OX MINING (PRIVATE) LIMITED
and
GOLD RECOVERY GROUP (PRIVATE) LIMITED
versus
OX DRILLING LLC
and
SIDNEY AUBREY STEYN
and
DIRK RENIER BENADE
and
THE COMMISSIONER-GENERAL

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 11 February 2013

Urgent Chamber Application

G Mlotshwa, for the applicants
L Uriri, for the 1st, 2nd and 3rd respondents

MAKONI J: The applicants approached this court on a certificate of urgency, seeking spoliatory relief on an interim basis and declaratory and interdictory relief in the final against the respondents.

At the hearing the respondents raised various points in *limine* viz:

(i) Whether the applicants had *locus standi* to seek protection of the court;
(ii) Whether the deponents to the founding affidavits had authority;
(iii) Whether spoilatory relief was available to the applicants when they allege more than possession i.e. go into the merits of the possession;
(iv) Whether the matter is urgent;
(v) That there are serious disputes of fact; and
(vi) The second applicant cannot claim to have been despoiled of possession which it never had.

A brief background to the matter is that the first applicant operates Inez Mine in Kadoma. On 28 April 20112 the first, second, third respondents entered into an agreement in terms of which the entire issued shares in the first applicant were purchased by the second

applicant. The parties agreed to amend the agreement. The effect of the addendum was to vest control and possession of Inez Mine in the new Board of Directors of the first applicant. What happened after the addendum is in dispute.

The applicant avers that Messrs Fred Moyo and Paul Diamond were appointed directors of the first applicant with the old board of directors resigning. The third respondent remained as operation manager in the first respondent until he resigned mid-November 2012. This is disputed by the third respondent.

What is not in dispute is that, the third respondent, having been away from the mine since November 2012 visited the mine on 1, 2 and 3 February 2013. He ordered the deponent to the founding affidavit not to allow Messrs Moyo and Diamond to have access to the mine. On 3 February 2013 he handed a letter from the third respondent's legal practitioners to the deponent which is annexture H. He informed him (the deponent) that the respondents were taking back their mine. The third respondent instructed two men to change the chain and the locks to the main gate into the mining complex. The third respondent installed his security at the gate with instructions not to allow Messrs Moyo and Diamond access into the mine. He also handed over a document to one Mr Mkunguluthi, a miner. The document indicated that the third respondent and the other former directors had been re-instated as directors of the company as evidenced by the letter head.

The last para of the letter from the third respondent's legal practitioners reads:

> "(c) *Ex-abudante cautela*, we would like to point out that your privilege and or right to occupy and control Inez Mine is extinguished as a result of the aforesaid cancellation and that, as a consequence, control of and ownership rights in Inez Mine reverted to and now vest in our clients with immediate effect."

I have decided to quote it as it will be relevant later on in the judgment.

In response to the points in *limine*, Mr *Mlotshwa*, for the applicants raised a point whether the first and second respondents were properly before me. My view is that it is important to deal with this point first as its disposal affects the points raised in *limine* by the respondents.

Mr *Mlotshwa* submitted that the third respondent purports in para 2 of his founding affidavit to depose to the affidavit on behalf of the other two respondents. Nowhere in his papers does he state or provide authority to do so. The special power of attorney produced as

authority to represent the first respondent was commissioned outside the country and was not notarised in terms of the rules. The first respondent is therefore not properly before the court.

The second respondent is also not properly before the court as there is no supporting affidavit in the papers filed by him giving the third respondent authority to represent him. There is no special power of attorney either.

Mr *Uriri* conceded that the Special Power of Attorney produced by the third respondent was executed in Ndola, Zambia and that it had not been authenticated in terms of the High Court (Authentication of Documents) Rules, 1971.

As regards the second respondent, Mr *Uriri* submitted that para 5 of Annexure B provides authority for the third respondent to represent the second respondent. He however pointed out that he could not take it further than that. In my view it was a veiled concession.

Paragraph 5 of Annexure B, which is a Resolution of the shareholders of the first respondent authorises the third respondent to do and perform acts to effect cancellation of the share purchase agreement against the second applicant and recover all assets of the first respondent. There is no mention of the third respondent representing the second respondent.

From the above, it is clear that the third respondent has no authority to represent the first and second respondents. The first and second respondents are therefore not properly before me. This leaves the third respondent.

Going back to the points in *limine* raised by the respondents, my view is that the third respondent cannot take those points in *limine*. Those points emanate from the relationship between the applicants and the first respondent. To the extent that the court has made a finding that the third respondent cannot represent the first respondent, the third respondent cannot therefore comment on the issues pertaining to the agreement between the applicants and the first respondent. I will therefore dismiss the points in *limine*.

As regards the act complained of, it is common cause that the third respondent, armed with a letter from his legal practitioners visited the mine on three successive days. He changed the locks to the main gate, changed the security personnel and instructed one of the miners to return to his previous posting before the agreement between the applicants and the first respondent. He did not have the consent of the directors of the applicants. These acts were not in terms of any statutory enactment. He in fact was acting on the strength of Annexure H written by his legal practitioners and addressed to the applicants, in particular the last paragraph. He was advised that he could take control and ownership with immediate effect. The legal basis for such advise is not clear from the letter.

In spoliation proceedings an applicant must establish the necessary factual basis for a finding that the respondents threatened or disturbed their occupation of their property. See *Minister of Agriculture & Development* v *Segopolo* 1992 (3) SA 967 at 973 G.

What the applicant must establish was clearly spelt out in *vant'Hoff* v *vant'Hoff & Ors* (1) 1988 (1) ZLR 294 (HC) at 296 B-C thus:

> "It is well established that in spoliation proceedings, all that the applicant needs to prove is that:
> (i) he was in peaceful and undisturbed possession; and
> (ii) that he had been unlawfully deprived of such possession.

In *casu*, I am satisfied that the applicants are entitled to the relief they seek. The third respondent had no legal basis whatsoever to act in the manner he did.

In the result I will grant the provisional order.

G N Mlotshwa & Company, applicants' legal practitioners
Farai Nyamayaro Law Chambers, 1st, 2nd and 3rd respondents' legal practitioners