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**NEUKIRCHER J:**

- 1] This is judgment in the applications for leave to appeal and cross-appeal filed by the parties to the main application. As a matter of convenience, they are referred to as in the *a quo* judgment. I indicated to the parties that I was prepared to adjudicate their respective applications on paper, which they agreed with. I gave them leave to file heads of argument on the respective applications which they did. The Applications for Leave to Appeal, Application for Leave to Cross-Appeal and the Application for Condonation for Leave to Cross-Appeal were thus adjudicated on the papers.
- 2] The main judgment was handed down on 2 November 2021. On 8 November 2021 Trencon filed a Notice in terms of Rule 42(1)(b) in which it sought an amendment of the order that was handed down. I agreed -in part - with the application and, for the reasons set out in the judgement handed down on 22 November 2021, the order granted on 2 November 2021 was amended.

- 3] The GEPF and the PIC both seek leave to appeal against the order<sup>1</sup> handed down on 22 November 2021. It bears mentioning that their Application for Leave to Appeal was filed timeously in terms of Rule 49(1)<sup>2</sup>.
- 4] Trencon seeks leave to cross-appeal and directs its application against paragraph 2 of the order. It is common cause that Trencon's application is late: it is dated 31 January 2022 and was uploaded to the CaseLines platform on 2 February 2022. At the same time that the Notice for Leave to Cross-Appeal was delivered, Trencon also delivered an Application for Condonation in terms of Rule 49(1)(b) in which it seeks condonation for the late filing of the Application for Leave to Cross-Appeal. This is opposed by the GEPF and the PIC.
- 5] Rule 49(1)(b) provides:
- “(b) When leave to appeal is required and it has not been requested at the time of the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within fifteen days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court's order are given on a later date than the date of the order, such application may be made within fifteen days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of fifteen days.”*

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<sup>1</sup> The order was amended in terms of Rule 42 on 22 November 2021 – it is referred to as “the order” in this judgment

<sup>2</sup> It was filed on CaseLines on 13 December 2021

6] It has been stated that an application for condonation must meet three requirements: (a) the applicant must give a full explanation; (b) the explanation must cover the entire period of delay; and (c) the explanation must be reasonable.<sup>3</sup> The entire purpose of filing the application for leave to appeal timeously serves the important purpose of protecting the interests of the party who was successful in the court *a quo* as that party is entitled to assume that the matter has come to a close when no application for leave to appeal is forthcoming. The court found that to grant condonation after an inordinate delay and in the absence of a reasonable explanation would undermine the principle of finality and could not be in the interests of justice.<sup>4</sup>

7] Trencon provides the following explanation for its delay:

7.1       that the application for leave to appeal by the GEPP and the Pic were received shortly before Trencon's legal team commenced their year-end leave and there was insufficient time to obtain instructions;

7.2       Trencon's counsel returned to chambers on 17 January 2022 after which advice was received, instructions were taken "*and this application was lodged as soon as possible thereafter*";

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<sup>3</sup>       Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as *Amicus Curiae*) 2008 (2) SA 472 (CC) para 22

<sup>4</sup>       Van Wyk *supra* at para 31



- 7.3       there is no prejudice to any party, there is good cause to condone the delay and there are good prospects of success that the cross-appeal will be upheld;
- 7.4       that, given the *dies non* period, only 13 court days had passed between the lodging of the application for leave to appeal by the GEPF and PIC, and Trencon's application, and 28 court days since the order of 22 November 2021;
- 7.5       as the GEPF and PIC's application for leave to appeal had yet to be determined, there would be no prejudice were this application to be heard together with that one.

8] Thus it would appear that the event that galvanised Trencon into action was not the order of 2 November 2021, but the Application for Leave to Appeal filed by the GEPF and the PIC on 13 December 2021. Piggybacking on this excuse, Trencon then blames the December 2021 recess and counsel's return to chambers on 17 January 2022 as further reasons for failing to file its application timeously. The final excuse is that, taking into account *dies non*, there is no true prejudice suffered as not much time has, in any event, passed since the order was handed down.

9] In my view, the above excuses are no excuses at all: Trencon has failed to set out any proper explanation for the fact that it failed to act between – at best for it – 22 November 2021 and 17 January 2022. There is no explanation provided for the steps it took between receiving the full judgment on 2 November 2021 and when the GEPF and PIC filed their

application for leave to appeal on 13 December 2021. Those 29 days remain unaccounted for. It also fails to set out when its attorneys went on leave in December 2021 and when they returned from recess in January 2022 and they do not explain when they sought advice from counsel after his return to chambers in 17 January 2022, when the advices were received and when the instructions to apply for leave to cross-appeal were given.

- 10] All-in-all, Trencon have failed to provide a full and proper explanation for its delay. Because it failed to do so, it is impossible to exercise any discretion as to whether the reasons for the delay are, in fact, reasonable.
- 11] By the time that Trencon filed its papers, 3 months had passed since the judgment of 2 November 2021 was handed down. What must also be born in mind is that the amendment granted on 22 November 2021 had no impact whatsoever on the order<sup>5</sup> that was granted against Trencon itself. The GEPPF and the PIC were thus entitled to assume that the relief against Trencon had become final.
- 12] Thus, in my view, the Application for Condonation falls to be refused.

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<sup>5</sup> Trencon's application to review and set aside the award of the tender was dismissed

- 13] As to the application for leave to appeal filed by the GEPPF and the PIC - I have considered the grounds upon which they seek leave and I am of the opinion that the appeal has reasonable prospects of success.<sup>6</sup> I am also of the view that there is another compelling reason to give leave to the GEPPF and PIC<sup>7</sup>, and this is the finding that the GEPPF is an organ of state for purposes of that application. That finding has implications for these entities. This too shapes my view that leave to appeal should be granted.

### **ORDER**

- 14] The order I therefore grant is the following:

1. Leave to appeal to the Supreme Court of Appeal is granted in the Application for Leave to Appeal filed by the GEPPF and the PIC dated 13 December 2021. Costs are costs in the appeal.
2. The Application for Condonation for the late filing of the Application for Leave to Cross-Appeal, filed by Trencon on 2 February 2022, is refused with costs.



**NEUKIRCHER J**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is

<sup>6</sup> Superior Courts Act 10 of 2013 Section 17(1)(a)(i)

<sup>7</sup> Ibid Section 17(1)(a)(ii)

reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 4 APRIL 2022.

Counsel for GEPP and PIC : Adv K Pillay SC and with her C Tabata and M Dafei

Instructed by : Bowmans

Counsel for Trencon : Adv M Chaskalson SC and with him S Pudfin-Jones

Instructed by : Joubert, Galpin Searle Attorneys