NYAMANDE MINING SYNDICATE
versus
MUNYUKWA CHIBANDA
and
PROVINCIAL MINING DIRECTOR
MASHONALAND EAST N.O.

HIGH COURT OF ZMBABWE
MUCHAWA J
HARARE, 20 August & 7 September 2021

Urgent Chamber Application

T B Vhiriri, for the applicant
M Ndhlovu for *Mr Ndudzo*, for the 1st respondent
F Gustin, for the 2nd respondent

MUCHAWA J: This is an urgent chamber application for a spoliation order. At the hearing, the applicant applied for an amendment to the order sought in its draft order which was granted. Having struck out the interim relief, the terms of the final order sought are now as follows;

> "The application for spoliation be and is hereby granted. The *status quo ante* before the spoliation is restored and the 1st respondent and anyone acting, through them be and is hereby ordered to remove its fence over and to vacate the mining claim described as Mutaki, 10 Hectares Block, Goromonzi under Certificate of Registration ME1248G whose beacons are clearly marked and identified by the following coordinates:
>
> A310477 8052970
> B310660 8053320
> C310841 8053235
> D310660 8052885
>
> Upon service of this order and restore possession to the applicant.
>
> **SERVICE OF THIS ORDER**
>
> WITHOUT DEROGATION from the normal powers of the Sheriff to serve Court process, the Applicant or their legal practitioners or any attested member of the Zimbabwe Republic Police is hereby authorized to serve this order on the respondents."

FACTUAL BACKGROUND

The applicant is a mining syndicate which holds a certificate of registration number ME1248G issued out on 26 July 2021 under the Mines and Minerals Act through the second respondent's office with the beacons set out above detailing its location. This is also described as located in Goromonzi approximately 1.4 kilometres NE of Nyamande School.

The first respondent's own mining certificate registration number ME1238G was issued out on the 6 July 2021, is described as located in Domboshava, approximately 1.3 kilometers NE of Nyamande School and the beacons are described by the following coordinates;

A310501 8053395
B310660 8053320
C310477 8052970
D310375 8053017
DP310480 8053380

The applicant alleges that it was in free and undisturbed possession of its mining claim, when, on 31 July 2021, the first respondent arrived with a "horde of malevolent and mean horde and proceeded to remove applicant's machinery and forcibly evicted the applicant's workers from the mining site then fenced off a portion of applicant's mining claim". This the basis on which the urgent application for a spoliation order is sought.

The first respondent filed a notice of opposition to the application and took points in *limine*. I heard the parties on these and reserved my ruling. It was agreed by the parties that, depending on my findings on the preliminary points and if there was need to proceed to the merits of the application, I could determine the matter on the papers. Below, I deal with the points in *limine*, in turn.

URGENCY

Mr *Ndudzo*, the first respondent's counsel submitted that this matter is not urgent as the applicant already has a spoliation order operating against its privies which was granted by consent under case HC 3941/21.

Further, it was submitted that the applicant concedes in para 12 of its founding affidavit that the first respondent had already fenced off its mining location well before the applicant even had its own certificate of registration. It was pointed out that the applicant will not suffer any

irreparable prejudice or harm if the matter is not heard on an urgent basis as there has been no dispossession perpetrated by the first respondent as alleged. Mr *Ndudzo* averred that it was in fact the applicants who had attempted to dispossess first respondent and their privies and accomplices have already been prosecuted.

The certificate of urgency by one Ivy Nyengera was alleged to be invalid and unhelpful as it does not mention any dates at all of the alleged infringements of the first respondent. The paucity in the certificate of urgency regarding the legal principles in relation to the remedy of a spoliation order was also criticized as reflective of a failure to apply her mind by Ivy Nyengera. Relying on the case of *General Transport & Engineering (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation Ltd* 1998(2) ZLR 301, it was argued that it is an abuse for a lawyer to put his name on a certificate where he does not genuinely hold the situation to be urgent and that such genuineness can be tested by the reasonableness of the purported view.

The applicant's case as argued by Ms *Vhiriri*, its counsel, is that the matter is urgent because the first respondent has dispossessed it of 5 hectares of its mining location through events which occurred on 31 July 2021 when the first respondent removed applicant's machinery and evicted its workers from the mining site and proceeded to destroy erected beacons and fence off applicant's mining claim. It is claimed that the first respondent is extracting minerals from applicant's claim and since such minerals are finite and deplete in quantity, the continued extraction will lead to financial loss on the part of the applicant and unjust enrichment on 1st respondent's part.

Further, it was submitted that there is no other alternative remedy for the applicant.

Ms *Vhiriri* argued that the certificate of urgency is relevant and valid and that dates and timelines are not a necessity and that it is sufficient that the certificate talks about the harm suffered or likely to be suffered if the court does not intervene on an urgent basis.

In the case of *Document Support Centre (Private) Limited* v *Mapuvire* 2006 (2) ZLR 240, the factors to consider in determining whether a matter is urgent were set out as follows;

> " I understand Chatikobo J in the above remarks to be saying that a matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then for in waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have lost the right or legal interest that it seeks to protect and any approaches to the court thereafter on that cause of action would be academic and of no direct benefit to the applicant."

In *casu*, the applicant does make a case for the need for urgent action if indeed the alleged cause of action which was complete on 31 July 2021 occurred as alleged. It is separate and distinct from the cause of action in case HC 3941/21 wherein 1st respondent complained of events which occurred on 12 July 2021 allegedly perpetrated by Mandizvidza Nyamande who is not a member of the applicant syndicate.

The applicant filed this application on 2 August so there was no delay on its part. If indeed the first respondent is continuing unchecked in extracting minerals from applicant's claim then any action thereafter would be academic. The certificate of urgency and the founding affidavit do set out a case for urgent intervention. The point in *limine* on urgency is without merit.

ALLEGED NON DISCLOSURE OF MATERIAL FACTS

Mr *Ndudzo* drew the court's attention to two other proceedings before this court being that of *Munyukwa Chibanda Mining Syndicate* v *Mandizvidza Nyamande & Anor* HC 3941/21 and *Tawanda Chamasuka* v *Munyukwa Chibanda & Ors*. It was submitted that the applicants were aware that as of 17 July 2021, the applicant was in peaceful and undisturbed possession of its mining location which was already fenced off. It was alleged that Mandizvidza Nyamande was a relative and associate of applicants herein who had unlawfully attempted to dispossess the first respondent of its mining location but was barred by the court through an order by consent of the parties.

The applicants were alleged to be also aware of the *Tawanda Chamasuka case* in HC 4048/21 wherein the same legal practitioners were acting for applicant and the matter had been withdrawn with costs.

Mr *Ndudzo* impugned the applicants' conduct in coming to court without disclosing the findings already made by the court in those two cases. It was contended that there are consequences in urgent proceedings for a litigant who fails to make full disclosure of material facts with the aim of keeping the court in the dark and misleading it. Reference was made to the case of *Nehanda Housing Cooperative Society & ORS* v *Moyo & Ors* HH-469-15.

Whilst conceding that the applicant members know Mandizvidza Nyamande, Mrs *Vhiriri* averred that they had no knowledge of case HC 3941/21 and it was not related to the case before me. All they claim to share is a family name.

It was accepted that Tawanda Chamasuka, the applicant in case HC 4048/21 is a member of the mining syndicate but he brought a personal and different matter on 27 July 2021, which was before the events of 31 July 2021, complained of herein.

I agree with Ms *Vhiriri* that the applicant is a separate and distinct legal persona. In terms of r 11 of the High Court Rules, 2021, such association is capable of being sued in its own name. The applicant's legal practitioners would have acted unethically if they had used information from HC 4048/21 in this case as there are two separate clients who instructed them. In any event the facts giving rise to the different actions are separate. In HC 3941/21, the first respondent was complaining of dispossession of his mining claim on 12 July 2021 by Mandizvidza Nyamande who is not part of the applicant syndicate. In case HC 4048/21, Tawanda Chamasuka was complaining that the certificate of registration ME1238G issued to first respondent, had been issued unlawfully and that his homestead had been invaded.

It is therefore my finding that the allegation of nondisclosure of material facts is without merit, in the circumstances.

ALLEGED MATERIAL FALSEHOODS

Mr *Ndudzo* alleged that the applicant's legal practitioner in paragraphs 1 to 4 of the grounds for the application, told lies. This is where the details of the alleged dispossession are set out. The first respondent counters these with his own allegations of what transpired on 31 July 2021. Two completely different versions emerge and I believe it is for the court to assess which version is the more probable one in considering the merits of this matter rather than taking this as a point *in limine*.

Mr *Ndudzo* took issue with the applicant's minutes which purportedly empowered Paulos Nyamande to institute these proceedings which are dated 29 July 2021 as an indication of a premeditated plan to seize first respondent's mine on 31 July 2021. The resolution however simply empowers Paulos Nyamande to represent applicant in "all legal matters pertaining to Mutaki 10 hectares of gold reef Goromonzi."

Mrs *Vhiriri* explained that the syndicate members held a meeting on the 29 July after there had been threats and came up with the questioned resolution which does not indicate any premeditation on the applicant's part.

No merit has been established on this point too.

Mr *Ndudzo* complained that the applicant alleges that an individual by the name of Munyukwa Chibanda, being first respondent, carried out the impugned acts on 31 July 2021 yet there is no such individual as Munyukwa Chibanda which is a mining syndicate made up of one Munyukwa and another Chibanda.

The applicant insists that it cited the 1st respondent in terms of its certificate of registration which does not indicate that it is a syndicate as is usual. It was argued that there is a presumption of validity of government documents until lawfully invalidated as per *Mhandu* v *Mushore & Ors* HH 80/2011.

In my opinion this point is inconsequential as the applicant cited the correct party in this matter. The conduct imputed on the 1st respondent is by extension placed at the foot of those acting on its behalf.

PRIORITY OF MINING RIGHTS

Mr *Ndudzo* submitted that this is a case of priority of mining rights which should be resolved in terms of section 177 (3) of the Mines and Minerals Act [*Chapter 21:05*] and that the allegations of any spoliation are false. The court was urged to just consider who acquired mining rights first and invite the Ministry of Mines to confirm the boundaries for each party and ascertain if there is any encroachment and resolve the dispute. It was argued that the rights of any subsequent pegger are subordinated to the rights of the priority or first pegger.

Further, Mr *Ndudzo* argued that it is unlawful for the applicant to seek to completely ignore the existence of the Mines and Minerals Act and seek recourse through the common law remedy of a spoliation order as common law cannot override an Act of Parliament and render it nugatory.

Section 345(1) which grants the High Court jurisdiction under the Mines and Minerals Act was said not to extend to spoliation jurisdiction. The correct route was said to be for the Court to refer the matter to the Mining Commissioner for investigation and a report.

A perusal of s 345(1) referred to by Mrs *Vhiriri* shows that the High Court shall exercise original jurisdiction in every civil matter, complaint or dispute arising under the Act. The court therefore has inherent jurisdiction as shown below.

> **"345 Jurisdiction of High Court and mining commissioners**
> (1) Except where otherwise provided in this Act, or except where both the complainant and defendant have agreed in writing that the complaint or dispute shall be investigated and decided by the mining commissioner in the first instance, the High Court shall have and exercise original

> jurisdiction in every civil matter, complaint or dispute arising under this Act and if in the course of any proceeding and if it appears expedient and necessary to the Court to refer any matter to a mining commissioner for investigation and report, the Court may make an order to that effect."

I find no merit in Mr *Ndudzo's* argument seeking to disqualify the Court from dealing with the matter as an application for a spoliation order.

The points *in limine* are accordingly dismissed.

THE MERITS

The parties agreed that I could determine the matter on the papers on the merits thereof. In hearing the submissions of the parties on the points *in limine,* it however became evident that there are two irreconcilable versions of the events of 31 July 2021. I am unable to establish whether the first respondent inter alia did in fact tamper with established beacons and encroached on applicant's mining location, fenced off a portion, thus dispossessing it from being in peaceful and undisturbed possession.

Ms *Gustin* representing the second respondent submitted that in matters of this nature, there is a need for ground verification in order to determine the alleged infringement.

As I intended to go this route in order to resolve this dispute which is evidence of the running battles in this community following the gold rush and subsequent mining certification of the parties and other villagers, I called the parties and advised them. An order was issued out by consent ordering the second respondent to carry out a ground survey in respect of both parties' mining locations boundaries and submit a report to this court by the 27 August 2021. Both parties were to cease mining operations pending the resolution of the matter on the merits. They committed to be bound by the report of the second respondent regarding the boundaries of their mining locations. The objective was to ascertain whether the first respondent fenced off a portion of the mining location belonging to the applicant. It was a common understanding of the parties that the order to be issued out at the end of the matter would therefore be a final order as the consent order took care of interim arrangements.

The ground verification exercise was duly carried out on 24 August 2021 in the presence of representatives of each of the three parties. The following results came out;

1. The first respondent had erected permanent beacons
2. There was no evidence on the ground of the destruction of applicant's beacons as alleged.

3. There was a security company manning the first respondent's block
4. There is a fence erected by first respondent which however encroaches into applicant's block as seen on the survey diagram
5. Both the Applicant's and first respondent's ground coordinates correspond with their application coordinates, therefore there is no encroachment on each other's block
6. The only issue is first respondent's fence which is encroaching into applicant's block.

The recommendation from the second respondent is as follows:

> "Munyukwa Chibanda Mining registration number ME1238G should remove their fence from Nyamande Mining Syndicate block (ME1248) and erect it within their mining location as per their ground coordinates."

The applicant has therefore established that it was in peaceful and undisturbed possession of its mining claim ME1248 and the first respondent dispossessed it by erecting a fence encroaching into its block.

I accordingly order as follows:

1. The application for spoliation be and is hereby granted with costs.
2. The *status quo ante* before the spoliation is restored and the 1st respondent and anyone acting through them be and is hereby ordered to remove its fence over and to vacate the mining claim described as Mutaki, 10 Hectares Block, Goromonzi under Certificate of Registration ME1248G whose beacons are clearly marked and identified by the following coordinates:

   A310477 8052970

   B310660 8053320

   C310841 8053235

   D310660 8052885; upon service of this order and restore possession to the applicant.

Zuze Law Chambers, applicant's legal practitioners
Mutamangira & Associates, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd respondent's legal practitioners