REPORTABLE (23)

Judgment No. SC 32/12
Civil Application No. 181/12

(1) SWIMMING POOL & UNDERWATER REPAIR (PRIVATE) LIMITED
(2) AEPROMM RESOURCES (PRIVATE) LIMITED
(3) TOLROSE INVESTMENTS (PRIVATE) LIMITED
(4) PATTERSON FUNGAI TIMBA

v

(1) JAMESON RUSHWAYA (2) ANNIE RUSHWAYA

SUPREME COURT OF ZIMBABWE
HARARE, JULY 19 & AUGUST 21, 2012

F Girach, with him Mr *Nyamasoka*, for the applicants

P Chitsa, with him *V Masvaya*, for the respondents

Before: CHIDYAUSIKU CJ, In Chambers, in terms of r 58 of the Supreme Court Rules as read with r 244 of the High Court Rules

This is a Chamber application, in which the applicants seek the relief set out in the draft order, which reads as follows in relevant part:

"IT IS ORDERED THAT

1. The appeal filed by the appellants against the judgment of the High Court in case No. HC 3967/12 shall be heard on an urgent basis.

2. The applicants shall file their Heads of Argument in the appeal matter within fifteen (15) days from (the) date of this order and the respondents shall file their Heads of Argument within ten (10) days of being served with the applicants' Heads of Argument.

3. The Registrar of this Honourable Court is hereby directed to set the appeal down for hearing on an urgent basis and to expedite the hearing of an appeal on the earliest available date.

4. Pending the determination of the appeal,

4.1 The respondents, their assignees, proxies as well as their company Xelod Investments (Pvt) Ltd be and are hereby interdicted from commencing and conducting any mining operation and/or interfering with any administrative operations whatsoever at Glencairn Mine.

4.2 The respondents and all their assignees be and are hereby ordered to vacate and return possession of Glencairn Mine to the applicants immediately upon service of this order, failing which the Sheriff or his lawful deputies assisted by any member of the law enforcement agencies, as the case may be, are authorized to ensure and restore possession of Glencairn Mine to the applicants.

5. Costs of this application will be (costs) in the cause."

In brief, the applicants want the appeal against the judgment of CHATUKUTA J heard on an urgent basis and that, pending the hearing of that appeal, I issue the interim interdict set out in paras 4.1 and 4.2 of the draft order quoted above. The application is opposed.

Generally speaking, 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. Where, however, the applicant for a spoliation order has been unsuccessful in the court of first instance and wishes to appeal against that decision the appeal will not necessarily be heard on an urgent basis. Different considerations apply, in that a court of competent jurisdiction will have determined whether or not there was spoliation. Whether or not the appeal should be heard on an urgent basis should depend on the prospects of success of the

appeal. Where the appeal has good prospects of success on appeal, the appeal should be heard on an urgent basis so as to bring to an end unlawful conduct. However, where the appeal has no prospects of success, I do not see why the appeal should jump the queue. It follows, therefore, that for me to grant the first relief I need to be satisfied that the appeal has prospects of success.

As regard the second relief, the interim interdict, for the applicants to succeed they must establish the essential elements for entitlement to such relief. I will consider the relief sought *seriatim*, but before doing that let me set out the background facts of this case.

THE FACTS

The facts of this case are succinctly set out by the learned Judge in the court *a quo*. I will summarise them as follows.

The parties to this matter are involved in a longstanding dispute over the control and ownership of Glencairn Mine in Kadoma ("the mine"). The fourth applicant ("Timba"), through the first applicant, and the first and second respondents ("the Rushwayas") are shareholders in the third applicant, which owns the mine at the centre of the dispute.

On 11 October 2010 the magistrate's court at Kadoma, in case no. CRB B044/10, directed the first, third and fourth applicants to co-exist with the Rushwayas at the mine pending resolution of a dispute over the shareholding in the third

applicant. The Rushwayas moved onto the mine in terms of the magistrate's court's ruling. It would appear that that ruling is extant and has never been set aside.

On 3 May 2011, following a series of law suits, the Rushwayas entered into an Agreement of Sale ("the Agreement") with Timba in terms of which they sold to the latter their rights and interest in Tolrose Investments (Pvt) Ltd and Aepromm Resources (Pvt) Ltd, in contemplation of a clean break between the parties. That Agreement was meant to end all law suits between the parties.

However, following the signature by the parties of that Agreement, disputes between the parties persisted. In particular, the Rushwayas, on or about 6 June 2011, wrote to the Mining Engineer concerning the appointment of Mr E Mudimu as the mine manager and complaining that, as a claim holder, they were not consulted on this appointment. The Mining Engineer, by letter dated 20 June 2011 addressed to "The Operator (whoever that is), Glencairn Mine", cancelled the appointment of Mr Mudimu as the mine manager and suspended all operations at the mine pending a proper manager's appointment. This prompted the application, which appears to me to all intents and purposes to be an application for the review of the Mining Engineer's decision. The applicants were successful. The Rushwayas appealed to the Supreme Court against that judgment. The appeal was heard and judgment handed down on 16 July 2012. I was handed a copy of this judgment during submissions in this matter. The Rushwayas' appeal was dismissed, on the ground that the Rushwayas had appealed against that part of the judgment which affected the Mining Engineer and not them. It was for the Mining Engineer to appeal against that part of the

judgment. It was held that the Rushwayas could only appeal against the interim interdict.

However, this judgment, in my view, has no bearing on what transpired at the mine on 5 April 2012, which events form the basis of the applicants' application for a spoliation order.

The events of 28 March 2012 are established by the evidence on a balance of probabilities. The learned Judge's finding in this regard cannot be faulted.

The Messenger of Court's Return of Service, which is on record, shows that on 28 March 2012, in pursuance of the order of the magistrate's court in case No. CRB B044/10, the Messenger of Court reinstated the Rushwayas at the mine. The Return of Service reads in relevant part as follows:

> "Placed Mr Jameson Rushwaya and Mrs Annie Rushwaya at Tolrose Mine to co-exist with Mr Patterson F Timba and others with assistance of Constables Kasero and Chikwature accompanied by Madzivanyika and Simoni – Support Unit ZRP."

Thus, it is quite clear that the Rushwayas' return onto the mine on 28 March 2012 was in pursuance of the lawful magistrate's court order and cannot constitute spoliation. Indeed, it would appear that the applicants did not argue that the events of 28 March 2012 constituted spoliation.

It is, however, the events of 5 April 2012 that form the basis of the application for spoliation. Timba, in para 13 of the founding affidavit in the court *a quo*, makes the following averments upon which the application for spoliation is founded:

> "13. Regrettably, in a calculated move, the first and second respondents through the assistance of the third and fourth respondents (the Messenger of Court and Commissioner Mufandaedza) and in the company of a mob of about forty (40) to fifty (50) youths invaded Glencairn Mine on the 5th of April 2012. The third respondent confirmed that he was armed with instructions of the fourth respondent to stop at nothing in ensuring the first and second respondents' access to the mine, changed all locks at the premises, inserted a new set of locks and subsequently handed the keys over to the first respondent. I struggle to comprehend how this matter may involve a Commissioner of Police unless the Commissioner is involved in a hazy and clearly unlawful crusade. I have never understood the position of the law to be that a Commissioner of the Zimbabwe Republic Police can have the lawful entitlement to issue orders to a Messenger of Court. …"

The Rushwayas deny that a Messenger of Court ever visited the mine on 5 April 2012. They only admit a visit by the Messenger of Court to the mine on 28 March 2012.

Thus there is a dispute of fact as to what occurred at the mine on 5 April 2012. The learned Judge in the court *a quo* decided to adopt a robust approach and resolved the dispute of fact in favour of the Rushwayas. This is what she had to say in this regard at pp 5-6 of the cyclostyled judgment HH 239/12:

> "The applicants submitted that the first, second and third respondents did not deny in the opposing affidavits that the third respondent replaced the keys at the mine and gave the new keys to the first and second respondents. The first and second respondents deny that the third respondent ever visited the mine on 5 April 2012 and alleged that, if he did so, it was not on their instructions. The third respondent denied ever visiting the mine on 5 April 2012. The submissions by the parties clearly raise a dispute of fact whether or not the third respondent visited the mine on 5 April (2012) and conducted himself as alleged by the applicants. I am, however, of the view that I can adopt a robust approach and resolve the dispute on the papers filed of record. I am inclined to adopt the robust approach in view of the fact that an application stands or falls on the papers filed of record. The applicants were well represented and an advocate was briefed to represent them. Therefore it can be assumed that they were satisfied with the adequacy of their pleadings.

It is trite that the *onus* to prove dispossession rests with the applicants. The *onus* is different from other urgent chamber applications where an applicant must establish a *prima facie* case. In the case of applications for spoliatory relief, the *onus* is on a balance of probabilities given that the relief is final in effect. It is therefore not enough for an applicant to make bare allegations.

The applicants in the present matter appear to me to have made bare allegations of wrongful or unlawful dispossession. It is alleged that the third respondent 'invaded' the mine in the company of a mob of forty to fifty youths. The mob must therefore have been rowdy and caused mayhem. There also must have been representatives of the applicants on the mine who witnessed the invasion, the 5th of April being a week day. The fourth applicant, who deposed to the founding affidavit, does not state that he was at the mine when the third respondent is alleged to have locked out the applicants. It would have been helpful if not imperative for the applicants to file supporting affidavits of those who witnessed the alleged invasion and therefore dispossession. However, the applicants did not consider it necessary to do so.

Mr *Mpofu* submitted that the first, second and third respondents did not dispute that locks were broken and (that) this amounts to acceptance of the applicants' allegations. The applicants, however, overlook that the third respondent insisted that he only visited the mine on 13 and 28 March 2012. He filed the returns of service dated 13 and 28 March 2012 as proof of his visits to (the) mine on those days. The conclusion that can be arrived at is that if the third respondent states that he never visited the mine on 5 April 2012, he cannot be said to be accepting that he removed and replaced locks on the mine on 5 April 2012.

The first and second respondents maintained that if the third respondent went to the mine on 5 April 2012, it was not on their instructions. The first respondent observed on page(s) 10 to 11 of his opposing affidavit that:

> 'According to the returns of service in our possession, the third respondent served the co-existence order on 13th March 2012 and the said Return of Service indicates that the applicants were given seven days to comply with the court order. The third respondent only went back fifteen days later on 28 March 2012 and he remarked:
>
> > "Placed Mr Jameson Rushwaya and Mrs Annie Rushwaya at Tolrose Mine to co-exist with Mr Patterson F Timba …".
>
> He never mentioned that he evicted the applicants and indeed he did not do that.'

The respondents further denied in paragraph 21 of the first respondent's opposing affidavit (that) a mob invaded the mine. They in fact accused the applicants of bringing youths from Harare to cause commotion at the mine and refer to the police reference of the complainant (the complaint?) that they

made to the police. It is therefore clear that the first and second respondents have denied that the third respondent ever visited the mine on 5 April 2012."

In resolving the dispute of fact in favour of the Rushwayas, the learned Judge *a quo* relied on the well established principle that the Messenger of Court's Return of Service is *prima facie* proof of the contents therein, and that the *prima facie* case can only be rebutted by clear and satisfactory evidence. For the above proposition the learned Judge *a quo* relied on *Gundeni v Kanyemba* 1988(1) ZLR 226; *Fox & Carney v Sibindi* 1989 (2) ZLR 173 (SC) at 175E-F; and *Kanyada v Mazhawidza* 1992 (1) ZLR 229 at 232C-D.

In my view, that the reasoning and conclusion of the learned Judge *a quo* in this respect cannot be faulted. The probability of an appeal court coming to a different conclusion from that of the court *a quo* is very remote.

It is apparent from evidence elsewhere in the record that Timba did appoint a manager who was resident at the mine and also had an agent who was resident at the mine. These are people whom one would have expected to depose to affidavits with firsthand information in support of Timba's version of what transpired at the mine on 5 April 2012. However, Timba chose not to make available firsthand evidence of what transpired at the mine on 5 April 2012. The affidavit of W. Magweregwede, as the complainant in a criminal investigation, is totally inadequate, in that it does not corroborate the hearsay averments of Timba. The affidavit simply avers that he was assaulted. Timba, who was not present at the mine, chose not to explain how he came to be knowledgeable of the events which he alleges in para 13 of the founding affidavit. He was content to make bold and bare allegations when he could easily

have obtained firsthand evidence on what transpired at the mine on 5 April 2012. Similarly, the statement by Samuel Gwavava, which is a statement to the police, is not even an affidavit and its admissibility is doubtful. Timba did not explain to the court why it was difficult for him to provide firsthand evidence of an occurrence that must have been witnessed, if indeed it did occur, by a lot of people.

In the result, I hold the view that the probabilities of an appeal court coming to a different conclusion from that of the court *a quo* on the issue of spoliation of the applicants are very remote.

For the foregoing reasons, the prospects of success against the court *a quo's* refusal to grant spoliation are minimal. For that reason I dismiss the application to have the appeal heard on an urgent basis.

I now turn to deal with the application for interim relief, to stop the Rushwayas from conducting mining operations and their eviction from the mine pending the hearing of the appeal. This relief is at the core of the ownership wrangle between the parties, who are shareholders and directors of the company that owns the mine.

A similar application was made to MUSAKWA J in case no. HC 6007/11. The learned Judge has this to say at pp 5-6 of the cyclostyled judgment:

> "It is not in dispute that when the first respondent made the decision that is being challenged, he did not hear the applicants. Based on the complaint he received from the third respondent, he made the drastic decision of closing mining operations without hearing the other side. That is not in conformity with principles of natural justice.

There is also the additional factor that the first respondent's decision amounts to a determination of a contractual dispute between the feuding parties. There does not appear to have been a basis for the first respondent to entertain a contractual dispute between the parties.

The requirements for an interdict as set out in *Setlogelo v Setlogelo* 1914 AD 221 are –

(a) A *prima facie* right even if it is open to doubt.

(b) An infringement of such right by the respondent or a well grounded apprehension of such an infringement.

(c) A well grounded apprehension of irreparable harm to the applicant.

(d) The absence of any other satisfactory remedy.

(e) That the balance of convenience favours the granting of the interlocutory interdict.

All the above requirements are met in the present application. As evidenced by the memorandum of agreement of sale that was entered into between the parties it is noted in clause 2.2 thereof that the assets constituting the subject matter of the sale including the gold mining claims were to be immediately transferred to the third applicant before payment. Therefore it cannot be the case that the fourth applicant who has interests in the third applicant has no rights to protect. The parties to this agreement must seek proper ways of enforcing the contractual obligations arising from that agreement without needlessly involving the first respondent.

In the result, the application is granted in terms of the amended draft order."

I agree with the learned Judge's statement of the law. In particular, I agree with the essential elements for the entitlement of an interim interdict set out in *Setlogelo's* case *supra*.

I, however, respectfully disagree with the conclusion of the learned Judge that the applicants are entitled to an interim interdict. I have not had access to the record of proceedings in case no. HH 6007/11 as I am sitting as a Judge in Chambers and not

as an appeal court. It may well be that the facts before the learned Judge justified such a conclusion. It would appear, however, that the judgment of MUSAKWA J is seriously flawed, in that there is no link between the interim relief granted and the final relief to be granted on the return day. The final order sought by the applicants on the return day is that the order of the Mining Engineer suspended in the interim should be confirmed. There is nothing in the judgment itself to indicate that the issue of the contractual rights of the respective parties will be determined on the return day. The issue of the contractual rights of the respective parties appears to me determinable only after a proper trial dealing with the issue of the contractual rights of the parties. This raises the question of whether the interim interdict evicting the Rushwayas and excluding them from the management of the company is an interim interdict pending what and when.

I am unable to grant the interim interdict sought in paras 4.1 and 4.2 of the draft order for the following reasons –

(a) There is no averment that the company that owns the mine (the issue of who owns the mine appears to be in dispute) has resolved, proof of which is usually in the form of a company's resolution, that the respondents be stopped from being involved in the mining and administration of the mine and be evicted from the mine. The averments and arguments seem to centre on *locus standi*.

(b) At the hearing of the appeal the Supreme Court will be seized with the issue of spoliation and not the litigants' respective rights of ownership of the mine and the right to administer and operate the mine.

(c) An Agreement of Sale, purporting to define the respective rights of the parties, was produced during submissions by the applicants' counsel. The applicants' case stands or falls on the founding affidavit. The applicants' case in the founding affidavit was predicated on the averments that they were despoiled and not on a breach of the Agreement of Sale. In fact there was no reference to the breach of the Agreement of Sale in the cause of action. Even if I were to accept that the applicants' rights in terms of the Agreement of Sale were pleaded by implication and therefore provide a basis of the *prima facie* right entitling the applicants to the interim interdict, I am not satisfied that the Agreement of Sale is valid and enforceable for the following reasons –

(i) For an Agreement of Sale to be valid and enforceable, the parties have to be *ad idem* on the *merx*, the price and method of payment. In the Agreement of Sale *in casu*, the parties are *ad idem* on the *merx*, the shares that are being sold. There is no agreed price. The parties agree to agree on the price;

(ii) The method of payment is equally uncertain;

(iii) Apart from the above, there is no averment that the conditions precedent have been fulfilled to activate the Agreement of Sale;

(iv) There is no averment that the parties seeking to enforce the Agreement of Sale have performed their part of the bargain.

In my view, the Agreement of Sale produced by counsel does not provide a *prima facie* right for any of the parties.

Having concluded that the applicants have no *prima facie* case and that the Supreme Court will not be seized with the issue of ownership and administration of the mine on appeal, I have come to the conclusion that the applicants are not entitled to the interim interdict sought in the draft order.

For a majority shareholder to succeed in an action to evict a minority shareholder, it is necessary to allege and prove that the company resolved to evict the minority shareholder and that the majority shareholder has *locus standi* to initiate legal proceedings to enforce the company's resolution. It is not enough for the majority shareholder to simply say that as the majority shareholder it wants to evict and exclude from the administration of the company the minority shareholder without a company resolution to that effect.

I would have been inclined to order a cessation of all mining operations pending the resolution of the dispute over the control and ownership of the mine. That course has not been ventilated in this application and could have serious consequences for both parties as the mine would, according to the applicants, simply flood with water and a considerable number of workers would lose their jobs. This mine appears to be a going concern with a production history that can be used to

assess damages to whichever party may prove the damages in future. I accordingly do not think that the issue of irreparable harm arises.

In the result, the application is dismissed with costs.

Atherstone & Cook, applicants' legal practitioners

Mkushi, Foroma & Maupa, respondents' legal practitioners