

MLAUZI SYNDICATE

Versus

THE MINING COMMISSIONER N.O.

And

THE MINISTER OF MINES AND MINING DEVELOPMENT N.O.

And

BILBOES HOLDINGS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 NOVEMBER 2022 & 12 JANUARY 2023

Opposed court application

L. Chimire, for the applicant
B. Mahuni, for the 3rd respondent

DUBE-BANDA J:

1. This is a court application for condonation for the late filing of an application for review. The applicant seeks an order couched in the following terms:
 - i. That the application for condonation be and is hereby granted.
 - ii. That applicant is granted leave to file its application for review within ten (10) days from the granting of this order.
 - iii. Costs of suit to be paid by the party who opposed this application on a legal practitioner and client scale.

2. The application is opposed by the third respondent. The second and third respondents neither filed opposing papers nor participated at the hearing of this matter. I take it that they have taken a position that they shall abide by the judgment of this court.

Background facts

3. The applicant and the third respondent are engaged in mortal fight over a boundary dispute between Calcite 23 and Calcite South. On 15 October 2013 the registration of Calcite South (46920) was cancelled on the basis that the claim was pegged and registered and unprocedurally. The applicant was directed to cease all mining activities and to remove its machinery and equipment from the site. The applicant appealed the cancellation decision to the Minister of Mines and Mining Development and on 27 August 2018 the decision to cancel the certificate was upheld.
4. The applicant seeks to review the decision of the first and second respondents in cancelling the registration certificate of Calcite South. The decision by the first respondent was made on 15 October 2013 and that of the Minister was made on the 27 August 2018. In terms of r 62 (4) of the High Court Rules, 2021 review proceedings must be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred, provided that the court may for good cause shown extend the time.
5. The applicant is outside the time-line to file an application for review, and it can only do so provided this court on good cause shown condones the failure to apply within the time allowed by the rules of court and extends the time for filing of such an application. It is against this background that applicant has launched this application seeking the relief mentioned above.

Preliminary objections

6. In the notice of opposition, heads of argument and at the hearing of this matter the third respondent raised the following preliminary objections: that the application is incompetent and improperly before the court; that the applicant has failed to apply for an extension of time within which to file its application for review and that no draft grounds for review were attached to the application hence the application is fatally defective. Mr *Mahuni* counsel for the third respondent argued that the preliminary points are dispositive of the matter, and they must be upheld and the application struck off the roll.

7. At the hearing, I asked the parties to argue the preliminary points only and thereafter I reserved judgment.
8. I now turn to deal with these preliminary points.

That the application is incompetent and improperly before the court

9. The third respondent contends that this application is incompetent and improperly before the court. The contention is anchored on the fact that this court in *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* HB 79/22 (*per* MOYO J) ordered the eviction of the applicant from Calcite South Mine, Inyathi, and that in ordering the eviction this court relied on the decision of the second respondent to cancel the mining claim, and therefore the decision of the second respondent has become a judgment of this court. It was submitted further that what is sought in the proposed application for review is to ask this court to review its own decision, which is impermissible. Mr *Mahuni* submitted that this preliminary objection has merit and must be upheld.
10. It was submitted further that the court accepted the second respondent's decision as correct and relied on it and ordered the eviction of the applicant from the mining claim. The respondent contends that the applicant seeks this court to reverse its decision through the backdoor. It was contended further that the applicant's averments that the decisions of the first and second respondents to cancel its licences were void, and that the cancellation of the registration certificate was a nullity, have already been determined by this court. This court is now *functus officio* in respect of these issues. It was argued that the effect of the relief sought on review will be to set aside the decisions of the first and second respondents' and the court's decision in *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* HB 79/22. It was contended that such will be incompetent.
11. The applicant submitted that this court in *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* HB 79/22 was never asked and it never dealt with the question

whether or not the first and second respondents' decisions were correct or wrong. Mr *Chimire* for the applicant submitted this court made it clear that what was before it was whether or not the third respondent was entitled to an order of eviction, and not whether the proceedings before the first respondent were valid and reviewable. Counsel argued that the court made it clear that the review of the first respondent's decision was not before it. Mr *Chimire* submitted that this preliminary point has no merit and must be dismissed.

12. Was the decision of the second respondent subsumed and has become the decision of this court? The second respondent made a decision, and on the basis of that decision this court ordered the eviction of the applicant from the mining claim. In *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* HB 79/22 this court said:

The view of this court in resolving the issue of whether the eviction should be granted or not is that, mining land is within the jurisdiction of the Mines Ministry. They issue certificates of registration and also cancel same where appropriate. Where the Mining Commissioner has taken a decision to cancel a certificate of registration and where the Mining Commissioner has found in favour of one party in a mining dispute or encroachment, the court, in a matter like this one, cannot re-visit the appropriateness or otherwise of the Mining Commissioner's decision since the purpose of these proceedings is not to review them but what the 1st defendant seeks in my view is to confirm its rights of ownership of a claim and to eject plaintiff from a claim where the Mining Commissioner has already found in its favour in a mining dispute involving the parties.

13. The second respondent's submission that the decision of the second respondent cannot be reviewed because it has since been taken over and subsumed by this court cannot be correct. I say so because it is clear that this court accepted the decision of the second respondent as part of the evidential material in support of the third respondent's case. The decision of the second respondent is not the decision of this court and has not been "subsumed" into the judgment of this court. It is simply a standing alone decision which

formed part of the evidential material before court. In fact this court was clear that it could not re-visit the appropriateness or otherwise of the Mining Commissioner's decision since it was not reviewing such a decision.

14. The third respondent contends that the applicant wants this court to reverse its judgment through the backdoor. I have found above that this court in *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* HB 79/22 stayed far away from determining the validity or otherwise of the decision of the second respondent, and accepted it as is for the purposes determining the matter that was before it. I take the view that whether the applicant seeks this court to set aside its judgment cannot be resolved as a preliminary point, but on the merits of this application. Particularly in determining whether the application for review has prospects of success. Again whether this court is being asked to review itself i.e. to review the decision in *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* cannot be determined as a preliminary point.
15. The third respondent contends further that the applicant argues that the cancellation of its licences and the certificate of registration are void and a nullity. It is argued that this court has ruled on these issues in *Mlauzi Syndicate v Ors Bilboes Holdings (Private) Limited* and it is now *functus officio*. This argument is based on an incorrect reading of the judgment of this court in HB 79/22. This court did not determine the validity or otherwise of the cancellation decisions, it accepted them "as is" on the basis that it was not being asked to review them. This argument on *functus officio* is of no moment. It is of no consequence.
16. The preliminary objection that this application is incompetent and improperly before court has no merit and is dismissed.

Failure to apply for an extension of time within which to file its application for review

17. The third respondent contends that this application is fatally defective in that the applicant only applies for condonation for the late filing of an application for review, and there is no application for the extension of time within which to file its application for review. It is submitted that the relief sought also resonates with the founding

affidavit in that the applicant only prays for condonation without seeking an extension of time to file the application. It was submitted further that even if condonation is granted the applicant will still be out of time to file an application for review.

18. *Per contra* the applicant contends that this is an application for condonation for its failure to apply to file the application for review within the time frame prescribed by the rules of court. It is contended further that what the applicant has stated in its founding affidavit is enough and sufficient, and this court is clear of what it is seeking. It is argued that it is not a requirement in terms of the rules of court that applicant should seek the extension of time, because the mere fact of applying for condonation is an acceptance that it is out of time and once condonation is granted it also means that the extension of time has been granted.
19. Mr *Chimire* submitted further that even if it is accepted that the applicant did not seek the extension of time within which to file its application for review, such failure is not fatal to this application. It is submitted further that the third respondent has not shown inconvenience or prejudice it has suffered by the applicant's failure to seek the extension of time. The applicant asks this court to condone the alleged non-compliance and allow the matter to be determined on the merits.
20. Rule 62 (4) of the High Court Rules, 2021 is clear that the time to apply for condonation is eight weeks of the date of the termination of the suit, action or proceedings in which the irregularity or illegality complained of is alleged to have occurred, provided that the court may on good cause shown extend the time. It is for the applicant to apply for the condonation for the late filing of the application for review and the extension of the time in which to file the application. The third respondent argues that even if condonation is granted the applicant will still be out of time to file an application for review. Even if the third respondent is correct I do not agree that this is a point of law that is dispositive of this application without dealing with the merits. I take the view that it is not an issue that can be resolved as a preliminary point.
21. My view is that this preliminary point has no merit and it is dismissed.

No draft grounds for review was attached to the application

22. The third respondent contends that in an application of this nature the applicant must attach the grounds of review to enable the court to assess its prospects of success. It is contended that the applicant has not clearly stated the grounds on which it is seeking the first and second respondents' decision to be set aside. Mr *Mahuni* submitted that a draft application for review which is valid and complies with the rules of court ought to have been attached to this application. Mr *Mahuni* submitted further that without a draft application this court is not in a position to determine the prospects of success of the intended review application. Counsel relied on *Lunat v Patel and Another* SC 35/21. Counsel submitted further that what is before court is a general complaint against the conduct of the first and second respondents and such does not suffice. It is on the basis of the above that counsel contended that this application is fatally defective and must be struck off of the roll.
23. *Per contra* Mr *Chimire* submitted that the grounds of review are easily discernible in the applicant's founding affidavit, and these are said to be corruption, lack of jurisdiction and bias. Counsel argued that this preliminary objection has no merit and must be dismissed.
24. In an application for condonation the grounds of review of the intended application for review are attached to enable the court to assess the prospects of success of the intended application for review. The court cannot assess the prospects of success of the intended review application at this stage of the proceedings. This is an issue that has to be determined at the stage the court considers the merits of the matter. Even in *Lunat v Patel and Another (supra)* the issue of the attachment of a valid notice of appeal was considered when the court was dealing with the merits of the matter, i.e. the prospects of success. This is an issue that cannot be resolved as a preliminary point. It is not a point of law that is dispositive of the matter. It simply relates to the merits of the application. In the circumstances this preliminary objection cannot succeed and it is dismissed.

25. It is trite that the issue of costs falls within the discretion of the court. Notwithstanding that the applicant has been successful at this stage of the proceedings, I am of the view that it is not entitled to costs. Although the preliminary objections have been refused, it cannot be said they were taken without cause. In the circumstances of this case my view is that costs be costs in the cause.

In the result, I order as follows:

- i. The preliminary objections taken by the third respondent have no merit and are hereby dismissed.
- ii. Costs shall be costs in the cause.

Masamvu & Da Silver-Gustavo Law Chambers, applicant's legal practitioners
Scanlen & Holderness, 3rd respondent's legal practitioners