

TIRIVANGANI CHIDYAUSIKU
versus
HAVILAHVALE MINING SYNDICATE
and
JELOUS HLANGANISO
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O
and
MINISTER OF LANDS, AGRICULTURE, FISHERIES,
WATER & RURAL SETTLEMENT

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 2 & 24 May 2023

Urgent Chamber Application- Spoliation

P Patisati, for the applicant
D Mundia, for 1st & 2nd respondents
N Mpande, for 3rd & 4th respondents

MAXWELL J: Applicant approached the court on an urgent basis seeking a declaration that first and second respondents and their assignees had committed an act of spoliation against him in respect of his occupation of subdivision 1 of Chifumbi North in Goromonzi District, measuring approximately 601.00 hectares. He also sought an order that the first and second respondents restore his peaceful and undisturbed occupation and use of the same farm. Applicant also sought an order for the eviction of the first and second respondents from the farm and costs of suit on a legal practitioner and client scale.

The certificate of urgency states that on 20 April 2023 respondents took unlawful occupation of applicant's farm and that applicant did not consent to the dispossession and respondents did not follow due process. In paragraphs 16 and 17 of the founding affidavit, applicant states

“ 16 The respondents did not however, follow due process. No court order for my eviction has been produced. This is so because there is no such court order. Further, the said Tribute agreement has not been confirmed by the Ministry of Mines and no confirmation from the third respondent of the extent of their mining block which encroaches into cultivated land.

17 I am advised that any such occupation without my consent by the respondent by the can (*sic*) only be unlawful in the circumstances as my offer letter is still extant. In the circumstances the act by the respondents to evict me and occupy the farm without following due process constitutes taking the law into their own hands and only serves to despoil me as respondents do not have lawful authority to occupy the farm.”

The application was opposed by the first and second respondents. The opposing affidavit was deposed to by one Regiment Chivava (Regiment) first respondent's accredited agent. Regiment submitted that there was no spoliation as of the date of filing the urgent application, i.e. 25 April 2023, first respondent's equipment was not on applicant's farm, but on Retired Colonel Bruce Ngavi's (Col Ngavi) since 21 April 2023. He further submitted that on 6 April 2023 the excavator arrived at applicant's gate but the guards refused to allow it into the farm, threatening the excavator operator, Nathan Mutambara (Mutambara) with violence. A police report was subsequently made. A meeting at applicant's gate was scheduled. Applicant and his lawyer came and promised to revert back to first and second respondents in two days' time. They agreed that the excavator would be parked at the guard post in the meantime. Neither applicant nor his lawyer honoured their promise. On 14 April 2023, after several attempts to get feedback from applicant and his lawyer, a decision was made to move the excavator to Colonel Ngavi's farm.

As Mutambara was moving the excavator, he was accosted by a group of menacing men who identified themselves as employees of the applicant. They threatened Mutambara and his workmates with violence. They forcibly removed the keys from the excavator and left.

A report was made to the police. On 21 April 2023 applicant was present at the police station and was advised of the plan of moving the excavator to Colonel Ngavi's farm and to set up cabins there. The excavator was moved on 21 April 2023.

Regiment also submitted that all parties are in legal possession of different portions of the land in question. Further that applicant occupies the farm subject to limitations imposed by the rights given to first and second respondents in respect of mining claims. He pointed out that if applicant wanted to use the land on which the mining claims were to be pegged, he should have

applied for reservation of the land against pegging. Further that the mining claims fall on two adjoining farms and occupy only a part of the applicants farm far away from the arable land, and at least 600 metres away from any agricultural activities or living quarters.

First and second respondents submitted an affidavit by Colonel Ngavi who confirmed that the excavator initially was at applicant's farm but was moved to his on 21 April 2023. Mutambara also deposed to an affidavit confirming that he was the driver of the excavator and that he was threatened by applicant's employees leading to his making a report at Juru Police Station. He confirmed moving the excavator on 21 April 2023 to Colonel Ngavi's farm.

Applicant filed an answering affidavit in which he confirmed that first and second respondents have taken their equipment to the nearby farm. He disputed that the area they had occupied was 600 metres away from the homestead and arable land. According to him they were 300 metres away. He disputed that the police were invited by first and second respondent and stated that in the second incident Mutambara had exaggerated events and made a false report. He stated that respondents have never been in physical possession of the farm or a portion of the farm. Further, that the obtaining of mining claims by second respondent did not give the first respondent possession of the farm, neither did it interfere with his peaceful and undisturbed possession of the farm. Applicant stated that first respondent used access to his farm as the front part of his farm was fenced up to a point where it connects with Colonel Ngavi's farm.

At the hearing of the matter, *Mr Patisani* prayed for an order against the second respondent on the basis that second respondent had not opposed the application and had not filed an affidavit supporting first respondent's. *Mr Mundia* pointed out that the relief sought is against first respondent and therefore it would not be proper to grant relief against second respondent. Indeed applicant's case was that first respondent despoiled him on the basis of a tribute agreement granted to it by the second respondent. The prayer for an order against second respondent was accordingly not granted.

In submissions on the merits *Mr Patisani* submitted that the notice of opposition confirms that applicant was in possession and that the activities of respondents on applicant's farm were without applicant's consent. He stated that first and second respondents ought to have followed due process to occupy part of the farm they claim is theirs.

Mr *Mundia* pointed out that as at the date of filing the application, first respondent was not on applicant's farm, as the matter had been resolved on 21 April 2023. He pointed out that the relief applicant seeks is in the present tense, assuming a continuing infringement. He prayed that the application be dismissed with costs on a higher scale.

In response to questions from the court, Mr *Patisani* confirmed that by the time of coming to court on 25 April respondents had removed their machinery from applicant's farm but he stated that excavations had commenced. On being asked if the excavations are still being done he stated that there were not continuing. He was however of the view that if the first and second respondent's conduct is not declared spoliatory, they may continue.

Analysis

It is trite that an application for a spoliation order in the court of first instance is heard on an urgent basis. This is so because the need to urgently stop unlawful conduct and self-help and restore the *status quo ante* until the law has taken its course is self-evident and needs no elaboration. See *Swimming Pool & Underwater Repair (Pvt) Ltd and 3 Ors v Jameson Rushwaya & Anor* SC 32/12. The question that arises is whether or not the applicant was despoiled. The law on spoliation is aimed at protecting a possessor in retaining physical control or regaining it where he or she has been unlawfully deprived of such possession. See *Dun Bois Wille's Principles of South Africa Law 2007 9th Edition*.

In order to succeed in spoliation proceedings, two requirements must be met;

- a) The applicant must show that he was in peaceful and undisturbed possession of the property, and
- b) That the respondent wrongfully deprived him of that possession.

See *African Apostolic Church (Vapostora ve Africa) and 5 Ors v Mwazha & Another* HH 412/20. It is not in dispute that applicant possessed the farm. The question to be answered is whether or not he was wrongfully deprived of that possession. In my view the answer is in the negative. On page 3 of the answering affidavit, in paragraph 8 applicant stated that respondents have never been in physical possession of the farm or any portion of the farm. That settles the matter. It would have been a different issue if applicant had stated the period in which first and second respondent forcibly possessed the farm. The answering affidavit confirmed the

submission by Mr *Mundiya* that by the time the application was filed, the issue had been resolved.

It is trite that the court will not deal with matters that would have been overtaken by events. The applicant filed the present application well knowing that first and second respondents had moved their equipment to the neighbouring farm. To then seek relief as if there is a continuing infringement is to mislead the court.

It appears that applicant is struggling with the fact of mining rights being granted to someone else on the farm for which he is the holder of an offer letter. In the founding affidavit he makes it appear as if the first and second respondents took occupation of the whole farm. He states in paragraphs 7 and 8 that;

- “7. I was in peaceful and undisturbed possession of the farm; and
- 8. I was unlawfully deprived of such possession.”

In paragraph 15 he states;

“15. On 20 April 2023 the respondents unlawfully took possession of the farm and forced themselves into the farm.....”

In paragraph 16 he states that no court order for his eviction was produced. This is against the fact that first and second respondents had advised him of the tribute agreement which he attached to the application. Applicant will do well to familiarize with the provisions of the Mines and Minerals Act [*Chapter 21:05*]. In section 179 of that Act, it is apparent that mining rights are superior to farming rights. I find that in this case there is no unlawful conduct to be urgently stopped. I find that first and second respondents had not resorted to self –help as at the time of filing this application. I also find that there is no *status quo ante* to be restored until the law has taken its course. The applicant has not been unlawfully deprived of the possession of the farm. He confirmed that respondents were never in possession of same. Accordingly, there is no basis for granting the relief sought.

Costs

Counsel for first and second respondents prayed for costs on an attorney –client scale on the basis that the application was needless as the dispute between the parties had been resolved four days earlier. Further that as at the time that the application was filed, applicant knew that no infringement of his rights existed. Applicant’s conduct was an abuse of the court process

resulting in unwarranted costs on the respondents. The prayer for costs on an attorney and client scale is therefore justified.

Disposition

1. The application be and is hereby dismissed for lack of merit
2. Applicant shall pay costs of suit on a legal practitioner and client scale.

Antonio & Dzvetero Legal Practitioners, applicant's legal practitioners
Mundia & Mudhara Legal Practitioners, first and second respondent's legal practitioners
Civil Division of the Attorney General's Office, third and fourth respondent' legal practitioners