

SILENCE SIBINDI (Represented by JOB BERNARD SIBINDI)
and
PWISEYI NHAMOINESU
versus
THE MESSENGER OF COURT, GWERU N.O.

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J
MASVINGO, 19 May & 22 September, 2021

M. Jaravaza for the Appellant
T. Militao for the Respondent

Civil Appeal

WAMAMBO J: This is a civil appeal. The dispute between the parties is over a piece of land that is at the boundary of their adjoining properties.

The appellant made an application before the court *a quo* for a spoliation order and a prohibitory interdict. The application was dismissed. He now appeals to this court.

The founding affidavit reflects as follows:

The appellants occupies Plot no. 36 Lot 54 Umsungwe Block sanctioned by a resettlement form issued to him in 2008. He has been in lawful peaceful and undisturbed occupation and possession of the said plot for 20 years. First respondent owns Dunstan Mine which is adjacent to and shares a boundary with appellants plot. First respondents plot is Plot no. 39 of Lot 54 Umsungwe Block and first respondent has been conducting mining activities there at for about 20 years First respondent's mining pits were about 200 metres away from the boundary of appellants plot. On 9 September 2020 first respondent violently and forcefully removed poles erected on the boundary between the mine and appellant's plot and encroached into appellant's plot by 30 meters and started conducting mining activities thereat. The

encroachment also covers a two roomed house owned by appellant. Annexure" C" reflects the affected area.

The first respondent's stance as per his opposing affidavit is as follows: -

On 29 July 1998 he pegged a mine reflected in Annexure "A". Ten years later he was allocated a farm, plot 39 as reflected in Annexure "B". Plot 36 and 39 share a common boundary.

In paragraph 3.4 to 3.8 first respondent says:-

"3.4 *However my mine encroaches a bit into the applicant's plot.*

3.5 *The encroachment is represented by the area marked by asterisks in Annexure" C" attached hereto.*

3.6 *The encroachment is legal in terms of the law. Technically I was first given the land that is now my Plot 39 in 1998 as a mine. That land stretched into the land that is now Plot 36, the applicant's mine.*

3.7 *All along I have not been using the encroached area. The applicant has been using it.*

3.8 *When the applicant decided to fence off that area I objected and that is what he is describing as spoliation."*

The Trial Court relied heavily on section 179 of the Mines and Minerals Act [Chapter 21:05] and found that first respondent has a clear right which supersedes that of appellant.

The Trial Court found that section 179 of the Mines and Minerals Act [Chapter 21:05] solved the dispute brought before it. Reliance was also placed on the matter of *Satond Investments (Pvt) Ltd v Muanashe Sahava* HH 336/18.

When the parties appeared before us we queried the issue of combining an application for an interdict and that of spoliation as the two have different requirements. *Mr Jaravaza* wisely abandoned the interdict and concentrated on the spoliation.

In oral submissions *Mr Jaravaza* pointed out the following. First respondent agrees that appellant is the one who possesses the land in question. The astericks inscribed on Annexure "C" were done by first respondent and should not be relied on. That first respondent effectively admits that he took the law into his own hands.

Mr Militao was of the view that flowing from the abandonment of the application for an interdict there is a need to have a relook at the prayer contained at page 18 of the record.

According to him first respondent still insists she did not dispoil the appellant. He argued that the second aspect of appellant's prayer is not supported by facts on the ground as there was no finding by the Trial Court that first respondent removed the poles in the first place. How then can she return the poles she never removed? At the end of the day *Mr Militao* was of the view that appellant sought an order in his grounds of appeal different from the one he sought in the court *a quo*. He also argued that paragraph 3 of the draft order in the grounds of appeal deals with an interdict and not spoliation. In *Oliver Masomera N.O v Savanna Africa Holdings (Private) Limited (under Provisional Management) & 5 Others* HH 83/18 TAGU J. at page 7 set out the requirements of spoliation thus: -

"When dealing with an application for spoliation what the applicant needs to establish is that he/she it was in peaceful and undisturbed possession. That it or he or she was despoiled, that his possession was taken without due process or without it /his/her consent."

Herbstein & Van Winsen in *Civil Practice of the Supreme Court of South Africa* 4th ed at page 1064 states as follows: -

"A mandamant van spolie is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue as between the parties."

Also see *Botha & Another v Barrett* 1966 (2) ZLR 73 at 79 e-f.

Section 179 of the Mines and Minerals Act [*Chapter 21:05*] provides as follows: -

*"179 Saving of rights of land owner over mining location.
Subject to subsection (12) of section one hundred and eighty the owner or the occupier of land on which a registered mining location is situated shall retain the right to graze stock upon or cultivate the surface of such location in so far as such grazing or cultivation dates not interfere with the proper working of the location for mining purposes."*

Section 180 (12) of the Mines and Minerals Act provides as follows: -

"Where a scheme has been approved by the Board under this section, any rights of cultivation confirmed by section one hundred and seventy-nine in respect of the land to which the scheme relates shall be suspended for the duration of the scheme."

The problem with the Trial Court's reliance on section 179 above is that appellant proved that he was in peaceful and undisturbed occupation of the said land.

First respondent also agrees that his mine encroached onto appellant's plot. First respondent then also avers that the appellant has been using the disputed land.

To buttress his case appellant avers that the land in dispute forms part of his plot and was never a part of first respondent's plot.

Appellant avers that he did not give first respondent authority to encroach onto his mine. Appellant occupies Plot 36 through Annexure "C", a resettlement form.

The fact that appellant had erected poles to fence off his plot which poles were only removed at the behest of first respondent in 2020 when he occupied his plot in 2008 supports his assertion that he has and was in lawful occupation when he was dispoiled.

In the light of the above we find that the trial court misdirected itself by relying on section 179 of the Mines and Minerals [*Chapter 21:05*] to resolve the dispute.

The issue of removal of poles at the boundary is alleged by appellant in her founding affidavit in paragraph 10 thereof. Appellant also alleges that first respondent started conducting mining activities on his plot.

In his opposing affidavit first respondent does not answer directly whether or not he removed poles or started mining operations.

In oral submissions it was submitted that the poles were never removed nor was there any mining equipment set up on the disputed land. One wonders why the opposing affidavit does not answer those two allegations directly. In any case how can first respondent start mining operations without equipment? The Trial Court seemed not to pay particular attention to these details perhaps because of the decision to dismiss the application.

If indeed the poles were not removed and there is no mining equipment belonging to first respondent appellant then there is no harm in granting an order as prayed for in the light that the opposing paper does not refute the allegation.

To that end we order as follows: -

1. The appeal is upheld
2. The order by the Trial Court be and is hereby set aside and substituted with the following: -
 - i) That in the interim between now and the return date, the first respondent be and is hereby ordered to forthwith relinquish, surrender and restore all despoiled agricultural land at Plot No.36 of Lot 54 Umsungwe, Gweru to the appellant.
 - ii) The first respondent be and is hereby ordered to forthwith return to the appellant all the fencing poles that she removed from the boundary between Plot No.36 of Lot 54 Umsungwe, Gweru and her mining claim.
 - iii) The first respondent be and is hereby ordered to forthwith remove all her mining equipment and mining gadgets from any and all portions of Plot No.36 of Lot 54 Umsungwe, Gweru.

WAMAMBO J.....

ZISENGWE J agrees.....

*Dzimba Jaravaza & Associates, Appellants Legal Practitioners
Militao Law in, Respondents Legal Practitioners*