IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: .....

Case No: 23554/2003

In the matter between:

M.G.P LEKOTA N.O. Applicant

and

CCII SYSTEMS (PTY) LIMITED Respondent

JUDGMENT

SOUTHWOOD J

[1] The respondent in the main application, M.G.P. Lekota N.O. (who will be referred to henceforth as the applicant) applies for leave to appeal against the whole of the judgment handed down on 15 April 2005 and for condonation of the late filing of the application for leave. In terms of Rule 49(1) the notice of application for leave to appeal should have been delivered on or before 10 May 2005 but the applicant delivered his notice on 20 July 2005, some two months late. The applicant in the main application, CCII Systems (Pty) Ltd (which will be referred to

henceforth as the respondent) opposes both applications. The respondent contends that the applicant lost his right to appeal as a result of peremption and that, in any event, there is no merit in either application.

[2] A further matter which requires consideration is the costs of the Rule 30 application brought by the respondent. The respondent no longer seeks a substantive order in that application, it merely seeks the costs. The respondent contends that when a notice of application for leave to appeal is filed late it must be accompanied by a substantive application for condonation. If not, the filing of the notice of application for leave to appeal is an irregular step which may be set aside in terms of Rule 30(1). When the applicant filed a notice of application for leave to appeal without an application for condonation the respondent delivered a notice in terms of Rule 30(2)(b). On 17 August 2005, after the applicant failed to respond to this notice, the respondent delivered an application in terms of Rule 30(1) seeking the setting aside of the notice of application for leave to appeal as an irregular step. That application was enrolled in the unopposed motion court for hearing on 21 September 2005. On 15 September 2005 the respondent delivered an application for condonation for the late noting of the appeal. Before further affidavits were filed the matter came before this court and it was ordered that –

(1) the matter be removed from the roll;

(2) the application for condonation and the application in terms of Rule 30 be dealt with in the application for leave to appeal at a date to be arranged; and

(3) the costs of the application in terms of Rule 30 be determined in the application for leave to appeal.

[3] The parties filed further affidavits and the matters were enrolled for hearing on 7 February 2006. In its affidavit the respondent raised the issue of peremption. The respondent contends that the applicant elected not to attack the judgment and acquiesced in it and accordingly lost the right to appeal. Since this issue is relevant both to the application for leave to appeal and the application for condonation it will be convenient to deal with it at the outset.

[4] The applicant's counsel did not deal with peremption in their heads of argument. However, the day before the hearing, the applicant's counsel filed supplementary heads of argument dealing with the issue. In these heads of argument it is contended, with reference to ***Maclean v Haasbroek NO and Others*** **1956 (4) SA 677 (A)** at 686A-D, that the respondent did not raise the point properly. It is argued that the point should be raised, *in limine,* by means of a substantive application so that the issue can be fully canvassed. It is further contended that it is impermissible to raise the issue in a replying affidavit. In argument

before the court it is suggested that because of the manner in which the respondent raised the issue the applicant did not have an opportunity to deal with the issue and the full facts are not before the court.

[5] This argument cannot be sustained. The judgment in ***Maclean v Haasbroek*** did not purport to lay down a rule of practice that the issue must be raised in a substantive application. However, it did decide that the issue cannot be raised for the first time on appeal and that it should be addressed in the court appealed against so that the facts can be fully canvassed. That is what the respondent did. It raised the issue in its answering affidavit to the applicant's application for condonation (the fact that the affidavit is called a replying affidavit is of no moment) after the applicant's deponent had explained why the notice of application for leave to appeal was delivered late. The applicant was entitled to deal with the issue in a further affidavit but obviously decided not do so. The applicant has not sought to file a further affidavit to deal with the issue or, if it regards the allegations relating to peremption as new matter, applied to strike them out. In the absence of an explanation it must be accepted that the applicant was content to argue the issue on the affidavit filed. In any event, the relevant facts appear to have been fully set out in the affidavits and there was no suggestion in argument that other facts could have been placed before the court.

[6] At common law a party could lose his or her right to appeal as a result of peremption. If the appeal has been perempted that is the end of the matter. There is no going back from that position. In ***Dabner v South African Railways and Harbours*** **1920 AD 583** at 594 Innes CJ summarised the position as follows –

> 'The rule with regard to peremption is well-settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the person alleging it. In doubtful cases, acquiescence, like waiver, must be held not proven.'

See ***Hlatshwayo v Mare & Deas*** **1912 AD 242** at 249, 252-3, 258-259: ***Middelburg Coal Agency v Solomon*** **1914 AD 417** at 419-420: ***Standard Bank v Estate Van Rhyn*** **1925 AD 266** at 268: ***Gentiruco AG v Firestone SA (Pty) Ltd*** **1972 (1) SA 589 (A)** at 600B and ***Natal Rugby Union v Gould*** **1999 (1) SA 432 (SCA)** at 443F.

In ***Standard Bank v Estate Van Rhyn supra*** at 269 Innes CJ restated the rule as follows –

> 'Now the rule which governs the matter has been laid down in a line of cases – ***Hlatshwayo v Mare & Deas*** **(1912, AD, p242)**, ***Clay v Union Government*** **(1913, AD, p385)**, ***Middelburg Coal Agency v Solomon & Co*** **(1914, AD, p417)**, and others. It comes to this, that if an unsuccessful litigant by unequivocal conduct, inconsistent with an intention to appeal, shows that he

> acquiesces in the judgment, then he cannot continue to prosecute his appeal.'

After referring to the above statement of the rule in ***Dabner's*** case, Innes CJ said –

> 'That is the doctrine. If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it.'

In ***Hlatshwayo v Mare & Deas supra*** at 249 Lord De Villiers CJ quoted with approval, the following passage from the judgment in ***Clarke v Bethel Co-operative Society*** **1911 TPD 1152** –

> 'The question of the peremption of an appeal is part of the law of election ... and is simply this: that where a man has two courses open to him and he unequivocally takes one he cannot afterwards turn back and take the other. Where there has been no unequivocal act then whether an election has taken place or not is a question of fact.'

Obviously, if the unsuccessful party informs the successful party that he has decided not to appeal, that is conclusive – see ***Bongers v Ekstein*** **1908 TS 910** at 920-921.

[7] In their supplementary heads of argument the applicant's counsel seem to suggest that these statements of the rule governing peremption are not binding and that the court should apply the rules

stated in ***Cohen v Cohen*** **1980 (4) SA 435 (ZAD).** They also contend, with reference to ***Michaels v Wells NO*** **1967 (1) SA 46 (C)** at 52A-B and D, that where an unsuccessful litigant has accepted a judgment of the court and abandoned any intention to appeal therefrom it can still appeal if it can show very special circumstances to induce the court to allow it to reopen litigation which it considers has reached finality. Neither submission has merit. This court is bound by decisions of the Appellate Division and the Appellate Division's statements of the rule which are still applied in South African courts. The passages in ***Cohen v Cohen*** emphasise that the Court must be clearly satisfied that an appellant has abandoned his right to appeal. This does not change the law relating to peremption. Insofar as it does, this court is bound by the decisions of the Appellate Division. ***Michaels v Wells NO*** was not a case of peremption. It was an application, on notice of motion, for an extension of the period within which to lodge an appeal against the decision of a single judge. The majority judgment relied on ***Cairn's Executors v Gaarn*** **1912 AD 181** for the principle that where an applicant for condonation had at first accepted a judgment of the lower court and abandoned any intention to appeal therefrom, and then later applied for condonation of the late noting of the appeal, such applicant must show –

> 'very special circumstances to induce the court to allow them to re-open litigation which they themselves regard as having reached finality'.

However, it is clear that the judgment in ***Cairn's Executors v Gaarn*** did not deal with peremption. It dealt with an application for leave to appeal made late. The statement referred to was made in relation to the facts of that case: the applicants had accepted the judgment and abandoned any intention to appeal therefrom and then after receiving fresh advice sought leave to appeal. This is contrary to the principle of peremption: that once an appeal is perempted that is the end of the matter.

[8] Counsel for the respondent submitted that the present matter is one of the clearest cases for peremption which is ever likely to come before the courts. I agree. This view is reinforced by the failure of the applicant's counsel to deal in their heads of argument with the issue of peremption despite the fact that it is clearly raised in the papers and the manner in which they dealt with the issue in their supplementary heads of argument.

[9] The relevant facts are not in dispute and may be summarised (briefly) as follows:

(1) On 15 April 2005 the court ordered the applicant to produce to the respondent, within two months of the order, copies of the records identified in the order;

(2) The judgment recorded (in para 40) that in respect of a number of the items referred to in the notice of motion the applicant no longer objected to producing these items and undertook to produce them for the respondent;

(3) In terms of Rule 49(1)(b) notice of appeal should have been filed within 15 days of the order appealed against; i.e. by 10 May 2005;

(4) After the judgment was handed down there was no communication between the parties or their legal representatives until 24 May 2005, when the Deputy Information Officer of the Department of Defence, Mr Alexander, telephoned the respondent and spoke to Mrs Odette Eksteen. Mr Alexander told Mrs Eksteen that the applicant was seeking an extension of time to comply with the order made on 15 April 2005. He requested an extension of 2½ weeks;

(5) On 25 May 2005 Mr Alexander again telephoned the respondent. He spoke to Dr Young, the respondent's Managing Director and repeated his request. Dr Young told him that he should submit his request in writing and furnish a proper explanation for the extension sought. Mr Alexander undertook to do so;

(6) After a period of approximately two weeks had elapsed and no written request was received, Dr Young telephoned Mr Alexander and enquired about the request. Mr Alexander undertook to investigate;

(7) On 13 June 2005 the State Attorney addressed a letter to the respondent's attorney referring to the fact that the applicant had been given two months to comply with the order of 15 April 2005 and stating that the applicant would not be able to furnish the documentation on 8 July 2005 and seeking an extension until 30 June 2005. On 14 June 2005 the State Attorney addressed a further letter to the respondent's attorney to correct the error in the letter dated 13 June 2005. The applicant sought an extension until 31 July 2005;

(8) On 15 June 2005 the respondent's attorney replied to the State Attorney's letter on 14 June 2005 asking for details of the efforts made by the applicant to comply with the court order;

(9) Before the State Attorney could reply, the respondent's attorney addressed a letter to the State Attorney on 20 June 2005 advising that the respondent was prepared to grant an extension until 30 June 2005 subject to the following conditions –

(1) that the applicant provided a suitable and reasonable explanation by close of business on 21 June 2005 as to why he required the extra time;

(2) that the applicant provided by the same date a detailed report of what efforts had been made in order to comply with the order;

(3) that the applicant undertook unequivocally to comply with the court order by close of business on 30 June 2005.

(10) On 24 June 2005 the State Attorney addressed a reply to the letter dated 20 June 2005 to the respondent's attorney. The letter reads as follows –

> 'Our telephone conversation herein on 22 June 2005 as well as your letter dated 20 June 2005 refer.
>
> I confirm informing you during our abovementioned telephone conversation that Mr Duvenage received your abovementioned letter on 21 June 2005 at 14h00. The said letter was immediately forwarded to client by facsimile transmission. Mr Duvenage requested me to attend to this matter in his absence on leave.
>
> I confirm that my client contacted me telephonically on 22 June 2005 indicating that they will be forwarding instructions in this regard as soon as possible. I confirm having received the letter from client on the afternoon of 23 June 2005. I have been instructed to respond to you herein as set out herein below.
>
> 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.

My further instructions are to point out that although the documentation to be supplied is DOD documents, it is in the possession of Armscor, the procurement agency of the DOD. Arrangements had to be made between DOD and Armscor for the documentation to be accessed and the relevant personnel had to be made available to locate and identify the documentation. The DOD and Armscor must recall members from Cape Town to attend to the above.

For the above reasons my client requests an extension to comply with the court order till the end of July 2005. My client will take every effort to supply the documentation as soon as possible, but cannot at this stage, commit to an earlier date.

I do hope that you can accommodate my client in this regard.';

(11) On 8 July 2005 the respondent's attorney replied to this letter from the State Attorney stating that producing some of the documents would present no difficulty and concluding –

'As to the balance of the documents, and subject to the above documents being delivered to us by 12:00 Midday on 15 July 2005, the indulgence requested by your client to deliver same on or before 31 July 2005 (make it close of business on Monday, 1 August 2005) is granted.'

(12) On 8 July 2005 the respondent's attorney received a further letter from the State Attorney. This letter reads as follows –

'1. Our previous correspondence herein – particularly your letter of 20 June 2005 and this office's letter of 24 June 2005 – refers.

2. 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.

3. My client regrets the *volte face* and will explain the reasons for this in the affidavit that will be filed in support of the application for condonation. However, the consequences that the court order has for this country, i.e. if all the documentation were to be given without adequate measures to protect information that is exempt, or could and should be exempted, from disclosure under Chapter 4 of Part 2 of the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), would be most severe. It is therefore in the public interest that the application for leave to appeal will be pursued. As presently advised my client will also seek to present further evidence to explain why the consequences would be so severe.

4. I trust that you will understand the position and give you my assurance that the application for leave to appeal will be filed as soon as possible';

(13) Mr Masilela, the Secretary for Defence, the deponent to the applicant's founding affidavit in the condonation application, explains what happened. After the judgment was handed down on 15 April 2005 the State Attorney, Mr Duvenage on 18 April 2005 made available to counsel for the applicant and the Department of Defence copies of the judgment. Upon receipt of the judgment Mr Rathebe the former Director: Legal Support in the Department of Defence, instructed the State Attorney to obtain an opinion on the prospects of success on appeal. However this instruction was subsequently withdrawn as the Information Act Advisory Committee ('the committee') (a

committee established between the Department of Defence and Armscor to advise on matters relating to requests for information made to the Department of Defence and Armscor) had not been briefed on the judgment. The committee had therefore not taken any decision or made any recommendation as to how the matter should to be dealt with. The Directorate: Legal Support then proceeded to prepare an information briefing for the committee, the Chief of the South African National Defence Force and Mr Masilela. On 25 April 2006 the Directorate: Legal Support held a meeting with the committee and a full oral briefing was given to its members with regard to the judgment, its implications and the prospect of an appeal. It was agreed at the end of the meeting that a further meeting should be arranged for the senior management of the Department of Defence and Armscor. A further meeting was held for the committee, the Directorate: Legal Support and the senior management on 5 May 2005. It was decided at that meeting that the State Attorney be instructed to obtain an opinion from counsel on the prospects of success on appeal in order to advise senior management. Counsel were instructed on 9 and 12 May 2005. Counsel were only able to consult on 16 May 2005 as both were engaged in other urgent matters. They furnished the opinion on 10 June 2005. Mr Masilela alleges that part of the delay in furnishing the opinion was largely due to the fact that counsel no longer had the documentation that previously formed part of their briefs. Mr

Duvenage provided this to them on 8 June 2005. On 8 June 2005 the Directorate: Legal Support and the Chairman of the Committee gave a briefing to the Defence Staff Council which consists of the Chiefs of all the services and divisions in the Department of Defence. After the briefing the Defence Staff Council decided that the judgment should not be challenged. There were two reasons. First, the Defence Staff Council had gained the impression that the respondent was already in possession of the majority, if not all, of the documentation to which it was seeking access and second, because the Minister was in any event probably obliged to make disclosure in the action which the respondent had instituted against him. After counsel's opinion was received on 10 June 2005 the committee again met to consider the opinion on 13 June 2005. On 14 June 2005 Mr Masilela left for China and Malaysia on official business. According to Mr Masilela the committee was therefore not able to give him a briefing on the opinion and he was not available to take a decision before he returned to the Republic. On the 29th of June 2005, after his return from China and Malaysia, a meeting was convened at which Mr Masilela was briefed on counsels' opinion, the judgment and particularly the effect that it was likely to have on the Republic's international and trade relations and the arms industry in general. After this briefing Mr Masilela became increasingly concerned that the Defence Staff Council's decision had been

taken too hastily and without a full appreciation of the real or the potential ramifications it was likely to have on the Republic's international and trade relations. Accordingly, Mr Masilela decided that the Minister should be briefed as soon as possible to ascertain how the matter should be dealt with. Mr Masilela recommended that the Minister should seek leave to appeal against the judgment in view of the self-evident public interest in the ramifications that could arise for the Republic's international and trade relations. Accordingly, the State Attorney was instructed to immediately engage the services of counsel including a new senior counsel to prepare both the application for leave to appeal and condonation.

[10] In this case it is not necessary to draw inferences from the applicant's conduct. The applicant's attorney and the applicant's deponent, Mr Masilela, state in terms that the applicant decided not to appeal against the judgment and to comply with it. That is perfectly consistent with the communications between the parties and their representatives during May and June 2005. Dr Young's undisputed evidence is that the applicant's actions (through his officials and attorneys) conveyed to the mind of the applicant that the judgment was accepted and would be complied with. The applicant's attorney and Mr Masilela also stated clearly and unambiguously that after deciding to comply with the order the applicant decided, for reasons which are not based on the contents of the record in the main application, to appeal against the judgment.

This is accurately described by the applicant's attorney as a *volte face*. That is precisely what the law does not permit. It is also noteworthy that the applicant did not request the new counsel to furnish a second opinion on the applicant's prospects of success. He merely instructed them to prepare a notice of application for leave to appeal. No further opinion on the applicant's prospects of success was obtained from counsel.

[11] It is accordingly found that by 24 June 2005 the applicant had lost his right to appeal as a result of peremption. For that reason alone the application for condonation and the application for leave to appeal must be refused.

[12] Strictly speaking that conclusion makes it unnecessary to consider the application for condonation and the application for leave to appeal. Nevertheless I shall record as briefly as possible my views on the merits of those applications.

CONDONATION

[13] The notice of application for leave to appeal was served on 20 July 2005, more than two months late. The delay was not insubstantial. It must be emphasised that the late filing of a notice of appeal particularly affects the respondent's interests in the finality of his judgment. When the time for noting an appeal has elapsed he is *prima facie* entitled to

adjust his affairs on the footing that the judgment is safe – the object of the rule being to put an end to litigation and let the parties know where they stand. See ***Cairn's Executors v Gaarn*** **1912 AD 181** at 193; ***Federated Employers Insurance Co v McKenzie*** **1969 (3) SA 360 (A)** at 363A.

[14] The factors usually considered by the Court in applications for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interests in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. These factors are interrelated; none is individually decisive. But if there are no prospects of success there would be no point in granting condonation. See ***Melane v Santam Insurance Co Ltd*** **1962 (4) SA 531 (A)** at 532C-F; ***Federated Employers Insurance Co v McKenzie supra*** at 362G. An application for condonation must be made as soon as the party concerned realises that the Rules have not been complied with – see ***De Beer en 'n Ander v Western Bank Ltd*** **1981 (4) SA 255 (A)** at 257; ***Ferreira v Ntshingila*** **1990 (4) SA 271 (A)** at 281D. The condonation of the non-observance of the rules is not a mere formality. The applicant must satisfy the court that there is sufficient cause for excusing him from compliance. What calls for some acceptable explanation is not only the delay in noting the appeal but the delay in seeking condonation – ***Saloojee & Another v Minister of Community Development*** **1965**

(2) SA 135 (A) at 138D-H. The applicant is required to give a full and satisfactory explanation for whatever delays occurred – see ***Beira v Raphaely-Weiner and Others*** **1997 (4) SA 332 (SCA)** at 337D-E: ***Darries v Sheriff, Magistrate's court, Wynberg and Another*** **1998 (3) SA 34 (SCA)** at 40I-41E.

[15] It is clear that the applicant has known from the outset that his application for leave to appeal was out of time and that an application for condonation would be necessary. The notice of application for leave to appeal foreshadowed such an application. This must be seen against the background that the respondent sought to enforce its constitutional right to access to information and the clear object of the Act to facilitate access to information as swiftly, inexpensively and effortlessly as reasonably possible.

[16] The first part of the delay was from 10 May 2005 to 29 June 2005. There is no satisfactory explanation for the delay. During this period the applicant had no intention of seeking leave to appeal. The various persons and committees carefully considered what the applicant would do and on 8 June 2005 the Defence Staff Council decided not to challenge the judgment. Counsel's opinion on 10 June 2005 was consistent with that decision. The delay in obtaining counsel's opinion played no role in the delay. The Defence Staff Council's decision stood until 29 June 2005 when Mr Masilela recommended to the applicant that he should seek leave to appeal.

[17] Mr Masilela's explanation for the delay in making his recommendation on 29 June 2005 does not stand up to scrutiny. The reason for his recommendation i.e. 'the self-evident public interest in the ramifications that could arise for RSA's international relations' and the other related matters must have been known when the judgment was handed down – if not when the respondent launched the main application. Nowhere does Mr Masilela explain why his view was not conveyed to all the persons involved in taking the decision not to attack the judgment or why the applicant himself did not independently arrive at this conclusion earlier. It is significant that the applicant decided, despite advice given by senior counsel, to appeal for reasons other than the applicant's prospects of success.

[18] The second part of the delay was from 29 June 2005 to 20 July 2005. Being late, the applicant should have acted with the utmost expedition. However he took 15 days from the belated decision on 29 June 2005 to file the notice of appeal. Once again Mr Masilela's explanation does not stand up to scrutiny. He refers to the non-availability of senior counsel (not the senior counsel who gave the opinion). This is no excuse. The application should either have been finalised by junior counsel alone or the applicant should have appointed a senior counsel who was available to give his immediate attention to the matter.

[19] The third part of the delay was the period from 20 July 2005 to 15 September 2005 when the applicant filed his condonation application. Mr Masilela's explanation is in the vaguest of terms –

> '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 of the drawing of the application.'

This is not the full and satisfactory explanation postulated by the authorities. There is nothing in Mr Masilela's affidavit which was not immediately available to him and the applicant's legal representatives on 20 July 2005.

[20] Mr Masilela's explanation falls far short of the very special circumstances required before the court will permit the applicant to apply for leave to appeal – see ***Cairn's Executors v Gaarn supra*** at 187 and 190-191.

PROSPECTS OF SUCCESS

[21] The applicant's notice of application for leave to appeal foreshadowed an application for leave to adduce further evidence to prove that the records or portions thereof are exempt from disclosure in terms of the provisions of Chapter 4 of Part 2 of the Act. A party who wishes to support his application for leave to appeal on the basis that the Appeal Court may be persuaded to receive further evidence which may affect

the judgment appealed against must furnish sufficient details pertaining to 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 receive the further evidence.

[22] The applicant has not filed an application to lead further evidence or even referred to such evidence in his affidavit and this possibility must therefore be discounted.

[23] The applicant's notice of appeal does not challenge the court's analysis of the scheme of the Act or the interpretation of the sections in issue. In the applicant's heads of argument filed in support of the application the applicant's counsel summarised the grounds of appeal as follows –

(1) The applicant had adduced enough evidence of facts to bring all the requested items of information within the ambit of the particular sections which protect such information from disclosure.

(2) Even if the applicant had not adduced adequate evidence of facts, the Court ought not to have ordered the applicant to disclose the whole record. Instead, it should have referred the request back to the applicant to consider which parts of each document warranted protection. The principle of severability would then apply in each instance

> where the applicant was of the view that it should disclose only part of a particular document. Such a ruling would apply to all of the requested items.

The applicant's counsel then say –

> '... in argument, the applicant will not take issue with the findings of the court to the effect that insufficient information was placed before it to enable the court to find that one or more of the sections relied upon by the applicant were of application and would serve to protect certain documents or certain categories of documents from disclosure. The point is not however abandoned.'

This stance disposes of all of the grounds in paragraphs 1, 3, 5, 6, 7, 8 and 9 of the notice of appeal except those relating to the exercise of the court's discretion in terms of section 82. That leaves the grounds in paragraphs 2, 4, 10 and 11. Grounds 2 and 4 relate to the interpretation of clauses in two agreements and paragraph 4.2 states baldly – 'The learned Judge ought to have found that item 11 falls to be protected in terms of sections 41(2) and 44(2) of the Act.' No reasons are stated. Grounds 10 and 11 relate to the exercise of the court's discretion. It is simply alleged that the court erred.

[24] In their heads of argument the applicant's counsel make two general points. First, that the court declined to refer the request back to the applicant so that consideration could be given to severance. It is then submitted that a court of appeal 'might well adopt a different approach'. Second, that the court did not comply with the general principle in

review matters to remit the matter unless there are special circumstances for not doing so. It is contended that there are no special circumstances in the present case: that the court was compelled to make assumptions as to the likely or probable content of the documents without having had an opportunity to examine them and that in the circumstances pertaining to the defence and security of the country the court should show a measure of judicial deference to the bodies or functionaries charged with taking decisions in complex and specialised matters. It is submitted that another court may find that this decision to substitute its own decision was not the correct decision and that the matter should be referred back to the Information Committee. None of these matters is covered by the grounds of appeal. Nor do the grounds contain reasons why the decisions were wrong. In argument before the court the applicant's counsel persisted in these contentions.

[25] There is no merit in these contentions. The notice of appeal does not attack this court's findings as to the nature of the enquiry and the court's powers in terms of section 82 of the Act (paras 45 and 46). Nor does it take into account the wording of section 82 of the Act which expressly empowers the court to set aside the decision and to require the information officer or relevant authority to take such action as the court considers necessary within a period mentioned in the order. Furthermore, in the unreported judgment of the Supreme Court of Appeal in ***Transnet Limited and Another v SA Metal Machinery Company (Pty) Ltd*** case SCA number 147/05 delivered 29 November

2005 the SCA dealt with the nature of an application in terms of section 78 of the Act as follows –

> 'A court application under the Act is not the kind of limited review provided for, for example, under the Promotion of Administrative Justice Act 3 of 2000. It is much more extensive. It is civil proceeding like any motion matter, in the course of which both sides (and the third party if appropriate) are at liberty to present evidence to support their respective cases for access and refusal. As the present matter serves to illustrate, the parties' respective cases in such application will no doubt in most instances travel beyond the limited material before the information officer. That conclusion is reinforced by the legislature's having catered for the presentation of evidence and the resolution of disputes of fact by reference to an onus of proof. Those provisions would have been unnecessary if the suggested limitation applied. Moreover it is unlikely that a Court, acting under s 82, would be sufficiently informed so as to be in a position to make a just and equivocal order were the limitation to apply.' (para 23)

The SCA dealt with section 82 of the Act in the following terms –

> 'Turning, finally, to the court's discretion in s 82, the appellant's main submission entails that despite a public body's failure to establish its case for refusal under s 36 and s 37 it can still be entitled to a discretionary order dismissing a requester's application. This is not a tenable argument. As the court *a quo* observed, it would be remarkable, to say the least, for the legislature to lay down detailed provisions governing refusal of access and then to enable a court by way of an unlimited discretion to confirm refusal even if the public body failed to justify refusal. However, the more important consideration is this. The primary purpose of the Act is to give effect to constitutional right of access to State information. The limitations on that right, in favour of a third party's right to privacy in general and commercial confidentiality in particular, are set by ss 36 and 37. If the public body fails under those sections to justify its refusal of access there can no longer be anything in the way of the requester's right to access. It follows that there can be no such discretion as that contended for. This conclusion accords with the aim and objects of the Act. If confirmation were needed it is provided by the terms of s 11. The power to "grant any

> order that is just and equitable" is therefore intended to enable the court to tailor the relief to which a successful applicant is entitled' (para 58)

See also ***Minister for Provincial and Local Government v Unrecognised Traditional Leaders, Limpopo Province (Sekhukuneland)*** **2005 (2) SA 110 (SCA).**

[26] It remains to point out that the grounds of appeal omit any reference to items 22, 23, 31, 39 and 42 and are also directed at the orders in respect of items 20, 21 and 24 in respect of which the applicant conceded access at the hearing (para 40).

[27] The lack of confidence of the appellant's counsel in the factual grounds raised in the notice of appeal is telling. In my view there are no prospects of success on the facts or the legal points raised.

[28] In the light of the conclusions reached on the explanation for the delay and the prospects of success it is not necessary to deal with the other matters. The application for leave to appeal should be refused.

RULE 30

[29] The basis for the respondent's application in terms of Rule 30 was that an application for leave to appeal filed late and without a substantive application for condonation is an irregular step. Relying on ***Theron v Coetzee*** **1970 (4) SA 37 (T)** and ***Oostelike Transvaalse Ko-operasie***

Beperk v Aurora Boerdery en Andere **1979 (1) SA 521 (T)** and the cases there cited, which hold that a notice of intention to defend filed late cannot simply be ignored and that the proper course for the aggrieved party to follow is to apply to have the notice of intention to defend set aside as an irregular step. The respondent suggests that the same procedure should be followed in respect of a notice of appeal filed late. I do not agree. The procedure described in the cases, referred to as the existing Transvaal practice, applies to cases where a notice of intention to defend is filed late. It exists to protect defendants who have defences but who fail to deliver their notices of intention to defend timeously. That consideration does not exist where a notice of application for leave to appeal is filed late. Where a notice of application for leave to appeal is filed the Registrar must set the matter down for hearing in terms of the rules. If the Registrar fails to do so the respondent may insist that he does. If the applicant has delivered the notice late and fails to apply for condonation the respondent may raise the point - if it is not taken by the court. Usually it will be upheld.

[30] It is irrelevant that the application in terms of Rule 30 elicited the condonation application. The application was not necessary and the respondent is not entitled to the costs thereof.

[31] The respondent has successfully opposed the application for condonation and the application for leave to appeal and is entitled to the costs. These costs will include the costs of 21 September 2005

when the application for condonation and the application in terms of Rule 30 were postponed. The reason for that postponement was the respondent's failure to respond promptly on being notified that an application for condonation was necessary. The applicant set the application down on the same day as the application in terms of Rule 30 and the respondent was clearly not able to answer in time. Save for 21 September 2005, both parties employed two counsel and the costs of two counsel will be allowed.

[32] The following order is made:

(1) The applicant's application for condonation of the late filing of the application for leave to appeal and the application for leave to appeal are refused;

(2) The applicant is ordered to pay the respondent's costs of the application for condonation of the late filing of the notice of application for leave to appeal and the application for leave to appeal, such costs to include the costs consequent upon the employment of two counsel;

(3) The applicant is ordered to pay the costs of 21 September 2005;

(4) The respondent is ordered to pay the costs of the applicant's papers in the application in terms of Rule 30.

S.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

2006-02-09