

Oozing Mining Syndicate v Tamuzi Mining Syndicate

HH 609-20

HC 4996/20

OOZING MINING SYNDICATE
versus
TAMUZI MINING SYNDICATE
and
THE MINING COMMISSIONER N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 21 & 25 September 2020

Urgent chamber application

Date of *ex tempore* ruling: 21 September 2020

Date of written judgment: 25 September 2020

Mr *T.S. Mujungwa*, with him, Mr *S. Machingauta*, for the applicant

Mr *K. Maeresera*, for the first respondent

No appearance for second respondent

MAFUSIRE J

[1] This is an urgent chamber application for interim relief. The applicant and the first respondent are mining syndicates. They are fighting over the rights of ownership, control and the enjoyment of a certain mine called Chigwell 56 (“*Chigwell*”), located in the Chegutu area of Zimbabwe. The applicant, Oozing Mining Syndicate, applies on an urgent basis for two remedies, one in the main, and the other as ancillary relief. The main relief is a stay of execution of a certain order of this court in HC 279/20, dated 2 September 2020. The ancillary remedy is for the restoration of occupation of Chigwell to the applicant. Verbatim, the relevant portion of the draft order reads:

“TERMS OF THE INTERIM RELIEF GRANTED

Pending the return date in this matter, the following interim relief be and is hereby granted: -

- a) The order issued under HC 2791/20 be and is hereby stayed pending the finalisation of the application for rescission filed under HC 4976/20.
- b) The respondents be and are hereby ordered to restore occupation of mining location Chigwell 56 of Chigwell Farm, Chegutu to the applicant upon service of this order until HC 4976/20 is finalised.

c) The respondents to bear costs of suit of this application.”

[2] The order of this court on 2 September 2020 aforesaid, per PHIRI J, was issued at the instance of the first respondent herein, Tamuzi Mining Syndicate, which was the applicant therein. It was granted in default of appearance by the applicant, which was the respondent therein. The court issued two declaratory orders—

- cancelling the applicant’s mining licence (in respect of Chigwell), and
- declaring the first respondent the rightful owner of Chigwell.

[3] Verbatim the operative part of that order reads:

“**WHEREUPON**, after reading documents filed of record, and hearing Counsel

IT IS ORDERED THAT

1. 1st Respondent’s Mining Licence Number 15965 be and is hereby cancelled.
2. Applicant be and is hereby declared the rightful owner of Chigwell 56.”

[3] In these proceedings, it is that order of 2 September 2020 the execution of which the applicant seeks a stay. It is said the stay is sought pending the determination of the application for rescission of judgment that the applicant has launched simultaneously with these proceedings. The grounds for relief alleged by the applicant in these proceedings are these. Until about May 2014 the first respondent was the registered owner of the mining rights over Chigwell. However, those rights were forfeited, following due process. Subsequently, the applicant successfully applied for the registration of the same rights in its name. But the first respondent, without a proper service of process, and surreptitiously, obtained those declaratory orders aforesaid. Afterwards, on the strength of that court order, and by means of self-help, the first respondent has seized control of the mining location and placed security guards to prevent the applicant from accessing the mine. Thus, the applicant concludes, it has “essentially” been evicted by the first respondent from the mine. The first respondent is now busy helping itself to some 30 tonnes of gold ore which belong to the applicant and which were awaiting milling and smelting. It is on that basis that the applicant seeks urgent relief as set out above.

[4] The first respondent opposes the application. It says the relief being sought is incompetent. It says the applicant should have proceeded by way of a court application for an interdict. On the merits, the first respondent denies the applicant's allegations of spoliation and maintains that the applicant is still in occupation of the mine even despite the applicant's knowledge that it no longer has any rights over it. The first respondent accuses the applicant's deponent to the founding affidavit, one Margret Hlanganiso ("**Margret**"), of fraudulent concealment of material facts allegedly relating to the fraudulent manner in which she purported to acquire the mining rights over Chigwell, in the name of the applicant. The first respondent's deponent to the opposing affidavit, one Jonathan Munemo ("**Jonathan**"), says he and others, including Margret's late husband, and then subsequently herself, got together as a syndicate in the form of the first respondent to run Chigwell. The first respondent was the registered owner of the mining rights. Margret was responsible for the payment of the inspection licences. At some stage, the second respondent wrongfully ordered the forfeiture of the first respondent's mining licence. Margret did not disclose this development to the rest of the members of the first respondent. Instead, she went on to apply for the same mining rights, in the name of the applicant. Jonathan says there is a criminal case pending at the police against Margret over her conduct.

[5] On the first day of argument I queried how the applicant could possibly seek a stay of execution of a mere declaratory order. Mr *Mujungwa*, for the applicant, readily conceded the irregularity, admitting that the main relief was incompetent. He abandoned it and amended the draft order to make the ancillary relief the main and sole relief sought. The interim relief sought in the amended draft order now read as follows:

“Pending the return date in this matter, the following interim relief be and is hereby granted:-

- a) The respondents be and are hereby ordered to restore occupation of mining location Chigwell 56 of Chigwell Farm, Chegutu to the applicant upon service of this order until matter under HC 4976/20 is finalised.
- b) The respondents to bear costs of suit of this application.”

[6] The final order sought on the return date was couched as follows:

- “a) The respondents be and are hereby ordered not to evict the applicant from mining location Chigwell 56 of Chigwell Farm, Chegutu without a valid court order for eviction through self-help (*sic*).

b) The respondents shall pay costs of suit.”

[7] I dismissed the application with costs soon after argument. It was incompetent. An order of spoliation is a final order. It is not interlocutory in nature: see *Mankowitz v Loewenthal* 1982 (3) SA 758, at 767F – H, and SILBERBERG & SCHOEMAN’S *The Law of Property*, 5th ed., para 13.2.1.3 at p 292. So, the draft order, as amended, was defective in elementary respects.

[8] That the applicant’s draft order, as amended, was defective in elementary respects was not the only problem. In fact, it was hardly the main problem. In appropriate circumstances a draft order can always be amended or corrected. The major problem with the application, and which was the main reason for my dismissing it, was that spoliation was not proved. With spoliation, the applicant has to prove the two basic elements, namely, peaceful and undisturbed possession of the object, and the illicit deprivation of that possession by the respondent. The standard of proof is higher than that required for a temporary interdict. The standard of proof should be on a balance of probabilities. For an interim interdict, all that is required to be proved is a *prima facie* case. This is elementary.

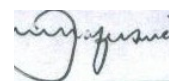
[9] Spoliation is about the protection of possessory rights. Ownership does not come into consideration. Yet the averments in the founding affidavit were predominantly about proof of ownership of the mining rights over Chigwell: how initially those rights had been in the name of the first respondent; how the first respondent got to lose them, and how they had ended up being in the name of the applicant. At the hearing, Mr *Mujungwa* was clutching at straws. He failed to appreciate that the defect that I had raised concerning the impropriety or incompetency of seeking a stay of execution against a mere declaratory order could not be cured simply by dropping that remedy and pursuing spoliation. The requirements are different. The whole application had been premised on a stay of execution, which is a species of an interdict. The application was completely silent on *when* exactly the applicant had been illicitly deprived of possession and control of Chigwell. It was silent on who exactly was there at the mine at the time of the alleged eviction? Who for the respondent did it? How did he or she or they do it?

[10] At the hearing, we spent some appreciable time sifting through the averments in the founding affidavit in an effort to find the answers to the questions above. But there was

nothing. Mr *Machingauta*, Mr *Mujungwa*'s principal with whom he sat, tried to intervene, encouraged by myself. The two had been wasting time, with Mr *Mujungwa* having to pause and defer to his principal who would whisper something into his ear each time I asked a question. But the intervention was no better. A concession could have preserved integrity. The sum total of Mr *Machingauta*'s submissions on intervention was that where the founding affidavit said Margret was a member of the applicant, and where the supporting twin affidavits by Njabulo Ndhlovu and Stanley Mlotshwa said they also are members of the applicant, I must read that to mean they are the people who were in possession at the time of the alleged spoliation! I was also urged to construe the date of the order by PHIRI J, namely the 2nd of September 2020, as the date when the alleged spoliation took place!

[11] I could not grant spoliatory relief under such circumstance, especially given that the respondent vehemently denied that it had taken over the running of the mine. The respondent maintained the applicant was still there. In the end I dismissed the application with costs.

25 September 2020



Tavenhave & Machingauta, applicant's legal practitioners
Mangwiwo Law Chambers, first respondent's legal practitioners