KHANYISA MINERALS (PRIVATE) LIMITED

versus

CROWBURG RESOURCES (PRIVATE) LIMITED
MINISTER OF MINES AND MINING DEVELOPMENT N.O.
THE PROVINCIAL MINING DIRECTOR MATABELELAND SOUTH N.O
DOLLAR TANTALUM MINING (PRIVATE) LIMITED
RICHARD BRIAN DOLLAR

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 29 June & 30 June 2021, 7 July 2021 & 21 July 2022

Condonation of late filing of court application for rescission of judgment

Ms T Mukwesha, for the applicant
Adv E Donzvambeva, for the respondent

CHINAMORA J:

Introduction:

I have before me an application for late filing of an application for rescission of judgment under HC 1651/20. The application is made in terms of r 63 of the old High Court Rules, 1971. The said judgment was a dismissal for want of prosecution entered against the applicant on 28 May 2020. What happened is that, on 16 October 2018, the applicant filed an application to set aside an order obtained under HC 8522/19. The basis of the application and relief sought was that the applicant had not been cited as a party in those proceedings, despite the applicant being an affected party. The applicant was barred for failure to file an answering affidavit in HC 8522/19, and a default judgment was entered against him as a result. A delay ensued in applying for rescission of the default judgment. It is the applicant's contention that good and sufficient grounds exist for condonation to be granted. The application is opposed by the first Respondent.

The application under HC 8522/19 was made in terms of r 449 (1) (a) of the old High Court Rules based on two (2) grounds, namely:

(a) The order was erroneously granted in the absence of the applicant, who is an interested party and whose rights were affected by the order concerned.

(b) The said order was granted in error since the party who obtained the relief was not the one who held the claims that were forfeited by the second and third respondents. The applicant argued that the claims were registered in the names of the fourth and fifth respondents. As such, contended the applicant, the first respondent had no *locus standi* to institute proceedings for reversal of forfeiture of claims it did not own.

The applicant submitted that it was the holder of the claims subject of the litigation in HC 8522/19, having acquired the claims after they were forfeited by the second and third respondents for failure by the fourth and fifth respondents to renew their inspection certificates as required by the Mines and Minerals Act. That being the case, the applicant contended that it had a right to be heard before a decision affecting its rights was made. It further asserted that it has invested extensively in developing the claims and, in fact, acquired a loan for this purpose. Additionally, the applicant argued that some international investors had invested in the mining project on the strength of the applicant's mining registration certificates which it had lawfully obtained. Thus, it argued that had the court which granted the default judgment been aware that there was a party whose rights were affected who was not before the court, it would not have granted the judgment. Further, the applicant that the Covid 19 pandemic hampered its ability to obtain the requisite authority to file an answering affidavit. In this respect, the applicant avers that one of its directors was not in Zimbabwe, which affected the making of key corporate decisions. The applicant averred that the delay was not due to willful disregard of the Rules of this court, since there was a need for an answering affidavit to be filed with a clearly agreed company position. Additionally, the applicant argued that it has a *bona fide* defence in HC 8522/19 in that it is the holder of claims that were awarded to the 1st respondent. The failure to join the applicant in the said lawsuit meant that the applicant could not vindicate its rights as it was not part of the proceedings owing to the failure to cite it. That was the applicant's submission in support of this application.

The law on applications for condonation

The requirements for an application for an application for condonation of failure to abide by the Rules to succeed are well settled in this jurisdiction. I must observe that the factors which a court considers were spelt out in *Director of Civil Aviation v Hall* 1990 (2) ZLR 354 (SC) at 357 which can be summarized thus:

(a) the length of the delay should not be inordinate
(b) there must be a reasonableness explanation for the delay
(c) the prospects of success of the application must be good.
(d) consideration has to be given to the likely prejudice to the other party

See also *Bessie Maheya v Independent African Church* SC 58-07

Analysis of the case

I have already observed that the order giving rise to this application was granted on 28 May 2020, meaning that an application for rescission had to be filed within a month of the applicant becoming aware of the default judgment. The applicant accepts that it filed the rescission application late, but would like the court to condone its lateness. In respect of prospects of success, the applicant's position can be captured as follows: The applicant acquired which are subject of the dispute after obtaining transfer obtaining transfer from JN Syndicate which had acquired them in April 2018. As I noted earlier in this judgment, the claims had been forfeited in terms of section 260 of the Mines and Minerals Act [*Chapter 21:05*]. The first respondent then filed an application to set aside the forfeiture under HC 5284/19, but did not cite the applicant in those proceedings. The omission was made despite the applicant being the registered holder of the claims. There are clear prospects of success in the application for rescission. I say this essentially for two reasons. Firstly, I consider the failure to cite and include the applicant in HC 5284/19 as a material non-joinder of a respondent of necessity and not one of mere convenience. The point was aptly made by the Minister of Mines and Mining Development (the second respondent) in his opposing affidavit in HC 5284/19 as follows:

> "1.1 The applicant [Crowburg Resources (Pvt) Ltd] is well aware that the claims in question have already been allocated to another miner.

> 1.2 By virtue of the claims having been allocated to another miner, the miner should be joined to this application as a party since the miner in an interested party. The relief being sought will affect the miner, hence the need to be a party to these proceedings.
> 1.3 The miner should be afforded an opportunity to be heard by this honourable court".

In light of the observations I have made above conclusion is that there was material non-joinder of the applicant herein in HC 5284/19. In forming this view, I fully agree with the remarks of CHEDA J in *Sibanda* v *Sibanda & Anor* 2009 (1) ZLR 64 (H) 66H; 67 A where he said:

> "It is therefore, pertinent to enquire as to the consequences of a non-joinder. The prejudice is there for anyone to see: there will be a lot of inconvenience, not only to the applicant, but to the court as well. No doubt this will result in the applicant being oppressed and, in an attempt to extricate herself there from, there will be a multiplicity of actions, a situation which should be avoided if possible. See *Morgan & Anor* v *Salisbury Municipality* 1933 AD 167."

The position in this jurisdiction is the same as in South Africa. The test for non-joinder was restated by SCHOEMAN A.J.A. in *Absa Bank Ltd* v *Naude NO* 2016 (6) SA 540 (SCA) in these terms:

> "The test whether there has been non-joinder is whether a party has a direct and substantial interest in the subject-matter of the litigation which may prejudice the party that has not been joined. In *Gordon v Department of Health, KwaZulu-Natal* [2004 ZALC 38], it was held that if an order or judgment cannot be sustained without necessarily prejudicing the interests of third parties that had not been joined, then those third parties have a legal interest in the matter and must be joined."

The second basis for saying that the rescission application has good prospects of succeeding is that a judgment which affects a party who was not cited is unenforceable against such a party. This is a settled position of law. In this respect, the Supreme Court criticized the rendering of a judgment in the absence of an interested party in *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors* SC 40/15, when GOWORA JA pointedly stated:

> "In *Hundah* v *Murauro* 1993 (2) ZLR 401 the point was made that for a party who has a real interest in the matter to be bound by a judgment of the court such party should be cited…If only to ensure that it is bound by whatever judgment is given. Such an order does not bind it if it was not a party".

Consequently, the position of law set out above means that a court cannot make a determination between parties that are not before it. Yet in HC 5284/19, it went on to give an

order that affects the rights and interests of a party not before it, whom it expected to be bound by that order. On the authority of *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors supra* that should not have been done. I do not agree with the first respondent's contention that there was no need to join the applicant because no relief was being sought against it. It is the first respondent's case that its claims were unlawfully forfeited by the third respondent. On the other hand, the applicant's submission is that the forfeiture was lawfully done as the first respondent had failed to renew its mining certificate as required by the Mines and Minerals Act. Clearly, as the applicant held the claims whose forfeiture was before the court, it had to be heard. It is significant that the Minister of Mines and Mining Development, if fact, supports the position that the applicant should have been joined to the proceedings in HC 5284/19. To say that the applicant does not deserve to be heard is to ignore its argument that the forfeiture was done in terms of the law for the reasons that it articulated. If that basis of forfeiture is correct, then the acquisition of the claims by the applicant would not be improper, thus entitling the applicant to a say in the proceedings in HC 5284/19. In my view, one cannot plausibly argue that the issue of non-joinder does not kill the application. On this logic, the case of *Hippo Valley Estates* v *Triangle Limited and Anor* HH 235-18 is obviously distinguishable.

The first respondent's other argument is that the order under HC 5284/19 had been complied with by the second and third respondents. This is a contention that I find without merit. The fact that the second and third respondents complied is neither here nor there, because the applicant's case is that it had a lawful right in the claims when it got them. Thus, it had a right to participate and give its side of the story in any proceedings whose decision or order had the effect of affecting its rights in the claims. In fact, that is the very *raison d'etre* of *Indium Investments (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors supra.*

On condonation, the 1st respondent argues that the court should not indulge the applicant as it has not given a reasonable explanation for the delay. The consensus of authorities on this subject agree that the court must look at all the requirements for the grant of condonation cumulatively. In this connection, I entirely agree with what MAXWELL J appositely said in *Sanctuary Insurance Co Limited* v *Micromart Zimbabwe (Pvt) Ltd and Anor* HH 14-22, when she remarked:

> "There may be times when a slight delay and a good explanation may help to compensate for weak prospects of success; and strong prospects of success may tend to compensate for a long delay. See: *Melane* v *Santam Insurance* Co Ltd 1962 (4) SA 531 (A). There would also be cases where the prospects of success, a reasonable and acceptable explanation for the delay and the importance of the issues raised may compensate for a long delay. See: *South African Poultry Association and Others* v *Minister of Trade and Industry and Others* 2018 (1) NR 1 (SC)".

I consider the prospects of success to be particularly good, even though the explanation for the delay may not be as good. However, on the basis of the likelihood of the application for rescission succeeding, I am inclined to grant the application. My view is that, given the merits of the applicant's case if it was joined to the proceeding under HC 5284/19, I would not decide this condonation solely on the basis of inordinate delay. The authorities I have referred to above support my approach. For this reason, I am not convinced with the 1st respondent's argument that the application has been recklessly instituted. As the applicant has not sought any costs against the 1st respondent, I find that stance eminently reasonable since it is the one which is the court's indulgence having failed to comply with the Rules.

Disposition

Accordingly, I will grant the following order:

1. The application for condonation of late filing of the application for rescission of judgment be and is hereby granted.
2. The applicant shall file its application for rescission of the default judgment within five (5) of being served with or becoming aware of this order.
3. There shall be no order as to costs.

Ms T Mukwesha, applicant's legal practitioner
Makwanya Legal Practice, first respondent's legal practitioners