KHANYISA MINERALS PRIVATE LIMITED
versus
CROWBURG RESOURCES PRIVATE LIMITED
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
THE PROVINCIAL MINING DIRECTOR MATEBELELAND SOUTH N.O
and
DOLLAR TANTALUM MINING PRIVATE LIMITED
and
RICHARD BRIAN DOLLAR

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 10 November 2022 & 14 July 2023

Opposed Court Application – Rescission of Default Judgment

T Mukwesha, for the applicant
Z W Makwanya, for the first respondent

CHITAPI J: The parties are described as per the heading to the application. The applicant prays for an order as set out in its draft order whose contents are as follows:

"**IT IS ORDERED**

1. The application be and is hereby granted.
2. The order that was granted by this Honourable Court per Honourable Justice Kwenda HC 1651/20 on the 28th of May 2020 be and is hereby rescinded.
3. The Applicant is hereby ordered to file its Notice of Opposition in case number HC 1651/20 within five days of granting of this order and thereafter the matter be heard in terms of the Rules of the High Court, 2021.
4. That there be no order as to costs if this matter is not opposed."

The brief background to the application is that in case number HC 1651/20 KWENDA J granted a default judgment in favour of the first respondent against the applicant on 28 May 2020 in chambers. The order granted in default was for the dismissal of case number HC 8522/19 for want of prosecution. In case number HC 8522/19, the applicant was seeking that the order of

MUNANGATI-MANONGWA J granted in case number HC 5284/19 in default on 4 September 2019 should be rescinded. There has been several litigations between the applicant and the first respondent. To put context to this application I will relate to the cases albeit in brief.

The litigation history between the parties start with court application case number HC 5284/19. The applicant was not a party to that application which was brought by the first respondent herein against the second, third, fourth and fifth respondents herein. The application was brought in terms of s 4(1) of the Administrative Justice Act, [*Chapter 10:28*] for an order to set aside the decision of the second respondent, the Minister of Mines and Mining Development ("Ministio") to forfeit Tantalite mining claims located in Gwanda District which were registered in the name of the fourth respondent herein. The first respondent sued the Minister on the basis that it was an interested party in the claims. Its interest arose from the fact that it had purchased Mbeta Mine and the claims which were cancelled by the Minister from the third respondent. The first respondent averred that although the Minister was aware of the sale, he nonetheless forfeited the claims without following procedural tenets of reasonableness and fairness. I shall not bother to discuss the detail of the alleged irregularities committed by the Minister. It suffices that in a default judgment granted by MUNANGATI-MANONGWA J on 4 September 2019 as already alluded to, the learned judge ordered as follows:

> "**IT IS ORDERED THAT**-:
> 1. The court application in terms of s 4(1) of the Administrative Justice Act, [*Chapter 10:28*] be and is hereby granted.
> 2. The second respondent (Provincial Mining Director own addition for clarity) decision to forfeit mining claims registered under registration numbers 36605 Mbeta, 11278 Mbeta 2 GA 428BM Mbeta 3 GA 429 Mbeta 4, GA 430BM 5; GA 433 BM Mbeta 6, GA 434 BM Forest Blanche GM 435 BM Forest Blanche 2, GA 2208 BM Mbeta 8 GA 2209 BM Mbeta 9 and GA 2210 BM Mbeta 10, be and is hereby set aside.
> 3. The second respondents decision to forfeit the claims mentioned in para 2 of this order be and is hereby set aside for being unlawful unreasonable and unfair.
> 4. The first and second respondents are ordered to revive the claims mentioned in para 2 of this order within 10 days of the granting of this order.
> 5. No order as to costs."

The applicant *in casu* joined in the dispute on 19 October 2019 when it filed case number HC 8522/19 for an order of rescission of the order of MUNANGATI-MANONGWA J granted in case number HC 5284/19.

The application was filed against all the respondents herein. The applicant relied for its application on r 449(1)(a) of the then subsisting High Court Rules, 1971. It averred that the order of MUNANGATI-MANONGWA J was issued in error and in default of the applicant as holder of claims Mbeta 4 –11 which coincided with claims whose cancellation had been made by the second respondent but reversed by the court order. The applicant attached certificates of registration to the claims concerned and also a notice to cancel the claims for the reason that the claims had been registered over ground not open to prospecting in contravention of s 50 of the Mines and Minerals Act, Chapter. It averred that the process of cancellation of its claims had not been concluded and it remained holders of the same. The error relied upon was that the court would not have granted the order it did had it been aware of the competing claim of the applicant to the claims. From record HC 8522/19, the last pleading to be filed was the first respondents notice of opposition on 31 October 2019.

The next process to be filed was a chamber application filed by the first respondent under case number HC 1651/20 on 4 March 2020 in which it sought the dismissal of the rescission of judgment application number HC 8522/19 for want of prosecution, such application being based upon r 236(3) of the High Court Rules 1971, then in force. The basis of the application was that the applicant had for a period exceeding thirty days post the filing of the notice of opposition by the first respondent failed or neglected to set down the application for a hearing. On 28 May 2020, KWENDA J granted the application for dismissal of case No HC 8522/19. The dismissal of case number HC 8522/19 meant that the judgment in case number HC 5284/19 remained extent.

The next process to be filed was case number HC 1238/21 filed by the applicant on 7 April 2021. In that application, the applicant sought an order of condonation of the late filing of an application to rescind the court order granted by KWENDA J in case HC 1651/20. The application for condonation was granted by CHINAMORA J on 21 July 2022. The applicant was granted an extension of time to file the application for rescission of judgment within five days of the service of the order of condonation being served upon the first respondent.

The next process to be filed then is this application to set aside the order of KWENDA J wherein he dismissed the applicant's application HC 8522/19 for want of prosecution. Counsel were agreed on the principles which the courts adopt in considering an application for rescission of judgment as set out by the Supreme Court.

The leading case on the subject is *Stockil* v *Griffiths* 1992 (1) ZLR 172 (SC) where GUBBAY CJ stated at p 173 D-F as follows:

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving 'good and sufficient cause' as required to be shown by r 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd* v *CC International (Pvt) Ltd* S 16/86 (not reported); *Roland & Anor* v *McDonnel* 1986 (2) ZLR 216 (S) @ 226 E-H; *Sougose Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) @ 211 C-F. They are (i) the reasonableness of the applicant's explanation for the default; (ii) the *bona fides* of the application to rescind the judgement; and (iii) *bona fides* of the defence on the merits which carries some prospects of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

It must however be borne in mind that the application HC 1651/20 in which KWENDA J discussed the applicant's application case number HC 8522/19 is one in which relief was sought on the grounds of non-compliance with r 236 and in particular as applies to this case, r 236 (3) (b) of the High Court Rules, 2021. The non-compliance referred to in the rule is the failure by the applicant to file an answering affidavit or set down the application for hearing. Unless the application is opposed, the judge when seized with the application if it is unopposed only has to consider the filing paper trail of the parties' papers and check the correctness of time calculations alleged by the applicant. If the paper trail establishes that the respondent is non-compliant with the time lines, the judge will either dismiss with costs the application not timeously prosecuted for want of prosecution or make such order as the judge considers justiciable or fit. It must be accepted that the merits of the matter sought to be dismissed is not a relevant consideration. However, the judge must still consider the nature and extent of the non-compliance together with any other relevant factors proper to take into account to enable the judge to judiciously exercise the judge's discretion on the appropriate order to grant. The use of the term "other relevant factors proper to take into account" implies that it is inadvisable to list the factors which maybe considered as they are case by case determinant. The proceedings for dismissal of a chamber application and decision thereof are therefore of little assistance to the determination of the merits of an application for rescission of that judgement save perhaps where the basis of the rescission is that the learned judge erroneously dismissed the main application because maybe the judge miscalculated the time limits or did not take account of a fact that impacts of whether or not the application should have been granted. For example the respondent in an application under r 236(3)(b) may have in fact filed the answering affidavit and notice of set down or quoted a wrong case number with the result that the

documents are misfiled. Rescission maybe the sought on the basis of an error common to all parties.

The uncertainly surrounding the procedural aspects of rescission proceedings of judgments granted under r 236 (3)(b) now r 59 (15) needs to be interrogated. The correct position I daresay is that a dismissal for want of prosecution is not a judgement on the merits. However because the application for dismissal is made on notice to the applicant, where the applicant has not defended the application and is in default, the order of dismissal is granted in default of opposition so to speak. So does the applicant who was in default of opposing the application for dismissal which was then granted apply for the rescission of the order of dismissal which was granted in default. Were the applicant to seek such rescission, the criteria for rescission would be difficult to apply because as I have observed, the judge who grants the order of dismissal in terms of r 59(15) where the application is unopposed does not consider the merits of the application and does not in fact grant a judgement that determines the merits of the claim of the applicant or defence of the respondent. There is therefore *stricto sensu* no judgement to rescind. In opposed applications, the judgement given is find and appealable; See *Mahongwa* v *Makandiwa* SC 95/21.

In my judgement, because the applicants claim will have been dismissed for want of prosecution without opposition there remains no application before the court to determine. If the applicant whose application has been dismissed for want of prosecution desires to have the matter again placed before the court, the applicant must apply to reinstate the matter. Neither r 236 in the 1971 High Court Rules nor r 59 (15) of the current rules 2021 dealt with the remedy open to the applicant whose case has been dismissed for want of prosecution in terms of the rule.

By comparison r 26(1) of the Supreme Court Rules 2018 provides for a deemed abandonment and dismissal for want of prosecution of an appeal for failure by the appellant to arrange for preparation of the record, failure to file heads of argument or failure to apply for a trial date as provided for in the rules. Rule 26(2) then explicitly provides an elaborate procedure for the appellant to exercise the right to apply to a judge of that court for reinstatement of the appeal. There is therefore no debate on the procedure to be adopted by an appellant in the circumstances of the deemed abandonment and dismissal as aforesaid. It is suggested with all deference to the rule maker that it may in its wisdom consider inserting an express provision in the rules for the applicant whose case has been dismissed for want of prosecution to apply for reinstatement on

such conditions and within such period as the rule maker may specify. I note in passing that Practice Direction 3 of 2013 for example provides for what an affected party may do in the event that its matter is struck off the roll or postponed *sine die*/removed from the roll. The issue of reimbursement of a claim dismissed for want of prosecution could also be revisited, again with due respect. It is also suggested if the Supreme Court practice of a deemed abandonment and dismissal is adopted, then only those applications for dismissal which have been opposed may be referred to the judge with unopposed applications being deemed dismissed and abandoned and the Registrar advising the applicant accordingly in a standard form of notification. In this way judges would only have to determine opposed chamber applications for dismissal and applications for reinstatement where there would have been a deemed abandonment and dismissal. Having made my respectful comments as above, I revert to the application before me.

The parties counsel not unexpectedly based the issue of the prospects of success on the averments made in the main rescission application HC 8522/19. There could be no argument to advance on the merits of rescinding the order of KWENDA J. I have considered whether or not to dismiss the application on the basis of a wrong format in that the application should have been one for reinstatement of the application for rescission of judgement HC 8522/19. The issue of the propriety of the application was not raised by the respondent and the court did not raise it either. It was a matter that struck my mind on preparing judgement. I decided to take a holistic approach and considered the substance of the application which was simply to have the application HC 8522/19 heard on the merits. The applicant mistakenly thought that it needed to be granted rescission of KWENDA J's order of dismissal so that it would oppose the application for dismissal. As already espoused, KWENDA J dismissed the unopposed application HC 8522/19 for want of prosecution. The applicant's remedy is an order of reinstatement of HC 8522/19. I considered that in the absence of a clear provision on what the applicant whose application has been dismissed for want of prosecution could do, I could, using the inherent powers of the High Court to regulate its processes as given in terms of s 176 of the Constitution determine the application on the papers since the papers adequately addressed the factors which the court considers in an application for reinstatement see *Francis Chandida* v *Antony Farai Adaareva* HH 103/23 a judgement of BACHI-MZAWAZI J wherein the learned judge after considering various authorities discussed the concept of the inherent jurisdiction of the High Court to regulate its process in the interests of

justice. In my view there would be no prejudice to the parties or would it be an affront to the interests of justice was the court to determine whether or not to reinstate the rescission application which was dismissed by KWENDA J. The draft order would not be an impediment in as much as it is a draft of the order sought and would not bind the court – See *Angelina Simaugele Zacharia* v *Shupikai Vito & Ors* HH 807/18 wherein ZHOU J stated at p 2 of the cyclostyled judgement:-

> "……After all the court is always at large to amend the draft order as it sees fit as it is not bound by the proposal terms thereof."

I would add however that whilst the court is not bound by the draft order, any order that the court gives must be within the contemplation of the parties and should arise from and be supported on the facts. In my view a relief of reinstatement of HC 8522/19 was in this cased the real issue within the contemplation of the parties and arises from their papers or affidavits filed of record.

In the case of *FBC Holdings* v *Robert Chiwanza* SC 31/17 the appellant's appeal had been deemed abandoned and dismissed because of a failure to pay for the record preparation. In considering an application for reinstatement following the deemed abandonment and dismissal for want of prosecution. GWAUNZA JA (as then she was) stated at p 2 of the cyclostyled judgement:-

> "In considering an application for reinstatement, MALABA JA (as then he was) held that:-
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> > 'The question for determination is whether the applicant has shown a cause for the reinstatement of the appeal. In considering applications for reinstatement of non-compliance with its rules, the court has a discretion to exercise judicially in the sense that it has to consider all the facts and apply established principles bearing in mind that it has to do justice. Some of the relevant factors that may be considered and weighed one against the other are: the degree of non-compliance the explanation thereof; the prospects of success on appeal; the importance of the case; the respondent's interest in the finality of the judgement; the convenience to the court and the avoidance of unnecessary delays in the administration of justice.'"

The above principles equally apply to a determination of an application to reinstate a matter which has been dismissed for want of prosecution. *In casu* the applicant averred that the progression of case number HC 8522/19 was affected by Covid 19. In particular it was averred that the applicant's directors were not in Zimbabwe and were locked out of Zimbabwe. It was further averred that the applicant's legal practitioners ended up renouncing agency on 19 May 2020 upon the failure to connect with the applicant's directors. The answering affidavit was consequently not filed nor was the matter set down. Equally, the application for dismissal for want

of prosecution was not opposed because the applicant's directors and the legal practitioners had lost touch.

The first respondent averred that there was no proof that the applicant lost touch with its legal practitioners. It was averred that the legal practitioners did not file an affidavit to confirm that they lost touch with the applicant's directors. The first respondent did not however deny that the applicant's legal practitioners had renounced agency for the reason given by the applicant's representative. The advent of Covid 19 and its effects was a sad reality of our lives. The courts have taken judicial notice of Covid 19. In the case of *Ex-Constable Garu 987343Y* v *The Commissioner General of Police and Anor* HH 570/22, a case cited in the applicant's heads of argument, it was stated thus:-

> "Judicial notice is taken of Covid 19 which counsel made reference to during submissions. The disease was/is a reality which people lived the world over. It could not be wished away. Its effects adversely affected the operations of governments including the court throughout planet earth. It adversely affected commerce and industry in a very sustained manner."

The legal practitioners of the applicant renounced defency when they could not locate the applicant's directors. The applicant attributes the failure to file the answering affidavit to the adverse effects of Covid 19. It appears to me that it would be taking Covid 19 and its effects lightly and akin to taking an arm chair approach to seek to set a standard of how persons ought to have reacted to the real life threat situations which Covid 19 placed humanity. To argue for example that the applicant's representatives ought to have kept touch with the applicant. When one is faced with a fearful situation and risk of contracting the deadly Covid 19 virus as the situation was the concept of the reasonable person's reaction is different to apply because no one including the reasonable person was safe.

In my view, it will be in rare circumstances for the court to put a standard of reasonable human reaction to the threats of Covid 19. Where the process of court time lines for litigants to comply with in filing processes were violated and the facts show that the violations occurred during the Covid 19 period, it is usual practice to accept the advent existence and threats posed by Covid 19 as a reasonable explanation for a failure to timeously comply with the rules. I will in this case accept that the applicant gave a reasonable explanation for not actively prosecuting its claim in the period in issue and applied for and was granted condonation by CHINAMORA J to apply to set aside the order of dismissal of the applicant's rescission judgement. The learned judge took into account

the intervening period and events. I am not inclined to make a contrary finding. In relation to the period post the order of condonation, I have accepted the applicant's explanation as reasonable and the length of delay is in the circumstances within reasonable limits.

I next consider the prospects of success. CHINAMORA J extensively dealt with the issue of the applicant's prospects of success if it was joined to case number HC 5284/19 should case number HC 8522/19 succeed and the joinder of the applicant is granted. The judgement of CHINAMORA J HH 455/20 remains extant. In particular, the learned judge noted that the applicant was an interested party in the mines dispute. The first respondent in response averred that the relief granted by MUNANGATI-MANONGWA J had been complied with. The first respondent did not give details of the compliance. In any event, if compliance is a defence of substance the first respondent can advance and establish the compliance in the application for rescission of default judgement case number HC 8522/19 proper. I say to because, the first applicant was not to ordered to comply with any order. It was the first and second respondents who were ordered to perform certain acts by MUNANGATI-MANONGWA J. They did not oppose this application. The applicant not having shown the evidence of compliance and the second and third respondents not having purported to have complied, the allegation of compliance is a naked allegation. What is clear is that the applicant holds registration certificates for the same area relating to certificates held by or claimed by the first respondent. There can only be one valid certificate of registration for a specific block or claim. It is important that there is order in the mining sector because of the strategic importance of mining to the development of the country. Where disputes of rights to mining claims abound, they should ideally be resolved on merits with the rule of law being applied so that claimants to a mining claim are accorded rights to be heard and the dispute being impartially adjudicated upon.

There are clearly very good prospects of success of the order of MUNANGATI-MANONGWA J being rescinded and the applicant as a holder of certificates over the same blocks on which the first respondent also claims certificates of ownership being granted leave to be joined in case number HC 5324/19 so that the disputed ownership is determined once and for all. As observed by CHINAMORA J, relying on the case of *Sibanda* v *Sibanda & Anor* 2009 (1) ZLR 64 (H) @ 67A per CHEDA J where the learned judge stated:-

> "It is therefore pertinent to inquire on 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 therefrom; 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 non-joinder of the applicant who holds certificates of registration over the claim where the first respondent holds certificates will in this case lead to a multiplicity of suits because the applicant will separately come to court to assert its rights with the result that the dispute of ownership rights will not be resolved to finality in one suit. Yet this will be possible if all interested parties participate in one suit and their representations are heard and taken into account in determining the dispute.

A striking feature of the first respondent's opposing affidavit is that it largely seeks to advance and support the decision of the second and third respondents who in fact do not oppose the application quite understandably so because they recognise the interests of the applicant to be heard. The first respondent is placed in a very invidious position in which it seeks to be the mouth piece and advocate for the second and third respondents without their brief. It seems to me that once it became apparent that the second and third respondents as the decision makers on the correct holding of mining claims had not opposed the application and gone further to indicate that the first respondent's interest in the claim was known, it was ill-advised to continue to oppose the application.

The last consideration I deal with is the issue of prejudice and balance of convenience fo the parties and the court. It is beyond reproach that the parties stand to suffer prejudice and so will the court if the dispute of the claims ownership is not resolved through a process where competing would be owners for the claims in issue are not dealt with in one sitting of the court. The interests of justice would dictate that the dispute be resolved to finality. The balance of convenience equally dictates that the rescission judgement case number HC 8522/19 be argued and it in turn informs the fate of case number HC 5234/19.

With regard to costs, it seems to me that it would be proper that costs follow the event in case number HC 8522/19. The determination in case number HC 8522/19 informs whether or not any one of the parties succeeds on the merits of rescission. The application *in casu* is more of a procedural one and leads to a hearing of the main case.

In consequence I grant the following order:

IT IS ORDERED THAT:

1) Application case number HC 8522/19 be and is hereby reinstated.
2) The further prosecution of case number HC 8522/19 shall be in terms of the rules of court with time limits applicable to the further processes being reckoned from the date of this judgment.
3) Costs are in the cause in case number HC 8522/19.

Dube Banda, Nzarayapenga & Partners, applicant's legal practitioners
Makwanya Legal Practice, first respondent's legal practitioners