RODGERS MADANGURE
versus
SHATO LUFEYI
and
DAYNDALE ENTERPRISES (PRIVATE) LIMITED
and
MUGEJO MAKONI

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 24 September and 20 October 2010

Urgent Chamber Application

M Nzarayapenga, for the applicant
T Mpofu, for first and second the respondents
B Chidziva, for third respondent

GOWORA J: The first and third respondents are business partners. Some time ago, the date has not been specified, the two agreed to enter into a joint venture involving gold mining in the country. The first respondent a foreign national then joined forces with the third respondent and others culminating in the formation of the second respondent and its subsequent incorporation as a limited liability company. There is some dispute as to whether or not the third respondent is a director in the second respondent, but in my view that dispute is not pertinent for the resolution of this application. At any rate, the first respondent is a director in second respondent.

In his founding affidavit, the applicant avers that he was in September 2009, approached by the third respondent who advised him that, he, third respondent and his "partners" in second respondent had purchased gold claims in Masvingo. The third respondent had revealed that his "partners" had abandoned the venture and that the claims were about to be forfeited due to non payment for statutory licences to the Ministry of Mines.

The applicant avers that he had been advised by the third respondent that the second respondent, first respondent and two others had purchased mining claims from one Elborn Tinago in October 2007 but that the foreign directors and the first respondent had lost interest

in the venture and had consequently pulled out of it. The third respondent advised the applicant that in total only US$15 000-00 had been invested in the venture by the first respondent and the partners to the venture. The third respondent confirmed his interest within the second respondent by exhibiting share certificates to the applicant which information he verified with the Registrar of Companies.

The applicant thereafter visited the site and ascertained that there was no activity. He then entered into an agreement with the third respondent which resulted in him purchasing the latter's shareholding in the second respondent on 7 September 2009. The 500 000 shares which the third respondent held in second respondent were then transferred to the applicant. Because there was an imminent threat of forfeiture the applicant paid the fees for the licences with the Ministry of Mines. Thereafter the applicant proceeded to pay out monies for the development of the site, purchasing equipment and ensuring that environmental impact reports were done. He also engaged forty locals to work at the site.

On 5 May 2010 the second respondent was under case number HC 2813/10 granted a provisional order by PATEL J. The interim relief granted by his Lordship was in the following terms:

Pending determination of this matter, the applicant is granted the following relief:

1

That upon service of this order the respondent and anyone claiming occupation through him be and is hereby interdicted from mining, milling of gold ore, or from being within 5 500 metres of the Gold Reef claims known as 20, 21 and 6 6 being claim numbers 7651, 8804 and 8817 situate at Avonmore Farm near Masvingo town.

2.

That the respondent and anyone claiming occupation through him be and are hereby interdicted upon service of this order from removing the electric transformer, building materials, the bore mill and any material currently being utilized at the aforesaid claims until the determination of the court application lodged with this Honourable court in case number HC 2814/10.

3

That in the event that the respondent disobeys this order the officer in charge ZRP Masvingo Central Station be and is hereby directed with the powers bestowed upon the police to stop disobedience of this order and to arrest any culprit for contempt of court.

The third respondent herein was the only respondent cited under that case number, the applicant was not a party. The applicant, then, in turn under case number HC 3604/10 approached the court, again on a certificate of urgency citing the second and third respondents herein as parties thereto. This application was for directions in respect of an application for joinder filed by the applicant under case number HC 3603/10. The terms of the interim relief granted to the applicant are as follows:

2) Pending the finalization of this matter, application is granted to the following interim relief:

   (a) The court application for joinder filed under HC 3603/10 be and is hereby allowed to be heard urgently with the parties being directed as follows:

      (i) The respondents are to file their opposing papers three (3) working days after being served with the application.

      (ii) The applicant be and is directed to file his answering affidavits, if any within two (2) working days after service upon his legal practitioners of the respondent's Notice of Opposition.

      (iii) The applicant be and is hereby directed to file his Heads of Argument within three (3) working days after filing the answering affidavit, if any, is to be filed or alternatively within five (5) days after receiving the notice of opposition.

      (iv) The respondents be and are hereby directed to file their heads of arguments within two (2) working days after receipt of the applicants heads of arguments.

      (v) The Registrar of the High Court is to set the matter down before the duty Judge within five (5) working days from the date of filing of heads of arguments for the respondents absence of which within five (5) days of filing of the applicant's heads of arguments.

   (b) The provisional order granted under HC 2813/10 be and is hereby deemed to be in operational against the applicant and or his agents, employees or assignees pending the finalization of the urgent chamber application.

The applicant avers in his founding affidavit that the provisional order of 5 May 2010 did not bestow any rights of occupation on the first and second respondents but that it simply

interdicted mining operations by the third respondent and all those claiming occupation through him. The applicant averred further that in terms of the provisional order that he sought and obtained on 1 June 2010 the *status quo ante* was restored between them meaning that whilst the third respondent could not carry out any mining operations at the site, he, the applicant could in terms of the provisional order of 1 June 2010, in particular the paragraph reading as follows: "that the provisional order granted under Case No HC 2813/10 be and is hereby deemed to be in operational against the applicant or his agents, employees or assignees pending the finalization of the urgent chamber application".

The applicant has now approached this court seeking an order for restoration of peaceful and undisturbed possession of the Gold Reef claims, a temporary interdict against interference in mining operations by the first and second respondents, an order that they keep the peace and an order for their eviction from the premises.

Mr *Mpofu* on behalf of the first and second respondents raised two points *in limine*, firstly that the matter was not urgent and secondly that the application was inappropriate.

As regards urgency Mr *Mpofu* contended that although he was aware of the rule that spoliation proceedings are ordinarily urgent, it does not stop the point being taken that a particular matter should not be brought to court on an urgent basis. He submitted that a party who does not approach the court when they should have must give a reasonable explanation for such failure. He contended that the alleged acts of spoliation were stated by the applicant as having occurred on 11 and 12 September 2010 and yet the application was only filed on 20 September 2010 and the applicant had not furnished in the affidavit with an explanation as to why the application had not been filed soon thereafter. He contended further that the allegation that a guardhouse had been built at the site can only point to the acts having been perpetrated over a lengthy period of time which confirms the contention by the respondents that the applicant failed to act timeously in order to have the court's intervention in the alleged acts of spoliation.

In my view, counsel is correct when he states that the relief of spoliation is dealt with on an urgent basis. If it is accepted that the events complained of took place on 11 and 12 September 2010, it would be in my view be stretching it for the respondents to submit that the applicant had not acted timeously in filing the application. The application was filed on 20 September 2010 which is about eight days at the most from the date of the alleged acts of

spoliation and I do not find that there was a delay in lodging the papers. In my view, there is no merit in their submission that the matter should not be treated as urgent.

I turn to the second point raised in *limine*, that of the propriety of the application.

The applicant accepts in his founding affidavit that the initial order by PATEL J under case number HC 2813/10 is still extant. That order interdicted the third respondent and anyone claiming through him, from mining, milling of gold ore and further prevented the third respondent and anyone claiming through him from approaching within 500 metres of the claims. The applicant herein was not cited as a party to that dispute but as he claimed occupation through the third respondent the provisional order perforce applied to him. There is no legal basis upon which he could claim immunity from the operation of the order.

Mr *Mpofu* contends that whilst the application before me purports to be one for a *mandament van spolie*, the real issue is the order granted on 1 June 2010 in that the applicant seeks to contend that in terms of the order of 1 June 2010 if it deems, so it is submitted that the order of 5 May 2010 does not operate against the applicant.

In his submissions, Mr *Nzarayapenga* contended that the applicant has been in possession of the site since buying shares from the third respondent and has been on a massive development program on the site and that everything thereon except for the transformer belongs to the applicant. He contended that the applicant was never removed from the site, and that the respondents simply came on his own, and imposed persons unknown onto the site.

It seems to me that the submissions by the applicant's counsel are basically skating over the facts. In his founding affidavit the applicant makes the following averment:

> "5.2. On the strength of its urgent application the first respondent obtained a provisional order, the terms of which basically interdict the third respondent and all those claiming occupation through him from carrying on any mining operations and occupying claims number 7651, 8817 and 88094 otherwise known as Good 20, 21 and 6 situate in Masvingo. Further it stops anyone from removing any equipment thereat".

The applicant was obviously aware of the terms of the order of 5 May 2010. He was aware that it sought to interdict the third respondent and himself not only from carrying out mining operations but from approaching within 500 metres of the disputed mining site. Under case number HC 3604/10 this fact appears in the certificate of urgency filed in accompaniment of the application. The pertinent part of the certificate reads:

> "1. The applicant is running a mining operation situate in Masvingo under Gold Reef claims know as 20, 21 and 6 being claim Reef claims know as number 7651, 8804 and 8817 of Avonmore Farm. This operation employees 40 people and only the applicant is running operations. It has however been stopped from operating by virtue of an interim provisional court order of this Honourable court granted on 5 May 2010 under case number HC 2813/10. The applicant is not a party to those proceedings, though he is the sole operator of the mining operations …"

It seems to me that on the strength of the statements in the certificate I can safely conclude that the applicant had sight of the provisional order and became aware of the terms thereof, to wit, that neither himself nor the third respondent could operate the site and mine thereon. He was also aware that he and the third respondent were prohibited from approaching within 500 metres of the site. This is the reason why he sought the provisional order of 1 June 2010 in an effort to avoid the interdict. It is not my mandate to interpret the terms of the order that the applicant sought and obtained and indeed it is not pertinent that I do so for the determination of this point in *limine*.

As the matter stand, the order by PATEL J interdicting him from mining, milling gold ore or from being within 500 metres of the claims is extant and has not been set aside. If I were to grant the provisional order that he seeks, that is "restoring him possession" of the site this would be tantamount to a review of that order. Both PATEL J and myself are judges of this court and hence we enjoy parallel jurisdiction. I cannot give an order that seeks to vary or alter an order of a judge of the High Court. Although the order in question is a provisional order, it is still a judgment of this court and cannot generally be varied or altered. In *Matanhire* v *BP Shell Marketing Service* (*Pvt*) *Ltd* 2005 (1) ZLR 140 (S) at 146 D-147 E CHIDYAUSIKU CJ stated:

> "The only jurisdiction that a court has is to make incidental or consequential corrections. The position was stated as follows in the case of *Kassim* v *Kassim* 1989 (3) ZLR 234(H) at p 242C-D where it was stated that:
>
> > "In general, the court will not recall, vary or add to its own judgment once it has made a final adjudication on the merits. The principle is stated in *Firestone South Africa* (*Pty*) *Ltd* v *Genticuro AG* 1977 (4) SA 298 (A) at 306, where TROLLIP JA stated:
> >
> > 'The general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction is the case having been fully and finally exercised, its authority over the subject matter has ceased'"

In *Firestone supra* at p 306, the court further stated that:

"The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt which the court overlooked or inadvertently omitted to grant."

Further on at 307C-G, the court went on to say:

"The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention … The exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance".

In *West Rand Estates Ltd* v *New Zealand Insurance Co Ltd* 1926 AD 173 it was stated that:

"The court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced".

The above principles were full reaffirmed in *Thompson* v *South African Broadcasting Corporation* 2001 (3) SA 746 (SCA) at 748-749: See also generally *Brightside Enterprises* (*Pvt*) *Ltd* v *Zimnat Insurance Co* 1998 (2) ZLR229 (H) at 231-232.

In *S* v *Wells* 1990 (1) SA 816 (A), the principles were stated as follows:

"According to the strict approach a judicial official is *functus officio* upon having pronounced his judgment which is a *sentential stricti juris* and as such incapable of alternation, correction, amendment or addition by him in any manner at all … A variant of this strict approach permits a judicial officer to effect linguistic or other minor corrections to his pronounced judgment without changing the substance thereof …
The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the substance of his judgment is not affected thereby (at 819-820).

In *Parker* v *Parker & Ors* 1985 (2) ZLR 79 (H), it was held that an order giving directions is not an incidental order and that a judge of the High Court cannot vary or alter an order of a judge of parallel jurisdiction, short of expanding on it (see at pp 84-85)".

I find that there is therefore merit in the submissions by Mr *Mpofu* that the import behind this application is not that of spoliation but an attempt on the part of the applicant to

avoid the interdict granted by PATEL J in favour of the second respondent on 5 May 2010. The application in fact seeks a variation of the order by PATEL J permitting the applicant, his employees and assignees to bypass the interdict and continue operations on the site on the basis of an order of this court. As the third respondent has disposed of this entire shareholding in the enterprise to the applicant herein, the effect of an order in the terms sought by the applicant would be to nullify the interdict granted in favour of the first and second respondents. In my view it is particularly reprehensible for a legal practitioner to launch proceedings clothed with a semblance of authenticity which proceedings are averred at seeking relief to subvert the compliance by a party with an order of this court. A morass of conflicting orders from this court can only result in confusion and in my view would not result in justice being done between the parties. The applicant has applied to be joined as a party to the proceedings in respect of which PATEL J granted a temporary interdict and that is in my view the appropriate dispute that needs to be determined between the parties as it is dealing with the parties' rights to occupy the claims. This particular application has been brought in an inappropriate and in my view dishonest manner and cannot be entertained.

I therefore uphold the second point in *limine* and on that basis, the application is dismissed with an appropriate order for costs.

Manase & Manase, applicant's legal practitioners
Muzenda & Partners, respondent's legal practitioners