BUBYE MINERALS (PVT) LTD
versus
THE REGISTRAR OF THE HIGH COURT
and
THE MINISTER OF MINES AND MINING DEVELOPMENT
and
THE MINING COMMISSIONER, MASVINGO
and
THE MINERALS MARKETING CORPORATION OF ZIMBABWE
and
RIVER RANCH LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, June 18, 2008

Court Application

Adv Trengove, with Adv. Zhou for applicant
Mr *Maphosa*, for 1st 2nd and 3rd respondents
Adv Colgrave, for 5th respondent.

CHITAKUNYE J. The applicant brought this application for a declaratory order purportedly in terms of sections 13 and 14 of the High Court Act [*Chapter 7: 06*] alternatively in terms of section 4 of the Administrative Justice Act [*Chapter 10: 28*].

The facts are that a dispute arose between the applicant Bubye Minerals (Pvt) Limited and fifth respondent River Ranch Limited about the mineral rights under a Special Grant. The dispute led to an application to the High Court in case no. HC 278/06. On the sixth December 2006 court ruled in favor of River Ranch Limited. The applicant not being satisfied with the ruling noted an appeal on the very next day.

In terms of rule 15 of the Rules of the Supreme Court, 1964, as amended, the registrar of the High Court is thereby enjoined to prepare the record of appeal and thereafter invite the parties to inspect the record before forwarding same to the Supreme Court. On 7 February 2007 the Registrar of the High Court invited the parties to inspect the record of appeal in terms of rule 15(8a) of the Rules of the Supreme Court. He alerted applicant that if it failed to do so in time, it would be deemed to have abandoned its appeal. On 9 February 2007 the applicant's legal practitioner Mr. Hussein attended the Registrar's office and inspected the record. He opined that the record was incomplete. He recorded his objection in a letter to the Registrar later that same day. On 22 February 2007, the Registrar re-invited the appellant to inspect the

record. In his letter he stated, *inter alia,* that "Please be advised that the Judge's hand written notes can not form part of the record hence I re-invite you to come and inspect the record within 48 hours failure which the appeal will be deemed to be dismissed/lapsed." In response to this re-invitation Mr. Hussein again attended the office of the Registrar on 26 February 2007. He noted that his earlier objection had not been attended to and so he inscribed on the Registrar's certificate that "The record is not complete. I wrote a letter on 9 February 2007 complaining about this. Why are you not complying with this? Please do not suppress information. I therefore am not signing 26/02/07". On 2 March 2007 the Registrar sent another letter to Mr. Hussein informing him, *inter alia,* that "I see no relevance to the said items to be included in the record, as they are not relevant to the appeal. Therefore, the appeal is deemed to have lapsed or abandoned." On 5 March 2007 Mr. Hussein addressed a letter of protest to the registrar. In his protest he said, among other things, that "Your letter is therefore a complete nullity as you purported to confer upon yourself judicial and legal powers which you clearly do not have. We therefore do not accept nor recognize your letter as having any force at law, and as far as we are concerned, the appeal that was lodged still stands. Abandonment of the appeal can only come into effect if the Appellant fails to inspect the record. This, you will see was in fact done.…" He went on to say that he expected the registrar to confirm that his letter had been written in error and should be ignored. On the same day Mr. Hussein wrote another letter of complaint to the Judge President on the same issue. Meanwhile on 7 March 2007 the Registrar responded to Mr. Hussein explaining his office's position regarding the inclusion of the documents that Mr. Hussein was insisting on. He concluded his letter by saying that, "If you feel strongly about the inclusion of any other information you are at liberty to apply for its inclusion from the bar when the matter is set down in the Supreme Court; and that, you have not signed the record and I am by copy of this letter advising the Supreme Court Registrar accordingly."

On 9 March 2007 the Judge President also responded to Mr. Hussein's letter by inviting the parties to proceed in terms of rule 15(9) of the Rules of the Supreme Court. The parties thereafter went before Gowora J. On 9 May 2007 Justice GOWORA dismissed the applicant's application in effect ruling that the registrar of the High Court was correct in his refusal to include the documents applicant was insistent on.

On the 2nd May 2007 the registrar issued another letter to applicant's legal practitioners asserting that in view of the ruling by GOWORA J, 'the decision of this office communicated to you on 2 March 2007 still stands'.

As a consequence of the above the applicant applied to this court seeking a declaratory order that:

"1. The letters written by the Registrar to the Applicants legal practitioners dated 2 March 2007 and 24 May 2007, and copied to the parties and the Registrar of the Supreme Court, are null and void and accordingly set aside.

2. The Registrar is to prepare the record of appeal for case No. H.C. 278/2006, appeal reference No. S.C. 350/2006, and transmit this record upon compliance with the rules, to the Supreme Court of Zimbabwe within 7 days of this order.

3. That Mr. Nyatanga bear the costs of suit on an attorney and client scale in his personal capacity, jointly and severally, with any Respondent that opposed this application.

The applicant alleged that the Registrar was wrong in saying that the applicant had not inspected the record and thus its appeal was deemed abandoned or lapsed. They contended that the registrar misconstrued the meaning of the rules in this regard.

The applicant was not clear in terms of which rule this application was being brought serve to say that they were bringing this application in terms of sections 13 and 14 of the High Court Act alternatively section 4 of the Administrative Justice Act. However these sections grant general jurisdiction. Section 13 is on the Original jurisdiction of the High Court whilst section 14 deals with the High Court's power to determine future or contingent rights. Section 4 of the Administrative Justice Act grants a person aggrieved by the failure of an administrative authority to comply with section 3 to apply to the High Court for relief and sets out the nature of the relief the High Court may grant.

The first respondent on the other hand maintained that the decision in its letter of 2 March 2007 deeming the appeal lapsed was valid. He argued that the inspection applicant says it did was not in accordance with the rules. First respondent contended that applicant was required to do an effective inspection whereby he would sign the registrar's certificate. Refusal to sign that certificate amounted to no inspection. The first respondent also argued that applicant has adopted a wrong procedure. If applicant felt that the registrar's decision or action was not correct it should have brought that decision on review.

The fifth respondent also opposed the application. It contended that the inspection required applicant to sign the registrar's certificate. What was required was an efficacy inspection and, this, applicant did not do.

The major issues are;

1. The meaning of inspection in terms of the rules and,
2. Whether the applicant complied with the rules for inspection or not.

The issues call for a closer examination of the rules in question.

Rule 15 sub-rule (8a)states that "A registrar of the High Court responsible for preparing a record shall invite the appellant and the respondent or their legal representatives to inspect the record before it is bound in order to ensure that-

"(a) all necessary documents are included in the record and are in the proper order; and

(b) any unnecessary documents are omitted from the record; and

(c) The record has been compiled in accordance with sub rules (1) to (5); and

(d) The papers are all properly paginated; and

(e) The record is legible."

That basically captures what is expected during the inspection. The importance of the inspection is made very clear by sub-rule (8b) which provides the consequences of failure to inspect. The sub-rule provides that "If the appellant or his legal representative does not inspect the record as provided in sub section (8a) within 10 days after being invited to do so, or within any further time granted by the registrar of the High Court, the registrar of the High Court shall notify the registrar of that fact, and thereupon-

"(a) the appellant shall be deemed to have abandoned his appeal;

(b) The notification in terms of this sub rule shall be treated as notice by the appellant in terms of rule 37 that he has abandoned his appeal."

The word 'INSPECT' maybe defined as 'to look at carefully; to examine or review officially' (*see Webster's Universal Dictionary & thesaurus 2003 edition*). The above provisions are quite clear on what is expected during that examination. Where such examination has occurred it is then expected the examiner will certify so. Indeed as stated by the then Chief Justice and Judge President in Practice note No. 2 of 1969 (Appellant Division) on the requirement for inspection by state counsel in criminal appeals, "In future, the following practice will be followed: Counsel who is appearing for the Crown in the matter will

satisfy himself that the record contains sufficient information to enable the court to adjudicate properly on all the points in issue. After he has done that he will issue a certificate certifying that he has so satisfied himself and the Registrar of the General Division will not, in terms of sub rule (10) of rule 15 certify that the record is complete and correct until he has been supplied with such a certificate." Though this practice note pertained to records in criminal appeals, I am of the firm view that the important aspect is the importance of the certificate to the Registrar's next course of action. Without that certificate the registrar cannot comply with rule 15(10). Rule 15(10) states that "After completion of the record a registrar of the High Court shall certify that is correct." This certification by the registrar is only possible were parties have inspected the record and certified so. Where there are disputes such would have been attended to by the parties in terms of rule 15(9) and the parties would then have certified the record. The record cannot be complete without the certification. Where a party does not certify it cannot be said that that party has complied with the rules. The certification in this case is by a party appending their signature to the registrar's certificate as that is the only way the registrar would have been enabled to certify the record as complete and forward same to the Supreme Court. An Inspection in terms of the rules is thus a process which involves an examination of the record in terms of rule15 (8a). A party examining the record must as of necessity append a seal in the form of a signature confirming the examination. To merely examine without such a seal would in my view be of no relevancy to the process. Equally to merely append one's seal by way of signature without examining the record would not be in compliance with the rules. An inspection in terms of the rules would thus require a party to check that:

1. All documents necessary and relevant to the appeal are included in the record and are in their proper order,
2. Documents that are not necessary for the appeal are removed from the record,
3. The record has been compiled in accordance with sub-rules (1) to (5)
4. The record of appeal is properly paginated,
5. The record of appeal is legible, and
6. A party has appended their signature to the record confirming that they have examined the record in terms of rule 15 sub rule (8a) and the registrar can forward same to the Supreme Court.

It is only when all this has been done that it can be said the record is complete and the registrar can act in terms of rule 15(10). In *casu* it cannot be said that what Mr. Hussein did would have enabled the registrar to certify the record as complete in terms of rule 15(10).

It is not disputed that Mr. Hussein attended the registrar's office. In that office he went through the Record of Appeal prepared by the registrar. He opined that certain documents should be included in order that he can be satisfied that the record is ready for transmission to the Supreme Court. That process of going through the record is in my view part of the inspection required. For the inspection to be of value he had to come up with an opinion on the state of the record. This, he did. The fact that he felt the need to include other documents did not repudiate what he had done. To confirm that he had gone through the record and come up with an opinion, on 9 February 2007 he wrote a letter to the registrar on his objections to the state of the record.

It is clear from that letter that applicant's legal representative was not happy with the exclusion of certain documents as pointed out in the letter. Upon assessing the objections the registrar re-invited applicant's legal practitioner and pointed out to him that the documents he wished to be included were not relevant. This, in my view, the registrar did as part of his duty to ensure that only those documents and evidence necessary for the appeal are part of the record excluding irrelevant documents. Indeed rule 15(8) of the Rules of the Supreme Court enjoins him to do so. At that stage it ought to have been clear to applicant's legal practitioner that there was a dispute regarding the relevancy of the documents he was insisting on.

Rule 15(9) provides that "the preparation of a record under the provisions of rules 22 and 34 shall be subject to the supervision of a registrar of the High Court. The parties may submit any matter in dispute arising from the preparation of such record to a judge of the High Court who shall give such directions thereon as justice may require." The registrar in his supervisory role made it clear to applicant's legal practitioner that the other documents and information counsel was insisting on were not relevant. Instead of accepting that the registrar was only doing his duty applicant's legal practitioner decided to instruct the registrar to include that which he wanted. Indeed in his letter of 9 February 2007 he wrote that "If you look at our letter of 7 February 2006. <u>We instructed you</u> to include this record. The record in our view is deficient and <u>the following documents must</u> <u>be included</u>…' (the underlining is mine) On 26 February 2007 he inscribed on the registrar's certificate, *inter alia*, "Why are you not complying with this? Please do not suppress information." The confrontational stance

adopted by counsel is difficulty to understand as surely he ought to have been aware of the provisions of rule 15(9). This sub-rule required him to submit the dispute to a judge so that his objection or dissatisfaction with the record would be attended to and he would then certify the record.

Had counsel reverted to sub rule (9) he would have saved his client the costs of this application and probably the appeal would have been heard by now.

Advocate Trengove who argued for applicant took a non-confrontational stance which in my view was commendable. He alluded to the fact that the dispute could easily have been resolved by reference to the procedure in the rules. According to the rules where there is a dispute or disagreement such should be referred to a judge for directions. He argued that the penalty built in only comes into play if one fails to inspect. In *casu* he acknowledged that the registrar did invite the parties to inspect in terms of the rules. In response there to applicant's legal practitioner went to the registrar's office and inspected the record. The legal practitioner was not satisfied with the record hence his letter to the registrar of 9 February 2007. There was then an event of which the legal practitioner was not aware of. In his opposing affidavit first respondent said that his office had sought the advice of KAMOCHA J. The judge had confirmed that the notes and documents applicant was insisting on to be included were not relevant. It would appear that armed with this the registrar re-invited the applicant to inspect the record within 48 hours failure of which the appeal will be deemed to have lapsed. In this re-invitation the registrar did not inform the applicant that a judge's view had been sought. To applicant, therefore, it was as if no advice had been sought. In that vein the applicant's legal practitioner in anger inscribed on the registrar's certificate what has already been referred to *Adv. Trengove* further submitted that without criticizing the registrar for seeking guidance from KAMOCHA J., that was nevertheless not an application under sub-rule 15(9). I find this stance apt. The first respondent, in any case, did not contend that applicant's legal practitioner was advised that his query had been referred to a judge. It was upon the applicant as a party to submit the dispute to a judge and not to hold the office of the registrar to ransom.

Further whilst it was within the applicant's rights to raise objections as it did, the language the legal practitioner chose to use was certainly unsavory. The legal practitioner chose to vent his anger at the registrar over his client's misfortune rather than revert to the rules for guidance.

It is my view that at that stage the applicant, faced with a possible penalty as

enunciated in the registrars letters, should have applied for directions from a judge in terms of rule 15(9) instead of inscribing unsavory remarks and accusations against the Registrar. Faced with such an attitude where one party says 'I won't sign till you do as I want' what should the registrar have done? It is at that stage the registrar chose to deem the appeal abandoned. In his opposing affidavit 1st respondent portrayed the final straw as thus 'The applicant's legal practitioner was invited and he made demands that were rightfully dismissed. When he came he only inscribed on annexure 'D' his insistence with the unreasonable demands. The Appeal's Office then sought directions from Justice KAMOCHA.

Upon being re-invited to inspect the record applicant's legal practitioner refused indicating that he will only do so if his demands were complied with. This resulted in the Appeal's Office considering the appeal 'deemed abandoned or having lapsed' (see para.11.2 and 11.3 of first respondent's opposing affidavit). Clearly the registrar's action/ 'decision' was as a result of applicant's refusal to fully comply with the rules of inspection.

All in all I am of the view that the registrar's letters were a concomitant result of applicant's legal practitioner's attitude. The legal practitioner chose a stance that was helpful neither to his client nor to the registrar's task.

The registrar having deemed the appeal abandoned we note that when applying for directions before GOWORA J. the fate of the appeal was not put in issue. All that the applicant sought was the inclusion of certain documents. Had applicant's counsel objectively and impartially applied his mind to the reality of the registrar's decision he would have realized that even if his prayer had been granted the decision taken by the registrar would not have automatically fallen off. I make these re marks to point out the need for legal practitioners to approach their cases with a sense of objectivity, impartiality and disinterest in order that they are not subsumed by their client's case. As was held in *Matamisa v Mutare City Council* 1998 (2) ZLR 439 at p.439 "A legal practitioner has a duty towards court as well as to his client. His duty towards court requires that he adopts a disinterested attitude in a case and remain in a position to give impartial and objective advice to his client." Had counsel heeded this he would not have fallen foul of rule 15(8b)

Rule 15(8b) provides that were the appellant has not inspected the record within the time given or extended the registrar of the High Court shall notify the registrar of that fact, and there upon-(meaning immediately there after) (a) the appellant shall be deemed to have abandoned his appeal. The registrar said he complied with this in its letter to applicant's legal

practitioner's dated 7th March 2007 wherein he wrote that "But as of today you have not signed the record and I am by copy of this letter advising the Supreme Court registrar accordingly."

The 'deemed to be abandoned' is a consequence of a party's failure to inspect in terms of the rules. Where such has occurred a party has to take steps to have the appeal re-instated if they are still interested in the appeal. In *casu* applicant sought a declaratory order to the effect that the letters by the registrar are null and void and that they be set aside. And that the registrar be ordered to prepare the record of appeal and forward same to the Supreme Court in terms of the rules.

In the circumstances as the applicant did not comply with the rules of inspection it cannot be said that the applicant cannot be deemed to have abandoned its appeal. The Registrar purported to act in terms of the rules where a party has not complied with the rules of inspection. If applicant felt the registrar had failed to properly act in terms of the rules of the Supreme Court or his decision was wrong the applicant should have brought the case on review for the registrar's purported decision to deem abandoned/lapsed to be reviewed.

Costs

The respondents asked for costs on a higher scale. First respondent in particular asked for costs *de bonis propriis* against Mr. Hussein. First respondent argued that Mr. Hussein should have known better that the registrar having made a decision such could only be taken on review as the registrar had become *functus officio*. He argued that this application was induced by Mr. Hussein's conduct which was not proper. First respondent went on to say that a reading of the applicant's founding affidavit and correspondence leading to this application gives the impression that Mr. Hussein seized upon the opportunity to reveal to this court his extreme dissatisfaction and displeasure at the judgment of Justice KAMOCHA. I tend to agree with first respondent on this. The language in the founding affidavit and in correspondence from Mr. Hussein show that he had lost all sense of objectivity as an officer of the court. There is so much verbiage with little or no relevance to the issues at hand. The letters to the registrar exhibit a worrying contemptuous attitude towards the registrar's office and a dangerous inclination to rubbish that office.

It is necessary to remind legal practitioners that as officers of court they have a duty

to uphold the dignity of the courts and the registrar's office in particular. Leveling unwarranted accusations against that office will not win a client's case. This is not to bar constructive criticism of that office. Such criticism should be based on facts and not on fanciful and misplaced understanding of that office's function. It is for the legal practitioners to ensure that their clients understand the role of that office As is evident in this case the registrar's contention that the documents applicant was insisting on were not relevant was adjudged to have been correct against the legal practitioner's avowed better judgment before his client.

Whilst accepting that costs be on a higher scale I am of the view that this may not be *de bonis propriis* against Mr. Hussein. In *Matamisa case (supra)* costs were so awarded because the application was totally without merit and was frivolous and vexatious. The legal practitioner was adjudged to have abused the legal process and had acted with *mala fides* and in a highly reprehensible fashion in bringing the application. This was aptly in line with what the Supreme Court held in *Techniquip* (*pvt) Ltd v Allan Cameron Engineering (pvt) Ltd 1994 (1) ZLR 246 (s*) that "An order that a legal practitioner pay costs *de bonis propriis* is only granted against legal practitioners in reasonably grave circumstances. Dishonesty, *mala fides*, willfulness or professional negligence of a high degree fall into this category. The critical factor to be determined before making such an order is whether justice demands that it be made..." In the present case whilst accepting that Mr. Hussein erred in his attitude/approach to the case I am not convinced that justice demands that he be so penalized.

Accordingly the application is dismissed with applicant to pay costs on an attorney and client scale.

Hussein Ranchhod & Co. applicant's legal practitioners

T*he Civil Division of the Attorney General's Office*, 1st, 2nd and 3rd respondents' legal practitioners

Dube Manikai & Hwacha, 4th respondent's legal practitioners

Costa & Madzonga, 5th respondent's legal practitioners.