Reportable:	Yes/No
Circulate to Judges:	Yes/No
Circulate to Magistrates:	Yes/No

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NO.: 689/2020
Date heard: 08-11-2021
Date delivered: 26-08-2022

In the matter between:

ANDRIES WIKUS SCHOLTS	1st Applicant/Respondent
HERTZOG VENTER	2nd Applicant/Respondent

and

JACOBUS ANDRE NEL ROSSOUW	1st Respondent/Applicant
RYNO ROODS	2nd Respondent/Applicant

CORAM: WILLIAMS J:

JUDGMENT

WILLIAMS J:

1. This is an application for leave to appeal brought by the respondents in the main application against the whole judgment and paragraphs 1 to 4 of the order made in the aforesaid application. I will continue to refer to the parties as described in the main application.

2. As the main application was one of some urgency, I made an order after hearing argument on 23 October 2020 and reserved the reasons therefore. The order made reads as follows:

(1) The first and second respondents are to make the applicants' 7 (seven) rhinoceros available to them for collection within 7 (seven) days of this order.

(2) The first respondent is to hand over the original microchip information and VGL information, to the extent that he has it in his possession, in respect of the rhinoceros to the applicants.

(3) The applicants are to pay the amount of R120 000, 00 (ONE HUNDRED AND TWENTY THOUSAND RAND) to the first respondent immediately after the rhinoceros have been handed over to the applicants.

(4) The first and second respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

3. On 11 November 2020 the respondents filed a request for reasons for the order and before the reasons were given, filed their notice of application for leave to appeal on 11 January 2021.

4. The applicants opposed the application for leave to appeal and in an affidavit dated 26 January 2021 objected essentially to:

    (i) The fact that the respondents had unconditionally and without any reservation of rights complied with a substantive portion of the order by making the rhinoceros available for collection within seven days of the order and that the rhinoceros were removed from the second respondent's farm on 30 October 2020 as per paragraph 1 of the order. Likewise the respondents have accepted payment of R120 000, 00 as per paragraph 3 of the order. There would therefore be nothing left to appeal against;

    (ii) As a result of the compliance an appeal would have no practical result or effect.

    (iii) The fact that the notice of application was brought out of time with no application for condonation. In terms of Rule 49(1) (b) the application had to be made within 15 days of the order i.e. by 13 November 2020.

5. At the hearing of the application for leave to appeal Mr Goodman SC indicated that the applicants would not pursue the issue of the late notice of application.

6. With regard to the merits, the essence of the respondents grounds of appeal are as follows:

6.1 That I erred in not finding that a material dispute of fact existed which could not be determined on the papers;

6.2 That I erred in finding that the agreement relied upon by the respondents was a *locatio conductio operis;*

6.3 That I erred in not finding that the agreement was a reciprocal one which would only entitle the applicants to possession of the rhinoceros upon performing their contractual obligations or tendering performance of such;

6.4 That I erred in finding that it was not necessary for the applicants to prove the termination of the conceded right;

6.5 That I erred in not correctly applying the principles enunciated in *Plascon Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984(3) SA 623 (A) in relation to the approach to be adopted in respect of disputes of fact in motion proceedings; and

6.6 That I erred, as a consequence of the above – mentioned misdirection, in granting a cost order against the respondents.

7. With regard to the practical effect of an appeal in the light of the rhinoceros having been returned to the applicants, Mr Van Niekerk SC for the respondents conceded that that particular factual situation could not be turned around but that it would not

impact on the further orders made. So for instance a court of appeal may find, on the basis that the respondents denied being in possession of the VGL information referred to in paragraph 2 of the order, that there was no factual basis upon which such an order could be made. With regard to paragraph 3 of the order i.e. the payment of R120 000, 00 to the applicant, the argument is that a court of appeal may, upon finding that my judgment on the merits of the application was flawed as alluded to in the grounds of appeal, order that the R120 000, 00 be returned to the applicants and/or that an order in terms of prayer 4 of the Notice of Motion would be appropriate (prayer 4 can be found on pages 4 to 5 of the main judgment).

8. As far as the VGL information goes, it will be noted that the order in relation thereto is qualified by the words *"to the extent that he has it in his possession".* An appeal of that order would therefore have no practical effect.

9. As far as a court of appeal may make an order in terms of prayer 4 of the Notice of Motion, such an order envisages action to be instituted by the respondents for the amount they consider due to them by the applicants. To institute such an action does not require a court order. An appeal on this basis would therefore also have no practical effect or result.

10. Mr Goodman is correct that the only issue which would remain is that of costs. In terms of s16(2)(a)(ii) of the Superior Courts Act 10 of 2013, the question whether the decision would have

no practical effect or result is to be determined without reference to any consideration of costs, save in exceptional circumstances.

11. The application for leave to appeal can be dismissed solely on the basis that an appeal would have no practical effect or result.

12. Mr Goodman has however also raised the issue of peremption which I deal with briefly.

13. In *South African Revenue Services v Commission for Conciliation, Mediation and Arbitration and Others* 2017(1) SA 549 (CC) at 561 E-H the Constitutional Court states the position regarding peremption as follows:

> *"[26] Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self resignation to the unfavourable order that could otherwise be appealed against. Dabner articulates principles that govern peremption very well in these terms:*
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> > *"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."*
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> *The onus to establish peremption would be discharged only when the conduct or communication relied on does "point indubitably and necessarily to the conclusion" that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order."*

14. It is clear that peremption is not lightly presumed. To this effect Mr Van Niekerk has pointed out that peremption had been raised for the first time during argument (I presume without having given the respondents an opportunity to deal with the issue) and that in any event the respondents had without unreasonable delay filed the notice of application for leave to appeal, which conduct cannot in the circumstances be seen to constitute conduct inconsistent with an intention to appeal.

15. The issue of peremption should however not have come as a surprise to the respondents. In their affidavit opposing the application for leave to appeal the applicants clearly state *inter alia* that the respondents have without reservation of rights and unconditionally complied with substantive portions of the order.

16. The respondents have not filed an answering affidavit and have given no explanation for why there was compliance with the order if there was a firm intention to appeal. The application for leave to appeal was also only filed two and a half months after the order, with no explanation for the delay. There is no reason why I should not find that the right to appeal has been perempted.

17. Finally and for the sake of completeness, as far as the merits are concerned, I am not of the opinion that an appeal, on the grounds raised, would have any prospects of success.

In the circumstances the application for leave to appeal is dismissed with costs.

CC WILLIAMS

JUDGE

For Applicants/Respondents:	Adv. J Van Niekerk SC De Klerk & Van Gend Inc. c/o Duncan & Rothman Attorneys
For Respondents/Applicants:	Adv. R Goodman SC Spamer Triebel Attorneys c/o Van De Wall Inc