

RONALD DAVISON MUGANGAVARI  
**versus**  
K AND G MINING SYNDICATE  
and  
PROVINCIAL DIRECTOR (MIDLANDS)  
and  
MINISTER OF MINES & MINERAL DEVELOPMENT

HIGH COURT OF ZIMBABWE  
MOYO J  
BULAWAYO 27 FEBRUARY 2019 AND 21 MARCH 2019

### **Opposed Matter**

*D T Mwonzora* for applicant  
*T Zishiri* for 1<sup>st</sup> respondents  
*Ms R Hove* for 2<sup>nd</sup> & 3<sup>rd</sup> respondents

**MOYO J:** This is an application for rescission of judgment. The judgment sought to be rescinded was granted by this court in default on 17 November 2017.

The parties have been embroiled in a mining dispute. It would appear that first respondent obtained judgment in this court against the applicant, second and third respondent. However, third respondent was not properly cited in that instead of citing the Minister of Mines and Mineral Development. First respondent cited the Ministry of Mines and Mineral Development and it is common cause that there is no such legal entity called a Ministry. It is a Minister who is the legal head and who has capacity to be sued On all issues affecting a Ministry. Applicant then later, decided to apply for an amendment to its court order with the wrong citation of Ministry instead of Minister and sought to correct the citation through a chamber application for an amendment to the court order. That order was granted in default as applicant did not oppose same.

Applicant argues that he did not receive the chamber application for amendment of the court order. He also claims that the amendment sought to substitute a party and was therefore incompetent. Applicant's contentions have resulted in the current application for rescission of judgment. Initially there were two issues for determination by this court, that is,

- a) whether applicant was in willful default and
- b) secondly whether applicant has an arguable case on the merits.

The first issue fell away after first respondent's counsel conceded that where process was served at an address that applicant now says is his former address and where the people there refused to accept process on applicant's behalf, but the sheriff nonetheless left the process on the top left corner of a black sliding gate, that this court cannot accept that manner of service as proper service.

The only issue that remains for determination therefore is whether applicant has reasonable prospects of success in challenging the amendment sought by the first respondent. First respondent contends that the citation was a typographical error and results in no prejudice to the applicant. It is important to note that whilst applicant is an interested party in the process, applicant is not the party who was wrongly cited in the pleadings being the subject matter of this application.

However, the rules provide that where an order for variation, or correction is of judgments being sought, it shall be on notice to all the interested parties. This particular order was not sought in accordance with the rules as the applicant did not receive the application to amend. Whilst ordinarily an application for amendment can be made, including an amendment substituting a (refer to *Old Mutual Asset Management Pvt Ltd* and *F & R Travel and Tours and Car sales* HH 53/07) party to the process before a court, I hold the view that is not clear if a party can be substituted in a completed process. This would entail obtaining judgment against a non-existent party and then proceeding to amend the judgment for execution purposes and then proceeding to execute against the correct party. Perhaps that could result in prejudice to the party being substituted for execution purposes. As GOWORA J (as she then was) put it in the *Old Mutual Asset Management Pvt Ltd* case (*supra*) where she stated thus:

HB 38-19  
HC 3122/17  
XREF HC 2764/17  
XREF HC 2031/15

“It is trite that an amendment even where it is intended to substitute a party, will be granted unless the application to amend is *mala fide* or would cause prejudice to the other side which cannot be cured by costs.”

Perhaps it can be argued that substituting a party in a finalized matter could cause prejudice that cannot be cured by an order for costs because the matter is already finalized. Whether such an amendment is possible or not is a matter for argument.

It is for these reasons that I hold the view that having not been served with the application for amendment, and seeing that this amendment could be held to be an amendment to substitute a party, depending of course on a lot of issues, and considering that argument can be made for and against the amendment, I am persuaded that this is a matter that needs to be re-opened, all interested parties allowed to ventilate their views and a proper determination be then made in the interests of justice.

It is for these reasons that I will grant rescission. I accordingly order as follows:

The application for rescission of judgment is granted with costs being in the cause.

*Mwonzora and Associates*, applicant’s legal practitioners  
*Garikayi and Company*, 1<sup>st</sup> respondent’s legal practitioners  
*Civil Division, Attorney General’s Office*, 2<sup>nd</sup> & 3<sup>rd</sup> respondents’ legal practitioners