

PRSCILLA SIPHIWE DUBE

Versus

MAPHEPHA SYNDICATE

And

**THE MINING COMMISSIONER N O
MINISTRY OF MINES**

And

THE PROVINCIAL MAGISTRATE N O

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 26 NOVEMBER 2008 & 15 JANUARY 2009

J James for applicant

T Moyo for respondent

No appearance from 2nd and 3rd respondents

Opposed Court Application and Counter Application

KAMOCHA J: In this matter, the 1st respondent Maphepha Syndicate applied and was granted an order *ex parte* by the magistrates' court on 16 October, 2008. The order authorised the Messenger of Court to proceed and evict the applicant, her employees and any persons claiming title through her from the mining claim identified in annexure "A" and "B". The Messenger of Court was authorised to enlist the assistance of members of the Zimbabwe Republic Police Sun Yet Sen if the need arose.

On receipt of the above magistrate's order the applicant applied for and was granted a provisional order by this court on 22 October 2008 wherein the Deputy Sheriff, Gwanda was ordered and directed to immediately eject Maphepha Syndicate and all those claiming title through it from the mining claim referred to in annexure "A" and "B" from which the applicant was evicted 6 days previously i.e. 16 October 2008, and to restore applicant in possession thereof. The 1st respondent was then interdicted from interfering with the applicant's possession of and utilisation of the aforesaid mining claim.

The parties approached me requesting if I could hear an application for confirming or discharging the provisional order early. I acceded to the request and set the matter on the earliest available date i.e. 26 November 2008.

In the final relief the applicant sought the following order.

- “(a) The *rule nisi* issued on the 16th October, 2008 in PA 28/08 by the 3rd respondent be and is hereby set aside and declared a nullity.
- (b) The 1st respondent be and hereby is interdicted from interfering with the applicant possession of, and enjoyment of the mining claim set out in annexure “A” and “B” to PA 28/08 unless there is a valid court order to that effect.

That the 1st respondent pays the costs of this application on a legal practitioner and client scale and 2nd and 3rd respondents pay costs of this application on a legal practitioner and client scale only in the event that they oppose this application.”

The 1st respondent filed a counter application wherein it sought an order in the following terms:-

“It is ordered that:-

1. The applicant and the 1st respondent herein, together with all those claiming title through them, be and are hereby interdicted from carrying on any mining operations for gold or other mineral at the disputed site, until such time as the 2nd respondent has resolved as to in whose claim the site lies.

Any gold ore already mined at the site, but not yet removed be left at the site until the resolution of this current dispute, at which stage its ownership will go to the party with the right to exploit the site for mining purposes.

The parties, by arrangement and agreement, be and are hereby allowed to station security guards for the purposes of ensuring compliance with this court order.

The 1st respondent be and is hereby ordered to pay the costs of this application if she opposes it, otherwise each party to meet its own costs”.

The main allegation by the applicant in the main application was that the 1st respondent had unlawfully ejected her from her mining claim with effect from 16 October 2008. The reason being that the magistrates’ court which granted the eviction order had no jurisdiction to entertain a claim relating to the ejection of the applicant from a valuable mining claim. The magistrates’ court monetary civil jurisdiction was at the relevant time a paltry \$50,00 after revaluation. Quite clearly a mining claim is worth infinitely far much more than that. The magistrates’ court being a creature of statute should operate within the confines of monetary jurisdiction bestowed on it by law. See section 11(b)(ii) and (iii) of the Magistrates’ Court Act, [Chapter 7:10].

It was submitted on behalf of the applicant that what the magistrate had done was similar to a situation where the magistrate presides over a murder trial and sentences the accused to death. That would be clearly wrong and a nullity.

There is merit in the applicant's contention. When a magistrates' court does what is not within its jurisdiction, the result of what it purports to do is void and it is a nullity in law with no force or effect. No benefit can be derived from it. It has been repeatedly stated that it is like trying to build something on nothing and expect it to stand; it will collapse. See for instances *Mcfaooy v United Africa Co. Ltd* (1961) ER 1165.

See also *Mkhize v Swemmor and Others* 1967 (1) SA 186 where it was stated at 197C-D that,

“judicial decisions will ordinarily stand until set aside by way of appeal or review, but to that rule there are exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside.”

See also a Zimbabwe case *Manning v Manning* 1986(2) ZLR I at 3D-F where a village court acted without jurisdiction.

In the light of the foregoing I hold that the applicant was unlawfully evicted from the mining claim in question on 16 October 2008.

In the result the need to consider other issues that were raised by the 1st respondent does not arise.

As regards the counter application I find no factual or legal basis for the order that is being sought. The founding affidavit falls far too short from meeting the requirement to prove its case. For instance it is not clear why the 1st respondent wants the applicant to be interdicted from carrying on any mining operations for gold on the said mining claim. She has been doing so for years with the authority of the Mining Commissioner. She has got a certificate of registration and a letter from the Mining Commissioner dated 29 June 2005. In the result the counter application must fail with costs.

Consequently, the order of this court is this:-

It is ordered that:-

- (a) the provisional order be and is hereby confirmed in terms of the draft order; and

that the counter application be and is hereby dismissed with costs.

James, Moyo-Majwabu and Nyoni applicant's legal practitioners

Messrs Galen Moyo-Masiye 1st respondent's legal practitioners