

**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 7718/22P

In the matter between:

**THE MEC FOR CO-OPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

**FIRST APPLICANT**

**BAMBA NDWANDWE**

**SECOND APPLICANT**

and

**UMKHANYAKUDE DISTRICT MUNICIPALITY**

**FIRST RESPONDENT**

**HOWARD SIHLE NDLOVU**

**SECOND RESPONDENT**

**GP MOODLEY**

**THIRD RESPONDENT**

**CT KHUMALO**

**FOURTH RESPONDENT**

**M Q MKHWANAZI AND  
FOURTEEN OTHERS**

**FIFTH TO  
NINETEENTH  
RESPONDENTS**

**SOLOMON MKHOMBO**

**TWENTIETH RESPONDENT**

**SF MDAKA**

**TWENTY FIRST  
RESPONDENT**

**JERICKO MUSAWAKHE GUMEDE**

**TWENTY SECOND**

	<b>RESPONDENT</b>
<b>SIYABONGA ROBSON NTULI</b>	<b>TWENTY THIRD RESPONDENT</b>
<b>INKATHA FREEDOM PARTY</b>	<b>TWENTY FOURTH RESPONDENT</b>
<b>AFRICAN NATIONAL CONGRESS</b>	<b>TWENTY FIFTH RESPONDENT</b>
<b>ECONOMIC FREEDOM FIGHTERS</b>	<b>TWENTY SIXTH RESPONDENT</b>

### **ORDER**

The following order is granted:

1. The application for leave to appeal is dismissed with costs, such to include the costs of two counsel where so employed.

### **JUDGMENT**

**MOSSOP J:**

[1] This is an application for leave to appeal against an order granted by me on 20 June 2022 in motion court. On that day, an urgent application (the urgent

application) served before me that was brought by the first and second applicants cited above. They are not the applicants in this application. The applicants in this application are the second to nineteenth respondents in the urgent application. I shall henceforth refer to them as ‘the appellants’. The application for leave to appeal is opposed by the first and second applicants and the first, twentieth and twenty first respondents. The other respondents have not participated in the application.

[2] Unfortunately, the affairs of the Umkhanyakude district municipality (the municipality) have occasioned the bringing of several applications in this court besides the urgent application. The urgent application was merely one in a seemingly endless stream of matters having their origin in the bitterly contested political environment that seems to characterise the municipality. The urgent application was preceded by two earlier applications,<sup>1</sup> heard by Chili J and Nkosi J. I shall refer to the application before Nkosi J as ‘the prior application’. Nkosi J granted two orders, one on 18 May 2022 (the first order) and one on 30 May 2022 (the second order). In essence, what was ordered by the first order was that, pending the final determination of the prior application, only the ‘ordinary usual business’ of the municipality could be conducted. The second order directed that the twentieth to twenty third respondents should serve as speaker, mayor, deputy mayor and municipal manager respectively of the municipality, pending the final determination of that application. These orders were apparently intended to create some stability in the affairs of the otherwise turbulent municipality.

[3] After the granting of the first order, a vote of no confidence in the then office bearers of the municipality was moved by the appellants on 13 June 2022. This led to the bringing of the urgent application, it being contended that this was in defiance of the provisions of the first order. An ex tempore judgment was delivered by me on the day that the application served before me, namely 20 June 2022. The order that I granted was in the form of a rule nisi with interim relief and it, inter alia, set aside the results of the meeting of the municipality on 13 June 2022. The return date of the rule that I granted was 3 August 2022, which was specifically chosen because it was also the return date of the earlier applications.

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<sup>1</sup> Those applications bear case number 6208/22P and case number 6077/22P.

[4] Assuming for a moment that the rule nisi that I granted was appealable, it still not yet having been finalised, the appellants were required to lodge an application for leave to appeal by no later than 11 July 2022.<sup>2</sup> This was not done. The application for leave to appeal was received by the registrar of this court on 6 September 2022.<sup>3</sup> It is accordingly some 41 days out of time.

[5] Before dealing with this lateness, something perhaps needs to be said, very briefly, about the delay between the date upon which the application for leave to appeal was received by the registrar and the date upon which argument was heard, being 29 November 2022. The difficulty that caused the delay was that counsel originally involved in the matter were so busy it was virtually impossible to agree on a date that suited each of them. My registrar suggested several dates to the parties on which I was available, none of which were suitable to counsel. Ultimately, I instructed my registrar to inform the legal representatives that they should agree a date amongst themselves, and I would then make myself available on that date, whatever it was, provided that it was before ordinary court hours. Thus, the matter was finally dealt with at 08h30 on 29 November 2022.

[6] Reverting to the late delivery of the application for leave to appeal, condonation for this was sought by the appellants. This was done in the form of an affidavit deposed to by Mr Bhekinkosi Petros Madlopha (Mr Madlopha), who was the seventh respondent in the urgent application. It makes for interesting reading.

[7] Distilled to its essence, Mr Madlopha states that the appellants were not satisfied with the order that I granted and wished to appeal that order. They immediately advised their legal representatives of their wishes. However, they were advised that they should not bring an application for leave to appeal as the issues between the warring parties would probably be resolved on 3 August 2022, being the date that the urgent application and the other applications were adjourned to. In the deponent's words:

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<sup>2</sup> In terms of Uniform rule 49(1)(b) a party seeking leave to appeal must deliver his notice of application to do so within 15 days of the date of the order appealed against.

<sup>3</sup> The applicants state that the application was delivered to the registrar on 2 September 2022. This is clearly an error as the notice of motion was only signed on 6 September 2022 and bears the registrar's stamp for that date.

‘It was therefore anticipated that all litigation would be determined once and for all on 3 August 2022 and that any appeal would be moot as a result.’

The deponent goes on to state:

‘Therefore, the appellants, acting on legal advice to act practically and sensibly, considered it appropriate that a notice of leave would not be necessary because the matters would be finally concluded on 03 August 2022.’

[8] As may be guessed, the matters that the appellants believed would be resolved on 3 August 2022 were apparently not all resolved. In particular, the issues arising out of the urgent application were apparently not resolved. Nor were they resolved on 11 August 2022, being the date to which the urgent application was thereafter adjourned.

[9] Mr Madlopha in his affidavit then draws attention to further events that occurred after 11 August 2022 at the municipality. These included attempts to call further meetings by the appellants that were allegedly thwarted by the speaker of the municipality based upon an allegedly ‘perverse and opportunistic’ reading of the order granted by Nkosi J. Mr Madlopha states further that because of this:

‘... it has become necessary to pursue the appeal. This is to say that the hope of resolving the legal impasse practically and sensibly, as advised by our legal representatives, has not come to fruition.’

[10] As interesting as these events post 11 August 2022 may be, they appear to be irrelevant to the issue of condonation. If it is accepted that a good explanation has been provided for why the application for leave to appeal was not delivered before 3 August 2022, which is not a finding that I now make, there is no reasonable explanation for the delay in lodging the application for leave to appeal between 3 August 2022, or 11 August 2022 being the extended return date, and 6 September 2022. After all, the appellants knew that no settlement had been achieved on 11

August 2022, yet still did not launch their application for leave to appeal. Almost a further month went by before this occurred. I have no idea of the reasons for this.

[11] A proper case for condonation must be made out where there has not been compliance with the Uniform rules of this court: condonation is not there for the mere asking. Parties seeking condonation must establish that they did not wilfully disregard the timeframes provided for in the Uniform rules and that there are reasonable prospects of their success on appeal.

[12] In *Melane v Santam Insurance Co Ltd*,<sup>4</sup> the following was stated about the factors that will be taken into account when considering a condonation application:

‘In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.’

[13] It was conceded by the appellants’ counsel when the matter was argued that the appellants were aware that there were time limits that needed to be complied with should they want to appeal. From the affidavit deposed to by Mr Madlopha, it is clear that they disregarded those time limits in preference to wagering everything on the possibility of all matters, including the urgent application, settling on 3 August

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<sup>4</sup> *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532B-E.

2022, a date that was already outside the time limits imposed for the lodging of a notice of application for leave to appeal. They consciously and knowingly disregarded the time limits but now seek condonation for so doing on the grounds that it was sensible for them to approach the matter in this fashion.

[14] In my view, it was clearly not sensible. It would, for example, have been sensible for them to deliver their notice of application for leave to appeal in time and hold it over for a while to determine what would happen on 3 August 2022 or, alternatively, argue the application and if it succeeded but they were subsequently able to settle the matter, abandon the appeal.

[15] Having considered and applied the criteria referred to in *Melane*, I am not satisfied that a proper case has been made out for condonation. Sufficient compelling facts have not been disclosed upon which I could reasonably exercise my discretion in favour of the appellants. Indeed, such facts that have been made known to me tend to indicate that a decision not to appeal was taken. I shall deal further with this proposition shortly. The lodging of applications for leave to appeal are subject to fairly short time constraints, primarily because the law cherishes the finality of decisions. Undoubtedly, circumstances will arise from time to time that permit these time limits to be extended to allow a deserving matter to enjoy the attention of a higher court. I do not believe that this is such a case. I come to that conclusion strengthened by the fact that the appellants have not disclosed or discussed their prospects of success in the affidavit seeking condonation and because the urgent application has, as yet, not been finally determined. The interim relief that I granted has yet to be confirmed in a final order.

[16] In the circumstances, condonation is not granted.

[17] Should I be incorrect in arriving at that finding, I am of the view that there is at least one other reason, there may be others, why the application for leave to appeal should not be granted. That reason is closely associated with the explanation provided by Mr Madlopha in his affidavit used in support of the application for condonation. It is the operation of the doctrine of peremption.

[18] According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge the judgment to which he has acquiesced. This doctrine is founded on the logic that no person may be allowed to opportunistically endorse two conflicting positions. Thus, one cannot decide not to appeal and then later decide to appeal.

[19] The doctrine of peremption has its origins in appeals.<sup>5</sup> It was enunciated in *Hlatshwayo v Mare and Deas*,<sup>6</sup> where Lord De Villiers CJ held that:

‘where a man has two courses open to him and he unequivocally takes one he cannot afterwards turn back and take the other.’

[20] Innes CJ in *Dabner v South African Railways and Harbours*,<sup>7</sup> stated in a similar fashion 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 party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.’

[21] In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*,<sup>8</sup> the Supreme Court of Appeal dealt with whether an appeal had been perempted. Cameron JA discussed the doctrine of peremption as follows:

‘Peremption of the right to challenge a judicial decision occurs when the losing litigant acquiesces in an adverse judgment. But before this can happen, the Court

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<sup>5</sup> *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)* [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) para 101.

<sup>6</sup> *Hlatshwayo v Mare and Deas* 1912 AD 242 at 249.

<sup>7</sup> *Dabner v South African Railways and Harbours* 1920 AD 583 at 594.

<sup>8</sup> *Tswelopele Non-Profit Organisation and others v City of Tshwane Metropolitan Municipality and others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) para 10.



must be satisfied that the loser has acquiesced unequivocally in the judgment. The losing party's conduct must "point indubitably and necessarily to the conclusion that he does not intend to attack the judgment": so the conduct relied on must be "unequivocal and must be inconsistent with any intention to appeal"...

[22] In *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd*,<sup>9</sup> the court stated that the enquiry into whether peremption has been established, does not involve an enquiry into the subjective state of mind of the person alleged to have acquiesced in the judgment but rather involves a consideration of the objective conduct of such person and the conclusion to be drawn therefrom.

[23] The objective conduct of the appellants in initially not seeking to challenge the order invites the conclusion that they perempted their right to appeal it. The longer that they remained passive regarding an appeal, the more likely that they had chosen not to appeal. Mr Madlopha stated in his affidavit that the appellants considered 'that a notice of leave would not be necessary'. This can only bear the meaning that an appeal was not to be proceeded with. This is fortified by the appellants' later conduct in trying to settle the litigation, as they were apparently advised to do. Objectively, they showed no signs of moving to attack the order that they now seek to appeal. Subjectively, they state that they were advised not to appeal, which advice they accepted. When these factors are considered collectively, the invitation to conclude that they perempted their right to appeal becomes irresistible. I furthermore cannot discern any overriding policy considerations that militate against the enforcement of the peremption of the appellant's right of appeal, nor were any suggested in argument. The broader policy considerations

'... are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice'.<sup>10</sup>

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<sup>9</sup> *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and another* 2016 (1) SA 78 (GJ) para 25.

<sup>10</sup> *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* [2016] ZACC 38; 2017 (1) SA 549 (CC) para 28.

[24] I accordingly conclude that the applicants' right to appeal was preempted. Leave to appeal cannot in such circumstances be granted.

[25] This does not leave the applicants remediless. As previously stated, the order that I granted was in the form of a rule nisi with interim relief and accordingly, the final word on it has not yet been spoken. That application has yet to be finalised and it is possible that the relief that I granted may be overturned when the matter is finally argued and disposed of. That fact simply serves as another reason why leave to appeal ought not to be granted. Entertaining an appeal at this stage would offend against the jurisprudence of appeal courts generally, namely that the piecemeal appellate disposal of the issues in litigation should be avoided.

[26] From the inception of the matter, the principle protagonists have been represented by two counsel. I do not regard that as a wasteful luxury and consider that it was necessary. That fact must therefore be reflected in the order that I now make.

[27] In the circumstances, I grant the following order:

1. The application for leave to appeal is dismissed with costs, such costs to include the costs of two counsel where so employed.

**MOSSOP J**

### **APPEARANCES**

Counsel for the appellants : Mr. T. G. Madonsela SC with Mr. M. N.

(2<sup>nd</sup> to 19<sup>th</sup> respondents)

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Date of Hearing : 29 November 2022

Date of Judgment : 2 December 2022