COLDAWN INVESTMENTS (PRIVATE) LIMITED
versus
THE PROVINCIAL MINING DIRECTOR FOR MANICALAND PROVINCE
and
FORESTRIDGE INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUZENDA & SIZIBA JJ
MUTARE, 26 March 2025 & 2 April 2025

CIVIL APPEAL

Advocate *D. Tivador* with Mr *S Chikengezha*, for the appellant
Mr *T Chimhofu* with Ms *T Rusinahama*, for the first respondent
Mr *P Garwe*, for the second respondent

SIZIBA J**:**

INTRODUCTION

1. This is a purported appeal against the decision of the first respondent purportedly delivered on 30 October 2024 as read with her determination dated 26 September 2024. When the matter came up for hearing on 26 March 2025, we invited counsel to address us on whether there was a proper appeal before us or not and after hearing their submissions, we took the position that the Notice of Appeal was fatally defective and struck the matter off the roll with costs.

BACKGROUND FACTS

2. It is common cause that on 12 July 2024, the second respondent registered a complaint of illegal mining and encroachment against the appellant before the first respondent's office. It is also common cause that on 6 August 2024, the first respondent convened a meeting of the parties in an attempt to resolve the dispute with the consent of the parties. The consent appears not to have been in writing. On 8 August 2024, a ground survey was carried out whereupon it was concluded by the first respondent's office that the appellant was the one encroaching into second respondent's mining claim. Consequently, on 26 September 2024, the first respondent issued out a determination in

favour of the second respondent and ordered the appellant to revert to its original position.

3. After this determination, the appellant challenged the decision of the first respondent through letters dated 10, 14 and 25 October 2024 wherein it insisted that the first respondent's decision was a nullity to the extent that she had purportedly issued an injunction in terms of s 354 of the Mines and Minerals Act [*Chapter 21*:*05*]. On 30 October 2024, the first respondent then wrote a letter to the appellant indicating that her determination of 26 September was still extant and in force. She also pointed out in that letter that the determination of 26 September had been in terms of s 348 of the Act and that s 354 had been quoted in error. All these facts are common cause from the record which was placed before us.

4. The appellant's purported Notice of Appeal is couched as follows:

> *"**TAKE NOTICE THAT** the Appellant hereby appeals to the High Court of Zimbabwe against the whole decision of the Provincial Mining Director N.O (PMD), Manica Province, Ms S. Mpindiwa, delivered on 30 October 2024 as read with her determination dated the 26th of September 2024 annexed hereto as Annexure 'A' and 'B' respectively."*

5. The first defect that cripples the appellant's purported appeal is that there was no determination or decision by the first respondent on 30 October 2024. The determination was only done on 26 September 2024 and hence there is no decision of the 30 October 2024 which can be read by this appellate court together with the determination of 26 September 2024. The first respondent only wrote a letter on 30 October 2024 to reply to a line of letters by the appellant and such a letter cannot form the basis of an appeal before this court. The second respondent was not even part of the exchange between the appellant and the first respondent and hence such a letter cannot be said to be a determination.

6. Above this, there is still another fatal defect to the appellant's purported Notice of Appeal. The relief sought by the appellant is couched as follows:

"*WHEREFORE, the Appellant prays for the following order:*

1. *The determination of the Provincial Mining Director, Manicaland Province, dated 30 October 2024 as read with her determination dated 26 September 2024 be and is hereby set aside.*
2. *The GPS coordinates of the Appellant's mining claims Monarch 7, Monarch 8 and Monarch 9 as recorded in the 1st Respondent's cadastral system in 2023 be reinstated and confirmed.*
3. *The Respondents, jointly and severally, are to pay the Appellant's costs of this appeal.*"

7. The first defect with the relief sought by the appellant is that there is no prayer that the appeal should succeed. The second defect is that the appellant prays this court to set aside the purported decision of 30 October 2024 when there is no such decision. The third defect is that there is no prayer for substitution of the first respondent's decision by an order of this court. The fourth defect is that paras 2 and 3 make reference to the 'Appellant' when there was no such 'Appellant' before the first respondent's forum and hence an order of this court substituting first respondent's decision and making any reference to an 'Appellant' will not only be wrong but meaningless as well.

THE LAW AND ITS APPLICATION

8. In ***Econet Wireless (Pvt) Ltd* v *Trustco Mobile (Pty) Ltd and Another* SC 43-13** at p 10 of the cyclostyled judgment, the court articulated the law as follows:

"The position is now well established that a notice of appeal must comply with the mandatory provisions of the Rules and that if it does not, it is a nullity and cannot be condoned or amended. See Jensen v *Avacalos 1993 (1) ZLR 216 (S)."*

9. This position is well settled in this jurisdiction. See ***Sambaza* v *Al Shams Global BVI Limited* SC 03-18** at pp 5 and 6, ***Sibuco Trading (Pvt) Ltd & Anor* v *Leaders (Pvt) Ltd & Anor* HB 38-15**.

10. Given the clear position at law, we were not persuaded to allow any amendment to the fatally defective Notice of Appeal. Counsel for the second respondent did allude to the point that there was no valid appeal before this court in his heads of argument but such argument was being made on the merits of the appeal rather than as a point *in limine* and even when the hearing commenced, counsel did not take up this argument as a point *in limine*. This undecided stance or attitude is unhelpful to the court. Where

counsel wishes to take up a point of law which has the potential to dispose of the matter without the consideration of the merits, such argument should be taken as a point *in limine* firstly in the heads of argument so as to give proper notice to the other party. Secondly, at the commencement of the hearing, the expectation would be for counsel who is taking a point *in limine* to rise on his feet first to address the court on the point so as to avoid wastage of time as the arguments on the merits would be a wastage of time unless the court directs that it wishes to hear the parties both on the points *in limine* and also on the merits. It is therefore on the basis of the above considerations that we decided to have the matter struck off the roll with costs as there was no proper appeal before us.

Muzenda J agrees _____

Manokore Attorneys, appellant's legal practitioners
Civil Division of the Attorney General, first respondents' legal practitioners
Rusinahama-Rabvukwa Attorneys, second respondent's legal practitioners