

**AMIN MATOLA**

**Versus**

**LANGTON MAPHOSA**

**And**

**GREENLIGHT MINING SYNDICATE**

**And**

**JOHN DUBE**

**And**

**TENNYSON NDLOVU**

**And**

**ISAAC NDLOVU**

**And**

**THE ZIMBABWE REPUBLIC POLICE  
MATABELELAND SOUTH**

**And**

**SHERIFF OF THE HIGH COURT OF ZIMBABWE**

**And**

**PROVINCIAL MINING DIRECTOR  
MATABELELAND SOUTH**

**IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 25 MARCH, 11 APRIL & 28 JULY 2022**

**Urgent Chamber Application**

*D. Dube* for the applicant  
*Ngwenya with T. Tavengwa* for the 1<sup>st</sup> to 5<sup>th</sup> respondents  
No appearance for the 6<sup>th</sup> to 8<sup>th</sup> respondents

**TAKUVA J:** Applicant has approached this court on an urgent basis seeking a spoliation order and the restoration of the *status quo ante*. The order sought is stated thus:

“1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> respondents’ employees or their agents, associates, assignees shall restore undisturbed possession and control of the following to applicant;

- (a) Mining claim namely Umzingwane E 22 registration number 50355 within 24 hours of the granting of this order failing which the Sheriff of the High Court of Zimbabwe or his lawful deputy or assistant in Bulawayo be and is hereby authorized, directed and ordered to evict the respondents and all those claiming occupation through them and shall restore vacant and undisturbed possession of the mining claim to applicant.
- (b) 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, agents, assignees, employees and anyone claiming occupation through them be and are hereby ordered not to interfere with applicant’s possession and control of Umzingwane E 22 mining claim registration number 50335.
- (c) 1<sup>st</sup> respondent to bear the costs of suit on an attorney-client scale.”

### **Background facts**

This is a mining dispute where two competing miners are jostling for the same piece of land. The 2<sup>nd</sup> respondent is a mining syndicate formed as a co-operative in 1988. It had fifty-eight (58) members. After its formation, it was granted mining rights over Partridge 2 and 3 mines at Esigodini. The respective registration numbers for these claims are 35484/34463. The syndicate has at all material times been exercising their mining rights.

However unbeknown to the 2<sup>nd</sup> respondent, the 8<sup>th</sup> respondent forfeited the respondents’ claims. After learning of the forfeiture in early 2021 engagements were made with the 8<sup>th</sup> respondents to have the forfeiture order set aside. These engagements are ongoing as currently there are over sixty (60) families residing and mining in this area over decades.

Meanwhile applicant on 12 November 2021 had four claims registered under;

- 1. Umzingwane E21 registration number 50334 and
- 2. Umzingwane E 22 registration number 50335.
- 3. Umzingwane E 23 registration number 50036
- 4. Umzingwane E 20 registration number 36701

These claims sit on the same land respondents and their families currently occupy. An ownership dispute erupted between applicant on one hand and respondents on the other. The Provincial Mining Director summoned both parties to his office for a meeting to discuss and resolve the complaints. The meeting was scheduled for the 1<sup>st</sup> March 2022. Applicant

attended the meeting but declined to consent to the jurisdiction of the Provincial Mining Director. He subsequently approached this court on an urgent basis seeking the above relief.

### **Applicant's case**

Applicant contends that he is a holder of mining rights registered under registration numbers 550335, 50334, 50336 and 460377. He further submitted that he has been in peaceful undisturbed possession and occupation of the mine from the 12<sup>th</sup> day of November 2021 until the 23<sup>rd</sup> of February 2022 when respondents invaded the mine and dispossessed him of physical control. According to the applicant the marauding gang in excess of eighty (80) people overpowered his two security guards. Further, applicant contends that the individuals who unlawfully invaded his mine were belligerent, armed with axes, machetes and effectively prevented applicant and his employees from gaining access to the mine. It is applicant's case that these individuals have made threats of violence towards his employees and are carrying illegal operations.

On this basis, applicant claimed that he had shown that he was in peaceful and undisturbed possession of the property and that the respondents deprived him of the possession forcibly or wrongfully against his consent.

### **Respondents' case**

The 1<sup>st</sup> to 5<sup>th</sup> respondents filed a notice of opposition in which they argued that;

1. The applicant was not in peaceful and undisturbed possession of the mine in question at the time of dispossession;
2. The dispossession was not unlawful and therefore did not constitute spoliation;
3. This matter is not urgent.

As regards urgency the submission is that the applicant took 13 days to present this application after it had been filed on 4 March or 7 March 2022. This is a clear sign of lackadaisical approach by applicant. Further if applicant was despoiled on 23 February 2022 why did he want wait the 23<sup>rd</sup> March 2022 to prosecute this application?

In respect of peaceful possession of the property. Respondent contended that applicant has never been in peaceful occupation of the property. In fact respondents aver that they have been in peaceful occupation and use of the mine for a very long long time. Despite the

registration of mining claims in the area in dispute, applicant has never taken occupation or possession of this property. He has never conducted any mining activities on this property and the mining equipment at the property was purchased by the 2<sup>nd</sup> respondent a long time ago. Equally, the homes that have been built in the area were so done a long time ago by the 2<sup>nd</sup> respondent's members.

It is respondents' assertion that they registered their mining rights prior to the applicant's registration. They have placed mining equipment on the site, built immovable structures and are residing there as they consider this area as their communal home with the Chief and Headman's knowledge. As regards the 2<sup>nd</sup> requirement for spoliation namely that the applicant was deprived of possession, respondents maintain that this is imaginary than real. They allege that applicant has not placed cogent evidence to prove on a balance of probabilities that he was unlawfully dispossessed. In his answering affidavit applicant has not confronted respondents' averments heard on. Applicant is aware and accepts that he found respondents in that area and that respondents' registration certificate was forfeited by the 8<sup>th</sup> respondent.

### **The Law**

The law that applies to the remedy of *mandament van spolie* is now well settled. More than a century ago, the rule was put by INNES CJ as follows;

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute." See *Nino Boninio v Deliangue* 1906 TS 20.

According to Silberberg and Schoeman, *The Law of Property* second ED at page 114:

"Possession" has been described as a component of a physical situation and of a mental state involving the physical control or detention of a thing by a person and a person's mental attitude towards the thing ... whether or not a person has physical control of a thing and what his mental attitude is towards the thing are both questions of fact."

An applicant in spoliation proceedings need not even allege that he has a *ius possidendi*; *spoliatus ante omnia restitundus est* ... All that the applicant must prove is that he was peaceful and undisturbed possession at the time of the alleged spoliation and that he was

illicitly ousted from such possession ... It is not sufficient to make out only a *prima facie* case ...” Silbeerberg & Schoeman *supra* at pages 135-136.

It is also a principle of our law that the purpose of a spoliation order is not the protection and vindication of rights in general, but rather the restoration of the *status quo ante* where the *spoliatus* has been unlawfully deprived of a thing, a movable, that he had been in possession or quasi – possession – see *Zulu v Minister of Works, Kwazulu & Ors*, 1992 (1) SA 181 (T).

The onus to prove the requirements in an application for a spoliation order is on the applicant and the lawfulness or otherwise of the possession challenged is not an issue. It has also been said that spoliation proceedings are by their very nature urgent.

### **Application of the law to the facts**

I start with the question of urgency. Notwithstanding what the respondents have stated in their opposing papers about the applicant’s failure to prosecute his case timeously, I am satisfied that the applicant gave a plausible explanation for the delay. It is however not correct that the applicant approached this court on the 23<sup>rd</sup> day of March 2022. He did so on the 4<sup>th</sup> day of March 2022 as proved by the stamp on the cover page. The explanation for the delay between the 4<sup>th</sup> and 7<sup>th</sup> March 2022 is reasonable. In the circumstances I find that applicant exhibited urgency in this matter and reacted in the least possible time by promptly approaching this court. Accordingly, I find that the matter is urgent.

On the merits the sole issue for determination is whether or not the applicant has satisfied the requirements for a spoliation order? These requirements are:

- (i) That the applicant was in peaceful and undisturbed possession of the thing;
- (ii) That he was unlawfully deprived of such possession.

In respect of the 1<sup>st</sup> requirement, I am not persuaded that the applicant was in peaceful and undisturbed possession of the property because when he first set foot there he found respondents in occupation and control of surface rights. What the respondents had lost through forfeiture are underground rights. It is common cause that a dispute immediately erupted over ownership of the mine. The respondents stated in very clear terms that they have occupied the premises previously known as Patridge 2 and 3 since 1988. In paragraph 17 the respondents make this specific allegation;

“Not only have we been carrying out mining activities but most of us and our families regard these premises as our rural homes. There are sixty (60) families within these premises, which families have possessed the property prior to applicant.”

Interestingly the applicant failed to comment on this very crucial point in his answering affidavit. There is absolutely no response at all. Consequently, the respondents’ allegations are not put in dispute? Therefore, they are accepted.

In Odgers *Principles of Pleading and Protection in Civil Actions in the High Court of Justice* 2<sup>nd</sup> edition, the learned author says;

“Any allegation unless traversed is admitted. The pleader must either admit or deny every material allegation of fact in the pleadings of his opponent and he must make it absolutely clear which fact he admits and which he denies.”

*In casu* material facts raised by respondents have not been traversed with sufficient particularity. As a result, they remain admitted.

As regards the 2<sup>nd</sup> requirement, the applicant has not in my view discharged the onus of proving that he was unlawfully deprived of such possession. This is clearly demonstrated by the following facts.

1. Notwithstanding the challenge by respondents in paragraph 24 of the applicant’s affidavit that no violence was employed or directed at the two security guards, applicant did not identify the guards in question. Further no affidavits by these two guards explaining what exactly took place were filed.
2. Despite the severity of the alleged assault and the use of axes and machetes, the security guards have not laid any criminal charges against the respondents.
3. No criminal charges of assault or criminal trespassing have been preferred against the respondents.

In my view the failure to challenge facts raised in the opposing affidavit shows that the applicant’s version on a balance of probabilities cannot be believed. The applicant bears the onus of proof. See *ZUPCO v Park Hove Services (Pvt) Ltd* SC-13-17 where it was stated that:

“The cardinal rule on onus is that a person who claims something from another in court has to satisfy the court that he is entitled to it. See *Pillay v Krishna*, 1946 at 952

– 953. It is also settled law that he who alleges must prove. See *NB Investments (Pvt) Ltd v Oliver and Partners* 1974 (3) SA 269 (RA)”

*In casu*, on the evidence, I find that applicant has failed to prove on a balance of probabilities that he was in peaceful and undisturbed possession of the mining claim. He has also failed to prove that he was wrongfully and forcibly deprived of his possession by the respondents.

In the result, I make the following order:

(1) The application be and is hereby dismissed with costs.

*Mathonsi Ncube Law Chambers*, applicant’s legal practitioners

*Mutuso, Taruvinga & Mhiribidi*, 1<sup>st</sup> – 5<sup>th</sup> respondents’ legal practitioners