

MINING PROMOTION CORPORATION  
versus  
FINER DIAMONDS (PRIVATE) LIMITED  
and  
MINING COMMISSIONER-MASVINGO  
and  
MINING AFFAIRS BOARD  
and  
MINISTER OF MINES AND MINING DEVELOPMENT

HIGHCOURT OF ZIMBABWE  
CHIKOWERO J  
HARARE; 9 May 2024 and 28 August 2024

### **Opposed Application**

*J R Tsivama*, for the applicant  
*T Mpofu*, for the respondent  
No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents

#### **CHIKOWERO J:**

[1] This is an application for rescission of an order allegedly erroneously granted in the absence of a party affected thereby. It is made in terms of r 449 of the High Court Rules, 1971(now r 29 of the High Court Rules, 2021).

[2] The applicant is a company with interests in the mining industry. So is the first respondent. The second respondent is the Mining Commissioner for Masvingo Province. The third respondent is a quasi-judicial board established in the terms of s 6 of the Mines and Minerals Act [*Chapter 21:05*] (the Act). The fourth respondent is the Minister responsible for the administration of the Act.

[3] The second, third and fourth respondents forfeited the first respondent's mining claims and offered them to the applicant. The applicant accepted the offer and was duly issued with two special grants by the Secretary of the Ministry of Mines.

[4] Having discovered the forfeiture of its mining claims the first respondent, under case number HC 2471/19, filed a Court application for review. It prayed for the setting aside of the decision to forfeit its mining claims. The application was filed on 26 March 2019. It was opposed by the second, third and fourth respondents. After hearing submissions, the Court, on 15 January 2020, issued the following order:

“IT IS ORDERED THAT:

1. The application succeeds.
2. The first respondent’s decision to forfeit applicants bear (sic) the following registration numbers, 12379BM, 12380BM, 12381BM, 12382BM, 12383BM, 10913, 10914, 10915, 10916, 10917, 10918, 10919, 10921, 10922, 12666BM, 12667, 12668, 126969, 12670, 12671, 12672, 12673, 12674, 12675 and 12578 is hereby set aside in terms of s 4(2)(a) and (e) of The Administrative Justice Act [*Chapter 10:28*].
3. The first and second respondents are hereby ordered within (7) days of this order to reinstate the applicant’s name on the claims card for the mining claims bearing registration numbers listed in clause 2 of this order and all such other official mining documents for such claims in their custody.
4. The first and second respondents be and are hereby ordered to allow applicant to opportunity (sic) to settle all outstanding inspection fees in respect of the claims listed (in) terms of the law up to the date of this order.”

[5] The judge who presided over the matter died on 1 February 2021 before he had delivered his reasons for the order.

[6] In *Mining Commissioner-Masvingo N.O and ors v Finer Diamond (Private) Limited SC 38/22* the Supreme Court dismissed an application for condonation of late noting of an appeal and extension of time within which to note an appeal. The application had been filed by the Mining Commissioner-Masvingo N.O, the Mining Affairs Board and the Minister of Mines and Mining Development as they were out of time in seeking to appeal the High Court judgment referred to in para 4 of this judgement.

[7] The application for condonation of late noting of appeal and for an extension to note an appeal out of time failed because the applicants in that matter (who are now the second, third and fourth respondents) had complied with the order and hence lost the right to appeal against the same. The court expressed itself thus at para(s) 17 – 19 of the judgment:

“[17] Undoubtedly the applicant by complying with the order he now seeks to appeal against acquiesced in the judgement of the court. He can now not be heard seeking to appeal against the judgment he has complied with. He cannot approbate and reprobate as it were...”

[18] The same fate visits the second applicant because it chose to ride on the back of the first applicant's founding affidavit without proffering its own.

[19] By complying with the court order the applicants deprived themselves of the right to appeal against the order. That finding of fact and law renders their application sterile on the basis that there can be no reasonable prospects of success on appeal."

[8] The present applicant was not cited as a party under case number HC 2471/19. It was not party to the application for condonation for late noting of appeal and extension of time within which to appeal.

[9] As already stated, case number HC 2471/19 was filed on 25 March 2019. The court order in that matter was granted on 15 January 2020. Therefore, the applicant's special Grants Numbers 6944 and 6946 had not yet expired when the application for review was filed and also when the court granted that application. This is common cause. But that is not the end of the matter.

[10] Two other facts are common cause. First, the two special grants expired on 20 September 2020. Second, the application the subject of this judgment was only filed on 13 May 2021, a period of eight months after the special grants had expired.

[11] The special grants had fifteen terms and conditions. The conditions were similar. The second such term and condition reads:

"2. The Grant shall be for the period of 12 months with effect from the date of issue and issued without any commitment in regard to extension. However, upon the written application of the holder at least ninety (90) days before the expiration of the grant, it may be extended on such terms and conditions, as the Secretary may deem appropriate."

[12] It is common cause that the applicant never applied for extension of the special grants. Consequently, the special grants simply expired on 20 September 2020.

[13] In these circumstances, it is no longer necessary to determine whether the applicant should have been cited at the time that the application for review was filed. It is no longer necessary to determine whether, on 15 January 2020, the court erroneously granted the order in the absence of a party affected by that order, namely the applicant. The need to do so has fallen away.

[14] The fact is that this matter, even as the application was being filed on 13 May 2021, had long become moot. It had become so eight months earlier (on 20 September 2020) when the

special grants expired. The case no longer presents an existing or live controversy requiring adjudication by this Court. See *Khupe and Anor v Parliament of Zimbabwe and ors* 2019(3) ZLR 915(CC).

[15] I also make an allied finding. The expiry of the special grants means the applicant did not have a legal right in the mining claims even at the time it filed the application. Without a legal right, the applicant cannot ask this court to rescind the order of 15 January 2020 to afford it an opportunity to apply for joinder to the application for review. Mr Tsivama told me that if I grant this application the applicant will proceed to file an application to be joined to the review proceedings and, if that further application is also granted it will then file papers opposing the application for review. Clearly, all that is uncalled for. With the special grants having long expired, the applicant has no legal interest to protect. See *Zimbabwe Teachers Association and Ors v Minister of Education and Culture* 1990(2) ZLR 48(HC) and *United Parties v Minister of Justice and Ors* 1997(2) ZLR 254(SC).

[16] Mr Mpofu also relied on *L Piras and Son (Pvt) Ltd and Anor (Intervening) v Piras* 1993(2) ZLR 245(S) in submitting that the applicant should have sought to intervene in the application for condonation of late noting of appeal and extension of time within which to appeal. I understood the submission to be that since a third party can intervene at the appeal stage there should be nothing standing in the way of such a party intervening in an application for condonation of late noting of appeal and for extension of time within which to note the appeal. This appears to be a reference to seeking to be joined to such proceedings. The order sought to be rescinded was taken to the Supreme Court in an endeavour to appeal against it. That bid failed. I cannot reopen the same matter under the guise of rescinding the same order. Otherwise, there will not be finality to this litigation. This forum shopping must be stopped in its tracks. Even if this Court rescinds the order of 15 January 2020 that decision will be a high sounding nothing. It will not put the applicant in a better position that he now is in. The special grants have expired.

[17] This is an application which should never have been filed the moment the special grants expired. The first respondent has been put out of pocket unnecessarily in having to defend this application and is therefore entitled to costs on an attorney and client scale. See *Chatora and Ors v Chairperson Western Region Rent Board* HB 63/2011, *Mahembe v Matambo* 2003(1) ZLR

148(H), *Borrowdale Country Club v Murandu* 1987(2) ZLR 77(H), *Manufacturers and Overseas Trading (Pvt) Ltd v Rhodesia (Pvt) Ltd* 1973(1) RLR 348, *Guard Alert (Pvt) Ltd v Mukwekwezeke and Anor* HH 405/20125 and *Zimbabwe Online (Pvt) Ltd v Telecontract (Pvt) Ltd* HH 206/2012.

[18] In the result, IT S ORDERED THAT:

1. The application be and is dismissed.
2. The applicant shall pay the first respondent's costs on the legal practitioner and client scale.

**CHIKOWERO J:**.....

*Sawyer and Mkushi*, applicant's legal practitioners  
*Mawere Sibanda*, first respondent's legal practitioners