RAY AND BRIAN ENTERPRISES (PRIVATE) LIMITED
versus
THE MINISTER OF MINES AND MINERAL DEVELOPMENT
and
THE PROVINCIAL MINING DIRECTOR
and
LARYSCOPE HEALTH CARE (PRIVATE) LIMITED
and
SCRAVIEN NYAMUCHENGWA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 7 February 2025 & 11 February 2025

Opposed Application Review-Ruling on Preliminary Point

Mr *T. Magwaliba*, for the applicant
Mr *F. Chimunoko*, for the 1st & 2nd respondents
Mr *T. Zhuwarara*, for the 3rd respondent
Ms *A. Mhlanga*, for the 4th respondent

MUSITHU J: This ruling is made pursuant to a preliminary objection raised by the third respondent's counsel at the commencement of oral submissions in this matter. The preliminary point was concerned with the propriety of filing the record of proceedings required in terms of r 62(5) of the High Court rules, 2021 (the rules), on the eve of the hearing of this matter.

The brief background to the matter is as follows. The applicant approached this court seeking the review of the first respondent's decision of: withdrawing the notice of intention to cancel the third respondent's certificate of registration of its milling site under registration number ME18: cancelling the certificate of registration of Kaukonde Tanyaradzwa Brian's block registration number 44957 and cancelling the certificate of registration of Scravien Nyamuchengwa's block registration number ME 348 G of Reef Serai A. The review was sought on the basis that the first respondent was actuated by bias and malice in the manner he made the decision. The decision itself was also dismissed as being grossly irregular for diverse reasons as

set out in the application. The applicant petitioned the court to set aside the decision of the first respondent.

The application was opposed by the first, second and third respondents. The third respondent pointed to the failure by the applicant to attach the record of the proceedings that it sought to have reviewed as being fatal to its application. That preliminary point was persisted with in the third respondent's heads of argument. The court was urged to dismiss the application for want of compliance with r 62(5) of the rules. This is the same point that Mr *Zhuwarara* for the third respondent pressed ahead with at the hearing before me.

The submissions and the analysis

Mr *Zhuwarara* submitted that pleadings and heads of argument by all the parties were filed before the record of proceedings which gave rise to the review had been submitted. The record of proceedings was only submitted under cover of a letter of 21 January 2025, when it ought to have been filed as far back as 6 September 2024. That record was only filed after the third respondent had raised an objection concerning its non submission. Mr *Zhuwarara* further submitted that contrary to the procedure set out in the rules, the record was submitted by the applicant instead of the first respondent. It was not even directed to the registrar but to the applicant. The record had not only been submitted late, but it was also uncertified and had been filed by the wrong party. Some minutes of the meetings held between the parties and the first respondent were allegedly missing from the record.

Counsel further submitted that the entire application was afflicted by an incurable defect, which called for the striking of the matter off the roll with costs in terms of Practice Direction 3 of 2013. As the *dominus litis,* the applicant was required by r 62(5) to ensure that there was compliance with the provision that required the submission of the record by the first respondent.

In response, Mr *Magwaliba* for the applicant submitted that the flaws alluded to by the third respondent did not render the application defective. It was not a requirement under r 62(5) of the rules that the record of proceedings be submitted at the time of filing the application for review. The failure to comply with r 62(5) did not undermine the application which was valid at the time of its filing. The record was only relevant for purposes of confirming the averments made by the parties at the hearings before the first respondent.

Counsel for the applicant referred to the case of *Zimpapers (1980) Ltd Workers' Committee & Ano v Musariri N.O.& Ors*[1], in which there was a complete failure to submit the record of proceedings of the Labour Court. In that matter, the court held that in the absence of a record of proceedings, the court had a discretion to postpone the matter pending the provision of the record or dismiss the application or grant any other relief. Mr *Magwaliba* further submitted that what made the applicant's position more tenable was that while the *Zimpapers* matter was concerned with the absence of a record, in the present matter the record of proceedings was already before the court. The applicant had been pushing the first and second respondents to have the record placed before the court.

The submission of the record of proceedings is governed by r 62(5) which states:

> "(5) The clerk of the inferior court whose proceedings are being brought on review, or the tribunal, board or officer whose proceedings are being brought on review, shall, within twelve days of the date of service of the application for review, lodge with the registrar the original record, together with two typed copies, which copies shall be certified as true and correct copies. The parties to the review requiring copies of the record for their own use shall obtain them from the official who prepared the record:
> Provided that it shall be the responsibility of the party seeking review to ensure compliance with this sub rule." (Underlining for emphasis)

The duty to submit the record of proceedings is in this case reposed on the tribunal whose proceedings stand to be reviewed. The record must be lodged with the registrar within twelve days from the date of service of the application for review on the said tribunal. It follows that the application for review does not have to be accompanied by the record of proceedings at the time that it is initiated. The record of proceedings is not a condition precedent to the launching of an application for review. Subrule 5 makes it the applicant's responsibility to ensure that the said provision is complied with. That provision does not oblige the applicant to avail the record of proceedings. It simply requires the applicant to take such steps as are necessary to ensure that the said record is placed before the court by the tribunal.

There is evidence on record that shows that there was communication between the applicant's legal practitioners and officials of the first respondent concerning the submission of the record to this court. The certificates of service of the application on record show that the application was served on both first and second respondents as far back as August 2024, and the

[1] 2007 (1) ZLR 288 (SC)

record of proceedings ought to have been submitted to the registrar around early September 2024. The record of proceedings was nevertheless placed before the court in time for the hearing of the matter. The third respondent contends that the record was not certified as required by the rules. It also contends that some of the minutes of the meetings that were held between the first respondent and the parties were missing. There is the further argument that in terms of procedure, that record ought to have been placed before the registrar by the first respondent and not the applicant.

Going by the dictum in the *Zimpapers* matter, this court is endowed with discretion to determine the next course of action where there has been non-compliance with r 62(5). The court can postpone the matter pending the provision of the record or dismiss the application outright or grant any other relief as the circumstances of the case may demand. In the *Zimpapers* matter, the court found that the dismissal of the matter owing to the unavailability of the record of proceedings was not grossly unreasonable because the issue had been raised when the matter was previously postponed. The record had still not been availed when the hearing resumed. The court further noted that the applicant could have approached the court for a *mandamus* to compel the registrar of the inferior court to prepare and avail the record.

The circumstances of the *Zimpapers* matter clearly justified the decision by the court to dismiss the application because the issue had previously been raised when the matter was earlier postponed. There was still no record before the court. In the present matter, although the issue of the record was raised in the third respondent's opposing papers and heads of argument, the record was already before the court at the time the matter was set down for hearing. The mere fact that the record was not submitted by the applicant instead of the registrar of this court does not in my view render the proceedings irregular. The same goes for the failure to submit certified copies of the record. What is critical is whether the record is a reflection of the proceedings that took place at the tribunal. The same tribunal before which the proceedings took place is the same tribunal that submitted the record through the applicant. It was not suggested to the court that the record did not correctly reflect what transpired at the tribunal.

In the court's view, the preliminary point should not have been taken in the manner it was done on behalf of the third respondent. Preliminary objections must be raised sparingly, and ideally reserved for those instances where the point is one that is dispositive of the matter before the court. The preliminary point raised herein was not one that was dispositive of the matter. this matter was

ripe to be argued. The alleged imperfections afflicting the record of proceedings could simply be cured by adjourning proceedings and allowing the parties to address them so that the matter is argued on the merits. Interruptions of this nature which tend to delay the determination of matters on the merits do not bode well with the efficient administration of justice and the need to achieve finality in litigation. Practitioners must, in keeping with the time honoured values of professional courtesy, learn to resolve some of these completely innocuous disputes amicably for the sake of progressing the resolution of the real dispute between the parties on the merits.

It is the court's view that the defects complained of in the record of proceedings can be readily attended to through a short postponement of the matter so that the matter can be argued on the merits within the shortest possible time.

Resultantly it is ordered that:

1. The first and second respondents shall, in consultation with the applicant, lodge with the Registrar the record of proceedings which complies with the provisions of r 62(5) of the High Court Rules, 2021, within five days from the date of this order.
2. The applicant shall serve certified copies of the record on all the respondents within 48 hours of the lodging of the record with the Registrar in terms of paragraph (1) above.
3. The matter shall thereafter be set down for hearing on a date to be agreed upon by the parties in consultation with the Registrar before the end of the term.
4. Costs shall be in the cause.

MUSITHU J: ……

Warara & Associates, applicant's legal practitioners
Civil Division of the Attorney General's Office, first and second respondents' legal practitioners
Kadzere, Hungwe & Mandevere, third respondent's legal practitioners