BUBYE MINERALS (PVT) LTD
versus
MINISTER OF MINES AND MINING DEVEOLPMENT
and
MINERALS MARKETING CORPORATION OF ZIMBABWE
and
MINING COMMISSIONER MASVINGO
and
RIVER RANCH LIMITED

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 29 March and 9 May 2007

Chamber Application

T Hussein for the applicant
No appearance for 1,st 2nd and 3rd respondents
Advocate J Colgrave for the 4th respondent

GOWORA J: On 1 February 2006 the applicant herein sought and was granted under a certificate of urgency the following interim relief:

1) That the Mining Commissioner for the District of Masvingo be and is hereby interdicted from giving effect to the purported cancellation of the deed of cession of Special Grant 1278

2) That the first respondent is interdicted from representing to any person or authority that the cession of Special Grant 1278 to the applicant is cancelled save in terms of the law.

The provisional Order in terms of which this relief was granted also provided for final relief in the following terms:

1) That the purported cancellation of the cession from the 4th respondent to applicant by the 1st respondent is null and void and is accordingly set aside

2) The Mining Commissioner for the District of Masvingo be and is hereby interdicted from giving effect to the purported cancellation of the Deed of Cession of Cession of Special Grant 1278
3) That the first respondent is interdicted from representing to any person or authority that the cession of Special Grant 1278 to the applicant is cancelled save in terms of the law

4) That the fourth respondent is hereby interdicted from mining, working or extracting minerals from Special Grant 1278 issued on 1 September 1992 ceded to applicant

5) That the second respondent is interdicted from selling, exporting or in any way dealing with precious minerals from Special Grant 1278 save under the express written authority of the applicant

6) That the first respondent restores vacant possession of the area covered by Special Grant 1278 to the applicant within fourteen days of the date of service of this order

7) That the first and fourth respondents bear the costs of this application on a legal practitioner scale, jointly and severally, the one paying the other to be absolved

8) That the applicant's legal practitioners, or any employee delegated by them, be given leave to serve copies of this order upon the respondents or their legal practitioners.

On the return day the matter came up for argument before KAMOCHA J on 20 June 2006. On 6 December KAMOCHA J issued a judgment in terms of which he dismissed the application with each of the parties being ordered to pay his or her own costs. An appeal has been filed against that judgment. Consequent to the applicant noting the appeal, its legal practitioners were called upon to inspect the record. The

applicant's legal practitioners, convinced that the record was defective requested that certain documents be included in the record. The registrar, equally convinced that the record was complete and the other documents irrelevant for purposes of the appeal declined to accede to the request. After a letter of complaint was addressed to the Judge President she directed that the parties approach a judge in chambers. The applicant thereafter filed a chamber application for directions to which was attached a draft order seeking relief in the following terms:

1. That the Registrar transcribe the record of proceedings kept by KAMOCHA J on 21 June 2006

2. That the Registrar include in the appeal record the following:

    2.1 Letter to Justice KAMOCHA dated 13 September 2006

    2.2 Letter from Hussein Ranchod & Company to Judge President MAKARAU of 28 November 2006

    2.3 Record of proceedings in High Court 1238/06(sic)

3. That the parties within 10 days of this letter agree as to the rectification of the transcript of proceedings in paragraph (1) failing which any party may apply for further directions.

The fourth respondent had not been cited but appears to have been served with the application and has filed documents in opposition. The application before me is made in terms of Rule 15(9) of the Rules of the Supreme Court 1964 as amended which provides that the preparation of a record shall be under the supervision of

> the registrar of the High Court. The Rule also provides that the parties may submit any matter in dispute on the preparation of the record to a judge who shall give such directions thereon as justice may require.

The founding affidavit to the application has been deposed to by one Adele Farquhar who is a share holder of the applicant and is also a Director in the company. She states that after the judgment was handed down on 6 December 2006, an appeal was noted against the same. Her legal practitioners during the same month then wrote to the Registrar requesting him to prepare the record. The legal practitioners also requested that the record kept by the judge be transcribed and included in the record. This request also included a letter written to the Judge President subsequent to the hearing before KAMOCHA J. On 7 February 2006 the registrar addressed a suitable letter to the applicant's legal practitioners inviting them to inspect the record. This was done on 9 February 2006. It is apparent that the legal practitioners were not satisfied with the inspection and dispatched yet another letter to the registrar again insisting that the record include the notes kept by the Honourable Judge. The registrar then responded on 22 February 2007 in the following vein;

> "As per your letter dated 9th February 2007 and per letter by Costa *Madzonga* dated 22nd February 2007.(sic)
>
> Please be advised that the judge's handwritten notes can not form part of the record hence I reinvite you to come and inspect the record within 48 hours failure (sic) of which the appeal will be deemed to be dismissed /lapsed."

This letter was authored by Mr Antonio of the registrar's office. On 2 March 2007 Mr Antonio again addressed a letter to the applicant's legal practitioners in which he advised that he saw no relevance in the request for the inclusion of the judge's notes and the letters in the record. He stated that the appeal was therefore deemed to have lapsed. According to the deponent to the affidavit the letter in question was overruled by the Judge President when she gave a directive that the parties approach a judge in chambers in accordance with the requirements of Rule 15(9).

The first, second and third respondents have not opposed the granting of the order sought. Only the fourth respondent has done so. As it is the only party to have entered opposition I will hereinafter refer to it as the respondent in this judgment. In argument, Mr *Hussein* sought to draw comfort from the lack of opposition from the other three respondents. My view is that this lack of opposition is understandable given that none of the three are directly affected by the outcome of the appeal. The dispute concerns the question of rights in a Special Grant in which the applicant and the fourth respondent claim an interest. The inclusion and citation of the other three is that there were decisions made by them which affected those rights and hence in order for the lawfulness or otherwise of those decisions to be tested and determined, it was necessary that they be brought to court. Other than that their role is that of administrative authorities who should be impartial in the resolution of the

dispute. The lack of opposition is consequently Dutch comfort in so far as the applicant is concerned.

Mr *Colgrave* for the respondent argued that in view of the letter by Antonio on 2 March 2007, the appeal has now lapsed and the letter from the JUDGE PRESIDENT did not change that position. His further contention was that she was only invited to deal with the matter after the letter from Antonio stating that the appeal had lapsed. He argued that what the applicant had to do was now take the matter on review.

The inspection of the record is at the invitation of the registrar of the High Court and where an appellant or his legal practitioner fails to inspect the record after being invited his appeal can be deemed to have been abandoned or lapsed. That is not an issue before me but it seems to me that the registrar advised the applicant's legal practitioners that the appeal had lapsed. I do not know whether the JUDGE PRESIDENT had been given sight of the letter written by Antonio when she invited the parties to approach a judge in terms of Rule 15(9). In this application I have not been asked to decide on the status of the appeal. I am not even sure whether or not it is within the ambit of the High Court to make pronouncements on its status. It is not my understanding that the application must needs fail because the registrar of this court had indicated that the appeal had lapsed. I am of the view that I am still able to determine the application until such time as there has been a pronouncement from the Supreme Court that the appeal has lapsed. Accordingly

despite the protestations of the respondent I will proceed to determine the matter on the merits.

It is correct as stated by counsel for the applicant in argument that the High Court in terms of the Constitution is a court of record. The High Court Act does not require that all proceedings before a judge be recorded by means of a mechanical device or that in the absence of such device that the judge should record all the proceedings in long hand. Apart from the Constitution, the applicant has referred this court to the case of *S v Davy*[1]. The appellant in that case had been convicted on one count of contravening s 2(1) of the Parks and Wildlife (Restriction on Hunting) (No 13) Notice of 1985. The evidence before the magistrate was not recorded by mechanical means. The record of proceedings revealed that the evidence of the principal witness had been taken down in a very summarized fashion. The record was seen to be clearly inadequate. Apart from this the appellant's own defence had not been properly set out on the record. Hence there was an application to rectify the record to record correctly the evidence that had been adduced on behalf of the state and the defence at the trial. The application was premised on the requirements set out in Order III of the Magistrates Court (Criminal) Rules 1966. The application was directed to the Magistrate and the Attorney-General. In determining the application which had been placed before the Supreme Court as a process of the appeal this is what GUBBAY JA (as he then was) stated at p 393C-F:

[1] 1988 (1) ZLR 386

"Before concluding this aspect, I wish to sound a note of warning to judicial officers who find themselves presiding at a trial in which the facility of a mechanical recorder is not available. It is their duty to write down completely, clearly and accurately, everything that is said and happens before them which can be of relevance to the merits of the case. They must ensure that they do not record the evidence in a way which is meaningless or confusing or does not give the real sense of what the witness says they must remove obscurities of language or meaning whenever possible by asking questions. This is because the record kept by them is the only reliable source of ascertaining what took place and what was said and from which it can be determined whether justice was done. See *R v Sikumba* 1955 (3) SA 125 (E) at 128E-F; *S v K* 1974 (3) SA 857 at 858H. A failure to comply with this essential function, where the deficiencies in the transcript are shown to be substantial and material, will constitute a gross irregularity necessitating the quashing of the conviction."

What was before KAMOCHA J was not a trial. It was an application, which would have been filed in accordance with our rules of court. The procedures for the filing and determination of applications are laid out in Order 32 of the said rules. An application and a notice of opposition filed in response thereto shall contain an affidavit signed by the person who can depose positively to the facts or averments contained therein. Where any of the parties is legally represented the rules require that the legal practitioners file heads of argument within the periods stipulated in accordance with the rules. The requirement for heads of argument to be filed is to acquaint the judge hearing the matter with the argument and authorities to be used in support of each of the parties case or claim whichever the

position is. The rules also provide that each of the parties shall be heard in argument unless the judge requires otherwise.

In casu, all the parties had filed extensive heads of argument. In addition, all the parties to the dispute had filed extensive affidavits on which the evidence was recorded. In so far as the application was concerned therefore all that the learned judge needed to determine the issues had already been placed before him. The applicant itself filed heads of argument which ran for some thirteen pages of the record. The respondents' heads of argument in total were spread over sixteen pages. In some instances, the rules provide for the recording of oral evidence if the judge considers it necessary.

What appears to be vexing the applicant is that the entire proceedings were not recorded by mechanical means, which in its view required the judge to meticulously record everything that transpired at the hearing before the Honourable KAMOCHA J. The notes that were kept by the judge of the submissions made by counsel were availed to the applicant's legal practitioner. They have in fact been attached to the chamber application. The applicant states that it cannot apply for rectification of the record because 'the record was not meticulous'. The legal practitioner is of the view that the notes are inadequate. In a letter written to all the parties to the dispute he sought confirmation of submissions made by himself and respondent's counsel which had, apparently in his view, not been correctly captured by the Learned Judge. It is the view of Mr *Colegrave* which view I am in agreement with, that the

applicant's counsel is seeking a rectification of the notes by the judge. The application before me is however not an application to rectify the record but for directions.

There is however no legal basis laid in the papers or on the argument presented orally before me to justify the order that the applicant seeks. Oral submissions are what they are. They are made in support of, in this instance, an application which is before the court and where the evidence has been captured in affidavit form. The case of *S v Davy* (supra) is distinguishable in my view as the judicial officer concerned had failed to record the evidence adduced at the trial accurately. In such a situation it would be difficult to understand how he could have reached an impartial and carefully considered verdict based on such a poorly kept record. Much as the applicant may wish to have the dicta in Davy's case interpreted in such a manner as to impose on judges the duty to record everything that is said before them, I do not believe that is the intention in that judgment. The practice of this court is that the judge listens to counsel in support of their presentations and decides on what to record. The discretion is entirely that of the judge. The manner of note keeping is also the preserve of the judge based entirely on convenience and ability to recall. It cannot have been the intention of the Legislature in decreeing that this court be a court of record, that a duty be imposed upon a judge to record all submissions made before such judge without regard to whether such arguments are relevant to the issues in point or not. The court has provided for rules of court to regulate the

manner in which its business is conducted. The rules do not provide for the extensive recording of everything that happens before a judge in an application and I have not been provided with any authority requiring the imposition of such duty. The order for the inclusion of the notes of the learned judge in the earlier application therefore fails.

Mr *Hussein* did not in argument, I kept very extensive notes, address on the issue of the letters he wished to form part of the record, and I will as a consequence not dwell on that aspect. There is further in the draft order, the requirement that the record of proceedings in case number HC 1238/06 be included in the record. Rule 15 (8) of the Rules of the Supreme Court enjoins the registrar of the High Court to exclude from the record all documents that are not relevant to the appeal. There is no indication on the applicant's papers that case number HC 1238/06 is in fact the subject matter of an appeal. The proceedings therein were not before KAMOCHA J. There has been no justification made out in the papers as to why, the pleadings under that case number, the papers of which were not before the learned judge should form part of the record. Even in his oral submissions Mr *Hussein* did not seek to justify their inclusion. In my view they are irrelevant and the registrar of this court was justified in his refusal to include them.

Counsel for the respondent urged me to award costs against the applicant on the punitive scale. I find no justification for making such an order. Granted, the applicant has taken the parties to court unnecessarily but I cannot overlook the fact that

the applicant, felt, erroneously as it has transpired, that it was in the right. There is no averment on the part of the respondent that the application was frivolous or vexatious. There was equally no suggestion on the part of the respondent that the applicant had embarked on a course of action calculated to abuse court process. I will therefore order costs on the ordinary scale.

In the result, the application is dismissed. The applicant is ordered to pay the costs of the application.

Hussein Ranchod & *Company,* legal practitioners for the applicant.

Costa & *Madzonga,* legal practitioners for the fourth respondent