

REPORTABLE: (9)

**(1) MINISTER OF MINES & MINING DEVELOPMENT (2)
THE PROVINCIAL MINING DIRECTOR FOR MIDLANDS
PROVINCE**

V

**(1) FIDELITY PRINTERS & REFINERS (PRIVATE) LIMITED
(2) JONAH NHEVERA**

**CONSTITUTIONAL COURT OF ZIMBABWE
GOWORA JCC
HARARE: 15 JUNE 2022 & 29 JULY 2022**

L. Madhuku for the applicants

T. Zhuwarara for the first respondent.

No appearance for the second respondent.

**Judgment No. CCZ 9/22
Constitutional Application No. CCZ 15/22**

IN CHAMBERS

CHAMBER APPLICATION FOR CONDONATION AND LEAVE TO APPEAL

GOWORA JCC: This is an application for condonation for the late filing of an application for leave to appeal conjoined with the application for leave to appeal. The applicants have filed this application in terms of r 5 as read with r 32 of the Constitutional Court Rules, 2016 (the Rules). It is a composite chamber application for condonation and for leave to note an appeal against the decision of the Supreme Court in case number SC 107/21.

FACTUAL BACKGROUND

The first applicant in this matter is the Minister of Mines and Mining Development, with the second applicant being the Provincial Mining Director for Midlands Province. In the case before the Supreme Court, they were the first and second respondents respectively. The first respondent in this application is Fidelity Printers & Refineries (Pvt) Ltd, a company duly incorporated following the laws of Zimbabwe. The first respondent was the appellant in the Supreme Court. The second respondent is a male Zimbabwean citizen who was cited as the third respondent *a quo*.

The subject of the dispute is a mine, namely Mirage 3 (hereinafter referred to as the mine). It is situated in Kwekwe in the Midlands Province. The first and second respondents were deadlocked in a dispute regarding the ownership of the mine as they both claimed the right to occupy the mine and to exploit gold sand ore contained therein. Both parties claimed ownership rights from their respective certificates of registration in the mine with the Ministry of Mines and Mining Development.

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The mine was initially registered in favour of the first respondent under certificate of registration No. 8132. In June 2020, the applicant revoked the certificate of registration in favour of the first respondent and declared the mine forfeit. In July 2020, a new certificate was issued and registered in the name of the second respondent under Special Grant No. 8202. Subsequent to these developments, the first respondent wrote to the first and second applicants and requested information about any arrears relating to statutory payments over the claim. In response, the second applicant informed the first respondent that he could not issue an inspection invoice for a forfeited mine. The second applicant indicated that the mine had been forfeited on 5 June 2020 in terms of s 260 as read with s 272 of the Mines and Minerals Act [*Chapter 21:05*] (the Act).

The first respondent reacted to the notification and filed an urgent chamber application in the High Court under case number HC 85/21. It submitted that the forfeiture of its claims in June 2020 was invalid, palpably arbitrary, and violated every known procedure in the Administrative Justice Act [Chapter 10:28], (the Administrative Justice Act), which ensured fairness. In the application, the first respondent challenged the forfeiture and relocation as unlawful on the premise that the procedure adopted by the applicants failed to comply with the dictates of the law as prescribed in s 220 of the Act.

The first respondent sought the following as interim relief: suspension of the operation of the forfeiture order by the Provincial Mining Director, the suspension of the operation of the special grant to the second respondent, an interdict against the second respondent from entering the mine and the setting aside of the forfeiture of the mine. The interim relief sought was granted on 17 February 2021.

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After the grant of the interdict in HC 85/21, the second respondent filed his urgent chamber application in Bulawayo under case number HC 55/21. In his founding affidavit, he averred that Fidelity Printers and Refiners (Pvt) Ltd had failed to pay inspection fees and the mine was forfeited to the State in June 2020. In addition, the second respondent averred that the first respondent had gone on a looting spree of the gold ore sands and that it was carrying out illegal mining activities by transporting the gold ore sands from the mine to another mine, namely GMI Red Baron Mine.

The second respondent sought the following orders as interim relief: an interdict restraining the first respondent from removing the gold ore sands from the mine and that he,

the second respondent, be granted the right to put in place security both at the mine and at GMI Red Barons premises to prevent the removal and processing of the gold ore sands.

The protracted dispute between the parties resulted in the consolidation of the matters by the High Court. The judgment from that consolidation was the subject of appeal in the Supreme Court.

At the hearing of the consolidated application before the High Court, the first respondent argued that, in terms of s 260 of the Act, the mining authorities should have afforded it an opportunity to make representations before a decision to forfeit its mining claim was made. It further argued that the first and second applicants were obliged by law to have sent a notice of forfeiture to the miner before deeming the mine forfeited. Finally, it argued that it did not suffice for the second applicant to place forfeiture notices on a board and that his or her approach violated the right to be heard in terms of s 3 of the Administrative Justice Act.

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On the contrary, the applicants and the second respondent submitted that the first respondent wished to read unspecified provisions into the Act. They argued that no notice of forfeiture was required to be issued in terms of the Act and that, although the first respondent was a wholly owned government entity, its status did not absolve it from paying inspection fees as required by statute.

In its determination, the High Court held that the miner had an obligation to motivate the annual inspection of his or her mining location, after which the miner would pay a renewal fee. After that, an inspection certificate would be granted. It further determined that

ss 260 and 270 of the Act, which formed the crux of the first respondent's argument, were not the beginning and the end of the forfeiture process but had to be read in conjunction with s 197 to s 199 of the Act which provide for the preservation of mineral rights and the processes to be followed by both the miner and the authorities regarding inspection certificates and the forfeiture of mines.

The court further held that s 260 of the Act was worded in peremptory terms and that a failure to obtain an inspection certificate made the mine liable to forfeiture. Lastly, it ruled that the right to be heard was embedded in s 271 of the Act and that the provision in contention did not grant an individual the right to be given notice, a warning or a letter of forfeiture. There was, in addition, no provision for the demand of payment of outstanding fees in respect of a mining location.

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It was against this decision that the first respondent launched its appeal to the Supreme Court. The grounds of appeal and the subsequent relief sought did not relate to any constitutional issues. The grounds of appeal were the following:

- “1. The court *a quo* erred in its interpretation and implementation of s 260 of the Mines and Minerals Act [*Chapter 21:05*]. Such provision does not permit the first and second respondent to act arbitrarily and without due notice to an affected party such as the appellant.
2. Concomitantly, the court *a quo* also misdirected itself in finding that the second respondent had acted lawfully when such respondent had not given proper prior notice before forfeiting the appellant's mining rights in Mirage 3 Kwekwe.
3. Furthermore, the Court *a quo* also erred in determining the provisions of the Mines and Minerals Act [*Chapter 21:05*] and excused the first and second respondent from giving credence to the appellant's rights as espoused in the Administrative Justice Act [*Chapter 10:28*].
4. Additionally, the court *a quo* grossly misdirected itself in finding that, in the circumstances, the third respondent had lawfully been issued a Special Grant which Grant only came into existence because of the unlawful forfeiture of the appellant's mining rights in respect of Mirage 3 Kwekwe.”

In the premises, the first respondent sought the following as relief on appeal:

- “1. THAT the instant appeal succeeds with costs,
2. THAT the order of the court *a quo* be set aside and substituted with the following:
 1. The Provisional Order issued by this Court in HC 85/21 on 17 February 2021 is hereby confirmed.
 2. The forfeiture of the appellant’s claim, Mirage 3 Registered under Certificate Number 18132, purportedly done on 5 June 2020, is hereby set aside.
 3. For the avoidance of doubt, further to para 2 hereof, any act done by the first and second respondents further to the forfeiture aforesaid, whose effect is to alienate the area under Mirage 3 Registered under Certificate Number 18132, is declared invalid and consequently null and void.
 4. The Respondents shall pay the costs of suit.”

From the grounds of appeal and relief sought *a quo*, it is apparent that the appeal did not raise constitutional issues for determination by the court *a quo*. Thereafter, on 21 October 2021, the court *a quo* handed down judgment *ex tempore* in favour of the first respondent. Consequent to the court's decision, the applicants have filed the present application.

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THIS APPLICATION

This application is for condoning the late noting of an application for leave to appeal by the applicants and an application for leave to appeal. Accordingly, the applicants seek the following relief:

1. The application for condonation for late filing of the application for leave to appeal be and is hereby granted.
2. The application for leave to appeal against the judgment of the Supreme Court in SC 107/21 be and is hereby granted.
3. The applicants shall file their notice of appeal within ten (10) days of the date of this order.
4. There shall be no order as to costs.

The applicants aver that they make this application in terms of r 5 as read with r 32 of this Court’s rules. The applicants seek leave to appeal against the decision of the court *a*

quo. It is common cause that they failed to note the requisite application for leave to appeal to this Court within the fifteen days stipulated by r 32 of this Court's rules.

The first respondent opposed the application. The second respondent did not oppose the grant of the relief sought and chose to abide by the decision of the Court. Accordingly, he did not attend the virtual hearing.

The first respondent has raised a preliminary point to the effect that this application is improperly before this Court on the premise that it is filed in defiance of r 32(3)(b) in that the decision against which the appeal is brought has not been attached to the application. The first respondent contends that the reasons for the court's judgment are not attached to the application, thus rendering the application fatally defective.

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On this issue, counsel for the applicants, Mr. *Madhuku*, and counsel for the first respondent, Mr. *Zhuwarara*, made the following submissions:

Mr. *Madhuku* submitted that the applicants' case was founded on r 5 of the Constitutional Court Rules. He further submitted that the rule justified their course of action of filing a hybrid application for condonation and an application for leave to note an appeal. The court queried the validity of the application in the absence of the impugned Supreme Court decision from the record of proceedings. The court asked Mr. *Madhuku* to address whether the application for condonation was not invalid, considering that the applicants had not attached written reasons of the judgment to the application as required by both r 35 and r 32 of the Constitutional Court Rules.

Mr. *Madhuku* posited that there was a gap in the current rules of the Court as they failed to consider circumstances wherein an applicant would have taken all the reasonable steps to obtain a judgment from the lower court.

In casu, he reasoned that the applicant had sought to obtain a judgment from the Supreme Court to no avail. Mr. *Madhuku* intimated that the applicants were compelled to launch the application due to the judgment's far-reaching effects. He submitted that after the order was issued by the court *a quo*, the owners of previously forfeited mines were now putting pressure on the mining authorities to set aside the forfeitures in respect of the mines. The mines were now the subjects of disputes as the dispossessed owners sought to retrieve ownership based on the judgment. The applicants criticized the *ex-tempore* ruling for imposing an undue burden on them with respect to the forfeiture of mining claims.

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Mr. *Madhuku* was adamant that the application before the Court was valid. He contended that the applicants had complied with all the requirements necessary despite the lack of assistance from the Supreme Court. To this end, he submitted that the primary consideration of the interests of justice ought to guide the Court's approach in disposing of the matter regardless of the absence of the written judgment. Accordingly, he argued that the Court should postpone the matter to enable the applicants to obtain the decision from the Supreme Court.

Per contra, Mr. *Zhuwarara* submitted that the tenor of rr 32 and 35 compelled the applicant to furnish the Court with reasons for the order. To buttress his point, he cited the authority of *Rushesha v Dera CCZ 24/17*. He insisted that there was no valid application on record and that the Court could not postpone a nullity as was apparent in the present case. Mr.

Zhuwarara stated that the *dicta* in *Tamanikwa v Zimdef* SC 73/17 were authority for the principle that a court of superior record could not amend nullities. He reasoned that what was not suitable for the Supreme Court to countenance in the *Tamanikwa* case (*supra*) could similarly not survive scrutiny in the Constitutional Court.

In addition, Mr. *Zhuwarara* submitted that Practice Direction 3/2013 militated against the Court's ability to grant the postponement order sought by the applicants. He posited that, according to para 10 of the practice direction, a matter that has been postponed *sine die* would be deemed abandoned if not set down within three months from the aforesaid date. Therefore, Mr. *Zhuwarara* contended that a postponement did not aid the applicants' case as there was no guarantee that they would obtain the reasons for judgment within three months. He, therefore, urged the Court to strike the matter off the roll.

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On the question of costs, the first respondent sought imposition of costs against the applicants due to their alleged perverse conduct in petitioning the court with full knowledge that their suit did not satisfy the essential elements for condonation or leave to appeal.

In response, Mr. *Madhuku* vehemently opposed the disposal of the matter in the manner prayed for. He contended that he did not have instructions to make any concessions. However, he conceded that there was no request to condone the absence of the judgment in the applicant's founding affidavit. Mr. *Madhuku* concluded his submissions by maintaining that there was a valid application. As such, it could not be regarded as a nullity by the Court. He submitted that postponing the matter with directions proffered to the Supreme Court would aid the interests of justice.

WHETHER THE APPLICATION IS PROPERLY BEFORE THE COURT

Before this Court proceeds to determine the merits of the application, an important and crucial issue has exercised the Court's mind, which may be dispositive of this matter. This issue has arisen due to the applicants' reliance on r 5 as the enabling law for an approach to the Court to obtain an indulgence to condone their failure to bring the application for leave within the stipulated period.

The issue goes to the validity of the application itself and whether or not it is properly before the Court. The requirements for an order of condonation are well settled. The leading authority in Zimbabwe is the case of *Bishi v Secretary for Education* 1989(2) ZLR 240(H), where CHIDYAUSIKU J (as he then was) said:¹

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“Rule 259 provides that the court may extend the time for bringing an application for review if good cause is shown. The first issue that falls for decision is, therefore, whether good cause has been shown to justify the court in extending the time or condone the delay in bringing this application. The principles that guide the court in an application for condonation were set out in the case of *United Plant Hire (Pty) Ltd v Hills & Ors* 1976 (1) SA 717 (A). In that case, Holmes JA had this to say at p 720F-G:

“It is well settled that, in considering applications for condonation, the Court has a discretion, to be exercised judicially upon a consideration of all of the facts; and that, in essence, it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the Rules, the explanation therefor, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus, a slight delay and a good explanation may help to compensate for prospects of success which are not strong.”

In support of the above proposition, the learned judge of appeal cited several authorities. Holmes JA's approach has been approved and followed in a number of subsequent cases. Among these cases are *Hermannsburg Mission & Anor v Sugar*

¹ At p242D-243C

Industry Central Board & Anor 1981(4) SA 278 (N) and *Vereniging van Bo-Grondse Mynamptenare van Suid-Afrika v President of the Industrial Court & Ors* 1983(1) SA 1143 (T). These authorities establish that the following are the factors to be taken into account in considering whether good cause has been shown:

- (a) the degree of non-compliance with the rules;
- (b) the explanation therefor;
- (c) the prospects of success on the merits;
- (d) the importance of the case;
- (e) the convenience of the court;
- (f) the avoidance of unnecessary delay in the administration of justice.”

The applicants have brought this application in terms of r 5 of the rules of this Court. The first respondent has submitted that the applicants must be non-suited for bringing their application under the wrong rule. Given the litigants' divergent views, a comparative analysis of the competing rules becomes inevitable. Rule 5(1), upon which the application is premised, provides for departures from rules and directions as to procedure. It states that:

- “(1) The Court or a Judge may, in relation to any particular case before it or him or her, as the case may be- **Judgment No. CCZ 9/22**
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- (a) direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he or she, as the case may be, is satisfied that the departure is required in the interest of justice;
 - (b) give such directions as to procedure in respect of any matter not expressly provided for in the rules as appear to it or him or her, as the case may be, to be just and expedient.”

In their founding affidavit, the applicants, in no uncertain terms, express that the first component of the application in respect of condonation is made pursuant to r 5 of this Court's rules. The application is premised on r 5. In so doing, the applicants are requesting the Court to accept that the application may be granted primarily on the applicants' failure to comply with the rules and that such failure must be pardoned as of right. A party cannot base any application before this Court on r 5 as it does not provide for a party to institute proceedings. It is a rule available to the Court where litigants have failed to comply with the

rules of court but the Court considers it is in the interests of justice to condone the departure. The applicants cannot predicate an application for condonation. Rule 5 is a tool in the hands of the Court. Thus, it is meant for instances where a party has instituted proceedings but fails to comply with any provision of the rules. In that instance, the Court may then direct, authorise or condone the departure from the rules in the interests of justice.

The rule under which an application for condonation is provided is r 35, which is the law upon which the applicants should have premised this application. To put the matter beyond doubt, that r 35 and not r5 is the applicable law for this application, it is only proper that I set out the pertinent provisions thereof. It reads as follows in relevant parts:

“35. Application for condonation and extension of time within which to appeal

- (1) An application for condonation for the late noting of an appeal or for an extension of time within which to appeal shall be by chamber application and shall be signed by the applicant or his or her legal practitioner and shall be accompanied by a copy of the judgment against which it is sought to appeal.
- (2) An application for condonation shall have attached to it—
 - (a) a draft notice of appeal in accordance with rule 33;
 - (b) an affidavit setting out the facts upon which the applicant intends to rely.
- (3) An application for an extension of time within which to appeal shall—
 - (a) have attached to it a notice of appeal in accordance with rule 33(1) and (2); and
 - (b) an affidavit setting out the reasons why the appeal was not entered in time or leave to appeal was not applied for in time and any relevant facts; and
 - (c) where it relates to a matter in which leave to appeal is necessary, comply with the requirements of subrule (2).
- (4) (not relevant)
- (5) (not relevant)
- (6) (not relevant)
- (7) A Judge may make such order on the application as he or she thinks fit and shall, if an extension of time is granted, also deal with any question of leave to appeal which may be involved.”

The above rule sets out the steps an applicant seeking condonation must undertake. It further informs the applicant of the need to file an affidavit that explains the delay in applying. It makes provision for the necessary documents to be annexed to the application. A draft notice of appeal and the decision appealed against are required to be part of the record. Its provisions accord with the factors to be considered by a court seized with an application for condonation. The applicants did not premise their application for condonation on the above-stated rule and, from the interchange with counsel, it is apparent that its import and significance were lost on them. It is unclear why the applicants would institute their application for condonation premised on r 5 when r 35 is available and is the correct rule for bringing such an application.

On the other hand, a perusal of r 5 shows that it is devoid of the procedural requirements set out in r 35. Instead, rule 5 provides for the exercise of discretion on the part of the Court to condone a departure or failure by a litigant to adhere to the procedure. It is not a rule allowing the bringing of an application for condonation. An applicant may refer to the rule as a basis for the exercise of the Court's discretion in considering the application for condonation. Basing their application on an incorrect rule renders their application fatally defective. The rules of this Court expressly dictate the procedure to be followed in applications of this nature. The importance of citing the rule on which an application is based was adequately articulated in *Bushu v Grain Marketing Board* HH 326/17, wherein the court noted that:

“However, in practice, any astute legal practitioner making an application in terms of a statutory provision including a rule of court is expected to indicate the rule or provision concerned. The need to cite the relevant provision of the law under which the application is made, where applicable, of course, cannot be overemphasized. The citation of the correct and relevant provision attunes the court to its jurisdiction and the judge or court as the case may be immediately opens up to the provision and, if need be, researches on the provision if it is not one that immediately comes to mind.”

It must be emphasised that litigants must proceed in terms of the relevant rule as that is what informs the respondent and the court as to the nature of the application and the relief sought. It is the rule that delineates the processes to be followed by the parties and the time frames demanded for each process. While r 35 is replete with what each party must comply with, including the Registrar, r 5 does not have any of those stipulations. It therefore follows that rule 5 applies to a matter that is already before the Court. In hearing that matter the Court may give directions, for example on further time within which parties may file papers, or condone a departure for example failure to file heads of argument within the period stipulated in the rules. Therefore, the latter rule cannot, under the circumstances, be the correct rule for an application for condonation for the late filing of an application for leave to appeal and the application for leave itself.

The court's rules regulate access to this or any other court. The need to pay regard to the rules when instituting proceedings was emphasised in *Mupungu v Minister of Justice*, **Judgment No. CCZ 9/22** **Constitutional Application No. CCZ 15/22**¹⁴ *Legal and Parliamentary Affairs CCZ 07/21*, where this court stated that:

“One cannot institute an action or application in the High Court, or any other court, without due observance of and compliance with the Rules of that court. The Rules inform a litigant of what is required of him to access the court concerned. If he fails to observe or comply with those Rules, he will inevitably be non-suited. To conclude this aspect of the matter, I am satisfied that the proceedings *a quo* were fatally defective and constitute a nullity for failure to comply with r 18 of the High Court Rules....”

When the draft order annexed to the application is read against the two rules, it becomes evident that the relief sought is more in line with r 35 than r 5. A closer examination of the two rules reveals that the relief sought by the applicants is provided under r 35(1) and sub-rule (3)(a), (b), and (c.). Therefore r 5, under which the applicants purport to approach the court for relief, is not the applicable law as it does not make provision for the filing of an application and does not provide for the relief sought. It is not a rule to premise an application

upon. Based on this rule, the applicants cannot be said to have filed a proper application for condonation for the late filing of an application for leave.

The applicants are, therefore, non-suited before this Court. Since this point is dispositive of the matter, it is unnecessary to consider the other preliminary point. Consequently, this application is a nullity as it stands on nothing.

DISPOSITION

It would be futile for this Court to proceed to determine the preliminary point raised by the first respondent. Before this Court can consider the contents of this application, it must be satisfied that a valid application is before it. This application is not; it must be therefore struck off the roll.

The first respondent sought costs on the legal practitioner and client scale in its papers. However, it failed to motivate why the applicants should be mulcted by an award of costs on a higher scale. It is not suggested that the applicants are guilty of vexatious conduct or that the application is frivolous. I see no reason to deviate from the general approach in constitutional matters, that is, that no party should be penalised with an order of costs, save in exceptional circumstances. No such special circumstances as would justify an order of costs even on the ordinary scale are evident in this matter.

Accordingly, the following order is made:

The application is struck off the roll with no order as to costs.

Civil Division of the Attorney General's Office, legal practitioners for the applicants

Coghlan Welsh & Guest, legal practitioners for the first respondent

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