

KUFAKUNESU CHITORO  
versus  
DUMISANI MOSES DUBE  
and  
DETECTIVE ASSISTANT INSPECTOR NDHLOVU N.O.  
and  
THE OFFICER IN CHARGE FRAUD SQUAD HARARE  
and  
DISPOL HARARE DISTRICT N.O.  
and  
COMMISSIONER OF POLICE N. O.  
and  
THE CO-MINISTERS OF HOME AFFAIRS N.O.  
and  
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MAVANGIRA J  
HARARE, 2 and 17 August and 22 September 2011

**Urgent Chamber Application**

*R Chavi*, for the applicant  
*Gitt Muzondo*, for the first respondent  
*Sikundai*, for the second, third, fourth, fifth, sixth and seventh respondents

MAVANGIRA J: The applicant seeks a Provisional Order in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. The respondents be and are hereby barred from interfering with applicant's property, Mbizi Milling Company, and operations there other than in terms of a lawful order.
2. That the respondents shall bear the costs of this application on a legal practitioner and client scale jointly and severally the one paying the others to be absolved.

INTERIM RELIEF GRANTED

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

1. The first respondent is hereby ordered to give vacant possession of Mbizi Milling Centre and to remit any proceedings generated from the operation of the mill since 6<sup>th</sup> July 2011 to the applicant immediately upon service of this order (sic)
2. That the second respondent together with the first respondent transport back to the applicant's home the property taken therefrom on 6<sup>th</sup> July 2011.
3. That the respondents are interdicted from interfering with the applicant's operations and officers and more particularly that; the second, third and fourth respondents desist from arresting the applicant and his officials based on any allegations pertaining to the ownership of Mbizi Milling Centre".

On 12 May 2011 the Messenger of Court, Kadoma advertised an auction sale in execution for a "three stamp gold mill" to be held in situ at Bigben Mine 2, also known as Mbizi Milling Centre, Alabama, Old Chakari Road. The eviction sale was conducted on 14 May 2011. One Cosmas Zezere was declared the buyer.

The applicant claims that Cosmas Zezere made the purchase in his capacity as the applicant's agent and not in his personal capacity as he (applicant) provided the funds for the purchase.

On 24 May 2011 the first respondent a director of Mbizi Mining and Milling (Pvt) Ltd filed an application in the Magistrates Court, Kadoma for the setting aside of the sale in execution. Cosmas Zezere was cited as a respondent. The applicant was not cited. The applicant attributes his non citation to the fact that he was an undisclosed principal of Cosmas Zezere. The parties are not agreed as to the fate of that application. Whilst the applicant claims that it was dismissed, the first respondent claims that it was not argued on the merits. The court's ruling attached to the applicant's papers and dated 13 June reads:

"The jurisdiction of the court is 2000 US dollars claims must not exceed the jurisdiction of the court. If X however does not pay the amount the other party may issue out a warrant of execution against property. Property to be first attached is movable property. If after attachment of the movable property the amount realised is insufficient to cover the debt immovable property will then be attached so that the amount will be realised. The original claim by Oswell Security against Mbizi Mining must have been within the jurisdiction of the court".(sic)

On 9 July 2011 the applicant was arrested. He states that this was on allegations of theft of the gold mill. The request for remand form attached to his application is incomplete

and it has not been possible to ascertain the accuracy of the charge as stated by the applicant. The applicant is appearing on remand before the magistrate at Kadoma.

The applicant claims that on 6 July 2011 the second respondent and one Detective Sergeant Nduku despoiled him of the gold mill and “purported to hand over its ownership to the first respondent. He attached to his papers a photocopy of a handwritten note which reads:

“This states that Detective Assistant Inspector Ndhlovu handed over Mbizi Milling Centre to Dumisani Dube the owner. Mbizi Milling Centre was unlawfully possessed by Kufakunesu Chitoro through means of theft and fraud. Harare Central CR 547/06/11, Serious Frauds DR 37/06/11 and Exhibit book no. 71/2011”.

The note is purportedly signed by Detective Assistant Inspector Ndhlovu, Dumisani Moses Dube and Detective Sergeant Nduku. It is endorsed thereon that the applicant refused to sign.

The applicant further claims that the second respondent came to his house in Kadoma and took away some of the “accessories” that he had there, these being an electric motor, a welding machine, seven submersible pumps, a pair of gas bottles and dewatering pump. He states:

“They then took me to the mill and declared that they were returning the things I had ‘stolen’ to the owner. They then removed my security guard and left Dumisani Moses Dube there”.

The applicant contends that the second respondents actions are illegal and that after the ruling by the magistrate at Kadoma he remains ‘the lawful owner of Mbizi Milling Centre, the gold mill of Alabama Kadoma in its entirety’.

He also contends that his arrest was illegal and an abuse of discretion. He contends that he was deprived by the respondents of his property which he was in peaceful and undisturbed possession of. He urged the court that there is therefore justification for the granting of the Provisional Order attached to his papers.

The first respondent opposed the application on the grounds that the applicant has not established that he was in peaceful and undisturbed possession of the property in issue. Inasmuch as he contends that he purchased and thus came into possession of the property through Cosmas Zezere, it is contended, the property which the applicant claims to have been despoiled of is not the property that was purchased by Cosmas Zezere in terms of the advertisement by the Messenger of Court. What was sold to Cosmas Zezere was a three stamp gold mill yet the applicant now claims to have been in possession of the milling centre

pursuant to the sale in execution. The first respondent contends that there is thus no justification for the granting of a spoliatory order.

The first respondent also opposed the application on the basis that the applicant has not established the requirements for a temporary interdict to be granted. He has established no right over the milling centre, it is contended, and there can thus be no interference with a non-existent right. It was contended that what was sold to the applicant is a three stamp gold mill complete with accessories.

It was also contended by the first respondent that the matter is replete with material disputes of fact which are not capable of resolution on the papers and that the application should be dismissed on that basis.

The second to the seventh respondents, it was submitted, are not opposed to the relief sought by the applicant as against the first respondent. They however object to the granting of para 3 of the interim relief sought as they have a constitutional mandate to act in a manner which may interfere with the applicant's operations and officers should the need arise.

The advertisement which set in motion the facts of this matter states *inter alia*:-

“(NB 1) It will be solely the purchaser's responsibility and liability to dismantle the stamp mill equipment after the Auction”.

It also states:-

“We shall sell to the highest bidder defendant's rights, title and interest in three Stamp Gold Mill complete with accessories”.

The applicant seeks to persuade the court to find that Cosmas Zezere in participating in the auction sale and purchasing the equipment that was being sold by the Messenger of Court, acted as his agent. He seeks to persuade the court to consider as true his explanation of how he came to be in possession of the milling centre. Yet, in his affidavit Cosmas Zezere states that he received money from the applicant for the purpose of purchasing Bigben Mine (2) Pvt Ltd 'on behalf of Desire Kufandaedza Chitoro, his young brother'.

In support of his application the applicant also attached the notice of attachment in execution, the inventory of which states:-

“Attached 1 x 3 stamp mill to cover claim and costs.

In terms of the advertisement which is also attached to his application by the applicant, the purchaser was to dismantle the stamp mill equipment after the auction. Thus, while in spoliation matters, the issue to be decided is whether or not the applicant was in

peaceful and undisturbed possession of which he was forcefully and unlawfully deprived, *in casu* the applicant has laid before the court documents which tend to cast doubt on what he claims to have happened. This is further compounded by the fact of his arrest, allegedly for theft of the gold mill. He does not claim to have been prevented from dismantling the stamp mill, presumably for purposes of taking it away from the milling centre. If as at 6 July the applicant was still at the milling centre, he ought to have been there maybe for purposes of safeguarding the stamp mill if his coming into possession of any items thereat was, as he claims, on the basis of the purchase by Cosmas Zezere.

It appears to me that the applicant's own papers create self contradictions in respects which do not assist in establishing the justification for the relief that he seeks.

It would appear to me that having been stung by his arrest, the applicant sought to derail the criminal proceedings by claiming to have been despoiled by the second respondent. It is noteworthy that the first respondent is not alleged to have taken an active role in the alleged despoliation. He was a mere recipient of the items recovered by the police on 9 July 2011 pursuant to his arrest on 6 July 2011.

The applicant has not in my view established that he was in peaceful and undisturbed possession of Mbizi Milling Centre when he was dispossessed thereof, if he was in fact dispossessed. I am not satisfied either, that he has established any right to Mbizi Milling Centre whose vacant possession he seeks in para 1 of the interim notice. However, as regards the property taken from his house on 6 July by the second respondent, the second respondent has indicated that the relief sought in the interim relief in respect thereof is not opposed. Paragraph 2 of the interim relief will therefore be granted.

With regard to para 3 of the interim relief sought, there is in my view no basis for interdicting the respondents from carrying out their mandate or lawful duties should the lawful need arise for them to do so, in a way that may interfere with the applicant's operations and officers. The second, third and fourth respondents, as submitted have no objection the granting of the second part of para 3 which prohibits them from arresting the applicant and his officials on the basis of any allegations pertaining to the ownership of Mbizi Milling Centre. The latter part of para 3 will thus be granted.

What is now of concern to the court is that in view of the determination made regarding para 1 of the interim relief, para 1 of the final order sought is now out of place and it would make no sense for the Provisional Order to bear such relief in the final order sought.

For purposes of having the court's concern addressed, the parties were called into chambers and they did attend on 22 September 2011. After the parties made their submissions regarding the terms of the final relief sought, the court immediately thereupon gave its ruling indicating that a Provisional Order as amended would issue in the following terms:-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. That the respondents be and are hereby barred from interfering with the applicant's property restored into his possession in terms of para 1 of the interim relief.
2. That the respondents shall bear the costs of this application on a legal practitioner and client scale jointly and severally, the one paying the others to be absolved.

INTERIM RELIEF GRANTED

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

1. That the second respondent together with the first respondent transport back to the applicant's home the property taken therefrom on 6 July 2011.
2. That the second, third and fourth respondents be and are hereby interdicted from arresting the applicant and his officials based on any allegations pertaining to the ownership of Mbizi Milling Centre.

SERVICE OF PROVISIONAL ORDER

The applicant's legal practitioners are hereby authorised to serve this order on the respondents”

These then are the reasons for the granting of the Provisional Order by this court on 22 September 2011.

*Murambasvina Legal Practitioners*, applicant's legal practitioners  
*Garabga, Nambe & Muzondo*, first respondent's legal practitioners  
*The Civil Division of the Attorney General's Office*, second, third, fourth, fifth, sixth and seventh respondents' legal practitioners