OLIVER MASOMERA N.O
and
SAVANNA AFRICA HOLDINGS
(PRIVATE) LIMITED [UNDER PROVISIONAL JUDICIAL MANAGEMENT]
versus
TAMANI INVESTMENTS (PRIVATE) LIMITED
and
ACTING PROVINCIAL MINING DIRECTOR
FOR MASHONALAND WEST N.O.
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O.
and
OFFICER IN CHARGE ZIMBABWE REPUBLIC
FLORA AND FAUNA UNIT [KADOMA] N.O.
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 13 December and 6 February 2019

Urgent Chamber Application

B Maruva with *J Zuze*, for the applicants
D Thomas, for the 1st respondent
P Macheka, for the 2nd to 4th respondents

TAGU J: The applicants are seeking an order to restore status quo ante by ordering the first respondent, their employees, agents, nominees or whosoever is occupying Juno 5 area Chakari Kadoma, to vacate the claim and that status quo prior to the first respondent unlawfully taking occupation of second applicant's mining claim be restored. Further, the applicants are seeking an order to interdict the respondents from mining and to stop all mining activities at applicants' mining claim and to order the first respondent, their employees, agents, nominees or anyone to desist from interfering with applicants' possession, utilization and operations at the mine. Finally, the applicants seek an order against the second respondent to delete and deregister

the tribute agreement number TR 29/18 from their records as it is a nullity and of no force and effect at law.

BRIEF BACKGROUND TO THE APPLICATION

The second applicant, a registered limited liability company is the owner of Juno 5 Mine in Chakari Kadoma. It is involved in the extraction and winning of gold and other valuable minerals which is taken to fidelity printers and Refineries of Zimbabwe where it is sold. On the 22nd of August 2012 this court granted an application placing the second applicant under judicial management. In terms of section 399 of the Companies Act [*Chapter 24:03*] the first applicant was appointed as the Provisional Judicial Manager by the Master of the High Court (5th respondent) with the powers and duties set out in Sections 302 and 303 of the Companies Act. On the 13th April 2017 the second applicant and the first respondent entered into a written memorandum of agreement on certain terms and conditions. Among other conditions the first applicant would allow the first respondent sole and exclusive rights to run the affairs of the second applicant and to file certain monthly reports. The first respondent was therefore granted access to Juno 5 mine in Chakari Kadoma.

However, right from the commencement of the agreement the first respondent failed to produce certain monthly reports as it was required to do in terms of the memorandum of agreement. The first respondent in fact produced reports belonging to an entity called Neema Resources (Pvt) Ltd of Hogerty Hills, Borrowdale. Following this breach the applicants cancelled and or terminated the agreement between the parties on the 10th July 2018. The first respondent then vacated Juno 5 mine claim and ceased operations. The applicants remained in peaceful and undisturbed possession of the mine claim for 6 months until the 5th December 2018.

On the 5th December 2018 the first respondent through a Mr Milton Marufu, armed guards and some personnel approached the mining claim with armed police from fourth respondent and produced a letter dated 30th of November 2018 from the office of the second and third respondents and then caused chaos and forcefully evicted the second applicant's employees from the mine without any just cause. The mine Manager was approached for assistance but he too got no help from the police who said were just following orders from the office of the second respondent. On the 6th and 7th of December 2018 the second respondent then advised the applicants that there was a tribute agreement between the parties yet what was there was only a

memorandum of agreement that had been cancelled in July 2018. Whilst trying to establish the root cause of the chaos the first respondent then brought for the second time through Mr Milton Marufu armed security guards and changed the security locks on the mine and took over the mining location without the applicants' consent.

On the 7th December 2018 the applicants filed this Urgent Chamber Application. The application was opposed by the first to the fourth respondents.

At the hearing of this matter Mr D Thomas took three preliminary points on behalf of the first respondent. The first point *in limine* raised by Mr D Thomas was that this matter was not urgent. He said urgency in this matter was self -created. He submitted that the applicants should have brought this application in June 2018 when the alleged breach of memorandum of agreement was made. He further said the move by the Ministry prompted the applicants to take action. The second point in limine was that the interim relief sought by the applicants was final in nature and this was not competent. The last point in limine was that there are material disputes of fact. His argument being that the applicants should have filed supporting affidavits from the employees who were allegedly chased away hence oral evidence has to be led on the issue.

The applicants opposed the first point *in limine*. They submitted that they have been in peaceful and undisturbed possession of the mine claims for six months since the termination of the memorandum of agreement. There was no reason for them to bring this application in June 2018. They submitted that the need to act only arose on or about the 5th or 6th of December 2018 when they were dispoiled by the first respondent.

Having heard the submissions I totally agree with the applicants that the need to act arose on or about the 5th of December 2018 and not June 2018. The reason being that after the termination of the memorandum of agreement and the vacation from the mine claims by the first respondent there was no need for the applicants to come to court because they remained in peaceful and undisturbed possession of the claims for six months. What triggered this action is the return of the first respondent with armed guards and taking over the mine claim as from the 5th of December 2018. In any case the applicants are applying for a spoliation order and spoliation orders are by their very nature urgent applications. I therefore find no merit in the first point *in limine* and I dismiss it.

Coming to the second point *in limine* that the relief being sought is final in nature hence not competent the applicants submitted that spoliation orders are by their nature final. They cited the case of *Mabwe Minerals (Private) Limited* v *Base Mineral Zimbabwe and Peter Valentine and Muyengwa Motsi* HH-119/14. I need not spent much time on this point. It is indeed trite that spoliation orders are by their very nature final in nature. The second point *in limine* has no merit and is dismissed.

The last point *in limine* equally has no merit. There are no material disputes of fact. If in fact the respondents were in possession of the mine claims what was the reason for the first respondent to come with a letter to assist them take over the claims if indeed they were in peaceful and undisturbed possession? It is clear the applicants were in peaceful and undisturbed possession from July 2018 to the 5th of December 2018. It is not disputed that the first respondent had to come with the assistance of armed guards and police to take over the mine. It is not in dispute they had to cut off locks and put their own. Why would they do so if they were in possession or occupation of the claims? There are no disputes of facts and the last point *in limine* is dismissed.

The applicants also took a point *in limine* that there was no resolution authorizing the deponent one Milton Marufu to file an opposing affidavit on behalf of the first respondent a company. They asked that Mr Milton Marufu's opposing affidavit to be expunged from the record. They relied for this contention to the provision of section 9 of the Companies Act as amended.

Section 9 provides that-

> "A company shall have the capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers."

They further cited the cases of (1) *Tapson Madzivire* (2) *Phinias Ngarava* (3) *Joseph Mumbwandarikwa* (4) *Crush Security (Private) Limited* v (1) *Misheck Brian Zvarivadza* (2) *Cobra Security (Private) Limited* (3) *The Registrar of Companies* SC-10-06 where an exception was said to exist only where a meeting of directors and a resolution would not be required where a company has only one director who can perform all judicial acts without holding a full meeting. In that case reference was made to the case of *African Distributors (Pvt) Ltd* v *Van de Wetheuzen N.O. and Ors* 1988 (4) SA 726. Further the applicants referred to the case of

Burnstein v *Yale* 1958 (1) SA 768 where it was held that the general rule is that Directors of a company can only act validly when assembled at a board meeting.

The first respondent argued that the deponent as the Director had authority to depose to a founding affidavit and that lack of resolution does not invalidate the founding affidavit. The counsel referred to paragraph 2 of the founding affidavit where Milton Marufu said-

> "I am the 1st respondent's director and am duly authorized to depose this affidavit on behalf of the first respondent".

In the Tapson Madzivire case supra, the Supreme Court put it very clearly that a company is a separate legal persona from its directors. It said while commenting on the provisions of section 9 of the Companies Act that:-

> "It is clear from the above that a company, being a separate legal person from its directors, cannot be represented in a legal suit by a person who has not been authorized to do so. This is a well -established legal principle, which the courts cannot ignore. It does not depend on pleadings by either party."

My understanding of the above is that Mr Milton Marufu must have been authorized to depose to a founding affidavit on behalf of the first respondent a company after a meeting of directors. However, the Supreme Court went on to say in the same case that –

> "The appellants had a genuine case that needed to be resolved because the fact that the entries in the company's records are false is not disputed by the respondent."

The Supreme Court then refused to close the door by dismissing the application hence it ordered among other things that the respondents be granted leave to file a resolution duly passed by the company's board of directors authorizing the institution of legal proceedings against the respondents.

Taking a leaf from that this court is of the view that the first respondent has a genuine defence that needs to be resolved. This being an urgent chamber application it is not a strict requirement that respondents should file opposing papers unless requested to do so by the court. However, I agree with the applicants that the founding affidavit by Mr Milton Marufu is not properly before the court because he was not authorized at a meeting of directors of first respondent to depose to the opposing affidavit as he did on behalf of a company which is a legal entity. The first respondent's opposing affidavit is therefore expunged from the record and the

court will go by the oral submissions made by the counsel for the first respondent. I therefore uphold the preliminary point raised by the applicants.

AD MERITS

This is an urgent chamber application for spoliation. The counsels for the applicants submitted that the applicants needed to prove two things, firstly that they were in peaceful and undisturbed possession and secondly that they were despoiled, that is the respondents took over the mine claims without their consent and or without following due process.

To substantiate their claim the applicants told the court that they were in peaceful and undisturbed possession up to termination of memorandum of agreement in June 2018. The first respondent moved out of the mine claim and lost possession for six months. The first respondent then came back armed with a letter dated 5 December 2018. The letter gave them authority to take over the mine unlawfully and dispossession took place forcefully. The dispossession was not sanctioned by Order of Court. Hence first respondent committed an act of spoliation.

It was their further submission that the tribute agreement referred to by the first respondent had not been registered. Registration was done on 14th September 2018 with shocking revelations. The letter dated 27th August 2018 gave rights not yet accrued to the first respondent. Only a memorandum of agreement was in existence which was later terminated. From June 2018 to December 2018 the first respondent was not mining and if they claim that they were mining they should produce returns to Fidelity and payment of Royalties.

It was their view that the second respondent did not follow procedures of registration of tribute agreement in terms of section 280 to 290 of the Mines and Minerals Act [*Chapter 21:05*] in that a board should have approved the tribute agreement. The tribute agreement it referred to does not have such endorsements. It was only signed in April 2017 and has never been in force and no meetings were held over one and half years later hence the document was fraudulently obtained. They submitted that there was a deliberate and unlawful taking of the law into one's hands which should not be allowed hence prayed that the application be granted.

The submissions by the counsel for the first respondent were that the first respondent never moved out of the mine claims in June 2018 after the cancelation of the memorandum of agreement. He said the move by the Ministry was to protect the second applicant who was now repudiating the agreements. He went further to submit that the first respondent lodged the tribute

agreement for registration 13 days after it was signed. The Ministry then registered the tribute agreement without any information. He in my view properly submitted that this court is not tasked to enquire on the validity of the tribute agreement an issue that will be dealt with during confirmation of the provisional order. However, he submitted that the first respondent did not despoil the applicants in any way. According to him this application had been brought to evict the first respondent via the back door. He said the first respondent is not privy to why the writer wrote the letter in question in the manner they wrote it. Further it was submitted that the Police validly acted on the instructions of the Minister to protect the first respondent's interests hence the disposition was in terms of the law. A concession was made that stoppage of operations was on the basis of the purported cancellation of the agreement but first respondent had people at the mine protecting equipment.

Brief submissions by the counsel for the second to fourth respondents were that the tribute agreement was approved in September 2018. It was said that the second respondent was not aware of the memorandum of agreement. According to them in terms of section 284 of the Mines and Minerals Act the tribute agreement was registered by the Mining Commissioner and not the board hence there was no need for endorsement.

When dealing with an application for spoliation what the applicant need to establish is that he or she/it was in peaceful and undisturbed possession. That it or he/she was despoiled that is possession was taken without due process or without its/ his/her consent.

In *casu* it is clear that prior to June 2018 the parties were working harmoniously following an agreement coined among the parties. It is not in dispute that on or around June/July 2018 the relationship soured. This resulted in the cancellation of the agreement that bound the parties. This from the facts resulted in the first respondent ceasing operations and leaving the applicants in peaceful and undisturbed possession of the mines in question for a period of almost six months. On or about the 5th of December 2018 the first respondent appeared at the mine claim armed with a letter from the second and third respondents to the effect that there was a tribute agreement and the effect of that letter undoubtedly was to evict the applicants from the mining claims. The first respondent was being assisted by armed police officers and other armed security guards. They then forcefully evicted the applicants and even cut locks to the buildings and they went on to put their own locks after chasing away the applicants' employees.

As I said above this was done without following due process. I was not convinced that some of the first respondent's personnel remained on the mine claim after termination of the memorandum of agreement. If indeed these employees for the first respondent had remained on the mine claim it boggles one's mind why after six months of not operating at the mine claim was it necessary for the first respondent to come back at the mine armed with a letter from the second and third respondents? It further boggles one's mind why the officers from the fourth respondent found it necessary to accompany the first respondent to the mine if indeed the first respondent had been in peaceful and undisturbed possession from the time of the termination of the memorandum of agreement? The whole process leaves one to assume that some kind of corruption was involved. If indeed it is correct that the applicants especially the first applicant or let alone the second applicant was the one that returned to the mine why did the respondents not follow due process in evicting the applicants. From a legal point of view the letter generated by the second and third respondents does not qualify to be a legal process with the power of evicting anyone. Assuming but not conceding that there was a tribute agreement that the second respondent was enforcing, in an application for spoliation it is trite that the court does not concern itself with ownerships. At law even a thief may be despoiled and is protected by law ones the thief has been despoiled without due process. The duty of the court is merely to restore status *quo ante* where one has taken the law into one's own hands. Issue of ownership will be determined on the return date.

In my view the applicants have managed to prove the essential elements for spoliation and interdict. Whether there was a valid or invalid tribute agreement is an issue for determination on another day. The court is therefore satisfied that the applicants were despoiled of their possession of the mining claims where they were in peaceful and undisturbed possession. The court will grant the relief sought as all the essential elements for spoliation and interdict have been proved.

IT IS HEREBY ORDERED THAT

TERMS OF FINAL ORDER SOUGHT

1. The 1st Respondent be and is hereby ordered to restore the status quo ante at Juno 5 mine, Chakari Kadoma.

2. The 2nd Applicant be and is hereby declared to be the sole and exclusive registered (holder) owner of Juno 5 mine Kadoma with exclusive rights to extract minerals from the said mine.
3. The 2nd and 3rd Respondents be and are hereby ordered and directed to cancel tribute agreement number TR 29/2018 registered on the 14th of September 2018.
4. The Respondents be and are hereby ordered to pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending the determination of the matter on the return date applicants are granted the following relief:

1. The 1st Respondent and everyone claiming occupation through them be and are hereby ordered to stop any mining operations at Juno 5 mine Chakari Kadoma until finalization of this matter.
2. The 1st Respondent, their agents, nominees or anyone acting through them be and are hereby ordered to desist from interfering with Applicants' possession, utilization and operations at Juno 5 mine Chakari Kadoma with immediate effect.
3. The 1st Respondent and anyone claining occupation through them be and are hereby evicted from Juno 5 mine Chakari Kadoma with immediate effect.
4. The 1st Respondent be and is hereby ordered and directed to allow Applicants 's officers, agents and employees unfettered access into Juno 5 mine Chakari Kadoma. Such access shall include the right of the Applicants to place on the mine such number of security guards as they may determine.
5. The 1st Respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

SERVICE OF ORDER

Service of this Provisional Order shall be effected by the Sheriff of Zimbabwe or any additional sheriff or any member of the Zimbabwe Republic Police or by the Applicants' Legal Practitioners upon the Respondents.

Zuze Law Chambers, 1st & 2nd applicants' legal practitioners
Masawi & Partners, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd - 4th respondents' legal practitioners