

DISTRIBUTABLE (31)

(1) MINING COMMISSIONER – MASVINGO N.O
(2) MINING AFFAIRS BOARD (3) MINISTER OF MINES
AND MINING DEVELOPMENT
v
FINER DIAMOND (PRIVATE) LIMITED

**SUPREME COURT OF ZIMBABWE
HARARE: 20 SEPTEMBER 2021 & 21 MARCH 2022**

D. Jaricha with *L. L. Dzumbunu*, for the applicants.

T. Mpofu, for the respondent.

**Judgment No: SC 38/ 22
Chamber Application No: SC 183/21**

IN CHAMBERS

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BHUNU JA:

[1] This is an application for condonation of late noting of an appeal and extension of time within which to note the appeal. The application is brought in terms of r 43 of the Supreme Court Rules 2018.

BRIEF FACTS

[2] The first applicant is the erstwhile Mining Commissioner for Masvingo a post which he says has since been abolished. No issue arises from the said abolition of post. The second applicant is a *quasi-judicial* board established in terms of s 6 of the Mines and Minerals Act [Chapter 21:05] whereas the third applicant is the Minister responsible for the administration

of the Act. On the other hand the respondent is a mining concern holding various mining blocks within the first applicant's area of jurisdiction.

[3] Following a dispute over failure to pay inspection fees, the applicants forfeited the respondent's mining claims and offered them to another company called Mining Promotions Corporation. The company accepted the offer and has since taken over the disputed mining claims through a special grant issued by the Secretary of the Ministry of Mines.

[4] Aggrieved by the alienation of its mining claims the respondent approached the High Court (the court *a quo*) alleging fatal procedural irregularity in the process of executing the forfeiture of its mining claims.

[5] The matter went before the late Honourable Justice Phiri, may his soul rest in eternal peace. After reading documents filed of record and hearing counsel the learned judge issued the following order on 15 January 2020;

“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, 1269, 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 claim's 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.”

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[7]. The above order was issued in the absence of Mining Promotions Corporation which was then the defacto owner of the disputed mining claims.

[8]. Dissatisfied with the decision of the court *a quo*, the applicants sought to appeal to this Court for relief. They were however out of time, hence this application for condonation of late noting of appeal and extension of time within which to file the appeal.

[9] It is common cause that Justice Phiri died on 1 February 2021 before he had prepared and delivered his reasons for judgment. The applicants have filed a copy of the appeal they intent to file in this Court. It shows that they intent to appeal without proffering the reasons for the order being appealed against.

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EFFECT OF THE JUDGE'S DEATH BEFORE GIVING REASONS FOR

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JUDGMENT

[10] Various issues and arguments including the effect of the learned judge's demise before he had given formal written reasons for his judgment were advanced. I consider that it is prudent to deal with this aspect of the case first as it has the potential of disposing of all the other issues and arguments raised in this application

[11] While preparing judgment I felt the need to hear further submissions from counsel on the effect of the death of the late honourable judge before he had delivered his formal written reasons for the order sought to be appealed against.

[12] Counsel for the respondent has since elaborated that the late judge *a quo* gave an extempore judgment in which he gave his reasons for judgment. A transcript of the alleged extempore judgment is however not part of the record of proceedings before me.

[13] In further elaboration counsel for the respondent submitted that this application for condonation of late filing of appeal and extension of time within which to note the appeal ought to be dismissed. This is for the reason that the applicant has since complied with the court order. Whereupon he drew attention to paras 13 and 14 of the founding affidavit, where the applicant unequivocally chronicles his endeavours to comply with the court order which he now wishes to appeal against.

[14] In paragraphs 13 and 14 of the founding affidavit, the applicant had this to say;

- “13. Upon receipt of the court order and in compliance with part two thereof I caused the issuance of the invoices to enable the respondent to make payment **in compliance with the court order.** See annexure “B” (Emphasis provided). **Judgment No: SC 38/22 Chamber Application No: SC 185/21**
14. The Respondent subsequently made payment based on the issued invoices **in compliance with the court order.** See annexure” “C” (Emphasis provided).

[15] That the applicant complied with the court order which he now wishes to appeal against is beyond question as it emanates from his own founding affidavit.

[16] On that score the respondent has now placed reliance on the dictum in the case of

Dhliwayo v Warman Zimbabwe (Private) Limited HB – 12 -22 where the court *a quo* said;

“According to the common law doctrine of peremption, a party who acquiesces to a judgment cannot subsequently seek to challenge a judgment in which he has acquiesced.”

[17] Undoubtedly the applicant by complying with the order he now seeks to appeal against acquiesced in the judgment 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.

See *S v Marutsi* 1990 (2) ZLR 370 (SC) where the court observed that:

“It is trite that a litigant cannot be allowed to approbate and reprobate a step taken in the proceedings. He can only do one or the other not both.”

[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.

[20] That being the case the application can only fail. Costs follow the result. It is accordingly ordered that:

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1. The application be and is hereby dismissed.
2. The applicants are to bear the respondent’s costs jointly and severally one paying and the other to be absolved.

Civil Division of the Attorney General’s Office, applicants’ legal practitioners.

Mawere Sibanda, respondent’s legal practitioners.