SANDAWANA MINES (PRIVATE) LIMITED
versus
TARIRO NDHLOVU N.O
and
AVOSEH INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 5 & 28 September 2023

Application for review

L Uriri, for the applicant
No appearance for 1st respondent
L Madhuku, for the 2nd respondent

MUNGWARI J: The applicant is Sandawana Mines (Private) Limited, a company with limited liability and duly registered in terms of the laws of Zimbabwe. It is a mining concern. The first respondent is Tariro Ndhlovu. He is cited in his official capacity as the Provincial Mining Director- Midlands Province. He is specified as the official who made the decision which the applicant seeks to impugn. The second respondent is Avoseh Investments (Private) Limited, an entity whose details are not known except that it is a holder of a mining claim.

Brief background

The Applicant's mining blocks were prospected, pegged and registered in May 1964 giving it exclusive mining rights to approximately 3878 hectares of land situate in Mberengwa District. Within the same area, the applicant additionally holds a valid mining claim called Lith 15 (GM8172). For expediency, I will refer to the area to which the applicant lays claim as the Sandawana mining area. In October 1986 the Ministry of Mines reserved the Sandawana Mining area against prospecting. That reservation notice subsisted until 30 September 2022 when it was revoked. Another notice against prospecting in the same area was however issued on 16 November 2022. During the period between 30 September 2022 and 16 November 2022 when the prospecting restriction had been lifted, the second respondent obtained a prospecting license. It pegged and registered Sandawana AV8 Mine (Registration No 1733BM) (hereinafter

referred to as Avoseh claim). That registration went through on the same day that the latest prohibition against prospecting in that area was reinstated on 16 November 2022. The applicant and the second respondent are both extracting lithium ore from their respective claims.

Applicant's case

The applicant argues that, the second respondent's Avoseh claim was pegged and registered within its mining area and that it only became aware of this when it noticed that the second respondent was extracting lithium ore within its mining area. It registered a complaint with the Mining Commissioner's office which in turn invited both parties to appear before the first respondent for a hearing. On 24 April 2023, the first respondent purportedly made a determination on the dispute. It is that determination that the applicant says is irregular and seeks this court to review. In pursuance of that objective, the applicant filed this application in terms of s 27 of the High Court Act [*Chapter 7:06*] as read with r 62 of the High Court Rules 2021(The Rules).

The applicant's contention is that the first respondent's decision effectively validated the illegal prospecting, pegging and registration of the second respondent's Avoseh claim within its (applicant's) Sandawana mining area. That decision directed both the applicant and the second respondent to operate within the areas defined by their disputed coordinates. It also instructed that the applicant should be confined to the coordinates which it supplied and should not withdraw them except with full explanations and reasons for withdrawal of the coordinates.

The Applicant challenges the determination by the first respondent on eight grounds. Many of the grounds are long and repetitive. In essence there appear to be only four grounds. I discerned those bases to be absence of jurisdiction, gross irregularity, gross unreasonableness or irrationality and interest in the cause particularly bias and hostility.

In detail, the applicant stated that the determination made by the first respondent is *ultra vires* the provisions of the Mines and Minerals Act [*Chapter 21.05*] (hereinafter the Act) as the first respondent did not have jurisdiction to entertain the matter. Its view is that there is no provision in the Act which gives power to the Provincial Mining Director to make any determination in respect of mining disputes. Put differently, the applicant alleges that the office of a Provincial Mining Director does not exist in terms of the Act. It is unknown and needless to say does not therefore have any statutory authority. Any decision which it purportedly makes can only be a nullity. The applicant further argues that it follows from the above that it is not

the Mining Commissioner's court which determined the dispute. If it was the decision remains flawed in that the proceedings were not commenced by the issuance of a summons in clear contravention of the provisions of the Act. Further, the applicant also avers that the first respondent's decision is grossly irregular in that he failed to make a finding which terminates second respondent's interest in Avoseh claim because the claim was registered in an area which was not open for prospecting and pegging. The ground survey report clearly shows that second respondent's Avoseh claim which was only registered on 16 November 2022, was pegged within the applicant's mining area which had been registered way before that date. The applicant also argued that the first respondent ignored the factual findings of the survey in making the determination as well as the rights of the prior pegger which take pre-eminence over the rights of a subsequent pegger. The first respondent, so continued the argument, ought to have made a finding that the first respondent encroached onto the applicant's mining area. Its registration was therefore liable for cancellation.

On the point of gross unreasonableness, the applicant's argument was that the first respondent acted in a grossly unreasonable and irregular manner when he placed reliance on unverified and informally submitted coordinates. To this effect the applicant attached a supporting affidavit from its consultant a Dr. Mabasa Temba Havadi. That consultant alleged that he had sent unsigned provisional coordinates to the first respondent via a social media platform called whatsApp. He had even made a note to the first respondent to get correctly surveyed lease boundary coordinates from the Surveryor General's Department. Dr Havadi said the coordinates that he submitted on behalf of the applicant were wrong as they were not verified by the Ministry's survey department and the first respondent should have disregarded them in the face of a ground survey report which he then obtained. He instead disregarded a survey report compiled pursuant to a ground verification exercise which was attended to by both parties and the ministry officials. According to the applicant, there was no basis shown for taking into account the wrong coordinates and on the basis of the apparently erroneous coordinates to then make a finding that the applicant and the second respondent must confine themselves to the areas defined by those unofficial and unverified boundaries.

On the issue of bias, the applicant argued that the first respondent acted with apparent bias in favour of the second respondent. It believed that the determination that was made on coordinates which were known to be incorrect supported that contention. In addition, it argued that the first respondent acted with extreme hostility towards it. That bias, so it said, became more pronounced when regard is had to the poorly disguised ploy where the reservation against

prospecting in the Sandawana mining area was lifted for approximately six weeks just to allow the second respondent to register its claim in the applicant's mining area. Immediately after, in fact on the same day that the second respondent registered its Avoseh claim the reservation against prospecting was reinstated. In the applicant's eyes these were fraudulent shenanigans aimed at favouring the second respondent to the applicant's financial detriment. It is against the above background that the applicant seeks the following order.

IT IS ORDERED THAT:

1. That the application for review be and is hereby granted with costs on the higher scale of attorney and client.
2. That the 1st Respondent's determination dated 24th April 2023 be and is hereby set aside.

The application was opposed by both the 1st and 2nd respondents.

First respondent's case

In opposing the application, the first respondent, Tariro Ndhlovu, the Provincial Mining Director for Midlands Province who heard and determined the dispute and whose determination is the subject of this application stated that he had rendered the determination in terms of his duties as Provincial Mining Director. He claimed that he was appointed by the Permanent Secretary for the Ministry of Mines and Mining Development and that he was acting under delegated authority from the Permanent Secretary who is the Mining Commissioner in terms of s 341 of The Act. The first respondent further alleged that the applicant attended the hearing upon his invitation and consented to the resolution of the dispute in terms of s 345 of the Act. In his own words, he said he was surprised that after consenting to the jurisdiction of the Provincial Mining Director, the applicant:

> "Rushed to the Court making frivolous accusations and insinuations about the lack of jurisdiction of the Provincial Mining Director, to whom they have accepted everything including the said annual inspections."

He dismissed the applicant's arguments in this application as "mere noise making" simply because the outcome did not favour it. He was adamant that there is no evidence of gross irregularity or unreasonableness in this decision-making process. He added that the decision itself is well articulated and sound at law. He also confirmed having used the coordinates that were availed by the applicant even though the applicant had sought to withdraw the coordinates for Lith 15. In his view, the first respondent was convinced that the applicant wanted to exercise his "prerogative willy-nilly" the effect of which was to change the location of the mining block. The attempt by the applicant to submit different lists of

coordinates on not less than three occasions could not be condoned as the Government initiative was likely to be held in abeyance due to the applicant's indecisiveness. He denied any involvement in the lifting of the reservation order or its reinstatement. He explained that the question of reservations against prospecting was the domain of the Attorney General acting on the recommendations of the Permanent Secretary for the Ministry of Mines and Mining Development. As such, so the argument went, the registration of the second respondent's Avoseh claim was above board. He passionately defended his decision. He went to great lengths in his attempt to convince the court that he had jurisdiction to deal with the matter and that he had not erred in making the determination that he did. His notice of opposition was punctuated with portions which were set in bold print and were underlined presumably for emphasis. It contained a good measure of intemperate and denigrating language against the applicant. It appeared that he personalised the issues. That would no doubt go against the expectations of neutrality that a provincial mining director must be viewed with given his role in the administration of the Mines and Minerals Act. I will return to deal with these issues later in the judgment.

Second respondent's case

The second respondent raised a single preliminary objection to the effect that the applicant had approached the court with dirty hands because it had failed to comply with s 51 of the Act which mandates a holder of mining rights to keep and maintain beacons. It however did not pursue the point *in limine* in its heads of arguments. The inference which I drew was that the objection must have been abandoned after the applicant filed its answering affidavit.

On the merits, the second respondent sought to ride on the coattails of the first respondent. It also alleged that there were no irregularities perceived in the procedure and determination issued by the first respondent. It added that the first respondent, had the powers to determine such matters because he is an appointed functionary of the Ministry of Mines in terms of ss 341-345 of the Act, and that he is capable of making decisions in disputes of this nature which are valid at law. Further it argued that the applicant had on its own volition signed the dispute resolution consent form which illustrated its acceptance of the first respondent's jurisdiction. The second respondent rounded off that argument by stating that the office of the Provincial Mining Director is recognized at law and its determinations are lawful.

Further the second respondent denied playing any role in the issuance of government gazettes relating to the imposition and lifting of reservation orders against prospecting in the area under dispute. It stated that it is among the many who benefited from the window of

opportunity which had been opened. The allegations of conspiracy cannot therefore be true. The registration and acquisition of its claim was above board and the applicant had not produced any evidence to the contrary. The second respondent further made the point that the applicant had failed to satisfy the requirements for the grant of an application for a review because it failed to provide evidence of lack of jurisdiction, bias or gross irregularity.

Inevitably, in its answering affidavit, the applicant took great exception to the energy which the first respondent expended and the vitriol which he directed at the applicant in his defence of the determination which he made. The applicant was of the view that in review proceedings, where allegations of procedural impropriety or bias are made, the presiding officer whose conduct is in question may if he wishes, file an affidavit only to clarify such matters as he may want to clarify and not to descend into the arena to the extent of rendering assistance to the second respondent as did the first respondent. That in the applicant's view is further proof of the first respondent's bias against it. The applicant further averred that the question of whether it failed to object to the first respondent's jurisdiction or consented to it is immaterial because neither action could confer jurisdiction on the first respondent if he did not have any. It maintained its argument that in presiding over the Mining Commissioner's court, the first respondent sat as a Provincial Mining Director and not as a Mining Commissioner contrary to the provisions of the Act.

The applicant and the second respondent filed their heads of argument as required. The first respondent did not. The matter was set down for hearing on 19 July 2023. On 30 June 2023 the applicant, mindful that it bore the responsibility to ensure that the record of proceedings was placed before the court authored a letter to the first respondent reminding him of the need to comply with the rules and to ensure that he lodged with the registrar two certified copies of the record. Despite the reminder nothing was availed. On 13 July 2023 a follow up letter was sent to the first respondent. It was copied to the registrar of this court. Despite the two reminders the record of proceedings was still not availed. At the hearing, the first respondent through his counsel, Mr *Chitekuteku* from the Civil Division was in attendance and undertook to file and serve the applicant as well as the registrar of this court, a true and certified record of proceedings on or before 31 July 2023. The undertaking morphed into an order of this court and the matter was postponed for that purpose. Unfortunately, the first respondent did not avail anything on 7 August 2023 as ordered. On 17 August 2023 he was again reminded by the applicant of the extant court order and that his conduct amounted to contempt of a court order. The strongly worded letters reminded first respondent through his counsel that he was

in contempt of court. They urged him to purge his contempt before the hearing. Those pleas fell on deaf ears. The first respondent remained unmoved. Clearly, what cannot be escaped is the realisation that the applicant has always been desirous to ensure compliance by first respondent with the provisions of r 62(5) of the High Court Rules, 2021.

At the subsequent hearing which had been scheduled for 18 August 2023, the first respondent's legal practitioner openly confessed that he had failed to secure the record of proceedings because the first respondent had apparently not kept a proper record during the proceedings *a quo*. Mr *Chitekuteku* stated it in the following manner:

> "There is no proper record of proceedings that was kept by the mining director … there is no record of proceedings."

To that end, it became common cause that there was no record of proceedings to talk of because the first respondent never kept one. My understanding of that development is that even trying to compel the first respondent to produce the record of proceedings as provided for in the rules would be a futile exercise. The court's order would only be a *brutm fulmen*. It would not yield any results unless if the first respondent manufactured one which would itself amount to a monumental fraud.

As a result of the startling revelation by Mr *Chitekuteku*, a new legal issue arose when counsel for the applicant proposed that even in the absence of a proper record of proceedings, the court could still proceed to quash the proceedings and set aside the decision in issue. The second respondent through its counsel, submitted that in the absence of the record of proceedings, the court could not proceed further. It could not, directly or indirectly, determine the review application. Its choices are limited to either dismissing the application or postponing it or making some other appropriate order in respect of the conduct of the review. The parties requested and were granted leave to file supplementary heads of argument to address the legal issue in question.

Applicant's argument

At the hearing Mr *Uriri* opted to abide by papers filed of record and added that, the effect of the absence of the record leaves the court with just one option, that of quashing the proceedings. He made reference to *Chidavaenzi* v *The State* HH 113/08 wherein there was an appeal against sentence only but at the hearing of the appeal against sentence it turned out that the record did not disclose that a plea had actually been recorded and the court found that the failure to keep a proper record was a misdirection vitiating the entire proceedings.

Second Respondent's argument

Mr *Madhuku* who appeared for the second respondent also opted to abide by the heads of argument filed of record. He insisted that there was need to distinguish the cases that counsel for the applicant had referred to. He argued that the cases cited referred to proceedings of the inferior courts and so are not applicable in situations such as in *casu*. He also insisted that, the review that is sought is a review of an administrative decision of a mining commissioner that is made in terms of the Act. Sections 341 up to 350 of the Act sets out the operations of a mining commissioner. Mining commissioners are appointed by the Executive, so the argument continued. He claimed that the language used in the Act is that the mining commissioner sets up a "court". However, it is not a court *per se*. The decisions which are made by mining commissioners are not court decisions and the proceedings are not judicial proceedings. They are actually administrative decisions. He cited s 350 of the Act which simply requires the mining commissioner to keep a register of the decisions that he makes. To Mr *Madhuku* that argument was also fortified by s 348 of the Act which he construed to mean that a mining commissioner need not keep a record of proceedings. In other words, a record of proceedings is not a statutory requirement. He then argued that because it is not a legal requirement the proceedings or decisions cannot be quashed merely on the basis that there is no record. Any quashing of that decision is the quashing of an administrative decision which in terms of the law is allocated to another arm of the state. It is not for the court to determine these boundaries or to determine the scope of the licenses. It is the domain of the administrative officials. The Act is run by the officials. If there is no record then this review application must either be dismissed or postponed. He referred to the case of Zimbabwe *Newspapers* (*Ltd)* (1980) *Workers Committee and Anor* v *Musariri NO & Ors* 2007(1) ZLR 288(S). He argued that this court must respect the responsibility of the mining commissioners when they are taken on review. The persons complaining of the decisions and taking them on review are the ones who bear the obligation to ensure that there is a record of proceedings. He added that in terms of the authorities if there is no record the court cannot proceed further with a review. It simply has no jurisdiction to quash the proceedings of administrative authorities merely on the basis that there is no record. It will cause massive chaos if the courts were to quash every decision of administrative authorities merely because there is no record. He urged the court to exercise any other options, unless if the applicant prayed for time to look for the record.

Issues for determination

The crisp issues which fall for determination in this matter are as follow:

1. Whether the first respondent had jurisdiction to deal with the dispute
2. Whether the first respondent's decision was grossly unreasonable and whether the first respondent was biased against the applicant.
3. Whether the proceedings are vitiated by dint of the first respondent's failure to keep and maintain a proper record of proceedings of the decision sought to be reviewed

I turn to deal with the issues below.

Whether the first respondent had jurisdiction to deal with the dispute

I choose to deal with the question of jurisdiction ahead of others not because it was the first ground to be raised as a basis for the review but because a determination that an inferior court or tribunal did not have jurisdiction to deal with the dispute will be dispositive of the application without considering other arguments. As already said, the first respondent claimed that he had jurisdiction to preside over the dispute by virtue of his appointment by the Permanent Secretary for the Ministry of Mines and Mining Development. He said he was acting under delegated authority from the Permanent Secretary who is the Mining Commissioner in terms of s 341 of the Act. The second respondent virtually mimicked the same argument and stated that the Provincial Mining Director had the powers to determine such matters because he is an appointed functionary of the Ministry of Mines in terms of ss 341-345 of the Act, and is capable of making decisions in disputes of this nature which are valid at law. Both of them were however seriously mistaken. The Permanent Secretary of the Ministry of Mines and Mining Development is not a mining commissioner in terms of the Act. If there was any debate in relation to that, it was brought to finality by MUREMBA J in the case of *Gombe Resources (Private) Limited* v *The Provincial Mining Director - Mashonaland Central & 3 Ors* HH 405/18 where she clarified the confusion that some litigants and officials in the Ministry of Mines appear to have in the following terms:

> "In terms of s 344 (1) the Mining Commissioner, acting mining commissioner or assistant mining commissioner is permitted to delegate his powers or duties vested in him by the Act to another officer, but this has to be with the consent of the Secretary."

It follows therefore that the person who is authorised to delegate his/her powers or duties to another person is the mining commissioner and not the Secretary for Mines. The difference between the mining commissioner and the Secretary is like that between day and night. They are different offices. If there was any doubt then s 344(1) which is couched in the following terms dispels it:

> "**344 Mining commissioner's powers to take oaths**
> (1) Any such mining commissioner, acting mining commissioner or assistant mining commissioner may, with the consent of the Secretary, delegate to any other officer any of the powers or duties by this Act vested in him."

As is apparent, it would be absurd to require a mining commissioner to seek the consent of the Secretary where he/she wishes to delegate his/her powers if the Secretary and the mining commissioner were one and the same person. Section 341 of the Act further vindicates my argument that the legislature did not intend that absurdity. It confirms the fallacy of the argument that the Secretary is a mining commissioner. He/she is not. The Secretary is a supervisor of the mining commissioners. It states that:

> **"341 Administration of Ministry**
> (1) The Secretary shall be and is hereby vested with authority generally to supervise and regulate the proper and effectual carrying out of this Act by mining commissioners (my underlining) or other officers of the Public Service duly appointed thereto, and to give all such orders, directions or instructions as may be necessary.
> (2) The Secretary may at his discretion assume all or any of the powers, duties and functions by this Act vested in any mining commissioner, and may lawfully perform all such acts and do all such things as a mining commissioner may perform or do, (my underlining) and is further empowered in his discretion to authorize the correction of any error in the administration or in the carrying out of the provisions of this Act, or to perform any other lawful act which may be necessary to give due effect to its provisions."

Admittedly, the provision allows the Secretary at his/her discretion, to undertake the duties and responsibilities of the mining commissioner. Any reading of that provision to mean that the Secretary is a mining commissioner will clearly be off side. What it simply means is that where a party wishes to rely on this provision, it must first show that the Secretary had assumed the powers and had indeed become the mining commissioner. Thereafter it must be shown that the Secretary then delegated his/her authority as a mining commissioner to the party who says so. In this case, it was incumbent upon the first respondent to show that at the time he purportedly resolved the dispute, the Secretary was the mining commissioner for the Midlands Province and that he/she had then delegated that authority to him. He did not even

attempt to do so. Without such proof, it is illogical to ask this court to accept the contention that the first respondent had been so delegated.

It is settled law that this court is permitted to make reference to its own records. Reference to the case of *Chanakira Masuku* v *Tariro Ndhlovu N.O. & Ors* HH 299/23, reveals remarkable coincidence if it is any. In that case, as in the instant application, Tariro Ndhlovu, a provincial mining director for Midlands Province was the first respondent. In that case, DEME J held as follows:

> "It is clear from the above authorities that the first respondent is a *de facto* official whose existence is not recognised by the Mines and Minerals Act [*Chapter 21:05*]. From the submissions made by the parties, there is no evidence that the first respondent was operating under the delegated authority of the Mining Commissioner when he determined the mining dispute between the applicant and the second respondent. To this end, I am of the view that the first respondent had no authority or jurisdiction to determine the mining dispute."

If the first respondent in this case is the same *Tariro Ndlovu* as in HH 299/23, which I am convinced he is, given the similarities of the names, the office held, the province concerned and the fact that HH 299/23 was decided as recent as April 2023 then the first respondent's actions point to an obstinately uncooperative attitude towards pronouncements of the courts. In fact, his attitude borders on conduct deliberately designed to trash the findings of this court. He knew when he presided over this latest dispute that he had no authority to do so. He could not have been ignorant of this court's judgment because he was a party thereto. If he was ignorant, it still must be said that there is something fundamentally wrong with the administration of the Ministry of Mines and Mining Development because the issue of provincial mining directors who illegally preside over mining disputes in the guise of being mining commissioners has been a subject of this court's discussions and orders times without number. In the latest of those, MUTEVEDZI J in the case of *Barrington Resources (Pvt) Ltd* v *Pulserate Investments (Pvt) Ltd* HH 446/23 bemoaned that chaos. He dealt with the lame argument that the decisions of mining commissioners are administrative and not judicial decisions. He put it as follows:

> "The question whether a provincial mining director is a mining commissioner is a tired debate. In a long line of cases this court has decisively dealt with the issue. These range from the 2018 case of *Gombe Resources Pvt Ltd* v *Provincial Mining Director Mashonaland Central and Ors* HH 405/18; *Pahasha Somalia Mining Syndicate* v *Eathrow Investments Pvt Ltd and Ors* HH 450/21 to DEME J's recent decision in the case of *Chanakira Masuku v Tariro Ndhlovu N.O. & Ors* HH 299/23. The indifference shown by the Ministry of Mines and Mining Development regarding the regularization of the anomaly which the courts have pointed to in relation to the status of officials called provincial mining directors is astounding. Repeatedly, the High Court has said provincial mining directors are not recognised in the Act. Perhaps I should put it more emphatically than before. I am not sure whether the officials in that Ministry

> who are responsible for sponsoring amendments to the law are not reading the judgments of this court or whether they benefit from the confusion arising from the illegalities committed by provincial mining directors who sit as presiding officers of the mining commissioner's court. When he/she sits to determine mining disputes, the mining commissioner does so not as some administrative official from the comfort of his office. He/she will be sitting as a court. A court is a formal institution which can only be presided over by a person designated by law to so preside over it. No amount of arrogance or posturing to persist with the illegality of pretending that provincial mining directors are mining commissioners who can preside over those courts will sanitise its unlawfulness. Whether anyone likes it or not, the law as interpreted by the courts is that if a provincial mining director presides over a mining commissioner's court and purports to make a decision as such, that decision is a nullity. The sooner whoever is responsible for those issues realizes that the better for everyone with interest in the mining industry."

The above chastisement ought to ring louder in the ears of an official who is a government bureaucrat and who has previously received a similar admonishment than a litigant who genuinely believes that what the official did is correct. In other words, the second respondent was more entitled to come to court and make the arguments it did than the first respondent. As stated earlier the first respondent's personalisation of the application and his unbridled anger towards the applicant surely demonstrate his awareness of the illegality of his decision. Given the above, it cannot be doubted that the first respondent did not have jurisdiction to determine the dispute. He is not a mining commissioner. He was not delegated that function by the Secretary of Mines who himself is not a mining commissioner and can only become so if he elects to. When he does and wishes to delegate his authority he must do so expressly. The first respondent simply assumed that by virtue of being a provincial mining director he had been clothed with the power to be a mining commissioner. That thinking is fallacious. Without jurisdiction, his entire determination was a charade. It is a nullity.

Further the claim by the respondents that the applicant consented to the jurisdiction of the Provincial Mining Director is preposterous because in terms of s 345 of the Act the person who has jurisdiction to hear and determine mining disputes is the Mining Commissioner sitting as a court. Once it is resolved as has been done, that a Provincial Mining Director is not a Mining Commissioner the issue of consent cannot arise. Jurisdiction is not and cannot be conferred on a person or office that is not authorised to determine mining disputes. The consent to jurisdiction referred to in s 345(1) is consent to the jurisdiction of a mining commissioner and not any other functionary such as a provincial mining director who arrogates to himself such power. The argument advanced by the respondents in this case are akin to arguing that a magistrate presided over a murder trial on the basis that both the prosecution and the defence consented to it. It is impossible. I am thus in agreement with the applicant's contention that even in the face of the consent to the jurisdiction of the first respondent to determine the matter,

any such consent to jurisdiction did not and could not clothe the first respondent with power to determine the matter. The applicant is correct to attack the proceedings for want of jurisdiction by the provincial mining director for the Midlands Province. See the case of *Manning* v *Manning* 1986 (2) ZLR 1 (SC).

In view of the foregoing, I uphold this ground for review.

The legal consequences of the first respondent's failure to keep and maintain a proper record of proceedings of the decision sought to be reviewed?

Assuming the above findings are erroneous- which in itself is a very long shot- the first respondent's decision could still be impugned on another ground. In cases such as *S* v *Davy* 1988 (1) ZLR 386 (S) and *S* v *Ndebele* 1988 (2) ZLR 249 (H) the Supreme Court and this court respectively held that the keeping and maintenance of a proper record of proceedings is critical. It is a gross irregularity warranting the setting aside of the proceedings where there are substantial and essential shortcomings in the transcript because the absence of a proper record results in the reviewing or appeal court finding it impossible to properly assess the correctness or validity of the proceedings. This is a basic principle of the law which the first respondent sought to circumvent by alleging that the mining commissioner's court is not a court in the proper sense of that word. The claim that the absence of a record of proceedings is immaterial appears to stem from the failure to understand the place of the court of a mining commissioner in the resolution of mining disputes. To put that court into its proper context I can do no better than relate to this court's findings in *Barrington Resources* (supra) where it dealt with an argument similar to the one advanced by Mr *Madhuku* that the decision by the first respondent was not a decision of a court and therefore that the proceedings before a mining commissioner are not judicial proceedings. As shown earlier, the court was emphatic that when a mining commissioner hears mining disputes, he/she does so as a court and not as some administrative functionary. I entirely associate myself with that finding. Its correctness cannot be doubted. Section 346 of the Act dispels any contrary notions that may linger. The provision specifically refers to judicial powers of a mining commissioner in the following terms:

> "**346 Judicial powers of mining commissioners**
>
> (1) A mining commissioner may hold a court in any part of the mining district to which he is appointed, or at his discretion in such place outside the said mining district as may be convenient to the parties interested, and may adjourn such court from time to time and from place to place as occasion may require.
> (2) A mining commission shall hear and determine, in the simplest, speediest and cheapest manner possible, all actions, suits, claims, demands, disputes and questions arising within his

> jurisdiction, as set forth in section *three hundred and forty-five*, and make such orders as to costs as he may deem just.
> (3) For the purpose of such hearing a mining commissioner shall examine witnesses on oath, which oath he is hereby empowered to administer, and take down the evidence in writing to be signed by the person giving the same, and do all things which he may deem necessary for a proper decision.
> (4) A mining commissioner shall have power to summon all witnesses required by the respective parties, or whom he may deem necessary to appear before him, and, in default of any such witness appearing, may, upon proof that his reasonable expenses have been paid or tendered to him, issue a warrant for his arrest, and may inflict upon him such penalties as he would have been liable to for disobedience to a subpoena to appear before a magistrates court.
> (5) The service of the summons and the execution of the warrant, issued in terms of subsection (3), may be lawfully performed by any person appointed for that purpose by the mining commissioner.
> (6) Any witness who, being duly sworn, wilfully gives false evidence before such mining commissioner on any question material to the matter at issue, knowing such evidence to be false, or not knowing or believing it to be true, shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

The provision proceeds to detail the procedure which a mining commissioner is required to follow in the determination of disputes before him. That procedure includes the examination of witnesses on oath and the taking down of their evidence in writing. Some of the powers are very sweeping. For instance, it could never have been the intention of the legislature that in the exercise of administrative powers a mining commissioner could issue a warrant for the arrest of a person summonsed to appear before his court but has defaulted and to levy penalties for disobedience of his subpoenas. The construction of the provision makes it abundantly clear that the court of a mining commissioner is a court with judicial and not administrative powers. In addition, s 360 prescribes that as far as is practicable, the procedure in the Magistrates' Court Civil shall be followed in the court of a mining commissioner. It states that:

> **"360 Magistrates court procedure to be observed in mining commissioner's court**
> Save as otherwise provided in this Act, the procedure to be observed by a mining commissioner's court and the fees chargeable in respect of any proceedings therein shall, so far as practicable, be in accordance with the law and rules governing procedure and fees in civil cases in magistrates courts."

The magistrates' court is required to keep records of proceedings in all civil cases it deals with. It is not impractical for the mining commissioner's court to keep records of proceedings. It is a court whose decisions have serious financial implications for the parties who appear before it. More often than not those decisions are subject to appeals and reviews. The review or appeal cannot be determined without recourse to the proceedings *a quo*. If there

is no record of such proceedings it becomes impossible to gauge the correctness or procedural propriety of the proceedings. The argument by Mr *Madhuku* that the court of a mining commissioner is not a court because it's a court created by the Executive is an aberration and smacks of desperation. The Constitution of Zimbabwe, 2013 in s 162 (a) – (g) provides that the courts of Zimbabwe comprise of all the conventional courts and in subsection (h) of 'other courts established by an Act of Parliament'. Courts established in that way are endowed with judicial power. The Mines and Minerals Act is not a creation of the Executive. It is an Act of Parliament. That it creates the court of a mining commissioner cannot therefore be impugned because it is expressly authorised by the Constitution.

Mr *Madhuku* further sought to prop up his argument of a record-less court on the strength of s 348 of the Act. He argued that the summary hearing of complaints envisages a situation where the court keeps no record of the proceedings. It appears a self-defeating proposition. The section provides the following:

> **"348 Summary hearing of complaints**
> Notwithstanding requirements of sections *three hundred and forty-five* and *three hundred and forty-six*, the mining commissioner may, if the parties concerned consent thereto in writing and are both present at the hearing, hear and determine any such complaint as above mentioned, summarily, and without any formal proceedings taken before him." (my emphasis)
>
> A minute of the decision shall be made by him in a register of complaints in which shall be entered every complaint laid before him, together with particulars thereof."

The word summarily may be difficult to understand. I do not however construe it to mean that a court which adopts a summary procedure is not required to keep a record of its proceedings. The Oxford Languages Dictionary (2020) defines the word summarily as meaning *'being dealt with without the customary formalities'*. I understand that, in relation to s 348, the court can proceed to deal with a matter without following the rituals stipulated in the provision. The purpose of the summary proceedings is to curtail the hearing where it is deemed unnecessary to go through such motions. The truncated proceedings must however still be a true record of what would have happened. In addition, the adoption of that procedure requires the consent of the parties, firstly to the mining commissioner's jurisdiction to hear the matter and secondly to the adoption of the summary procedure. In this case, the first respondent simply provided "annexure 4" which is a purported consent to the jurisdiction of the Provincial Mining Director by the parties. He neglected to avail proof of the parties' consent to him dealing with their dispute summarily as required by the Act. I did not hear the first respondent say he had adopted the summary procedure in dealing with the case. He was unequivocal that he did not

keep any record of proceedings. He did not avail a copy of the case register as proof of the summary proceedings. In fact, a postponement was granted in order to give the first respondent an opportunity to secure the said. Numerous requests to avail the record by the applicant went unanswered. A court order secured in a bid to force him to produce the record of proceedings still yielded nothing.

My finding therefore is that the court of a mining commissioner is required to keep a record of its proceedings regardless of the procedure it adopts in the resolution of the dispute. It is therefore a gross irregularity such as *in casu*, for that court to fail to keep a proper record of its proceedings.

The effect of a failure by a court, quasi-judicial body or administrative tribunal to maintain and file a record of proceedings was set out in the case of *Chiura* v *Public Service Commission & Anor* 2002 (2) ZLR 562(H) at 566 in which this court reasoned as follows:

> "A review of any proceedings of judicial or *quasi*-judicial bodies or tribunals proceeds on the basis of a proper record of proceedings in a good state reflecting exactly what transpired during those proceedings. It proceeds on the basis of strict compliance with the rules of court that require certain aspects to be satisfied before the matter can be set down for hearing. Order 33 rule 260 of the High Court Rules, 1971 requires that a record of proceedings must be prepared by the officer responsible for those proceedings and must be lodged with the registrar, in its original form, and not otherwise, with any additional copies of that record being certified. It is important to note that what is required for purposes of review is a record of proceedings that are subject for review. It follows that if the responsible clerk of court, tribunal or person responsible for the quasi-judicial body is unable for whatever reason to supply the record of proceedings, it is pointless to even think of a review. The question is what would be there to be review. That is, however, not to say the aggrieved party cannot be heard on review simply because the responsible authority or body has failed to put together a record of proceedings.
>
> In a court application the hearing party can still seek audience with this court and point out that irregularity, that is, the failure to put together a record of the proceedings. On that basis alone the court can still make its decision. See also *S* v *Ndebel*e 1988(2) ZLR 249(H)."

As noted above, the principles applicable to judicial officers, quasi-judicial bodies and tribunals in so far as the keeping of a proper record of proceedings are the same. This court has on various occasions quashed proceedings where an inferior court or tribunal, had failed to keep a proper record of proceedings. In *Chidavaenzi* v *The State* HH 113/08 per MAKARAU JP, (as she then was), at p 3 of the cyclostyled judgment, the court held as follows:

> "The trial court clearly failed to keep a full and comprehensive record of the proceedings before it. This amounts to a misdirection vitiating the entire proceedings. It is on this basis that although the appellant noted an appeal against sentence only, we set aside the conviction of the appellant and ordered that the goods that had been forfeited to the state be returned to her."

On the strength of the above authorities, it admits to no doubt that the first respondent erred and grossly misdirected himself in failing to keep a record of proceedings and this vitiates the purported proceedings. In the case of *Zimbabwe Newspapers (1980) Limited Workers Committee & Anor* v *Musariri N.O & Ors* 2007 (1) ZLR 288 (S) CHIDYAUSIKU CJ stated the law on the fate of review applications that become afflicted with the difficulty of not having a proper record of proceedings as follows:

> "Faced with that situation, the court a quo had the discretion to postpone the matter pending the provision of the record, dismiss the application or order any other relief. (my emphasis).
>
> The court *a quo* has a discretion as to which course to follow. Where the court a quo, in the exercise of its discretion, dismisses the application as opposed to postponing the matter or granting any other relief, this court will not interfere with the exercise of such discretion unless the exercise of the discretion was grossly unreasonable."

The above authority was cited by the second respondent in its heads of argument in support of its case. I asked Mr *Madhuku* to explain what he understood by "granting any other relief" and he struggled to show that there is another meaning other than the ordinary one. The phrase means that the court is at large to grant any other relief it deems appropriate. Such relief may include the quashing of the proceedings complained of. In this case, dismissing the applicant's case would amount to rewarding the first respondent for ill- performance of his functions. Postponing the matter is intended to afford the person responsible for production of the record of proceedings more time to do so. It would be meaningless for the court to go that route in the full knowledge that the record of proceedings does not exist. That avenue was closed in this application because even if the case had been postponed for eternity the record would not have been produced. It is for that reason that the authorities state that the reviewing court has a very wide discretion where a record of proceedings is not before the court taking into account the circumstances of the case.

> "Rule 62(5) of the High Court Rules 2021 is equally pertinent. It provides that:
>
> ***62. Reviews***
> (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 subrule."

A reading of the rule in its entirety shows that the requirement to avail the proceedings before the reviewing court starts with the officer whose proceedings are being brought on review. He/she must lodge with the registrar of this court the original record and two typed copies of the record of proceedings. The applicant in turn has the obligation to ensure compliance. In this case, the first respondent who is the officer who presided over the proceedings being questioned confessed that he did not keep such record. The applicant cannot do anything more to ensure compliance after it wrote correspondence demanding compliance and followed it up by a reminder to the first respondent that he was required to comply with the rules of court. It fully discharged the onus which it bore.

COSTS

In argument, the applicant conceded that there is no justification for seeking costs on a higher scale. The parties agreed that costs shall follow the cause. There is therefore no reason for me to depart from the norm.

DISPOSITION

In view of the foregoing, **IT IS HEREBY ORDERED THAT**:

1. The determination of the first respondent dated 24 April 2023 purportedly resolving the dispute between the applicant and the second respondent and directing them to operate within their areas as defined by the disputed coordinates circumscribing their mining claims in the Sandawana Mining Area be and is hereby declared a nullity and of no force or effect
2. Respondents shall pay the applicant's costs

Chimuka Mafunga Commercial Attorneys, applicant's legal practitioners
Civil Division- Attorney General's Office, first respondent's legal practitioners
B Chipadza law Chambers, fourth respondent's legal practitioners