

MIRIAM KANDONGWE

versus

CAROLINE MUKETIWA

PEPUKAI KUNAKA

Versus

MIKE MAGUVAZA

MINING COMMISSIONER MASHONALAND WEST

MINISTER OF MINES AND MINING DEVELOPMENT (N.O)

THE COMMISSIONER GENERAL ZIMBABWE REPUBLIC POLICE (N.O)

HIGH COURT OF ZIMBABWE

MUZOFA J

CHINHOYI, 30 January, 10 & 22 February 2023

Urgent Chamber Application

V Masvaya, for the applicant

F Murisi, for the 1st respondent

T Marira with N E Changwa, for the 2nd – 4th respondents

MUZOFA J:

1. The applicant approached the court for spoliatory relief on an urgent basis for restoration of peaceful possession of Golden Mile 12 registration number 23506 ‘the mine’ by the 1st respondent and that they vacate the mine and costs on a higher scale.

2. The applicant correctly sought a final order since a spoliation order is final and definitive in nature, it cannot be granted as a provisional order¹. It being a final order, the standard of proof is on a balance of probabilities.
3. Despite the application being filed as an urgent matter, which should ordinarily be disposed as soon as possible, the matter delayed. The delay was by consent. After hearing parties, the dispute presented as a boundary dispute. I then issued an interim order by consent for the 2nd and 3rd respondents to conduct a survey to establish the applicant and the 1st respondent's extent of occupancy in respect of the disputed mining location. The verification was to be done in the presence of the applicant and the 1st respondent. The parties duly conducted the exercise and a report was timeously filed. Parties subsequently appeared before the court for further submissions.

Factual Background

4. The applicant registered a mining block known as Golden Mile 12 in 1995 with a registration number 23506. The applicant has religiously complied with all the necessary legal and statutory requirements for a valid registration. However, the validity of the registration is disputed, the 2nd respondent alleges that it was forfeited in June 2021. The forfeiture is subject to litigation.
5. The applicant has been in occupation of the mine since 1995. In November 2021 the 1st respondent invaded the mine and advised all the occupants that he was the new owner. The applicant approached the Provincial Mining Director who advised the applicant that his mining registration was forfeited. The applicant filed an application for review under HC26/21. The 1st respondent together with his security personnel moved out of the mine after being served with process. Peaceful possession was restored to the applicant.

The applicant's case

¹ Gateway Primary School & Ors v Marinda Fenesy & Anor SC 63/21, Blue Rangers Estates (Pvt) Ltd v Muduvuri & Anor 2009 (1) ZLR 368

6. According to the applicant, on the 22nd of January 2023 the 1st respondent invaded the mine again. His security guards were chased from the mine. Loice Marufu, the applicant's wife filed an affidavit confirming that the 1st respondent took over the mine as the new owner. The 1st respondent's brother one Bruce and some employees started mining in the shaft using generators, compressors and jack hammers.
7. The 1st respondent violently ordered the applicant's agents out of the shafts. They duly complied. They are now confined to the mine compound living in fear of eviction from the 1st respondent.
8. The applicant avers that he was in peaceful and undisturbed possession of the mine and that the 1st respondent deprived him of such possession forcibly or wrongfully against his consent which are the only requirements he must prove to obtain spoliatory relief. The applicant relied on the case of *Moyo & Another v Blanket Mine (1983) Pvt Ltd*² wherein the requirements were alluded to.

The 1st respondent's case

9. In opposing the application, the 1st respondent raised different issues which to my mind do not constitute any valid defence legally. He denied occupying the applicant's block. Instead, he accused the applicant of being an illegal occupant since his block was forfeited. It was argued that the court must not assist an illegal occupant to aid and abet the illegality.
10. On his part the 1st respondent indicated that he applied for registration of a mining block under 1215/21. The application is pending approval by the 2nd respondent. Pending such approval, he has fenced and placed security guards to secure the block.

The 2- 4 respondents' case

11. Mr. *Marira* indicated that he had instructions not to oppose the application. Obviously, this is not a proper approach in such cases. The 2nd and 3rd respondents are the administrators of the Mines and Minerals Act (Chapter 21: 05) in terms of

² SC 87/22

which the mining registration certificates are issued. They therefore have a duty to provide the court with information for the proper resolution of such cases.

12. I insisted that the 2nd respondent plays its part in the proper resolution of this matter. It is then that I issued an order by consent for a survey to be conducted by the 2nd respondent. Thereafter submissions were made on behalf of the 2nd and 3rd respondents. I will revert to the submissions later in the judgment.

Submissions on the survey report

13. The findings were set out as follows: -
- i. The applicant's surveyed position is different from the master plan in the 2nd respondent's office.
 - ii. The 1st respondent's pending registration 1215/2021 corresponds with the master plan.
 - iii. According to the master plan there is no encroachment between Golden Mile 12 and 1215/2021.
 - iv. According to surveyed position, there is encroachment of 3 hectares between Golden Mile 12 and 1215/2021.

It was explained that the surveyed position is the position pointed to by a party which obtains on the ground which is not on the master plan at the 2nd respondent's office.

14. The report also included recommendations which are really comments, that Golden Mile Registration number 2306 was forfeited on 3 June 2021. Also that M and A Mining Syndicate's application (1215/2021) is pending processing.
15. The submissions made by parties did not concern the substantive issue on the verification exercise. It seems parties were in agreement on what the report reflected. The submissions centered on the conduct of the parties on site.
16. *Mr. Masvaya*, submitted that the 1st respondent defied the court order therefore he must not be heard. He literally blocked the parties and denied them access to a place marked DP on the survey diagram. He actually threatened to unleash dogs on the parties if they ever moved an inch towards the place. The dogs were on

leash held by some visibly drug men . The 1st respondent's legal practitioner *Mr. Murisi* did not seem to reprimand the 1st respondent but dismissively said that the parties' mandate had been fully executed and they must leave. This was confirmed by counsel for the 2nd and 3rd respondents. Infact *Mr. Marira* graphically and emotionally explained the 1st respondent's conduct which his legal practitioner seemed to tolerate. Clearly the situation on the ground was indeed terse and threatening.

17. *Mr. Murisi* tried to down play what transpired on the basis that they believed that the place marked DP had nothing to do with the court order. This was an obvious misrepresentation. The court order was clear, it was for the verification of the applicant and 1st respondent's extent of occupancy on the ground. The place marked DP is within the 1st respondent's pending application known as M & A Mining Syndicate 1215/21. This is the place that the 1st respondent fenced. At the time, the 1st respondent's application had not been approved yet he was already conducting some mining activities. He had the audacity to even deny the responsible authorities access to the mine. His conduct was abhorrent and need to be censured.
18. It is within the court's discretion to decline to hear a litigant who flagrantly defies a court order. It is all about the court's integrity, the court is entitled to protect and regulate its processes. If a litigant defies a court order, he or she cannot expect to approach the same court for audience³.
19. In this case I have made a finding that the 1st respondent denied the 2nd and 3rd respondents to fully execute their mandate. I pondered if denying the 1st respondent audience would serve any meaningful purpose. Courts are open to deal with disputes between litigants. Closing the door on the 1st respondent may be too harsh considering that on the whole the 2nd respondent was able to compile the report requested by the court. The report depicted the extent of the applicant and the respondent's occupancy. Access to DP would have revealed the 1st respondent's unsanctioned mining activities. In my view this is an issue that the 2nd respondent must take up seriously and deal with. These activities are detrimental to the environment. The court was told that the 1st respondent's

³ CFI Retail (Pvt) Ltd v Manyika SC 8/16

mining activities have not been approved by the 2nd respondent and the Environmental Management Agency. In addition, all the mining waste flows directly into a nearby river which the local communities use.

20. Having expressed myself on the untoward conduct of the 1st respondent, I do not think denying him audience is in the interest of justice since the court order was executed albeit with some difficulty. The 1st respondent can only be censured by way of costs on a higher scale as prayed for by the applicant.
21. I revert to the substantive issues on spoliation. The survey report shows that both the applicant and the 1st respondent's claims on the mine are not recognized by the 2nd respondent. Since spoliation does not concern itself with ownership, this matter is disposable on a factual finding as to who was first on the disputed place.

The Law

22. A *mandament van spolie* is a restitutory interdict that accrues to a possessor who has been deprived of possession by another on the pretext that the latter was entitled to do so, or where the possessor has otherwise been deprived of possession unlawfully. The rationale behind the remedy is that no one may take the law into their own hands. Possessors, whether in lawful possession of an item or not, who are deprived of their possession must first have their possession restored to them before possession is investigated⁴.
23. The applicant must prove two requirements, that he was in peaceful and undisturbed possession of the property; and wrongful dispossession against his consent⁵. Possession connotes both physical possession and the requisite animus or intent to secure some benefit to the possessor.

Application of the law to the facts.

24. The applicant has discharged the onus placed on him. I am satisfied that the applicant occupied the places in dispute marked Kunaka Homestead and shaft from 1995. A submission was made that during the ground verification at Kunaka homestead there were people and old structures. Also, when the applicant pointed

⁴ Eckard's Principles of Civil Procedure in the Magistrates' Courts, 5th edition, Juta and Company Ltd, 73

⁵ Botha & Anor v Barrett 1996 (2) ZLR 73 (S) at 79-80

his homestead no one contradicted the fact. The 1st respondent's submission that this homestead was unoccupied is therefore untenable and unsupported. This is the area that overlaps 3 hectares between the applicant's surveyed coordinates and the 1st respondent's M & A 1215/21 surveyed coordinates. The 1st respondent did not deny that he fenced and posted security guards around the area falling under 1215/21. There was evidence that during the verification exercise at some point it was denied that he was working on the shaft, but in court his legal practitioner conceded that he has been working on the shaft from 2021 when he filed his application for registration.

25. The 1st respondent's defence that he has a pending application which covers the area where the Kunaka Homestead and the disputed shaft is located is without legal support. To his detriment, a pending application does not confer any rights⁶. It may be granted or not granted. It is hanging in the air and no rights can be derived from it. Even if the mining registration is granted. The law does not allow him to arbitrarily dispossess and evict the applicant. He must follow due process. This is the very essence of spoliation, no one must take the law into his hands.
26. The fact of the illegal occupation by the applicant does not constitute a valid defence. It is a settled principle of spoliation that the issue of ownership is not considered. The point taken by the 1st respondent was not fully argued and therefore remained unsubstantiated.

Costs

27. Ordinarily costs follow the cause and I have no reason to depart from the settled position. The applicant requested for costs on the legal practitioner client scale based on the 1st respondent's conduct. It was also submitted that this is a second spoliation by the 1st respondent. Mr. *Murisi* opposed the granting of costs on a higher scale on the basis that the 1st respondent was entitled to defend his rights in court.
28. Costs on a higher scale are punitive in nature. The court must therefore exercise its discretion judiciously. In *Mutunhu v Crest Poultry Group (Pvt) Ltd*⁷

⁶ *Chamu v Mpindiwa HMA 31/17*

⁷ *HH 399/17*

MUSHORE J in making an order for costs on the legal practitioner – client scale as claimed by the applicant in this case had this to say on page 22 of the cyclostyled judgment:

“The defendant has sought an award of damages on a higher scale. It is settled law that the award costs on an attorney/client scale is likely to be granted if the conduct of the litigant from which such an award is sought amount to an abuse of the court process and that his actions thereby brought additional and unwarranted expenses to the other party. The leading case on the issue is *Nel v Waterbuung Landbouwers Ko-operative Vereeniging* 1946 AD 54 where the court found that the party ought not to be put out of pocket for unnecessary proceedings. Also see *Muduma v Municipality of Chinhoyi and Samuriwo* 1986(1) ZLR 12 (HC) where Reynolds J found that one party was put through considerable inconvenience by virtue of the respondent’s unreasonable objections and behaviour.”

29. I have already expressed myself on the 1st respondent’s conduct that must be censured. In addition, the 1st respondent had no recognized defence to the claim. He was well aware that he took possession of the mine without proper authority. The court can only express its displeasure by way of costs on a higher scale against the 1st respondent.

DISPOSITION

The 1st respondent does not deny fencing and posting security guards around the area falling under his prospective application under 1215/21 to secure it. The place covers the applicant’s homestead and the shaft. He had no lawful authority to do so.

Accordingly, the following order is made.

1. The application be and is hereby granted with costs on the legal practitioner client scale.
2. The 1st respondent, his agents, proxies and assignees be and are hereby ordered to restore forthwith to the applicant possession of Golden Mile 12 registration 23506.

3. The 1st respondent, his agents and assignees be and are hereby ordered to forthwith vacate Golden Mile 12 Registration number 23506 upon service of this order.

Chitsa & Masvaya Law Chambers, applicant's legal practitioners.

Murisi and Associates, 1st respondent's legal practitioners.

Civil Division of the Attorney General, 2nd, 3rd and 4th respondent's legal practitioners.