KENCOR HOLDINGS (PRIVATE) LIMITED
versus
TARIRO NDLOVU N.O. MINING COMMISSIONER
FOR MASHONALAND CENTRAL
and
SCREENON MINING (PRIVATE) LIMITED
and
NYANGU JOSSAM MANGERE
and
THE REGISTRAR OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 21 July & 26 October 2022

Opposed Application

Mr A Dracos, for the applicant
Mr *C Chitekuteku,* for the 1st respondent
Mr *T Sena,* for the 2nd and 3rd respondents
No appearance for the 4th respondent

DEME J: The application has been brought before this court in terms of Section 31 of the High Court Act [*Chapter 7:*06] as read with Rule 95 of the High Court Rules, 2021. The applicant is seeking the relief couched in the following way:

> "1. Within 10 days of the grant hereof the first respondent shall return to the fourth respondent the record dated 26 October 2020.
>
> 2. The fourth respondent shall set down for hearing case No. CIV"A" 43/20 within 10 days of receipt of the record from the first respondent.
>
> 3. The first respondent shall pay costs of suit on a legal practitioner and client scale."

The applicant and second respondent are companies duly incorporated in terms of the laws of Zimbabwe. Its legal practitioner Ms Njerere depose to the founding affidavit on behalf of the applicant. The first respondent is the Mining Commissioner for Mashonaland Central and is cited in his official capacity. From the papers filed, there are no further particulars for the third respondent. The fourth respondent is the Registrar of this court.

Save as may be highlighted, facts in this matter seem to be common cause. According to the applicant, sometime in 2019, the first respondent heard the mining dispute between the applicant, on one hand and the second and third respondent on the other hand.

The first respondent did not deliver his determination in the matter which prompted the applicant to approach this court, under case number HC 9285/19, seeking an order compelling the first respondent to hand down his determination in the matter. Consequently, the application under case number HC 9285/19 was granted on 11 December 2019 in favour of the applicant.

On 20 January 2020, the first respondent delivered a determination on the mining dispute. Dissatisfied by the first respondent's determination, the applicant appealed against the decision under CIV (A) 43/2020. On 12 August 2020, the applicant's counsel, Ms Njerere wrote to the first respondent inquiring about the costs and time required by the first respondent to prepare the record of proceedings for the appeal. In his response, the first respondent highlighted that he was not aware of what he is required to do in terms of the law. According to the applicant, the first respondent highlighted that he was going to supply the applicant's legal practitioners with the relevant correspondence in the matter. The applicant averred that its legal practitioners went on to prepare the index to the record of proceedings based on the documents in their possession and subsequently submitted the index to the first respondent who made alterations to the index. The applicant's legal practitioners made some corrections based on the alterations made by the first respondent and submitted the bound record of proceedings to the first respondent for signature.

The applicant's legal practitioners later served upon the parties a record that was signed by the first respondent. The fourth respondent called upon the parties to file their Heads of Argument. On 17 November 2022, the 2nd and third respondents wrote to the fourth respondent alleging that there were some documents missing from the record. The applicant objected to the request of the second and third respondents through the letter dated 20 November 2020. Consequently, the fourth respondent returned the record to the first respondent for further action. According to the applicant, the fourth respondent did not act in terms of the law by returning the record to the first respondent. The applicant wrote to the fourth respondent advising him to set the matter down for hearing using the record which was signed by the first respondent in October 2020.

The application was opposed by the second and third respondents. They averred that in terms of Rule 9(2) of the High Court *(Miscellaneous Appeals and Reviews)* Rules, 1975, the first respondent was required to prepare a correct record of proceedings for submission to the fourth respondent. The second and third respondents further affirmed that where preparation of the record was impossible, the first respondent was required to lodge with the fourth

respondent reasons for the decision. The second and third respondents further maintained that the record which was submitted to the fourth respondent was not a true and correct record as it did not contain all the documents. They also asserted that in terms of Rule 95(16) of the High Court Rules, 2021, where the first respondent has no formal record of proceedings, the fourth respondent has got powers to direct the first respondent to submit additional documents relating to the dispute which the fourth respondent considers necessary. Thus, according to the second and third respondents, the fourth respondent acted in terms of the law by returning the record to the first respondent.

The second and third respondents also claimed that the appeal must not proceed based on the record dated 26 October 2020 as, according to their belief, this record is not a true and correct record. The second and third respondents additionally averred that the record of proceedings is supposed to be prepared by the first respondent and not the applicant's legal practitioners. They also maintained that when the applicant's legal practitioners prepared the record of proceedings, they did not consult them. They further alleged that the record of proceedings only advanced the interests of the applicant as they did not participate in the preparation of that record. According to the second and third respondents, it is unjust to compel the first respondent to return an incomplete record to the fourth respondent. The second and third respondents motivated the court to dismiss the present application.

In its answering affidavit, the applicant averred that the documents which the second and third respondents seek to be part of the record were never part of the record. The applicant asserted that its legal practitioners objected to the production of the documents by copy of the letter dated 20 November 2020. The applicant further alleged that its legal practitioners only prepared the index to the record based on the documents which were in possession of the first respondent. The applicant also averred that in March 2019 when they appeared before the first respondent, the second and third respondents did not produce the documents which they want to be part of the record.

The first respondent, at the time of the hearing of this matter was automatically barred by operation for failing to file his opposing papers. Though the first respondent was represented at the hearing, the counsel for the first respondent, Mr *Chitekuteku*, did not make an oral application for the upliftment of the bar. Thus, the first respondent remains barred. It is an established practice that the court cannot *mero* motu uplift the bar. Neither can this court condone the departure from its Rules in the absence of the application being made by the affected party. My view is fortified by the case of The President of Zimbabwe

Robert Gabriel Mugabe N.O and Ors v *Morgan Richard Tsvangirai*[1], where the court postulated that:

> "I am aware that r 4C of the High Court Rules authorises the High Court to depart from its own Rules. Thus, if the Prime Minister had admitted his failure to comply with r 18 and had sought condonation for such failure to comply with r 18 of the High Court Rules, the court *a quo* could, if it was so persuaded, have granted condonation for such failure to comply with r 18 of the High Court Rules. It, however, is a misdirection for the court to condone a departure from the High Court Rules in the absence of an application for such condonation. *In casu*, the Prime Minister contended that he did not need such condonation because r 18 of the High Court Rules was superfluous or invalid. Where a litigant adopts such a stance condonation cannot be granted by the court *mero motu*."

The issues for determination are:

(a) Whether there is any basis for ordering that the first respondent should return to the fourth respondent the record dated 26 October 2020.

(b) Whether the fourth respondent acted in terms of the law by returning the record to the first respondent for further action.

In determining whether or not there is any basis for ordering the first respondent to return the record to the fourth respondent, it is critical to examine all surrounding circumstances leading to the preparation of the record dated 26 October 2020. It is common cause that on 12 August 2020, the applicant's legal practitioners wrote to the first respondent inquiring his costs and time needed to prepare the record of proceedings. The letter of 12 August 2020 reads as follows—

> "We refer to our client's appeal on 11 February 2020. We notice that the record still has not been filed with the Registrar of High Court. Please advise the bearer hereof of your cost for preparing the record and funds permitting he will then pay. Please also advise how long you will require to prepare the record so that client can uplift it for filing.
>
> We are looking forward to hearing from you."

It is further common cause that the first respondent highlighted that there was no proper record prepared. The first respondent, through the letter dated 2 September 2020, responded to the applicant's legal practitioners in the following way—

> "We write in this instance regarding the record of proceedings for the Kingdom Claim, registration number 22939BM.
>
> We regret to inform you that after thorough search we could not find information required on the record of proceedings. We however, could only avail all the correspondence regarding the case, which we believe has been provided for to you to date."

[1] SC21/17.

It is not disputed that the applicant's legal practitioners went on to prepare the index of the record of proceedings which they shared with the first respondent. It is common cause that the second and third respondents never participated in preparation of the record of proceedings. The applicant did not explain, through its affidavits or through written and oral submissions, why it failed to consult the second and third respondents during the preparation of the record of proceedings.

It is clear from the first respondent's letter of 2 September 2020 that there was no formal record of proceedings. The first respondent only had correspondence. In my view, the record of proceedings was only prepared at the instance of the applicant's legal practitioners. Since there was no proper record of proceedings, it was only proper and prudent for the parties to proceed as such in accordance with Rule 9(1)(b) of the High Court (Miscellaneous Appeals and Reviews) rules, 1975. Rule 9 of the High Court (Miscellaneous Appeals and Reviews) Rules, 1975 provides as follows:

> "(1) within fifteen days of receipt of a notice, the tribunal or officer concerned shall—
>
> (a) if a formal record of the proceedings was kept, lodge it with the registrar;
>
> (b) if no formal record of the proceedings was kept, lodge with the registrar reasons for the decision concerned, together with all papers relating to the matter in issue.
>
> (2) Where a formal record is lodged, the provisions of Order 33, rule 260 of High Court of Zimbabwe Rules, 1971, shall, mutatis mutandis, apply.
>
> (3) Where no formal record is lodged, the registrar may require to be submitted such additional copies of the papers as he deems necessary."

It is my considered view that the applicant proceeded under the wrong assumption that the first respondent had, in its custody, a formal record of proceedings. Accordingly, I find no basis for ordering the first respondent to return to the fourth respondent the record that was irregularly prepared at the instance of the applicant who has no duty to prepare such record. Mr *Sena* correctly argued that if the order sought is granted in its current form and shape, this would encourage the first respondent to defy the directive issued by the fourth respondent.

The applicant argued that the requirements of the present application for mandatory interdict have been met. He referred the court to the cases of *Tribac (Pvt) Ltd* v *Tobacco Marketing Board*[2], *Lipschitz* v *Wattrus N.O.*[3] and *Kaputuaza & Anor* v *Executive Committee*

[2] 1996 (2) ZLR 52 (S)

[3] 1980 (1) SA 662 (T)

of Administration of Hereros and Ors[4]. Mr *Dracos,* on behalf of the applicant submitted that the following are the requirements of a mandatory interdict:

(a) A clear right.

(b) An injury actually committed.

(c) The absence of similar protection.

Although a clear right, which the applicant is entitled to, may be established in the sense of access to justice, it is difficult for the court to make a finding that an injury has been suffered by the applicant as a result of the fourth respondent's action of returning the record to the first respondent for inclusion of certain documents. According to the counsel for the second and third respondents, Mr *Sena*, the dispute between the parties is for the ownership of mining claims. He further submitted that the documents which the fourth respondent requested from the first respondent are within the custody of the first respondent. Mr *Sena* referred the court to the case of *Dube* v *Moyo and Ors*,[5] where the court postulated that compliance of an officer with the statutory duty may be enforced through mandatory interdict which may have the following two purposes:

(a) To compel the performance of a specific statutory duty;

(b) To remedy the effects of unlawful action already taken.

In light of the fact that the court has already made a finding that the first respondent had no formal record of the proceedings, it is prudent that all relevant documents be part of the record. This will help the court of appeal to properly ventilate the issues for determination. In my view, the applicant does have other remedies available to it. The remedy pursued by the applicant is not the best remedy as it seeks to deny the second and third respondent's access to justice through insisting that the documents by the second and third respondents should not form part of the record. The applicant surreptitiously identified its own documents which it considers necessary for its case. The second and third respondents should not be denied an opportunity to identify their key documents for inclusion in the record. In my view, there is no prejudice that may be suffered by the Applicant if the documents requested become part of the record. On the contrary, the second and third respondents may stand to suffer incurable prejudice if such documents are not part of the

[4] 1984 (4) SA 295 (SWA).

[5] HC1133/10.

record. If the documents are not genuine, the applicant may make its own submissions at the time of the hearing of the appeal.

For the purposes of determining whether or not the fourth respondent acted lawfully, it is critical to examine the duties of the fourth respondent. Herbstein and Van Winsen, quoted by the Supreme Court in the case of *Mutasa and Anor* v *Registrar of Supreme Court and Ors*[6], define the duties of the Registrar in the following way:

> "The role of the registrar is set out by the authors *Herbstein and Van Winsen, The Civil Practice of Superior Courts of South Africa, (*3rd ed, Juta and Co Ltd, Cape Town) at p.35 as follows:
>
> > 'the Registrar is an official of the court, responsible for the smooth functioning of the court and is charged with multifarious duties which duties are administrative in nature. For the purposes of clarity, these duties include but are not limited to the issue of process, recording, preserving and directing the flow of all documents filed by the litigants. The Registrar is also responsible for the setting down of cases and issuance of court orders. It is common cause that the Supreme Court is a court of record and the Registrar is the custodian of all court records. Case management which includes maintaining records and scheduling hearings is also the Registrar's prerogative.'"

In the case of *Mutasa and Anor* v *Registrar of Supreme* Court (*supra*), the court made the following observations:

> "In instances where the registrar has been granted quasi-judicial functions these are specifically spelt out either in the relevant legislation or the rules of this court. For instance where a party is called upon to inspect a record and he fails to do so within the prescribed time r 15 (8a) of the Supreme Court Rules specifically authorizes the registrar to deem the appeal abandoned. The rule also specifies the remedy that the party has against the decision of the registrar."

Thus, Rule 9(3) of the High Court (Miscellaneous Appeals and Reviews) Rules, 1975 confers, upon the fourth respondent, quasi-judicial functions of demanding additional documents as he or she may consider necessary if no formal record of proceedings was prepared by the first respondent. The fourth respondent acted in accordance with his prescribed duties. He received the letter from the second and third respondents requesting that certain documents be made part of the record. After carefully assessing the request, the fourth respondent used his discretion to make a direction that the first respondent includes, in the record, the documents requested by the second and third respondents. In my view, the fourth respondent, in so doing, did act lawfully.

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[6] SC27/18.

The second and third respondents filed their counter application praying for the following relief:

> "1. The application be and is hereby granted.
> 2. The second respondent is hereby ordered, within 30 days from the date of this order to prepare and lodge with the third respondent a record in terms of Rule 95(14) and (16) of the High Court Rules, 2021, which record shall contain the following documents:
> (i) notice of forfeiture of first respondent's Kingdom mining claim;
> (ii) Certificate of Registration for Kingdom 29-38 issued to the first applicant;
> (iii) Certificate of Registration for Kingdom 45, 46, 48 and 49 issued to second applicant;
> (iv) A copy of Inspection Record Book which contains the Inspection Certificates for Kingdom mining claim from 2007 to date;
> (v) Mining Returns filed by the Applicants;
> (vi) Permit to transport order(*sic*) granted to first applicant dated 17 September 2014, and;
> (vi) Authority to dispose of gold granted to first applicant dated 28 October 2013.
> 3. Third respondent shall set down for hearing case No. HC CIV (A) 43/20 within ten days of receipt of the record from the second respondent.
> 4. There shall be no order as to costs."

In their counter-application, the second and third respondents become first and second applicants respectively while the applicant in the main application becomes the first respondent. The first respondent in the main application becomes the second respondent while the fourth respondent becomes the third respondent in the counter-application. Thus, the draft order of the counter-application should be construed in that context. Thus, for purposes of the counter-application, I will address the parties as such.

In the counter-application, the first and second applicants seek an order compelling the second respondent to prepare and lodge with the third respondent a true and correct record related to the dispute between the applicants and the first respondent. According to the applicants, some time in 2009, the dispute arose between the first applicant and the first respondent regarding claim number 22939BM otherwise known as Kingdom Mining Claim. The second respondent, on 9 December 2009, delivered a ruling in favour of the first applicant. Part of the 2009 ruling is as follows:

> "However, a perusal of our records reveals that block number 22939BM registered in favour of Kencor Holdings P/L was forfeited on 18/07/07 because of non-payment of renewal fees. The last inspection fee was paid on 30/06/05.
>
> Screenon Mining P/L registered 10x10 gold reef claim on 21/09/2007.
>
> Accordingly, Kencor Holdings P/L have no grounds to challenge title given to Screenon Mining P/L. In addition the letters to inquire about the missing cards were only done after the mining claims had been forfeited.
>
> In conclusion, Kencor Holdings P/L do not hold any mining rights over the forfeited claims and should therefore not interfere with Screenon Mining P/L."

It is the case of the applicants that the first respondent never challenged the 2009 decision of the second respondent. The applicants also averred that despite this ruling the first respondent went on, under case number HC 9285/19, to seek an order compelling the second respondent to make another ruling. The application under case number HC 9285/19 was ruled in favour of the first respondent. According to the applicants, the second respondent, on 2 December 2019, made a ruling which was similar to the 2009 ruling.

The applicants claimed that after appealing against the decision of the second respondent under case number HC CIV (A) 43/20, the first respondent, unilaterally and without the involvement of the applicant, prepared a record which the second respondent lodged with the third respondent. According to the applicants, the record prepared by the first respondent is not the true and correct record. They further maintain that their legal practitioners wrote the letter to the third respondent objecting to the accuracy of the record which saw the third respondent returning the record to the second respondent so as to incorporate the documents highlighted by the applicants. According to the letter of 17 November 2020 penned by the applicants' legal practitioners, they highlighted that the following documents were claimed to be missing from the record:

i. notice of forfeiture of first respondent's Kingdom mining claim;
ii. Certificate of Registration for Kingdom 29-38 issued to the first applicant;
iii. Certificate of Registration for Kingdom 45, 46, 48 and 49 issued to second applicant;
iv. A copy of Inspection Record Book which contains the Inspection Certificates for Kingdom mining claim from 2007 to date;
v. Mining Returns filed by the applicants;
vi. Permit to transport ore (wrongly captured as "order" in the draft order for the counter application) granted to first applicant dated 17 September 2014;
vii. Authority to dispose of gold granted to first applicant dated 28 October 2013;
viii. Decision delivered by the second respondent on 9 December 2009.

According to the applicants, the counter-application is motivated by the need to ensure that the appeal court should have critical documents for it to be properly informed of the nature of the dispute between the parties. Without the documents highlighted, the applicants argued that they will be heavily prejudiced.

The counter application was opposed by the first respondent. The basis for the opposition of the counter application was that the first and second applicants never, at the

hearing before the second respondent, produced such documents which they seek to be part of the record.

According to the first respondent, the parties were invited to make submissions and documents at the hearing of the dispute before the second respondent but the applicants never submitted any document which they seek to submit now. The first respondent also submitted that the record that it prepared contained all the documents produced at the hearing of the dispute by the second respondent. The first respondent further alleged that it prepared the record in order to expedite the finalisation of the dispute between the applicants and the first respondent. It is the first respondent's case that it continued with the paying of the inspection fees up to 2018 to the second respondent. The first respondent further argued that if the mining claim had been forfeited, there was no need for the second respondent to continue receiving inspection fees from the first respondent. The first respondent also averred that by copy of the letter of 3 February 2020 it requested, from the second respondent, the detailed information and the file in question for perusal. According to the first respondent, by requesting the documents that were never part of the record, the applicants had acted in bad faith.

The first respondent raised a point in *limine* to the effect that the applicants ought to have applied for review of the decision of the third respondent. The applicants opposed the point *in limine* and correctly submitted that the counter application in the form of mandatory interdict was the best available remedy and relied upon the case of *Dube* v *Moyo* (*supra*). Accordingly, the point *in limine* is without merit and consequently stands dismissed.

For purposes of the counter application, the following are the issues for determination:

(a) Whether or not the counter application is merited.

(b) Whether or not the first respondent's defence to the counter application has merits.

In para 6 of its opposing affidavit to the counter application, the first respondent averred that the first respondent's legal practitioners prepared the record. Part of para 6 is as follows:

> "The record that the first respondent's legal practitioners prepared consists of all the documents that were available to the first respondent pertaining to the dispute. They only did so to try and expedite the conclusion of this long outstanding matter."

It is apparent that the first respondent, on oath, affirmed that it, through its legal practitioners prepared the record of proceedings. This position is diametrically opposite to

what the first respondent averred in the founding affidavit of the main application. In its founding affidavit, the first respondent averred that its legal practitioners only prepared the index of the record guided by the documents produced by the second respondent. This unexplained departure from its earlier position leaves the court with more questions than answers. As early as February 2020, the applicant wrote to the second respondent requesting for the information that it could use for purposes of compiling the record of proceedings. The letter of 3 February 2020 addressed to the second respondent penned on behalf of the first respondent by Afareshe Gambiza is as follows:

> "I have been duly mandated by the Directors of Kencor Management Services (Pvt) Ltd, to represent the said company in all cases (including this matter).
>
> It is in our business interest to be availed with detailed information that can help us to have a full appreciation on all what has been happening on this claim, since we had been paying for the renewals for all along but only to be advised of certain developments that happened in 2007.
>
> We are looking forward to your usual corporation (sic) and avail the file for our perusal and retrieval of the much-needed information."

As highlighted before, there was no formal record of proceedings in the custody of the second respondent. Thus, the counter application is premised on the basis that there was no proper record of proceedings as submitted by Mr *Sena* on behalf of the applicants. A finding had already been made to the effect that the third respondent's directive was not unlawful as the third respondent has such powers to make such directive. By contrast, the first respondent sought to clandestinely compile the record of proceedings while the applicants did openly, through the letter addressed to the third respondent and copied to the third respondent's legal practitioners, request for the documents which they considered to be missing from the record. In the premises, the counter application is merited as it seeks to ensure that key documents be part of the record. Such documents will enable the appeal court to have an appreciation of the history of the dispute and be able to properly interrogate the issues before it. Without these documents, the appeal court will find it difficult to trace the background of the dispute. It is in the interest of justice that the counter application be granted.

In its defence, the first respondent insisted that the second respondent certified the record some time in October 2020 and that such record should be the sole record for the purposes of the appeal. The first respondent also submitted that the documents requested by the applicants should not form part of the record as such documents were never produced at the hearing of the mining dispute before the second respondent. I find no merit in the first

respondent's defence as the second respondent did not keep proper record of the proceedings of the hearing.

Consequently, it is ordered as follows:

(a) The main application be and is hereby dismissed.

(b) The counter application be and is hereby granted.

(c) The second respondent, in the counter application, is hereby ordered, within 30 days from the date of this order to prepare and lodge with the third respondent, in the counter application, a record in terms of Rule 95(14) and (16) of the High Court Rules, 2021, which record shall contain the following documents:

(i) Notice of forfeiture of first respondent's Kingdom mining claim;

(ii) Certificate of Registration for Kingdom 29-38 issued to the first applicant;

(iii) Certificate of Registration for Kingdom 45, 46, 48 and 49 issued to second applicant;

(iv) A copy of Inspection Record Book which contains the Inspection Certificates for Kingdom mining claim from 2007 to date;

(v) Mining Returns filed by the applicants;

(vi) Permit to transport ore granted to first applicant dated 17 September 2014;

(vii) Authority to dispose of gold granted to first applicant dated 28 October 2013.

(d) The third respondent, in the counter application, shall set down for hearing case No. HC CIV (A) 43/20 within ten days of receipt of the record from the second respondent in the counter application.

(e) There shall be no order as to costs.

Honey and Blanckenberg, applicant's legal practitioners
Civil Division, first respondent's legal practitioners
Chimuka Mafunga, second and third respondents' legal practitioners