MINERALS IDENTITY (PVT) LTD
and
CHENAI MUNYORO
and
DYNS MUNYORO
and
DYANA MUNYORO (NEE MANDISEKA)
and
MUNYORO MINING SYNDICATE
and
PATIENCE MUNYORO
and
EDITH MUNYORO
and
RATIDZO MUKARATI
and
COUNCILOR MANYONGA
and
MUDYIWA MASHONGANYIKA
and
MINISTER OF MINES AND MINING DEVOL. N.O

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE; 8 May 2024

Urgent Chamber Application

G Chinawa, for the applicant
Gama, for the 1st – 6th respondents
C Mutsvandiani, for the 7th respondent
E Jera, for the 9th respondent

TAKUVA J: This case typifies an unfortunate situation in this country where lawlessness and threats of violence are being utilized by "Makorokoza" (illegal miners) as tools to scupper normal and peaceful mining operations by owners of registered mines. Court orders are willy-nilly defied as the law of the jungle sets in.

This is an urgent chamber application for a spoliation and prohibitory order wherein the applicant seeks an order in the following terms;

> "1. The application for spoliation and prohibitory order be and is here by granted.
> 2. The first to ninth respondents and their agents be and hereby ordered to restore to the applicant and its agents the undisturbed use possession and control of Koodoo 10 Mine in Mudzi District.
> 3. The first to ninth respondents and any person claiming any right through them be and are hereby bared and prohibited from approaching the said ….site and disturbing any operations. There of whether directly or indirectly.
> 4.the Sheriff of the High Court of Zimbabwe is here by ordered so evict from KOODOO 10 Mine, first to ninth respondents and then a seat, including removal of any mining equipment brought by the first to ninth respondents and their agents thereat and demolition of any illegal structures erected by the first to ninth respondents or their agents at the said mine site.
> 5. Any duly attested members of the ZRP be and is here by ordered to ensure compliance by the first to ninth respondents and their agents with the terms of this order asset out in para 1-4 above and cause to be arrested and brought before the court any of the said respondents who act in contravention of this order.
> 6. The first to ninth respondents shall pay the applicant's costs jointly and severally the one paying the others to be observed on an attorney client scale."

Background facts

This application is aimed at the restoration of applicant's peaceful and undisturbed possession and occupation of KOODOO 10 gold …..claim and for a prohibitory order, barring the first to ninth respondents and their agents from interfering with applicant's peaceful and undisturbed mining activities at KOODOO 10 gold ….claim in Chitiyo Village MakahaMudzi District following the grant of an order by MANYANGADZE J on 8 August 2023. The detailed facts of this matter not only make a sad reading but also reveal an alarming behaviour by the respondents, especially the members of the MUNYORO FAMILY.

In order to fully appreciate my point, it is instructive to gave a precise of the matter. The applicant is the 60% beneficiary owner and holder of rights and interests in a mining location registered under 14778 and known as KOODOO 10 Mine situate in the District of Mudzi. Applicant has a valid and binding partnership agreement with one John Nkomo in respect of KOODOO 10 mine. The agreement is duly registered with the office of the tenth respondent. In terms of the said agreement, the applicant exercises rights on the mine registered in John Nkomo's name under certificate of registration No. 14778.

At all material times, the applicant was in peaceful and undisturbed possession of KOODOO 10 mine until its workers and management were despoiled by the first to third respondents on 6 June 2023. Thereafter the matter proceeded as follows;

1. An urgent chamber application for a spoliation order was file don 9 June 2023 under case no. HC 3805/23. Matter was set down before CHINAMORA J on 19 June 2023.
2. The first to third respondents defaulted the hearing and the court granted a order for a spoliation wherein the first to third respondents and their agents to restore undisturbed use, possession and control of KOODOO 10 mine to the applicant and further barred and prohibited the first to third respondents from interfering with applicant's mining operations at KOODOO 10.
3. Unhappy with this order, first to forth respondents filed an application for rescission of judgment under HC 4256/23 on 28 June 2023. Respondents claimed that there was a boundary dispute between KOODOO 10 mine and their own mine which is registered under their family syndicate called Munyoro Mining Syndicate Registry No 42792.
4. On the same day (28 June 2023). First to fourth respondents filed an urgent chamber application requesting the court to stay execution of the order granted by CHINAMHORA J pending the hearing of their application for rescission.
5. Rescission was granted by MUNGWARI J by the consent of the parties because of the need to interrogate what fourth respondent alleged as a boundary dispute between its KOODOO mine and KOODOO 10 mine. The matter was subsequently allocated to Justice Manyangadze and parties appeared before him on 18 July 2023.
6. By consent of the parties, the court ordered a case management and disposal process as follows;
   a) Parties were to carry out mines visit at KOODOO 10 and at what fourth respondent considered to be its KOODOO mine under the supervision of the tenth respondent.
   b) The parties were given timelines to file their papers and come back to court on 8 August 2023 for the disposal of the matter.
7. The mine visit of 25 July 2023 was carried out in the presence of the entire Munyoro family members with first to third respondents representing the fourth respondent. This was so as the issue was essentially a boundary dispute between fourth respondent's KOODOO mine and KOODOO 10 mine.

8. Not surprisingly, the first to the fourth respondents defaulted the hearing before MANYANGADZE J, just as they did before CHINAMORA J. Their legal practitioner renounced agency at the doorstep of the court citing alleged failure to receive instructions from the first to the fourth respondents. The first to sixth respondents were at all material times aware of the directive by Justice Manyangadze to appear before him on 8 August 2023.
9. On 8 August 2023, MANYANGADZE J granted an order in favour of the application in the following terms:

"1. The application for a spoliation order be and is hereby granted.
2. The first, second and third respondents be and are hereby ordered to restore to the applicant and its agents the undisturbed use, possession and control of KOODOO 10 mine in Mudzi District.
3. The first, second and third respondents and any person claiming any right through them be and are hereby barred and prohibited from approaching the said mine site and disturbing any operations there of whether directly or indirectly.
4. The Sheriff of the High Court of Zimbabwe and/or any duly attested members of the ZRP be and are hereby ordered to ensure compliance by the first, second and third respondents and their agents with the terms of this order as set out in para 1 – 3 above.
5. The first, second and third respondents shall pay the applicant's costs jointly and severally the one paying the others to be absolved on the ordinary scale."

10. The order by MANYANGADZE J remains extant to date. On 20 September 2023, first to fourth respondents filed an application for rescission of judgment arguing that they were not advised by their lawyer of the set down date of 8 August 2023. Respondents (ie first to sixth respondents) unsuccessfully attempted to stay MANYANGADZE J's order -see HCH 6497/23.
11. Notwithstanding the above first to sixth respondents ganged up with the seventh to ninth respondents who brought in over 30 bouncers to KOODOO 10 mine where they are now operating 24 hours a day in illegal mining. They scaled down the perimeter fence erected around the mine operational site. Stationed at KOODOO

10 mine was a ZANU PF marked black Ford Ranger double cab Reg No AFX 1471 that was being driven by the seventh respondent and used by first to ninth respondents for operational purposes.

12. The applicant then filed this application on 20 October 2023.

APPLICANT'S CASE

It is applicant's contention that it was in peaceful and undisturbed possession of KOODOO 10 mine on 14 October 2023. On this occasion first to ninth respondents were accompanied by 30 male bouncers who enabled the invaders mine and remove gold ore unlawfully from KOODOO 10 mine. Further, applicant submitted that it was illicitly ousted from such possession without its consent. Applicant also claimed that it has discharged the onus on it to prove the above on a balance of probabilities.

According to the applicant this is not the first time for first to sixth respondents to commit acts of spoiliation against applicant's KOODOO 10 mine. So far four judges of this court have dealt with this dispute and issued or delivered to grant various orders as explained in its Founding Affidavit. As regards urgency applicant argued that the matter is extremely urgent because the respondents resolved to self-help. Evidently, first to sixth respondents have not learnt from their past criminal conduct resulting in some of them being arrested for breaching MANYANGADZE J order and are currently on bail. Yet they continue unabated with the same criminal conduct showing that they are a law into themselves. The unlawful invasion of KOODOO 10 mine unclear contempt of MANYANGADZE J's order proves this beyond any shadow doubt.

It was applicant's further contention that the situation on the ground at KOODOO 10 calls for urgent attention as any delay will not only give justification to the first to ninth respondents that they are above the law, but will cause irreparable prejudice to applicant's operations at the mine. Therefore, an urgent relief is required to restore the status *quo ante* by interdicting the first to ninth respondents and their agents from resorting to self- help and from interfering with applicant's mining activities. If the matter is not heard on an urgent basis, the applicant will indeed suffer irrepable harm and loss through the outright acts of lawlessness and criminality.

Applicant also urged the court to dismiss the ten (10) points *in limine* on the ground that they have no merit. These points as outlined by Mr Gama for the first to sixth respondents are:

1. That Dyns Munyoro DYANA MUNYORO do not exist and the court cannot issue an order against non-existent persons.
2. Misjoinder of fist to third respondents.
3. That the relief sought is incompetent because a final order can not be sought through the chamber book.
4. That the matter is *Res Judicata* in respect of first to third respondent.
5. Non joinder of one RABSON NKOMO the holder of the claim.
6. That the Founding Affidavit does not disclose a valid cause of action.
7. That the property in question is not ascertainable in that it is non-existent.
8. That there are material disputes of fact which can not be resolved on papers.
9. *Lis pendenis* - the matter is pending.
10. That there is non-disclosure of material facts by the applicant.

I shall return to these points later in this judgment.

On these facts, applicant prays for its application in terms of the draft order for spoliatory relief to be granted.

THE CASE FOR THE FIRST TO SIXTH RESPONDENTS

The fifth respondent one Patience Munyoro filed an opposing affidavit in her capacity as the "chairperson and authorized representative of the fourth respondent - Munyoro Mining Syndicate." She also stated that "this affidavit is made and sworn on behalf of the fourth respondent and I." It should be noted that the "Notice of opposition is headed "first to sixth respondents Notice of OPPOSITION" and reads:

"TAKE notice that the first to sixth respondents intend to oppose the application on the grounds set out in the affidavit annexed to this notice……." (my emphasis). The annexed affidavit is headed; " fourth and fifth respondents' OPPOSING Affidavit on p 4 of the record. What this means is that the first, second and third rely on the affidavit by fourth and fifth respondents. A reading of this opposing affidavit confirms this position. Also the opposing affidavit file by first, second, third and sixth respondents all state they "incorporate the averments made in that affidavit and adopt the opposing affidavit as my own opposing affidavit."

After a rather lengthy narration of the background facts, the respondents raised ten (10) points *in limine* outlined above. I shall proceed to put their arguments point by point.

1. THAT DYNS MUNYORO AND DYANA MUNYORO DO NOT EXIST

   The basis of this argument is that the second respondent's proper name is DEANS MUNYORO and yet applicant cited her as DYNS Munyoro. Equally so the third respondent's proper name is DAINAH MANDISEKA, who was cited as DYANA MUNYORO (Nee Mandiseka). It was submitted that because of this misspelling, the two respondents are not before the court and do not exist. Therefore, the court can not issue an order against non-existent litigants.

2. MISJOINDER OF FIRST, SECOND, THIRD, FIFTH AND SIXTH RESPONDENTS

   The argument here is that first respondent is a mere employee of the fourth respondent. She at all the times acts on the instructions of her employer the fourth respondent. She is not the holder or possessor of KOODOO 10. There is no legal basis for citing her as a respondent as she has no direct and substantial interest in the matter. She only has indirect financial interest in the matter derived from her relationship with the fourth respondent.

Consequently, her citation is bad at law. As regards the second, third, fifth and sixth respondents, it was submitted that they are "members and employees" of the fourth respondent. Once the fourth respondent is cited as a party they are also cited. In any event the boundary dispute should involve the two holders of the two gold claims, namely Radson Nkomo and Munyoro Mining Syndicate.

Further, the order to give possession, use and control of that mine to the applicant must be directed to the fourth respondent. Respondents also submitted that ordering employees and agents of the syndicate to take measures that are harmful to their employer and contrary to the employer's wishes is unconstitutional and harmful to public policy. Accordingly, respondents relying on Rule 11 of the High Court Rules 2021 argued that the joinder of the said respondents is improper and application ought to be dismissed as against those respondents.

3. The 3rd point *in limine* is that the relief sought is incompetent in that in paragraph 2 of the draft order, applicant seeks an order compelling the respondents to place KOODOO 10 mine at the disposal in his possession and under its control yet spoliation has nothing to do with the

use and control of property. On this ground it was submitted that the order sought is a final interdict rather than a spoliation order.

Secondly the order is incompetent for the reason that the relief is in connection with non – existent property whose co-ordinates are unmown. This is confirmed by the Ministry report that shows that the applicant had pointed out 12 hectares of land as the "John Nkomo" claim when at law a gold claim cannot exceed 10 hectares in extent.

4. Respondents' 4th point *in limine* is that as far as the first, second, third and tenth respondents are concerned the matter is *res judicata* in that applicant seeks relief which it has already been granted. It has now filed a similar application, based on the same cause of action and seeking similar relief against the same parties presumably because the existing default judgment whose terms are identical in terms of the present draft or is difficult to enforce. This is clear abuse of court process.

5. The 5th point *in limine* relates to what respondents' term fatal non-joinder of Rabson Nkomo the holder of KOODOO 10 Mine. The argument here is that the question of whether or not applicant had peaceful and undisturbed possession of KOODOO 10 at the material time is a matter that cannot be decided in the absence of the lawful holder of the claim. Further, respondents countered that for applicant to be entitled to the permanent interdict sought, it must establish a clear right to possess, use and control KOODOO 10. To decide that issue in the absence of Rabson Nkomo is not only to violate his constitutional rights but to resolve the sworn enemies' dispute in the absence of one of the protagonists.

Further, it was argued that the boundaries of KOODOO 10 cannot be fixed or ascertained in the absence of the holder of KOODOO 10 who indisputably is Rabson Nkomo. Finally, respondents submitted that the non-joinder is fatal as there are no issues that can be resolved in the absence of the holder of KOODOO 10.

6. Respondents argued that the applicant's founding affidavit does not contain a cause of action. The point being made is that the founding affidavit does not say anything about the applicant's cause of action that is valid.

7. In their 7th *point in limine*, first to sixth respondents contented that the property in question is non-existent. I must point out that this point has already been raised by the respondents in their 3rd *point in limine* while discussing the competency or otherwise of the relief

sought by the applicant. Be that as it may, the gist of the argument is that the coordinates, map, beacons and boundaries of KOODOO 10 Mine in Mudzi registered in the name of John Nkomo are unknown as they do not exist. This is confirmed by the tenth respondent who in his report dated 28 July 2023, stated that:

> "Juawo Nkomo (KODOO 10) has to redefine their ground positions as the area shown on the ground is over 10 hectares as stated on their certificate and office records and also another position of this claim is covering Munyoro family homesteads."

8. The respondents also contented in their 8th point *in limine* that there are material disputes of facts that the court cannot resolve on papers. The issue is whether or not the ground in fourth respondent's possession is KOODOO 10. Respondents deny being in possession of KOODOO 10 as alleged by applicant. Accordingly, the court cannot resolve this dispute in light of the fact that there are no coordinates of the land, no maps, no beacons of KOODOO 10. Respondents rely on RABSON NKOMO who they allege is the holder of title of KOODOO 10 Mine. His affidavit appears on p 44 of the record. They also placed reliance on the 'INSPECTIONS CERTIFICATE" which appears on pages 45 – 46 of the record together with the "Findings" on pages 49 – 50.

It was further submitted that another contentions issue is whether or not the transfer of the claim from JUAWO NKOMO to RABSON NKOMO was fraudulent. The court cannot resolve this issue on the papers. Reliance was placed on *ZIMTRADE* v *MAKAYA* 2005 (I) ZLR 447 (H) AND *ZIMASCO PRIVATE LIMITED* v *MARIKANO* 2010 (2) ZCR 167 (H).

9. The 9th point *in limine* is that of *Lis Pendens* namely that the matter is pending. This arises from the fact that applicant is alleged to have filed an application under HC 427/20 on 12/08/2020 seeking the same relief as in *casu*. It is further alleged that this matter is pending determination and it is between the same parties.

MERITS

The first to sixth respondents submitted that the applicant has not alleged let alone prove dispossession. He speaks of interference and not dispossession in his founding affidavit. Spoliation does not concern itself with use or control but dispossession. Secondly, it was argued that applicant has no right at all to the mine in that John Nkomo is not recognized by the Ministry of Mines. The person it recognizes is RABSON NKOMO. The Certificate of

Registration on page 72 is false in that it should have been in the name of Juawo Nkomo. Applicant cannot derive its right from the Joint Venture Agreement since it is in Juawo Nkomo's name and it is common cause that John Nkomo and Juauro Nkomo are two different people. On the basis of the above, it was contented that applicant has no right to KOODOO 10 Mine. It was further contented that applicant has suitable alternative remedy being a court order granted by MANYANGADZE J on 8 August 2023, wherein first to third respondents are barred from approaching KOODOO 10. Mr *Gama* for the first to sixth respondents conceded that first to fourth respondents own a gold claim in Makaha area which is 20km away from KOODOO 10 mine.

Mr *Mutsvandiyani* for the seventh respondent submitted that the seventh respondent has no interest in th case. She denied engaging bouncers or providing a vehicle to ferry ore from KOODOO 10. She is opposing the application because the applicant has sought costs against her. As regards the vehicle, she submitted that no evidence has been brought to substantiate this allegation by the applicant. Finally, it was denied that she disturbed the peace at KOODOO 10 Mine as she is not even aware of the dispute

Mr *Jera* for the nineth respondent opposed the application on three (3) grounds firstly, it was submitted that there is no cause of action for spoliation as against the nineth respondent in that the founding affidavit has nothing to justify the cause of spoliation as against the nineth respondent. It was also contented that applicant has not alleged that it was in peaceful possession and that he was dispossessed through specific acts of unlawfulness. Also, the deponent of the affidavit does not say he saw nineth respondent at the scene. Further there is no evidence that he placed bouncers at KOODOO 10 Mine.

Secondly, it was argued that the order sought is incompetent in that it is final in nature. Finally, it was submitted that the matter is *res judicata* in that there is a judgment already by MANYANGADZE J which was granted against the first to third respondents. The argument here is that there is no new act of spoliation. Applicant showed seek contempt of court as a relief. It was contented that the application must be dismissed with costs at a higher scale.

ANALYSIS

I shall deal with the points in limine seriatim.

1. Whether or not Dyns and DYANA Munyoro exist. It is clear that these two respondents' names were misspelt as DYNS instead of DEANS and DYANA instead of DIANAH. The question is, does this misdescription render the application invalid?

CILLIERS et al in *Herbestein & VAN WINSEN'S THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA*, 5th ed VOL 1 p143, states the need for the proper citation of parties as follows;

> "Before one cites a party in a summons or in an application proceedings, it is important to consider whether the party has *locus standi* to sue or be sued (legitima *persona standi* in *judicio*) and to ascertain what the correct citation is." (my emphasis)

See also Peter van Blerk in LEGAL DRAFTING: CIVIL PROCEEDINGS, JUTA & Co. Ltd 2014 where while discussing the same principles states:

> "Generally speaking it is the practitioner representing the plaintiff who is required to take the initiative in identifying parties for the action. This function must also receive the consideration of the Defendant's legal practitioner. It happens from time to time that to use the colloquial expression, the plaintiff has sued the wrong party or even although less frequently, that the wrong plaintiff has sued.
> A practitioner faced with one or the other of these situations must identify precisely what has occurred. In the case of the so-called "wrong defendant", the 1st question to be asked is on whom the summons was served. Is it the party cited in the summons? If so, the second question is whether the cause of action relied upon by the plaintiff is one that lies against the defendant cited by the plaintiff. If the party served with the summons is correctly described (ignoring spelling errors or minor inmaterial mistakes), then one should admit the alterations concerning the identity of the defendant and deny the appropriate allegations regarding the cause of action. If the description of the defendant clearly does not apply to the person in which the summons is served, the person served had technically speaking no duty to oppose the proceedings_ _ _." (my emphasis)

Coming closer home in *GARIYA GAFARIS (Pvt) Ltd* v *van WYK 1996* (2) ZLR 246, MALABA J (as he then was) held *inter alia* that,

> "In the present case the proceedings were null and void because the proceedings had been brought against a non-existent defendant. Therefore, there could be no question of the substitution of a new judgment debtor as there was no old judgment debtor."

In that case action had been instituted against a non-existent company in terms of a deed of suretyship. It was common cause that there was no company by the name "CON and SON (Pvt) Ltd" the purported defendant.

In van Vauran v *BRAUN & SAUNDEERS* 1910 TPA 950 WESSELS J at p955 stated:

> "NEXT, the summons must specify the defendant. It is not that it will not be a flaw in the summons if the deft is not described as accurately as he should be. If a man is baptized "GEORGE SMITH" it is no defence in the summons to call him "JOHN SMITH" because the individual is pointed out with sufficient accuracy. But if there were no mention of the defendant at all the summons would be a wholly worthless document and could not be amended by inserting the defendant name in court." (my emphasis)

A summons issued against a person who has already died is wholly invalid since it was issued against a non-existent person- see *van Herden v dn PLESSIS* 1969 (3) SA 298 (0). Equally so a summons issued against a dissolved partnership is invalid and could not be rectified by amendment – *STEWARD SCOTT KENNEDY* v *MAZONGOROR SYRINGES (Pvt) Ltd* 1996 (2) ZLR 565 (S). See also *MARANGE RESOURCES (Pvt) Ltd v COREMINING & MINERALS (Pvt) Ltd and 3 Ors* SC 36 – 16.

The issue in casu is whether or not the second and third defendants, namely "DYNS" Munyoro and DYANA MUNYORO (nee Mandiseka) can be described as "non-existent." The "Oxford Advanced Learners Dictionary" describes the word "exist" as, means "to be real, to be present in a place or situation." Whereas the noun "existence" means, "The state or fact of being real or of being present."

The principle distilled from all the precedents cited *supra* is that where a litigant is non-existent, the summons is declared invalid and the same goes for the resultant proceedings. However it appears to me that the phrase "non-existent" is used to relate without limiting its meaning to litigants who were deceased at the time the summons was issued, artificial persons that have no existence at the time the summons is issued chose artificial or natural persons that lack *locus standi* for one reason or another or those mis-described as 'Pvt Ltd' instead of 'PTY'. I could not find a precedent where a summons was declared null and void due to the name of a party being mis-spelt. Counsel for the respondents in casu has not referred me to any such precedent.

Prejudice to the other litigant is one of the relevant factors that the courts have considered together with whether or not the cause of action relied upon by the plaintiff is one that lies against the defendant cited by the plaintiff.

In *casu*, it certainly cannot be said that the two defendants are non-existent for the following reasons:

(a) At the time the application was filed and served, the applicant and the two were no strangers. They knew each other very well.
(b) The parties had engaged each other in previous litigation over the same mining dispute.
(c) The application was served on the two respondents' legal practitioner who filed a notice of opposition together with opposing affidavits focusing on the merits of the case.
(d) The applicant's founding affidavit clearly and concisely spelt out the cause of action between the parties.
(e) The two defendants were not prejudiced as a result of the spelling error.
(f) The two had previously appeared before MANYANGADZE J described as *in casu*.
(g) They denied the allegations against them on the merits showing that they were more than familiar with the current cause of action in that it squarely applies to them in their personal capacities.
(h) It is common cause that the two are brother and sister carrying out mining activities as members of the fourth respondent.

I take the view that it should not amount to a fatal defect in the application to misspell or mistype the two respondents' first names in these circumstances. To declare these proceedings null and void for this reason would result in gross injustice by preventing the courts from doing justice between man and man. I accordingly find that the two individuals were in existence at the time the application was filed. Consequently, I find no merit in the first point *in limine* and it is hereby dismissed for lack of merit.

The second point *in limine* relates to the alleged misjoinder of first to third respondent in that they are mere employees or members of the fourth respondent who have no direct interest in the matter. The reliance on r 11 of the High Court Rules 2021 is misplaced in my view. The rule states:-

"(1) ……
(2) ……
(3) A plaintiff suing a firm or association needs not allege the names of the proprietors or associates. If he or she does, any error of omission or inclusion shall not afford a defence to the association.
(4) ……
(5) In any proceedings in which an association is a party, any other party may by written notice to the association delivered before or after judgment, call for particulars as to the full name and residential address of the proprietor or of each associate, as the case may be, at the time the cause of action arose ……" (my emphasis)

Mr *Gama* interprets this rule to mean that once an association or syndicate is cited, it becomes a misjoinder to cite the associates or members. I disagree. Quite clearly rule 11 does not in anyway support that argument. To the contrary, the rule permits citation of members of a syndicate as well as the syndicate itself subject to conditions stipulated in sub rules (3) and (5). The first to third respondents are being sued in their personal capacities as well as they were physically present at Koodoo 10 during the invasion of applicant's rights. Further Mr *Gama* blows hot and cold by arguing on one hand that second to third respondent do not exist and on the other they were misjoined. Surely what does not exist cannot be joined.

Counsel for respondents further submitted that this alleged misjoinder is fatal to the applicant's ease and that the application ought to be struck off the roll with costs. I disagree because this is contrary to r 32 (11) of the High Court Rules 2021 which provides:-

> "32(11) No cause or matter shall be defeated by reason of the misjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter."

The point *in limine* lacks merit. It is hereby dismissed.

Thirdly it was submitted that the relief sought as final cannot be obtained through the Chamber Book. It was also argued that the relief is in connection with non-existent property with unknown coordinates. I find this submission surprising in view of the visit made by all the parties following an order by MANYANGADZE J in matter HC 3805/23.

Spoliation is inherently final and because it has nothing to do with ownership, it includes use and control. *Burnham* v *Neumeyer* 1917 TPD, *Runsin Properties (Pty)* v *Ferreira* 1982 ISA 658 (SE). Respondents also argued that the matter is *res judicata* as against first to third and tenth respondents. The requisites for a plea of *res judicata* are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded on the same cause of complaint; all three requisites must be satisfied – See *Gwaze* v *National Railways of Zimbabwe* 2002 (1) ZLR 679 (S).

The plea was restated by MULLER JA in *African Wanderers FC (Pvty) Ltd* v *Wanderers FC* 1977 (2) SA 38 (A) at 45E where the learned judge was quoting Voet 44.2.3 (Gane's translation) as follows:-

> "There is nevertheless no room for this exception unless a suit which had been brought to an end is set in motion ……between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking."

In *Horowitz* v *Brock Cods* 1988 (4) SA 160 at 178 the definition of 'subject matter' was put as follows:-

> "The requisites of a valid defence of *res judicata* in Roman Dutch law are that the matter adjudicated upon on which the defence relies, must have been for the same cause, between the same parties and the same thing must have been demanded.

What is meant by the "same thing" having been demanded was explained in *African Farms and Townships Ltd* v *Cape Town Municipality* 1963 (2) SA 555A at 562 D as follows:-

> "……that where a court has come to a decision on the merits of a question in issue, that question at any rate as a *causa petendi* of the same thing between the same parties, cannot be resuscitated in subsequent proceedings."

In *casu*, three questions arise namely:-

(a) are the two actions between the same parties?

(b) do the two actions concern the subject matter?

(c) are they founded on the same cause of action?

The two actions are (i) proceedings before MANYANGADZE J and (iii) this action the question being whether MANYANGADZE J considered and decided any of the issues *in casu*. In order to answer this question it is necessary to examine the record of proceedings under HC 3805/23. Essentially MANYANGADZE J dealt with an application for spoliation and granted an order in the following terms:

> "1. The application for a spoliation order be and is hereby granted.
> 2. The first, second and third respondents be and are hereby ordered to restore to the applicant and his agents the undisturbed use, possession and control of KODOO 10 mine in Mudzi District.
> 3. The first, second and third respondents and any person claiming any right through them be and are hereby barred and prohibited from approaching the said mine site and disturbing any operations thereof, whether directly or indirectly.
> 4. The Sheriff of the High Court of Zimbabwe and, or any duly attested members of the ZRP be and is hereby ordered to ensure compliance by the first, second and third and their agents with terms of this order as set out in para 1.3 above.
> 5. The first, second and third respondents shall pay the applicant's costs jointly and severally one paying the others to be absolved on the ordinary scale."

This order was granted on the 8th of August 2023. First, second and third respondents were in default. They later applied for stay of execution which was dismissed. They persist with their challenge of this order through application for rescission that is pending. Instead of being

law abiding mature citizens, they teamed up with fourth to ninth respondents and 30 bouncers to invade Koodoo 10 Mine. To understand respondents thinking and conduct, one was to quote verbatim fourth and fifth respondents' opposing affidavit sworn to by fifth respondents. In para 16 (b) (c) (d) (e) she states:

> "16(b) However, there is one thing that cannot escape the attention of the court. Applicant says that it was despoiled on 6 June 2023. See para 15.1 of the founding affidavit.
>
> (c) It also avers that as a remedy for the spoliation it was awarded a spoliation order on 8 August 2023 which is extant ……the simple question that arise is *what is the applicant's cause of action now?*
>
> (d) ……
>
> (e) One cannot seek a fresh interdict because a similar interdict granted to him has not been complied with. That is abuse of court process." (my emphasis)

Respondents contend that because of these facts, the defence of *res judicata* is available to them.

Going back to the requirements of the defence, the issue is whether or not they have all been met. As regards the first one although it is correct that in so far as the applicant and first, second and third respondents the action is between the same parties. The same cannot be said about the fourth to ninth respondents who are coming in the picture for the first time.

The second requisite is that the matter must have been for the same cause. *In casu* there is a fresh invasion carried out by the three respondents together with about 30 hooligans. This mob unlawfully took over mining operations at Koodoo 10 Mine. A totally different *modus operandi* was employed in that this time around politicians were roped in to assist first to sixth respondent to despoil the applicant. As a result of this mob's conduct, applicant completely lost possession of Koodoo 10 Mine.

In my view this is a new cause of action different from the one before HON MANYANGADZE J. Surely one cannot commit an unlawful act for which he is found liable and proceed to commit a similar invasion a few months down the line and then raise *res judicata* as a defence. *Res judicata* in my view is meant to prevent a victim from having a second bite of the cherry by resuscitating a matter that was previously finalized. However, *res judicata* does not and should not have the effect of condoning a new breach of peace.

The fifth preliminary point lacks merit. As indicated (supra) r 32 (ii) states that no cause or action shall defeated by reason of a misjoinder of any party. In any event Rabson Nkomo is not an interested party. While ownership is a non-issue in an application for a spoliation order, Rabson Nkomo is certainly not a holder of any rights over Koodoo 10 Mine. The facts which are common cause as per the reports and correspondences filed by the tenth respondent's Mashonaland East Mines Office are as follows:

(a) In 2018, Rabson Nkomo fraudulently transferred Koodoo 10 Mine from its holder John Nkomo and immediately the fraud was discovered, the purported transfer was reversed as per correspondence from Mrs G. Chacha of the tenth respondent dated 16 March 2018 – see Annexure AN[1] where she confirmed the cancellation of the purported transfer. Also, there is Annexure AN[2] from the current Provincial Mining Director, Mashonaland East dated 6 September 2023 confirming the same position.

(b) No rights accrue from a fraud.

(c) Attempts by Rabson Nkomo to sue the applicant over Koodoo 10 Mine failed before this court – See Annexure AN[3].

(d) On 27 September 2023, the Provincial Mining Director Mashonaland East further placed on record that Rabson Nkomo has no rights over Koodoo 10 as his fraudulent Certificate was duly cancelled – see Annexure AN[4].

(e) Rabson Nkomo is already before the criminal court for his fraudulent conduct.

The owner of Koodoo 10 is John Nkomo as per his Certificate of Registration issued in 1986 and remains valid to date – see Annexure AN[5] to the Answering Affidavit. It is John Nkomo who is in a partnership agreement with the applicant to which applicant has a 60% shareholding in the partnership.

In so far as the sixth point *in limine* is concerned the respondent's argument is that the F/A does not contain the cause of action. An examination of the applicant's founding affidavit reveals that para(s) 13 – 14 speak to the taking away and restoration of possession while para 20 mentions the violent takeover of the Mine by the respondents. Therefore, it is not true that the founding affidavit is silent on the set of facts that constitutes the cause of action. Accordingly, I find this preliminary point without merit. It is hereby dismissed.

The seventh point *in limine* is that Koodoo 10 is unascertainable. I am surprised by this submission in light of the fact that the parties as per MANYANGADZE J's directive went to the ground in Makaha area where an inspection was carried out in the first to third respondents' presence. It emerged that there are two Mines namely Koodoo 10 that belongs to the applicant and Koodoo Mine registered in favour of the respondent. This latter Mine is located approximately 20km away from Koodoo 10 Mine. This totally excludes the possibility of a boundary dispute between the parties. Respondents requested to migrate from Banze area to Koodoo 10 but the request was declined – see Annexure AN[2]. Accordingly, it is crystal clear that Munyoro Minig Syndicate or any of its members has no mining rights near Koodoo 10.

Further the following Facts were revealed by the inspertion:-

1. Koodoo 10 Mine location

(a) All the coordinates to the full block that constitutes Koodoo 10 Mine location in Makaha Mudzi District were physically identified by the parties and were consistent with the physical description of the mine location on the certificate of the registration.

(b) Koodoo 10 Mine Block Certificate of registration number 14778 was duly issued in 1986 and is extant.

(c) The block constituting Koodoo 10 Mine site was properly pegged and lawfully located in consonance with the description layout in the certificate of registration number 14778, being 3.5 km North West of TS 105 Rugamba Hill. The coordinates thereto, as identified by the enquiring team also correctly establish the extent of the mining location.

2. Koodoo Mine Location

(a) Parties were shown by the Munyoro Family what they perceived to be coordinates to the Koodoo Mine Block.

(b) The Block in (a) is largely located inside Koodoo 10 Mining Block.

(c) Koodoo Mining is registered in the name of a syndicate called Munyoro Mining Syndicate under Certificate of Registration number 42792 issued in 2012, i.e. almost 26 years after the registration of the Koodoo 10 Block. Koodoo Mine location is on Lawleys concession, approximately 2.4 km south east of Spot Height 2395.

(d) Where Koodoo Mine site is located in Banze on Lawleys Concession is almost 20 km away from Koodoo 10 Block and does not share a boundary with Koodoo 10.

(e) There were no lawful changes or variations in the location of Koodoo from Lawleys Concession to an area within Koodoo 10 Mine Block.

On the facts the inescapable conclusion is that the Munyoro Mining Syndicate is operating illegally within the area that falls under Koodoo 10 Mine site. Munyoro Mining Syndicate only operate lawfully on the Mine area lawfully granted to them in terms of their Certificate of Registration, which area is on Lawleys Concession. Instead, they have chosen to abandon their mine site and superimpose themselves on Koodoo 10 Mine Block.

On the above evidence, the contention that Koodoo 10 Mine is unascertainable lacks merit. In fact, it is Koodoo Mine that has no known boundaries around Koodoo 10 Mine. Accordingly, the point *in limine* is hereby dismissed.

The eighth point *in limine* is that there are material disputes of fact relating to:

(i) Is Rabson Nkomo the lawful owner of Koodoo 10 Mine.

(ii) Whether or not the transfer of the claim from John Nkomo to Rabson was fraudulent.

In my view these disputes can be resolved on the papers if the court adopts a robust approach. I intend to utilize that approach. As regards the first point, I agree with Mr Chinawa for the applicant that "mention of Rabson Nkomo as the alleged owner of Koodoo 10 Mine is a tired argument which the first to sixth respondents have made in the past and failed". It is beyond doubt that the owner of Koodoo 10 Mine is John Nkomo as shown by his extant Certificate of Registration. Also it is John Nkomo who is in a partnership agreement with applicant.

As for the second point, there is abundant documentary evidence that Rabson Nkomo fraudulently transferred Koodoo 10 Mine from its lawful owner John Nkomo. The fraud, was discovered and is well documented by Ministry of Mines officials. The Provincial Mining Director, Mashonaland East confirmed the fraud and the cancellation of the transfer. Rabson Nkomo is currently facing criminal charges arising from the fraudulent activities.

In any event a dispute over ownership in a spoliation matter cannot be considered material. What is critical is mere possession. In the result, these so-called material disputes are

capable of resolution on the papers filed of record. Accordingly, their point *in limine* is without merit and is hereby dismissed.

Lis pendens is the ninth point *in limine* raised by the first to sixth respondent. The basis of this point falls away in that the urgent chamber application referred to was removed from the roll and is no longer pending before the court. The point is without merit and is here by dismissed.

The tenth and final point *in limine* is that there is non-disclosure of material facts by the applicant. These facts were said to be the following;

(a) that applicant did not alert the court of a pending matter.

(b) that Ralson Nkomo had an interest.

(c) that the applicant did not refer to a report from the Ministry of Mines that shows Rabson inherited mining rights from his father.

The alleged non -disclosure is non-existent in that firstly the pending matter was removed from the roll. Secondly it is a fact that Robson Nkomo has no interest in the matter in that he committed fraud as per the Ministry officials' findings in their report. In fact, he never inherited any rights from his father. It is a fact that the applicant is in a joint partnership with Jonh Nkomo. Therefore, He has *locus standi*. This point *in limine* has no merit. It is hereby dismissed.

The seventh respondent opposed the application on the merits, while the ninth raised *res judicata* and that the order is incompetent as points *in limine*. I have already dealt with these points and found both to be meritless.

<u>MERITS</u>

<u>SILBERBERG AND SCHOEMAN</u>

<u>THE LAW OF PROPERTY SECOND EDITION</u>

Durban- Pretoria Butter Worths

1983 at p.114 states;

"Possession has been described as a compound of a physical situation and of a mental state involving of the physical control or detention of a thing by a person and that person's mental attitude towards the thing. Two points emerge from this definition. The first is that whether or not a person has physical control of a thing and what his mental attitude is towards the thing are both question of fact. The second point is that the definition contains no reference to the legal basis on

which the possessor may exercise physical control over a thing or which would justify his mental attitude towards the thing and neither does it give an indication of the kind of benefit which he may derive from the thing which he controls. In other words, fundamentally possession denotes a purely oactual relationship of a person to a thing which exists irrespective of whether or not the person concerned has any legal right to that thing so that even a thief acquires possession of the thing he steals. Thus, it has been suggested that “before there was law there was possession.”

It is accepted in our law as a general rule that a possessor is protected against any person, including the owner or his successor in title who deprives him of his possession without a court order. In an application, the court will order restoration, even against the owner, without considering a defence on the merits of the dispute. Further a *bona fide* possessor is not only entitled to protection by means of the mandament *van spolie*, but also becomes owner, on separation, of all fruits produced *picor to litis contestation*.

For possession to exist at law there must be the *amunus* elements and the objective control element. Silberberg *supra* at p135 while discussing the principle of spoliation states; “In the final analysis the protection of possession is part and parcel of the protection of the peace in a community, which could not be maintained if every person who asserts that he has a real right to a particular thing which is in another person’s possession would be entitled to resort to self-help. Therefore, a possessor who has been deprived, or de spoiled; of his possession by unlawful means whether it be by force, fraud stealth or other means) may apply to court by *mandament van spolie* for an order directing the spoliator to return the thing to him immediately. In such proceedings the court will refuse to consider any claim by the spoliator that he has a better title to the possession of the thing in question. This means that the applicant in spoliation proceedings need not even allege that he has a *ius possidendi*; spoliatus *ante omnia restituendusest.* All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession. <u>The onusis on the applicant to prove this on a balance of probabilities</u>. It is not sufficient to make out only a *prima facie* case because;

> “although a spoliation order does not decide what apart from possession, the rights of the parties to the property, spoliated were before the act of spoliation and merely orders that the *status quo* be restored, it is to that extent a final order.” (my emphasis)

What this means is that if the applicant succeeds in proving peaceful and undisturbed possession at the time of deprivation and that the respondent committed an act of spoliation, the court will summarily restore the *status quo aute* and will do that as a preliminary to any inquiry or investigation into the respective rights of the parties prior to the act of spoliation.

In casu, the *cor pus and animus* elements which are necessary to constitute the kind of possession which qualifies for protection against spoliation have been proved on a balance of probabilities. The applicant's founding affidavit speaks to dispossession in pp 13,14,18 and 20. On the evidence it has been clearly established that (a) applicant was in peaceful and undisturbed possession of the property, and (b) that respondents deprived him of the possession forcibly and wrongfully against his consent.

By relying on MANYANGADZE J`s order for support their *res judicata* defence first to sixth respondents concede that applicant was in peaceful and undisturbed possession of the mine before he was despoiled. Also, by challenging applicant`s ownership although irrelevant shows that first to sixth respondents that applicant was in occupation of the mine in dispute.

Further by mounting an application for rescission on the grounds that the dispute between applicant and first to sixth respondents is a boundary dispute, respondents do concede that applicant was in occupation of KOODOO 10 mine. Essentially, they accept that applicant encroached into "their" claim. In light of this what is surprising is that instead of pursuing their boundary dispute before MANYANGADZE J, they did not turn up on 8th August 2023 and a default judgment was granted. The question then becomes how they hoped to resolve this dispute having lost through the legal route on numerous occasions. In my view the answer is that respondents simply resorted to the law of the jungle by carrying out a fresh invasion of the mine. In other words, they simply took the law into their own hands. The respondents had no court order hence they acted unlawfully.

As regards seventh and nineth respondents' role in this new invasion, applicant has explained sufficiently the basis upon which they acted in common purpose with the first to sixth respondents in paragraphs 15,1, 20 and 21 it outlined how the unlawful dispossession occurred. Specifically, para 21 explains the involvement of seventh, eighth and ninth respondents respectively. Applicants referred to the model, registration number and colour of a motor vehicle that was used by the seventh respondent at the scene. It was not denied that seventh respondent

drives or uses such a vehicle. The eighth respondent is the sitting Councillor forward 14 in Mudzi District where the mine in dispute is located. The nineth respondent is the DCC chairman in Mudzi District. According to the applicant all three were present at the mine on the day he was despoiled.

From the circumstances outlined above and the brazen manner in which the dispossession was carried out, it is apparent that this second invasion was well planned and coordinated.

Firstly, it was necessary to organize 30 plus male adults. Secondly transport had to be secured and thirdly, the bouncers' loyalty had to be beyond question. In my view, these are the areas which the seventh, eighth and nineth respondents became handy. I say so because there is clearly something or some persons whose conduct emboldened the first to sixth respondents to carry out such an action in the manner, they carried it out. In my view it is the assistance they received from the seventh, eighth respondents that assured them success. I find therefore that seventh eighth and nineth respondents rendered direct or indirect assistance to first to sixth respondents at KOODOO 10 mine when applicant was disposed of his mine.

PROHIBITORY INTERDICT

Applicant's relief includes a prohibitory interdict in that it prayed for an order prohibiting all respondents from committing an invasion or from continuing an existing one. Such an interdict may be final or *pendente lite*. In order to obtain a final interdict, the applicant must establish the following:

(a) A clear right, by which is meant no more than that the right alleged must be established on a balance of probabilities.

(b) an injury actually committed or reasonably apprehended; i.e an apprehension of injury which a reasonable man would have entertained upon being faced with the situation concerned.

(c) The absence of similar protection by any other ordinary remedy.

These requirements are at times listed as

(a) A clear right

(b) A well-grounded apprehension of irreparable injury.

(c) The absence of other injury

(d) the balance of convenience

Clear Right

In casu, the applicant has established a clear right in that the owner of KOODOO 10 mine is John Nkomo as per his extant certificate of registration issued in 1986 and remains valid to date. The applicant is in a partnership agreement with John Nkomo in which applicant has a 60% shareholding and has made huge financial investments in excess of US $850 000.00 on the mine. it has been proven by very clear evidence that the fourth applicant and or its members have no mining rights at KOODOO 10 mine area where it is carrying out illegal mining activities. Respondents cannot claim mining rights in that area through Rabsor Nkomo's certificate of registration because that certificate was fraudulently procured and rightly cancelled by the Ministry.

Mining rights are only conferred through a certificate of registration in terms of the Mines and Mineral Act. In any event, the rights of John Nkomo as the prior pegger override any rights of the fourth respondent if any in terms of s 177(3) of the MineS and Minerals Act. The clear right *in casu* has been established on a balance of probabilities.

AN INJURY ACTUALLY COMMITTED OR REASONABLY APPREHENDED

That applicant suffered actual injury that is irreparable is clear on the evidence before me. First to third respondents are repeat offenders as they were first found liable by MANYANGADZE J for despoiling the applicant of its mine violently. They have done it again this time with a huge number of invaders. In terms of applicant's founding affidavit, the respondents immediately commenced illegal mining and removing gold ore from the shaft at the mine. Quite clearly applicant was financially prejudiced as a result of the respondents' collective unlawful conduct. Effectively the respondents have unlawfully evicted applicant from KOODOO 10 mine. If this conduct is not arrested immediately the issues of ownership and or encroachment or boundary dispute would be rendered moot and nugatory. This requirement in my view has been established. The injiury to the applicant is irreparable.

The absence of any other Remedy

Applicant has no other satisfactory remedy other than making an application for a *mendamen van spolie* and a prohibitory interdict. From the manner in which the ore is being looted, it is virtually impossible to quantify the loss for purposes of suing for damages. Resorting

to the criminal law has not assisted the applicant. Taking the matter to the local political leadership did not yield fruitful results. Even an order of this court was ignored by the respondents.

The Balance of Convenience

The balance of convenience favours the granting of the relief as the applicant has always been in occupation and use of the mine in question. As indicated *supra* if the order is declined applicant will suffer huge financial losses in lost investment and stolen ore. On the other hand the respondents will not be adversely affected as they will continue to operate on what they term their side of the area where they operate as " Makorokoza" (illegal gold miners). The granting of the relief will enable them to pursue the issue of the boundary dispute by prosecuting their case to finality in a lawful manner. In my view the injury to be suffered by the applicant will be greater if the relief is refused than that to be suffered by the respondents if the relief is granted.

On the basis of the above I find that the applicant has established all the requisites of a prohibitory interdict. As regards costs respondents' defence is frivolous and vexations. They were not candid with the court.

In the result, it is ordered that

1. The application for a spoliation and prohibitory order be and is here by granted.
2. The first to ninth respondents and their agents be and are hereby ordered to restore to the applicant and its agents the undisturbed possession and control of KOODOO 10 mine in Mudzi District
3. The first to ninth respondents and any person claiming any right through them be and are hereby barred and prohibited from approaching the said mine site and disturbing any operations there of whether directly or indirectly.
4. The Sheriff of the High Court of Zimbabwe is hereby ordered to evict from KOODOO 10 Mine first to ninth respondents or their agents at the said mine site
5. Any dully attested member of the Zimbabwe Republic Police be and is hereby ordered to ensure compliance by the first to ninth respondents and their agents with the terms of this order as set out in paragraphs one to four above and cause to be arrested and brought before the court any of the said respondents who act in contravention of this order.

6. The first to ninth respondents shall pay the applicant's costs jointly and severally the one paying the others to be absolved on attorney and client scale.

Chinawa Law Chambers, applicant's legal practitioner
Gama and Partners, first to sixth respondents' legal practitioner
Shava Law Chambers, seventh respondent's legal practitioners
Moyo and Jera Legal Practitioners, ninth respondent's legal practitioners