

ENVIRONMENTAL MANAGEMENT AGENCY
and
DIRECTOR GENERAL, ENVIRONMENTAL MANAGEMENT AGENCY
versus
ANGEL HILL MINING COMPANY (PVT) LIMITED
and
MINISTER OF ENVIRONMENT, TOURISM & HOSPITALITY
INDUSTRY N.O
and
MANYAME CATCHMENT COUNCIL

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 12, 22 November & 15 December 2021

Opposed Application

T J Chivanga., for the applicant
Muguwe, for the 1st respondent
C Chitekuteku, for the 2nd respondent

MUZOFA J: This is a combined application for condonation of late noting of an application for rescission of default judgment and an application for rescission of default judgment.

The first applicant is a statutory body established under the Environmental Agency Act [*Chapter 20:27*]. The second applicant is a director in the first applicant. The first respondent is a company registered in terms of the laws of Zimbabwe. The second respondent is the Minister responsible for the tourism and hospitality industry. The third respondent is a body corporate established in terms of s 24 of the Water Act [*Chapter 20:25*]

The dispute is primarily between the first applicant and the first respondent in respect of the first respondent's authority to conduct alluvial mining along Angwa River. The first respondent obtained a Provisional Order against the applicants. When the matter was set down for confirmation the applicants were in default. The Provisional Order was confirmed under HC 2989/19 on 29 May 2019.

The terms of the order were as follows:

1. The provisional order that was granted by the Honourable Court on 12 April 2019 be and is hereby confirmed.
2. The decision by the first, second, third and fourth respondents of refusing to issue a Sand Extraction Permit and all necessary documents that may be required for the applicant to start its alluvial mining along Angwa River be and is hereby set aside.
3. The first, second, third and fourth respondents be and are hereby interdicted from declaring the sand extraction permit that was issued by the fourth respondent on the 15 March 2019 null and void.
4. The first ,second, third and fourth respondents be and are hereby ordered to issue to the applicant a Sand Extraction Permit and all necessary documents that may be required for the applicant to start is alluvial mining along Angwa river within 48 hours of granting of this order.
5. In the event of failure by the first second, third, and fourth respondents to comply, this order shall take the place of the Sand Extraction Permit and all other necessary documents required for the applicant to start its alluvial mining along Angwa River.
6. The first to fourth respondents shall pay costs of suit on an attorney and client scale.

The applicant averred that it issued a sand extraction permit with special conditions to the first respondent on 23 April 2019. The permit was to expire on 30 September 2019. In January 2021 the first respondent started preparations for alluvial mining along Angwa River. The applicant issued an environmental stop order to stop the first respondent from mining. The first respondent approached the court again on an urgent basis under HC 577/21 for the suspension of the environmental stop order. This time the application was opposed by the applicants. Despite opposition the Provisional Order was granted it is yet to be heard for confirmation .The effect of the order was to suspend the environmental stop order issued by the applicants and the fine levied against the first respondent. The court ordered the continuation of the mining activities. When the first respondent waved the court order under HC2989/19 as its authority to mine, it dawned on the applicants that the first respondent could continue mining in perpetuity without restraint based on the court order. Thus the applicants filed the two applications to have the default order set aside.

The applicants bring a dual application. The justification of such an application is set out as for convenience instead of making two applications one application would save both the court and the litigants' time and resources. The other reason is said to be to achieve justice between the parties without undue delays.

In respect of the application for condonation. The applicants concede that the application was made after a long period of about two years. The reason for the delay is that the applicant's might have misinterpreted the court order thereby failing to fully appreciate the full extent of its meaning.

As for the application for rescission of judgment, the applicants urged this court to find the explanation for the default reasonable and that the matter enjoys good prospects of success. I will revert to the detailed accounts of the explanation in due course if it becomes necessary.

The first respondent opposed the applications and took a preliminary point that a dual application is not provided for in the rules. It is incompetent and must be struck off. Secondly that the deponent to the applicants' founding affidavit lacks authority. On the merit the court was urged to dismiss the applications as there is no reasonable application for the delay and the extent of the delay is long. Also that the applicants have no prospects of success in the main matter.

I shall address the issue on the dual application first. Both parties are agreed that there is no rule that provides for such an application. The respondent relied on the case of *Bramwell Bushu v GMB* HH326/17 where the court made the point that although there is no provision that an application must state in terms of which law it is made, it is desirable for astute legal practitioners to do so. I find the case irrelevant in the resolution of this issue. The case did not deal with dual applications. If there is any relevance it is that failure to state the rule of law in terms of which an application is made does not non suit a party.

The applicants relied on the case of *Tenke Fungurume Mining SA v Bruno Enterprises (Pvt) Ltd* HH 478/19 where the court allowed a dual application. I agree with the reasoning in the *Tenke* case. This court is a court of inherent jurisdiction. It is imbued with power to control its processes in the interests of justice. Therefore what is not prohibited and advances the interests of justice can be done by this court. It is also trite that rules are made for the court, they are a tool for use to achieve order in the hearing of cases. What the court has to consider is whether hearing dual application is not prejudicial to either party. In this case having the matters heard simultaneously is more convenient for both parties and the court and in turn ensuring the two matters are resolved expeditiously. The applicants' justification for the dual

application is persuasive. In the absence of any prejudice to either party, I find no reason not to hear the application. The preliminary point is dismissed.

The second point taken is that the deponent to the applicants' founding affidavit has no authority. It is trite that a corporate body speaks through a board resolution. Where the authority of a deponent to such a company is challenged the Board resolution must be produced. It can be produced anytime during the proceedings. See generally *Tapson Madzivire & Ors v Misheck Brian Zvarivadza & Ors* SC 10/2006., *CE Dube v PSMAS* SC73/19.

In this case the authority was not attached to the application. It was handed over the bar by the applicant's counsel. I find the authority valid although it was inelegantly prepared. That disposes of the point taken. The deponent was authorised to represent the applicants. The point taken is dismissed.

Condonation.

Condonation for the non-observance of the court's rules is an indulgence granted at the discretion of the Court. This discretion is exercised judiciously upon a consideration of such factors as the extent of the delay and the reasonableness of explanation thereof, the prospects of success, the interest of justice and the interest of the parties in the finality of litigation. See generally *Friendship v Cargo Carriers Ltd & Anor* 2013 (1) ZLR 1 (S). Where the extent of delay is long the court can decline condonation despite the prospects of success.

This application was made almost two years after the default order was granted. The period of delay is long. The applicants became aware of the order immediately after it was granted. They decided to live with it. In their terms, they even partially complied with the order although this was disputed by the respondent. The applicants' explanation for not seeking rescission in terms of the rules is that they misinterpreted the court order under HC2989/19. According to the applicant it understood the order to require them to issue a sand extraction permit which it did issue. The permit expired in September 2019. Secondly they did not understand the order to grant the first respondent an unbridled right to commence alluvial mining without complying with all the statutory requirements. In March 2021 the applicant discovered that the first respondent was conducting alluvial mining without an Environmental Impact Assessment Certificate. The first respondent approached the court and an order was granted based on the default order.

The explanation is unreasonable. The order by JUSTICE ZHOU is very clear. It required the applicant to issue a Sand Extraction permit and all documents necessary for the first respondent to start its alluvial mining along Angwa River. The applicant chose not to

comply with the order. The applicant selectively appreciated the issue in respect of the Sand Extraction permit only. It remained mum on the alluvial mining yet this is the very issue that has caused its problems. Even in its founding affidavit there is no explanation why it did not issue the necessary documents for alluvial mining to the first respondent. Since the applicant opted not to comply with the order, the order became the required permit and documents for the commencement of alluvial mining.

In my view the issue is not the court order. The court order granted the first respondent the right to start its mining activities. This was in May 2019. All the necessary documents required for such mining were subsumed in the court order including the EIA at the commencement of the mining. The applicant cannot cry foul after two years. In terms of s 101 of the Environmental Management Act [*Chapter 20:27*] an EIA is valid for two years. Within the two years from the date of the default order the first respondent's mining activities were validated by the court order. The applicant acted prematurely and the first respondent rightfully waived the court order to justify its operations when the environmental stop order was issued. The basis of the complaint is baseless.

The applicant cannot plead for indulgence after two years when it made a conscious decision not to oppose the application. Even after the granting of the order, it consciously chose not to comply with the order. Had it complied with the order it would have had the opportunity to make sure the first respondent properly complied with the statutory requirements. The first applicant is reposed with the duty to superintendent over issues that affect the environment. A laid back approach as is evident *in casu* is unacceptable. The applicant literally neglected its duties and only to come to court expecting some soft landing. It is not possible. The applicant cannot raise the issue of the importance of an EIA at this stage when, on being served with the application it did not appreciate the importance. Secondly when the default order was granted it did not appreciate its importance. Only to appreciate it when the first respondent had commenced its operations. Courts should not be seen to condone such an approach. The applicants were in wilful default and the explanation for the delay in filing the application is unreasonable.

I have already touched on the prospects of success in dealing with the explanation for the delay. There are no prospects of success in the main matter.

There must be finality to litigation. The order was granted two years ago. The first respondent has arranged its business in terms of the court order. It is not in the interest of justice

that such a matter be re visited. The applicant's recourse as the superintendent of all such projects can only apply at the lapse of two years from the date of the court order.

The application for condonation is therefore dismissed. Since the applicant has not been condoned. The application for rescission of judgment cannot be considered.

My finding then raise the issue on the form of order that should be granted. In my view the application for rescission of judgment cannot be dismissed since it has not been decided on the merits. It remains as an application placed before the court before condonation was granted. It is improperly before the court. The proper order then is to remove it from the roll.

In the result, the following order is made.

1. The application for condonation for the late filing of an application for rescission of judgment be and is hereby dismissed with costs.
2. The application for rescission of a default judgment is removed from the roll.

Dube, Manikai & Hwacha, applicants' legal practitioners

Zimudzi & Associates, 1st respondent's legal practitioners