. The same applies to what Mr Masimela says concerning the meetings and briefings involving the DLS, the IAAC and the DSC. These deliberations all preceded and were part of the background to the MoD's initial decision not to appeal.

21. What led to the MoD's *volte face* was Mr Masimela's recommendation on 29 June 2005 that the MoD should seek leave to appeal "*in view of the self-evident public interest in the ramifications that could arise for RSA'S international trade relations, etc*" (Masimela para 4 record 92-93). Mr Masimela made his recommendation (and the MoD apparently accepted same) without having received any legal advice that the MoD actually had reasonable prospects of success or that senior counsel's opinion had been wrong.

22. Accordingly, one of the important aspects in assessing the MoD's explanation for the delay is why it took until 29 June 2005 for Mr Masimela and the MoD to come to the view that an appeal should be pursued because of the effect of the judgment on South Africa's international and trade relations. In that regard we note the following:

22.1 Mr Masimela was presumably privy to the deliberations of the DLS, IAAC and DSC over the period April – June 2005.

After all, he claims personal knowledge of the contents of his affidavit "*save where the context clearly indicates otherwise*" (para 4 record 87).

22.2 There is no explanation whatsoever as to why the view adopted on 29 June 2005 was not conveyed by Mr Masimela to the DLS, IAAC, DSC and MoD at a much earlier stage, or why for that matter the MoD himself did not independently come to this view at an earlier time.

22.3 In this latter regard, the concern which apparently moved Mr Masimela to make his recommendation on 29 June 2005 was nothing new. Such considerations were repeatedly raised by the MoD's deponent in the answering affidavit in the main application (see, for example, Njikela para 25.4 M255, paras 34.7-34.10 M263-265; para 38.1 M267). If the concern was a valid one, there was no reason for it not to have been acted upon promptly after judgment was delivered.

22.4 Furthermore, we submit that a court is not likely to be much impressed by an explanation to the effect that the appellant decided, despite an adverse opinion from senior counsel, to appeal on grounds extraneous to the appellant's prospects of success.

23. The next important consideration in assessing the MoD's explanation is the delay from 29 June 2005 (a) to 20 July 2005 (when the application for leave to appeal was served) and then (b) to

15 September 2005 (when the condonation application was served). In this regard we submit that the explanation is again unsatisfactory:

23.1 Given the lengthy delays which had already been brought about by the MoD's initial decision not to appeal and given that by 29 June 2005 the MoD was already seven weeks out of time, the MoD should have acted with the greatest alacrity. Yet he took until 20 July 2005 (three weeks) to serve the application for leave. Expressed differently, the MoD – despite the history of delay – filed his application for leave to appeal on the 15th court day after his belated decision to appeal, i.e. he acted no more quickly than the rules would have required had judgment been delivered not on 15 April 2005 (as it was) but on 29 June 2005 (when the MoD decided to appeal).

23.2 The explanation offered in paragraph 36 of Mr Masimela's affidavit (record 93) does not, in our submission, pass muster. The application for leave should either have been finalised with junior counsel alone, or the MoD should have briefed a silk who was available to give the matter his or her immediate attention.

23.3 Even less satisfactory is the explanation for the further delay until 15 September 2005 for the filing of the condonation application. All that Mr Masimela says in this regard is what is contained in the last sentence of paragraph 36 of his affidavit (record 93):

> "*The application for condonation for the late filing of the application for leave to appeal could not be finalised simultaneously since further information was required for the completion for the drawing of this application*".

23.4 As Dr Young points out in reply (para 23 record 113), there is no information in Mr Masimela's affidavit which would not have been available to him and the MoD's counsel as at 20 July 2005. Mr Masimela has not identified any such information.

23.5 We thus submit that the delay from 20 July 2005 to 15 September 2005 is wholly unexplained.

24. We submit that on any reckoning the explanation for the MoD's non-compliance is unsatisfactory. And to the ordinary factors which are applicable in all condonation applications may be added the special consideration that the MoD is seeking condonation in respect of a delay which is attributable in substantial measure to his own initial decision not to challenge the judgment. In similar circumstances Innes J in *Cairns' Executors v Gaarn* 1912 AD 181 observed as follows (at 187):

> "*This is not a case, therefore, where an aggrieved litigant, intending to appeal, has by accident or inadvertence allowed the prescribed time to lapse. On the contrary, the applicants deliberately refrain from taking steps to have the appeal set down, because they meant to abandon it and accept the judgment. And parties in that position must show very special circumstances to induce the Court to allow them to reopen*

> *litigation, which they themselves regarded as having reached finality …*".

25. In the same case Solomon J said the following (at 190-191):

> "*But, in fact, this is not a case of mere delay: it is a case in which it is clear that the applicants had deliberately abandoned any intention of appealing, and had decided to accept the judgment of the Court below … In these circumstances, without expressing any opinion upon whether there was acquiescence in the judgment, I am of opinion that a very strong case would have to be made out to justify us in saying that sufficient cause had been shown for granting relief …*".

(It seems that the court in *Cairns* refrained from deciding the case on the basis of peremption because the party opposing condonation had not raised such a defence.)

26. It may be noted that in the *Cairns* case the court refused condonation despite the fact that the merits involved a legal question described by Solomon J as "*interesting and important*", one which it would have been desirable to finally settle (at 193).

Further evidence?

27. The concluding paragraph of the application for leave to appeal (record 11) foreshadowed not only a condonation application but also an application for leave to adduce further evidence to "*prove*" that the documents mentioned in the application for leave to appeal were protected from disclosure. No such application has been

forthcoming, and Mr Masimela says nothing about it in his affidavit in support of condonation.

28. Of course, this Court, being *functus officio*, is unable to hear further evidence. In terms of s22 of the Supreme Court Act 59 of 1959 the power to decide whether further evidence should be received vests in the court hearing the appeal. Appeal courts are reluctant to allow cases to be re-opened, as appears from the general considerations which have been held to apply in such applications (see Erasmus *Superior Court Practice* A1-56 and the cases there cited; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th Edition at 909-910).

29. However, a party who seeks to support his application for leave to appeal on the basis that a higher court may be persuaded to receive further evidence which may affect the lower court's judgment must furnish sufficient details concerning the new evidence and why it was not previously adduced to enable the trial court to determine whether there is a reasonable prospect that the appeal court will accede to the request. That has not been done in the present case, and we thus submit that the possibility of further evidence being adduced on appeal should be disregarded.

Conclusion on condonation

30. We submit that there has been a lengthy delay; that the delay has not been satisfactorily explained; and that in view of the MoD's initial decision to abide the judgment very special circumstances for

condonation have to be shown, and that such special circumstances have not been demonstrated. Condonation should thus be refused.

Prospects of success

31. Neither the application for leave to appeal nor Mr Masimela's affidavit raise anything new in regard to the merits of the case. For the reasons set out in our heads in the main case and in the judgment we respectfully submit that there is no reasonable prospect that an appeal court will come to a different conclusion. We wish to make only a few additional submissions.

32. In paragraph 2.2 of the application for leave an alternative contention is raised (in regard to the umbrella agreement) that it was a tacit term of the said agreement that its contents were "*protected or protectable*". No such allegation was made in the main application (nor in Mr Masimela's affidavit, where it would constitute new evidence). Moreover, if (as this Court found) clause 18 of the umbrella agreement does not on a proper construction apply to the terms of the agreement itself, it would be inconsistent with the express terms of the agreement to reach the same conclusion by postulating a tacit term. This would be impermissible (see, for example, *Birkenruth Estates (Pty) Ltd v Unitrans Motors (Pty) Ltd* 2005 (3) SA 54 (W) para 24 and the authority there cited).

33. As regards the repeated contention (in the application for leave to appeal) that the trial court should have afforded the MoD the opportunity of withholding portions of documents (see paras 2.3,

3.4, 5.4, 6.4, 7.3, 8.2, 9, 10 and 11 of the application for leave), we emphasise the point made by the learned trial judge in paragraph 107 of his judgment, namely that the inadequate factual foundation for the grounds of refusal raised by the MoD and the failure by the MoD to properly consider the issue of severability were matters raised by CCII in its internal appeal to the Department, in its founding and replying papers in the main application, in written argument and in oral argument. At no stage did the MoD seek to address the deficiencies in his case. In these circumstances, we submit that there is no reasonable prospect that an appeal court will interfere with the trial court's exercise of its powers under s82 of the Act, particularly given that one of the objects of the Act is to ensure that persons are given access to information "*as swiftly, inexpensively and effortlessly as reasonably possible*" (s9(*d*)).

34. The suggestion in paragraphs 1.2.2, 3.2 and 6.1 of the application for leave (and in paragraphs 43 to 45 of Mr Masimela's affidavit record 96) that mere refusal by a third party to consent to disclosure is a sufficient basis for withholding records is, we submit, without merit. Such a contention is fundamentally inconsistent with the Act and was not even advanced on the MoD's behalf at the hearing of the main application.

35. In paragraphs 1 to 8 of the application for leave the MoD contends that the trial court erred *inter alia* regarding its application of s36(1)(*c*) and s37(1)(*a*). To the extent relevant, we mention that these two provisions were the subject of a recent (and as yet unreported) judgment of the Supreme Court of Appeal delivered on

29 November 2005 in the case *Transnet Ltd and Another v SA Metal Machinery Company (Pty) Ltd* Case 147/05 (copy attached):

35.1 Concerning s36(1)(*c*), the SCA in essence confirmed what this Court held in paragraph 60 of its judgment, namely that s36(1)(*c*) is concerned with a reasonable expectation of probable harm (see paras 26-44 of Howie P's judgment).

35.2 Concerning s37(1)(*a*), the SCA confirmed what this Court said in paragraph 26 of the judgment, namely that the words "*grounds for*" need to be read into the section (see para 18 of Howie P's judgment). As regards the point which this Court in paragraph 62 of its judgment found unnecessary to decide, Howie P held (para 57) that it was indeed necessary for the public body to show more than that there had been a breach of the duty of confidence. If the public body could not show a likelihood or reasonable expectation that the third party would suffer harm of the kind contemplated in s36(1)(*b*) and s36(1)(*c*), it would not – for purposes of s37(1)(*a*) – be at risk of an adverse finding (in an action for breach of confidentiality) either for damages or cancellation.

35.3 The SCA also held that parties cannot circumvent the terms of the Act by resorting to confidentiality clauses, and emphasised in particular the right of the public to know the expenditure entailed by contracts concluded by public bodies (paras 55-56).

36. If, despite all the aforegoing submissions, this Court should find that leave to appeal should be granted, it does not follow that leave should be granted in respect of all the records which the MoD was ordered to hand over. The prospects of success in respect of each item would need to be assessed. For example, in regard to items 10, 11, 48, 52, 12 and 13 (application for leave paras 1-8) the MoD contends that the trial court erred on the merits. The failure to apply severance is raised in the alternative. On the other hand, in relation to the remaining items (dealt with in paragraphs 9 to 11 of the application for leave) the MoD apparently accepts that he was obliged to produce the records and raises only the complaint that he should have been afforded the opportunity of applying severance. If the latter complaint has no reasonable prospects of success there could be no justification in granting leave to appeal in respect of the production of those items.

RULE 30 APPLICATION

37. As noted earlier, the only aspect of the rule 30 application which requires decision is costs. However, in order to decide that issue it is necessary to determine whether CCII was justified in launching the application.

38. CCII contends that the filing of a late application for leave to appeal without an application for condonation is an irregular step. The MoD contends otherwise, apparently on the basis that condonation can be granted at any stage (Duvenhage para 6.2 record 57).

39. It is submitted that where the rules specify that a particular procedural step must be taken within a prescribed period of time and a litigant seeks to derive some advantage for himself by taking the step, the taking of the step after the expiry of the prescribed period is irregular (see *Theron v Coetzee* 1970 (4) SA 37 (T), *Oostelike Transvaalse Koöperasie Beperk v Aurora Boerdery en Andere* 1979 (1) SA 521 (T) and the cases there cited, dealing with late notices of intention to defend). These cases specifically hold that the late document cannot simply be ignored and that the proper course for the aggrieved party to follow is to apply to have the late document set aside as an irregular step. (In the second of the cases just cited, Grosskopf AJ [as he then was] described this as "*die bestaande Transvaalse praktyk*" – 524F.)

40. It is no answer to say that the court can at any stage grant condonation. If that were a good argument, rule 30 would never find application, since in terms of rule 27 the court can at any time condone not only non-compliance with time limits but also any other non-compliance with the rules.

41. We submit that until condonation is granted (which is effectively an extension of time under rule 27), the late document is an irregular step. Indeed, technically the defaulting litigant should not file the document itself but rather a condonation application in which he seeks leave to file the document (and to which he would annex the document he wishes to file).

42. We thus submit that the filing of the application for leave without an application for condonation was an irregular step.

43. The prejudice suffered by CCII is self-evident. The late document cannot simply be ignored (see the cases cited above). In terms of rule 49(11) the filing of an application for leave suspends the judgment. Accordingly, until the irregular application for leave is set aside the successful litigant is precluded from enforcing his judgment. The annexures to the rule 30 application demonstrate that CCII was anxious to receive as soon as possible the records which the MoD was ordered to produce.

44. The rule 30 application had a most beneficial effect. It was enrolled for hearing on 21 September 2005. This elicited the condonation application (served on 15 September 2005), in consequence whereof CCII agreed that the rule 30 application be removed from the roll and heard simultaneously with the application for leave and condonation application. This, in turn, enabled CCII to take steps to arrange for the hearing of all three matters by the learned trial judge.

45. We thus submit that CCII was entitled to bring the rule 30 application and should be awarded the costs thereof.

CONCLUSION

46. We thus submit that the application for leave and the application for condonation should be dismissed with costs including those attendant on the employment of two counsel, and that CCII should

be awarded the costs of the rule 30 application, again including the costs of two counsel.

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26 January 2006