

REPORTABLE (23)

(1) MINISTER OF MINES AND MINING DEVELOPMENT (2)
ZIMBABWE MINING DEVELOPMENT CORPORATION (3) MARANGE
RESOURCES (PRIVATE) LIMITED (4) ZIMBABWE CONSOLIDATED
DIAMOND COMPANY

vs

(1) GRANDWELL HOLDINGS (PRIVATE) LIMITED (2) MBADA
DIAMONDS (PRIVATE) LIMITED (3) COMMISSIONER GENERAL
ZIMBABWE REPUBLIC POLICE

**SUPREME COURT OF ZIMBABWE
PATEL JA, GUVAVA JA & UCHENA JA
HARARE, 22 JUNE 2017 & 19 JUNE 2018**

L. Uriri, for the first appellant

J.R. Tsvima, for the second, third & fourth appellants

T. Mpofo with *E.T Moyo*, for the first respondent

No appearance for the second & third respondents

UCHENA JA: This is an appeal against part of the judgment of the High Court granting a spoliation order and other consequential relief in an application at the instance of a shareholder on behalf of a company.

The facts leading to the application before the court *a quo* are as follows.

The first respondent (Grandwell Holdings (Private) Limited) a private foreign company entered into a commercial arrangement with the Government of Zimbabwe for the purpose of mining diamonds in the Chiadzwa area in Manicaland Province. In 2009 the third

appellant (Marange Resources ((Private) Limited) a wholly owned subsidiary of the second respondent (Zimbabwe Mining Development Corporation) and Grandwell Holdings (Private) Limited signed an agreement. The agreement resulted in the incorporation of the second respondent, Mbada Diamonds (Private) Limited, a private company, owned 50 percent by first respondent, and 50 percent by third appellant. Mbada Diamonds was to mine diamonds at Chiadzwa on special grants granted to Marange Resources (Private) Limited.

Marange Resources (Private) Limited and Zimbabwe Mining Development Corporation are companies controlled by the Government of Zimbabwe. This extended Government's influence to the operations of Mbada Diamonds through Marange Resources (Private) Limited which has a 50 percent shareholding in Mbada Diamonds.

In 2015 the Government of Zimbabwe through the first appellant crafted a policy to merge all diamond mining companies at Chiadzwa into one single entity, the fourth appellant (Zimbabwe Consolidated Diamond Company). The parties engaged with a view of agreeing over this initiative. Meetings were convened from about March 2015. Grandwell was hesitant, but said it was not opposed in principle. It required a blueprint on the merger to enable it to decide whether or not Mbada Diamonds should join the merger. Communication between parties to the proposed merger continued in good faith. According to Grandwell's chairman, David Kassel, Grandwell's engagement was *bona fide*.

The engagement continued till the events of 22 February 2016. According to paras 43 and 44 of the first respondent's founding affidavit the shareholders of Mbada Diamonds held a meeting to resolve on whether or not Mbada should join the proposed merger of diamond mining companies. That meeting ended with what the first respondent

called a deadlock as the shareholders could not agree on whether or not to join the merger without further information. Marange Resources (Private) Limited (the third appellant) was willing to join the merger on the available information. Grandwell though not opposed to the merger was taking a cautious approach. It wanted a blueprint with information which could help it make a decision on that issue. It had placed it on record that it was in principle not opposed to the merger. According to para 39 of its founding affidavit it was not taking a position of non-co -operation as it would “seek to accommodate Government requirements wherever reasonably possible”. It was therefore not a deadlock as to whether or not Mbada could eventually join the merger. The difference between the shareholders was therefore merely on their then current positions.

On 22 February 2016 the Government through the Secretary for Mines and Mining Development wrote to Mbada Diamonds advising it, among other things, that it had discovered that the special grants entitling it to mine diamonds had expired, and that, with no title, Mbada Diamonds had to cease all mining activities with immediate effect and vacate the mining site. Mbada Diamonds was given 90 days to remove all its equipment and other valuables. Any further access to the mining site would be upon request to the first appellant.

On the same day, the first appellant called a press conference to announce the new development that Mbada Diamonds and other diamond mining companies no longer had valid special grants or other rights on the basis of which they could continue with their mining operations. The first appellant further announced that those companies should cease operating and vacate the mining locations within 90 days. The first appellant specifically directed those companies to remove all their machinery, equipment and other related materials from the mining locations.

On 27 February 2016 the first respondent brought an urgent chamber application in the court *a quo* seeking an interdict and a spoliation order. The first respondent alleged that when the first appellant issued a press statement, Mbada Diamonds' operations were forcibly stopped by armed police assisted by some of Mbada Diamonds' senior employees. It alleged that after the first appellant's announcement, the police and officials from the first appellant moved into Mbada Diamond's processing plants and shut them down. Mbada Diamonds' security team was disbanded and evicted from site and other employees were forcibly evicted both from their work stations and their on-site residences. Security systems were paralysed. The first respondent also alleged that Marange Resources (Private) Limited the other shareholder of Mbada Diamonds, was in support of the initiative to consolidate the mining companies into a single entity and was therefore acting in concert with the first appellant to despoil the second respondent. The evidence on record does not support the allegation that Marange Resources (Pvt) Ltd directly participated in despoiling Mbada Diamonds. It merely proves Marange's willingness to join the merger before receiving further information while Grandwell needed further information before it could decide on whether or not Mbada Diamonds should join the merger.

It was on these facts that the first respondent sought an interim order declaring that the conduct of the appellants in removing Mbada Diamonds' representatives from its mining site and effectively assuming control of Mbada Diamond's mine constitutes an act of spoliation. The first respondent also sought an order directing the appellants to vacate Mbada Diamond's mining site with immediate effect and interdicting the appellants from interfering with Mbada Diamonds' operations. Mbada Diamonds through an affidavit signed by its Chief Executive Officer Luciyano supported the first respondent's application.

The application was opposed by the appellants who raised several preliminary points including that the first respondent as a shareholder of Mbada Diamonds had no *locus standi* to institute an action on behalf of the company. The appellants argued that Mbada Diamonds should have made the application to enforce its rights. The first respondent argued that it was entitled to institute proceedings on behalf of the company through a derivative action. The appellants argued that derivative action was not available to the first respondent.

The court *a quo* dismissed the preliminary point raised by the appellants and held that derivative action was available to the first respondent. The court *a quo* held that it would have been futile for the first respondent to seek a resolution to sue the appellants given the stance Marange Resources (Private) Limited had already taken towards the intended merger. The court *a quo* found that since Marange Resources (Private) Limited was acting in concert with the other appellants, it would have been futile for the first respondent to have called for a meeting to resolve that Mbada Diamonds should vindicate its rights. The court *a quo* held that the circumstances of the case justified the procedure adopted by the first respondent. In any event the court *a quo* also found that the first respondent, as a shareholder of the second respondent, had a direct interest in the second respondent and therefore had the necessary *locus standi* to institute the proceedings.

On the merits the court *a quo* held that the appellants committed an act of spoliation on the second respondent (Mbada Diamonds). The court therefore granted the application for spoliation. The first appellant was aggrieved by that decision and appealed to this court on the following grounds:

1. The court *a quo* erred in not finding that, to the extent the first respondent had alleged facts which went beyond the question of spoliation and rather sought to assert a right

to mine and consequently, of possession; the appellant was entitled to demonstrate the absence of the same and that, upon the court *a quo* accepting the absence of such rights, the first respondent could not be granted the relief of spoliation.

2. The court *a quo* erred in finding that the shareholder's derivative action was available to the first respondent when the founding affidavit had not made out a case for the same, and that, in any event, the first respondent had *locus standi in judicio* to institute the proceedings.
3. The court *a quo* further erred in finding that the first respondent had peaceful and undisturbed possession of the mining concessions in its capacity as project manager and that, therefore, it was entitled to spoliatory relief in its personal capacity when the founding affidavit did not make such allegation and relief was not sought on that basis.
4. The court *a quo* further erred in finding that the appellant had committed an act of spoliation against the fifth respondent when, in the circumstances, the appellant was not found to have done anything to evict the fifth respondent from mining concessions.
5. The court *a quo* further erred in entitling, authorising and empowering the fifth respondent's security personnel, with all its chain of command, to remain at the mining concessions until resolution of a matter that was resolved on the 22 February 2016 when the relevant statutory functionary exercised his discretion against the further extension/renewal of the special mining grants in question.

The second, third and fourth appellants were also aggrieved by the decision of the court *a quo* and appealed to this Court on the following grounds.

1. The court *a quo* erred in finding that the appellants had committed acts of spoliation against the first and second respondents in the absence of evidence or even an allegation that the appellants evicted the said respondents and in the face of evidence from sixth respondent to the effect that its actions and presence at the mining site were for purposes of preventing unlawful mining activities as well as securing State property.
2. The court *a quo* erred in finding that the first respondent had been despoiled when no evidence had been placed before it, or even alleged, regarding any peaceful and undisturbed possession of the mining site or spoliation by the appellants.
3. The court *a quo* erred in finding that the first respondent had *locus standi* and or that the shareholder's derivative action was available to the first respondent in the absence of evidence that the second respondent was unwilling or unable to institute the proceedings.
4. The court *a quo* erred in concluding that the appellants (including the first appellant) were effectively a single economic unit when their relationship is defined by law and each acted or exercised its rights as provided by law.

Having read the record and considered the submissions made by counsel for the appellants and the first respondent, I find that, although the appeal is premised on many grounds, only two issues arise for determination.

1. Whether or not the first respondent had *locus standi* to bring the application on behalf of the second respondent through derivative action, or whether or not derivative action was available to the first respondent.
2. Whether or not the appellants despoiled the second respondent.

I will consider and determine the first issue.

Whether or not derivative action was available to the First Respondent.

Mr *Uriri* for the first appellant challenged the first respondent's right to institute the application in the court *a quo* on behalf of the second respondent, a company which in terms of the law is entitled to enforce its own rights. Mr *Tsivama* for the second, third, and fourth appellants agreed with Mr *Uriri's* submissions. It was argued for the appellants that the first respondent did not have the right to institute action on behalf of the second respondent without evidence that the second respondent was unable to institute the proceedings to protect its interests. On the other hand Mr *Mpofu* for the first respondent argued that its right to institute the application arose from derivative action since the second respondent was not able to act on its own behalf. The issue is therefore on when a shareholder of a company can institute proceedings on behalf of a company.

It is a trite principle of company law that a company should itself enforce its rights when it is wronged. This was considered as the rule in *Foss v Harbottle* [1843] 2 Hare 461, 67 ER 189. The rule in *Foss v Harbottle* is that, the proper plaintiff in an action in respect of a wrong alleged to be done against a company is *prima facie* the company itself. Thus as a general rule, where the company is wronged, the proper plaintiff to institute an action to remedy the wrong is the company itself. No other person has the right to institute an action on behalf of the company if the company is able to vindicate its rights. However, the rule as explained in *Foss v Harbottle* is not inflexible and can be relaxed where necessary in

the interest of justice. Gibson, *South African Mercantile and Company Law*, 8th Ed at pages 370-371, states the following:

“But the rule in *Foss v Harbottle* is not universal. It is subject to exceptions. It does not apply where the interests of justice require the rule to be dispensed with (*Russell v Wakefield Waterworks Co (1875) LR 20 Eq 474*). **So where a wrong has been done to a company, a court will allow dissentient members to bring an action in their own names against those responsible, where the latter hold and control the majority of the shares in the company and will not allow any action to be brought in the name of the company.** “(emphasis added)

The rule in *Foss v Harbottle* does not in appropriate circumstances prevent an individual member from suing through derivative action. Derivative action is an exception to the rule in *Foss v Harbottle*. In Zimbabwe, derivative action has been recognised in many cases. (See *L Piras and Sons (Private) Limited v Piras* 1993 (3) ZLR 245 (S) and *Lameck Kufandada v Dairiboard Zimbabwe and Others* HH 564/15). In the *Piras* case GUBBAY CJ said the following:

“The derivative action is an exception to the rule in *Foss v Harbottle* (1843) 67 ER 189 and was expounded thus by Lord Denning MR in *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 (CA) at 857 d-f:

“It is a fundamental principle of our law that a company is a legal person, with its own corporate identity, separate and distinct from the directors or shareholders, and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrongdoer, the company itself is the one person to sue for the damage. Such is the rule in *Foss v Harbottle*. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only person who can sue. Likewise, when it is defrauded by insiders of a minor kind, once again the company is the only person who can sue. **But suppose it is defrauded by insiders who control its affairs — by directors who hold a majority of the shares — who then can sue for damages? Those directors are themselves the wrongdoers. If a board meeting is held, they will not authorise proceedings to be taken by the company against themselves. If a general meeting is called, they will vote down any suggestion that the company should sue them themselves. Yet the company is the one person who is damnified. It is the one person who should sue. In one way or another some means must be found for the company to sue. Otherwise the law would fail in its purpose. Injustice would be done without redress.**”

The nature, then, of a derivative action is that it is a device designed to enable the court to do justice to a company controlled by its wrongdoers and prevents a

serious wrong from going unremedied. A shareholder is allowed to appear as the plaintiff. He acts, not as representative of the other shareholders, but as a representative of the company to enforce rights derived from the company. The action is brought by him in his own capacity to vindicate the company's rights.”
(emphasis added)

It is important to note that derivative action is available when certain requirements are met. It must be clear that the company has been prevented from instituting proceedings by alleged wrongdoers in control of the company. It must be alleged and proved that the wrongdoers (the majority shareholders or the other shareholder in the case of equal shareholders) have refused to institute the action and have prevented the company from instituting action using their majority or equal votes. In order for the company to institute proceedings on its own behalf, the shareholders must agree through a resolution. Thus if the majority shareholder, using his majority vote, or the equal shareholder using his equal vote, blocks the attempt by the company to institute action to remedy the wrong, the minority or other equal shareholder is entitled to approach the court through derivative action.

In this case, Mr *Uriri* for the first appellant, submitted that derivative action was not available to the first respondent because there was no finding that the second respondent was prevented from instituting proceedings and that there are no findings that the second respondent refused or failed to act in its own interest. Mr *Uriri* relied on the fact that the second respondent itself responded to the application filed by the first respondent. According to the first appellant this shows that the second respondent was capable of instituting the proceedings to safeguard its interests. In support of that, Mr *Tsivama*, counsel for the second to fourth respondents, submitted that in order for the court to find whether or not derivative action was available to the first respondent, the court ought to ask itself whether there was

any wrongdoing against the company by the majority shareholders or those in control of the company, before the party which seeks to rely on derivative action can succeed.

On the other hand, Mr *Mpofu* for the first respondent submitted that derivative action was justified on the basis that the seeking of a resolution for the second respondent to institute proceedings would be a futile exercise since the third appellant, the other shareholder of the second respondent, would have made that impossible. Mr *Mpofu* further submitted that the futility of the meeting was known as the first respondent tried to call for the meeting with the other shareholder. Mr *Mpofu* submitted that an attempt was made to call for a shareholders' meeting but was declined by the other shareholder.

A perusal of the record reveals that there is no evidence that an attempt was made for the shareholders of Mbada Diamonds to convene a meeting to decide whether or not Mbada should institute spoliation proceedings to protect its rights. There are only two shareholders of Mbada Diamonds, the first respondent (Grandwell) and the third appellant (Marange Resources). There is no evidence on record that the other shareholder actively prevented the company from instituting such proceedings. On record is a letter from the first and second respondents' South African legal practitioners threatening to institute proceedings on their behalf.

Whether or not the first respondent attempted to call for a meeting with the third respondent is a question of fact which must be proved by evidence. In this case, it was not proved that an attempt was made. As a result, it was not established that the second respondent was actively prevented by the third appellant from instituting the proceedings *a quo* in its own name.

According to Gower L.C.M *Principles of Modern Company Law* pages 649-650,
for derivative action to be justified:

“It must be shown that the alleged wrongdoers control the company. The clearest way of doing this will be to show that both the directors and the general meeting have been invited to institute proceedings in the name of the company and have refused to do so, and that the refusal was because of the votes cast by the wrongdoers. However, the English cases recognise that there is no point in formally asking the directors to institute the proceedings if they are to be the defendants, and that it is not necessary to convene a general meeting and to invite it to resolve upon proceedings in the company’s name, provided that the court can be satisfied *aliunde* that the wrongdoers are in effective control.”
(emphasis added)

It is therefore clear that derivative action can be relied on in two circumstances. In the first situation, it must be proved that a meeting was called for the shareholders to pass a resolution for the company to institute proceedings. In the event that the other shareholders refused or prevented the meeting from taking place, the other shareholders can rely on derivative action to institute action on behalf of the company. However, this is not what happened in this case. No attempt was made by the shareholders of Mbada Diamonds to convene a meeting to pass a resolution for the company to institute the proceedings.

The court *a quo*, conscious of there being no such evidence, at pages 12 to 13 of its judgment, said:

“In *casu*, the position of the American courts, as stated by Gower above, seemed to have been Mr Hashiti’s point. He submitted that in the absence of an invitation by Grandwell to Marange for a meeting to pass a resolution to sue in the name of Mbada; that in the absence of evidence that such an invitation had been turned down; that coupled with Werksmans’ letter aforesaid, and Luciyano’s affidavit, it could not be said Mbada had been unable to bring the urgent chamber application by itself and that therefore the derivative action was not available to Grandwell.”

I recognise the force of the respondent’s argument. But in my view, the position of the English courts seems to accord more with notions of justice and the spirit of the derivative action. The law must not be rendered impotent. In *casu*, the Minister moved with exceeding speed. For six or seven years’ operations at Chiadzwa had gone on unhindered. But on 22 February 2016, in one fell swoop, things were turned upside down. Mining was abruptly terminated; Mbada’s personnel were forcibly expelled from site; inadequate security had exposed the precious diamonds, the expensive equipment, personal belongings, and more to destruction and theft. The situation was one of dire emergency. Werksmans letter of demand of 23 February 2016, sent by email, had been ignored. There had been no let-up in the looting, forcing Grandwell, four days later, to run to the law.

Marange itself had already passed a resolution to adopt the Minister’s plans for the consolidation of diamond mining companies, including Mbada into one single entity without agreement with Grandwell, its co-shareholder. This was in spite of the outstanding details Grandwell had requested on the proposed scheme. **Further, the evidence showed that it was officials from Mbada, as the Minister’s representatives, with the assistance of the police, who had executed the Minister’s directives.**

In my view, the spirit of the derivative action, being an exception to the rule in *Foss v Harbottle*, is that “—the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.”

These are the reasons which swayed the court *a quo* to allow derivative action by Grandwell (the first respondent).

The second situation, which basically reflects the English position, is that if it is proved that calling a meeting was an exercise in futility, the other shareholder can institute proceedings on behalf of the company without seeking a resolution that the company institute the proceedings. For the shareholder who seeks to rely on derivative action to rely on this option, the court must be satisfied that the majority shareholders or equal shareholders, who are the wrongdoers and would not want the company to institute proceedings, are in effective control. The second respondent is owned by the first respondent and the third appellant in equal shares of 50 percent each. This means, if a meeting was to be called to pass a resolution for the company to sue and one shareholder votes against such a resolution, the company could not sue in its own name. It can also be established that the other shareholder was in effective negative control.

According to evidence on record Marange Resources was chaired by the Secretary of Mines who authored the letter of 22 February 2016. The same Secretary also chaired the second and fourth appellants. The special grants which enabled Mbada to mine belonged to Marange Resources which is wholly owned by the second appellant. The Zimbabwe Consolidated Diamond Company, fourth appellant, which was to replace Mbada Diamonds and other diamond mining companies into mere 50 percent shareholders, is chaired by the Secretary of Mines. The Secretary's office was responsible for crafting Government policy. It was responsible for the granting of special grants. It also was entitled to make definitive orders on mining operations as it did on 22 February 2016. In view of the above there is no doubt that, in spite of formal equality as between the two shareholders,

power and control were on Marange Resources' side. The Secretary's word was administratively final.

It was also established and proved that the third appellant as the other shareholder opposed the application. That alone made it pointless to call for a meeting to resolve that the company institute application proceedings which the other equal shareholder was opposing. There was clearly no chance that such a resolution could be passed. Therefore, derivative action was justified, because it would have been futile to call for a meeting to resolve that the company should sue in its own name. Marange Resources would clearly not have agreed that Mbada Diamonds should apply for an order against its own chairman and the Minister's decisions and conduct.

In this case the first respondent relied on an assumption that the third appellant would have made it impossible for the resolution to be passed. That assumption is supported by sufficient evidence that it would have been futile to call for a meeting to resolve that Mbada Diamonds should make the application. The futility was clearly explained by the court *a quo*. It entitled the first respondent to rely on derivative action. There was proof that the third appellant was fully entangled to the will of its chairman and the other appellant companies he chaired. There was therefore evidence *aliunde* that it was impossible for the second respondent to institute spoliation proceedings in its own name.

It is clear that the right to institute proceedings using derivative action is meant to remedy wrongdoing against a company by its directors or majority or equal shareholders. In this case, the court *a quo* correctly relied on the futility of expecting the first respondent to call for a meeting to resolve that the company should sue the appellants for spoliation as the

other equal shareholder's position on the application was known. It was opposing the application. It clearly would not have supported a resolution for the company to make an application it was opposing. The first respondent was therefore entitled to rely on derivative action to sue on behalf of the second respondent.

GUVAVA JA: I fully concur with UCHENA JA's assessment of the facts leading up to the institution of the proceedings *a quo* and his conclusion on the first respondent's entitlement to sue by way of derivative action on behalf of the second respondent. Once it has been found that the first respondent had *locus standi* to bring the application then the second issue must be determined.

Whether or not the appellants despoiled the second respondent.

In my view, the facts of this case disclose a classic text book case of spoliation. In the case of *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ stated as follows at p 79 D-E:

“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:
That the applicant was in peaceful and undisturbed possession of the property; and,
That the respondent deprived him of the possession forcibly or wrongfully against his consent.”

In order to make a determination of whether or not the second respondent was despoiled it is necessary to prove the two factors stated above.

I propose to deal with each factor in turn.

(i) Whether or not the second respondent was in peaceful possession.

It was submitted, firstly, by the appellants that the second respondent was not in peaceful possession as the special grants entitling it to mine had expired. The appellants' argument was that, since the possession was unlawful, it could not be peaceful.

It has been stated in a number of cases that issues of rights are irrelevant in spoliation proceedings. In *Yeko v Oana* 1973 (4) SA 735 (AD) at 739 G it was stated that:

“The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliata has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.”

In the case of *Chisveto v Minister of Local Government and Town Planning* 1984

(1) ZLR 248 (H) the court remarked:

“Lawfulness of possession does not enter into it. The purpose of the *mandamus van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these principles, it is necessary for the status *quo ante* to be restored until such time as a competent court of law assess the relative merits of the claims by each party... In fact, the classic generalisation is sometimes made that in respect of spoliation actions even a robber or thief is entitled to be restored possession of the stolen property.”

It is apparent from the facts of this case that the first respondent, being a 50 per cent shareholder of the second respondent, was in possession of the mining fields through the second respondent. Possession in legal terms depicts both the mental and physical elements. It is not in dispute that the second respondent was in physical possession of the mining fields at the relevant time and was carrying out mining operations.

Secondly, the appellants also alleged that there was no evidence on the record that the appellants had committed the acts complained of. The first appellant stated that the mere fact that he had called a press conference and stated that the possession of the respondents was unlawful does not in itself amount to spoliation. In any event he argues that he was not at the scene nor was any evidence given to link him to the persons who had despoiled the respondents.

It is not in dispute that agents of the State descended on the Mine premises on 22 February 2016. It was alleged in the founding affidavit that ZMDC and Marange were the implementing agents of the scheme which culminated in Mbada Diamonds being removed from the mining site. The evidence given by the second respondent clearly stated that the armed police were hired by the first to fourth appellants.

In my view it would be an absurdity to find that the police and the other officials would have acted in the manner they did without the authorisation and knowledge of the first appellant. The acts complained of were carried out immediately after the delivery of the letter from the permanent secretary of the first appellant stating that the special grants had expired. This was immediately followed by the press conference held by the first appellant reiterating that position and giving the second respondent notice to vacate the mining claims. It seems to me that the facts, as set out, establish that the first appellant was primarily instrumental in the removal of the second respondent from the mining site.

I am satisfied that the court *a quo* correctly found that the second respondent was in peaceful possession before the appellants acted in common purpose in removing the second respondent from its peaceful possession of the mining site.

- (ii) Whether or not the second respondent was forcibly and wrongfully deprived of possession

It is not in dispute that on 22 February 2016, after the press conference by the first appellant, armed police and officials from the Ministry of Mines moved onto the mining site which was being operated by second respondent and forcibly shut down its operations. The security team of second respondent was disabled and its employees were evicted from both their work stations and their on-site accommodation. These actions were conducted without a court order.

All Mbada Diamonds employees were rounded up and their communication with the outside world was cut off. They were also subsequently forced off and barred from the mining site. The officials proceeded to switch off the machines and equipment which were in operation. The armed police officers remained on site and stopped employees from accessing the plant. Mbada employees were threatened with violence and were forced to leave the mine during the evening of the 23 February 2016. The third respondent, the Commissioner General of Police, confirmed that the police had acted in the manner complained of. In my view, in spite of the protestations of the third respondent, the police would not have acted in such a manner if they had not been called upon to do so by the appellants, who stood to benefit from the unlawful removal of the second respondent.

There is no doubt in my mind that these facts show that the second respondent was removed without its consent. The removal was unlawful as it was carried out without due process.

The court *a quo* thus correctly found that the second respondent had been unlawfully removed without its consent.

It seems to me that the factors which must be proved in order to grant spoliatory relief had been met and the court *a quo* was correct to grant the order as prayed.

PATEL JA: I have read the separate opinions rendered by UCHENA JA and GUVAVA JA on the two issues for determination in this matter. I fully endorse and concur with their respective conclusions for the following reasons.

As regards the first issue, the question of *locus standi a quo*, the authorities cited above relate primarily to the situation where an aggrieved minority in a company seeks to represent it in a derivative action against an oppressive majority. *In casu*, the position is slightly different in that the situation to be addressed is that of one 50 per cent shareholder taking up cudgels as against the other equal shareholder. Neither holds a majority shareholding in the company but either is capable of frustrating the legitimate claims of the other by declining to participate in matters concerning the good governance and best interests of the company. It is in this sense that either shareholder can be said to be in effective negative control of the company. As is aptly reasoned by UCHENA JA, this scenario fully justifies the entitlement of either shareholder to proceed against the other by way of a derivative action in order to protect or vindicate its rights.

As for the second issue revolving around the question of spoliation, I can do no more than adopt the succinct reasoning of GUVAVA JA. There can be no doubt that Mbada

Diamonds was in peaceful and undisturbed possession of the mining location in question at the relevant time, irrespective of the continuing validity or otherwise of its special grants and notwithstanding the supposed expiry of its right to carry out mining operations in that location. It is equally indisputable that the appellants, acting in concert, contrived to abruptly and unceremoniously deprive Mbada Diamonds of its possession of the mining location, forcibly and wrongfully against its consent, through the agency of the Commissioner General of Police and his cohorts.

In the result, both appeals in this matter must fail. It is accordingly ordered that the appeals herein be and are hereby dismissed with costs.

GUVAVA JA: I agree.

UCHENA JA: I agree.

Civil Division, Attorney-General's Office, appellant's legal practitioners

Sawyer & Mkushi, second, third and fourth appellants' legal practitioners

Scanlen & Holderness, first respondent's legal practitioners