

EXMIN SYNDICATE

v

**(1) LUKE DUBE (2) THE PROVINCIAL MINING DIRECTOR
MATEBELELAND SOUTH N.O (3) THE OFFICER IN CHARGE OF
ZIMBABWE REPUBLIC POLICE-FILABUSI N.O (4) THE OFFICER
COMMANDING ZIMBABWE REPUBLIC POLICE, MATEBELELAND
SOUTH N.O (5) THE SHERIFF OF ZIMBABWE N.O**

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, BHUNU JA & MUSAKWA JA
BULAWAYO: 14 NOVEMBER 2022**

Advocate D. Sanhanga, for the appellant

Advocate T. Mpfu, for the first respondent

No appearance for the second to fifth respondents

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

1

GWAUNZA DCJ

[1] After initially reserving its judgment at the end of the hearing in this matter, the court later allowed the appeal and issued the following order;

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:

- 1) The first respondent and all persons claiming occupation rights, title and interest through him, shall remove or cause the removal of themselves and all such persons occupying the mining claim Tigress held under registration number 10098BM and as identified by the second respondent.
- 2) Failing such removal, the Sheriff of Zimbabwe be and is hereby authorised and directed to evict the first respondent and all those claiming occupation, rights, title and interest through and under him from mining claim being Tigress number 100098BM as identified by the second respondent

- 3) The first respondent and all those claiming with or through him are barred from carrying out any mining activities on the mining claim Tigress registration number 10098BM.
- 4) The first respondent is ordered to pay the costs of suit on an attorney and client scale.'

The court indicated that full reasons for the judgment would follow in due course.

These are they.

- [2] This appeal is against the entire decision of the High Court handed down on 31 March 2022, in which the court dismissed the appellant's application for a spoliation order against the respondents.

[3] **FACTUAL BACKGROUND**

The appellant and the first respondent have engaged in a litany of disputes in the court *a quo*, all related to their respective entitlements to the mining claims that they operate on. The two mining claims are situate in Insiza District, Matebeleland South and are adjacent to each other. The appellant is the holder of mining claims known as Tigress, while the first respondent has been conducting mining operations on claims known as Lion West 25.

- [4] Sometime in 2021 a boundary dispute arose between the appellant and the first respondent. The former alleged that the latter had encroached onto its mining location and proceeded to mine gold ore, thereby depleting the finite resource on its mine. At the time that the boundary dispute arose, the first respondent had amassed a substantial amount of gold ore which was stockpiled on the part of the appellant's claim that he was accused of encroaching onto. In disputing the allegations of encroachment onto the appellant's claim, the first respondent insisted that he had been

carrying out mining operations on his mining claim, that is Lion West 25 for the past 17 years without interruption and that no encroachment had taken place.

- [5] On 8 March 2021, the second respondent wrote to the parties to the effect that after attending at the disputed claims to ascertain the coordinates of the parties' mining claims, as ordered by the High Court at the instance of the appellant (HC276/21), his finding was that the first respondent had indeed encroached onto the appellant's mining claim. The second respondent went on to direct the first respondent to vacate the appellant's claim and revert to his own coordinates. The latter did not comply, prompting the appellant to later on request the second respondent's intervention. The second respondent subsequently advised the appellant of his failure to prevail upon the first respondent to vacate the part of the appellant's claim that he had encroached onto. He consequently suggested that the appellant could seek an interdict against the first respondent from the court *a quo* since the court was already seized with the matter.

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

3

It is pertinent to note that both the appellant and the first respondent attended at the mining claims together with the second respondent, in compliance with the order of the court.

- [6] An interdict sought by the appellant was subsequently granted against the first respondent under case number HC884/21. This was after the first respondent, who had consented to the provisional order sought against him, failed to oppose the confirmation of the final order interdicting him from further encroaching onto the

appellant's claim. Faced with imminent eviction from the appellant's claim, the first respondent sought to have the interdict rescinded but later withdrew the application. This circumstance led to the enforcement of a Warrant of Ejectment by the Deputy Sheriff that saw the first respondent being evicted from the part of the appellant's claim onto which the encroachment had taken place. The appellant submits that this action, conducted by the Deputy Sheriff on 1 February 2022, restored it to its peaceful and undisturbed possession of the disputed part of its claim, as well as the stockpiles of gold ore that the first respondent had 'unlawfully' extracted therefrom.

[7] The appellant further averred that on the 16 February 2022 the first respondent recruited a mob of about 20 men who forcibly removed it and its workers from the same portion of its mining claim, from which the first respondent had been evicted barely two weeks earlier. It is not disputed that the first respondent thereafter, and despite the presence of the police to whom the appellant had appealed for assistance, loaded and removed around 400 truckloads of gold ore, from the same stockpile that he had left on the disputed part of the appellant's claim upon his earlier eviction therefrom. The estimation of the quantity of the gold ore carried away by the first respondent was given in a sworn statement deposed to by an eye witness to the event. The appellant claims that the first respondent thereafter took the gold ore to a stamp mill.

[8] In evicting the appellant and its workers from the same place that he had been evicted from two weeks earlier, the first respondent acted on the strength of a spoliation order granted against persons other than the appellant, on 16 February 2022 in case no HC 190/2022. The appellant's workers, who had earlier been served with a copy of

the court order in question, correctly pointed out firstly, that the order was issued in a matter in which the first respondent had not cited the appellant, but other parties unknown to it, and therefore having no connection to the appellant's claim. Secondly, that the order related to the first respondent's mining claim Lion West 25, and not Tigress, the appellant's claim from which the first respondent had earlier been evicted. The appellant submits further that the invasion of and eviction of its workers from, the disputed part of Tigress, its claim, had been carried out without the assistance of the Deputy Sheriff of Zimbabwe, and so was a case of self-help by the first respondent. It then emerged that unbeknown to the appellant, the first respondent, after being evicted from the appellant's claim, had successfully filed an urgent application for spoliation against parties other than the appellant. It is also evident from the order in question, that it was granted in default, as those cited as the perpetrators did not appear in court.

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

5

- [9] The appellant wrote urgent letters of protest to the first respondent's legal practitioners, urging them to stop the first respondent from invading its claim under the guise of enforcing a spoliation order that in any case, did not cite the appellant as a respondent. The appellant received a delayed response denying that the first respondent had despoiled the appellant of any part of its mining claim. The first respondent echoed this denial in his defence to the spoliation proceedings *in casu*. While not expressly disputing that the appellant had not been cited as a party to the proceedings in HC190/22, he denied that any violence had been perpetrated against the appellant's workers. His contention was that all he had done was to obtain an order to evict persons who had violently taken over his own mining claims. Further, that the removal of such invaders from his claims was therefore properly orchestrated,

the order in question having restored Lion West 25 claims into his possession. The first respondent reiterated that he was still operating from the same mining location he had been working on since 2005.

- [10] The first respondent advanced the further defence that in any case, it was trite law that the holder of base metal registration certificates such as the appellant could not seek to interfere with the exclusive gold mining rights that he himself held. That being the case, he further contended, he had applied for a *declaratur* under case number HC373/2022, which was still pending before the court. He did not articulate a response as to why he had acted on the basis of a court order not issued against the appellant, nor concerning its mining claim, to access its claim, and cart away the very same mining ore that he had been prevented from taking away upon his eviction from what was ruled to be a part of the appellant's mining claim.

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

6

- [11] In determining the merits of the matter and after properly citing the law on spoliation, the court *a quo* found that the appellant had failed to satisfy the essential elements for the relief of the spoliation order that it sought. This, so the court reasoned, was because the appellant and the first respondent had competing interests in the mining location in question and further that the former had not shown by clear proof that it was forcibly dispossessed of the disputed part of the alleged mining claim. The court found that the appellant held certificates to base minerals and had been extracting nickel on its own claims. On the other hand, the first respondent had exclusive gold mining rights and had been extracting gold ore at its mining location for close to 20 years. The court found further that the parties' mining rights were mutually exclusive.

[12] Having opined that the matter concerning the determination of those mining rights was not before it, the court *a quo* noted that the first respondent was in any case armed with an extant order of the court (HC190/22) in terms of which Lion West 25 mining location was restored to him. The court did not advert to the order, also extant and coincidentally issued by the very same judge, in terms of which the first respondent had earlier been evicted from the same claim from which he had evicted the appellant and its workers. Nor did the court comment on the propriety or otherwise of the situation where an order authorising the eviction of persons other than the appellant from the first respondent's mining claim, Lion West 25, was used to evict the appellant from its own claim, Tigress.

Be that as it may, the court ultimately found against the appellant and dismissed its application for a spoliation order.

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

7

GROUND OF APPEAL

[13] Irked by the decision of the court *a quo* the appellant noted the present appeal on the following grounds:

1. The court *a quo* erred and contradicted itself in holding that the appellant had not established a clear right for the grant of a *mandament van spolie* on the basis that appellant and first respondent had competing interests in the mining location in question;
2. The court *a quo* erred and grossly misdirected itself in finding that appellant had failed to satisfy the elements for the grant of a *mandament van spolie* on the basis that appellant had not shown clear proof that it had been forcibly deprived of possession when the evidence presented showed a contrary position.
3. The court *a quo* erred grossly in failing to find that the appellant had been unlawfully or wrongfully deprived of possession when the evidence from the first respondent clearly confirmed that he had dispossessed the appellant by taking the law into his own hands.

4. The court *a quo* erred in law in holding that appellant had failed to show ‘clear proof’ that it had been despoiled when the law only requires a party to show proof on a balance of probabilities.
5. The court *a quo* erred in holding appellant had not shown a clear right for the relief sought on the basis that there was an extant order of court under HC190/22 restoring Lion West 25 mine to 1st respondent when in fact the spoliation complained of took place at a different location being Tigress Mine and the cited parties were distinct from appellant.
6. The court *a quo* erred and grossly misdirected itself in failing to acknowledge that there was an extant order of court under HC 884/21 which had already determined the boundaries of appellant’s mines and further caused the vacation of first respondent from the appellant’s mine.

THE LAW

[14] There is no dispute between the parties, nor between the parties and the court *a quo*, as to the essential elements and import of, an order of *mandament van spolie*. This is evidenced by the citation of apposite authorities by both parties and the court. The point of departure, as is clear from the evidence, was the application of the principles of spoliation established in the cited authorities, to the facts of the matter before the court. The court *a quo* in its judgment appositely cited the following passage from the case of *Diana Farm (Pvt) Ltd v Madondo N.O. & Anor 1998 (2) ZLR 410(H) at 413*;

“The law relating to the basis on which a *mandament van spolie* will be granted is well settled. In *Davis v Davis 1990 (2) ZLR 136 (H) at 141*, Adam J quoted with approval the following statement by *Herbstein J* in *Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748 (c) at 753*:

“.....two allegations must be proved, namely (a) that applicant was in peaceful and undisturbed possession of the property and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.”

.....The *onus* is on the applicant to prove two essential elements set out above. Past the second element is lack of consent. In *Botha & Anor Barrett 1966 (2) ZLR 73(S) at 79-80*, it was said by *Gubbay CJ*:

“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are;

- (a) that the applicant was in peaceful and undisturbed possession of the property;
- (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.”

These excerpts need no elaboration as they clearly postulate the law on spoliation.

APPLICATION OF THE LAW TO THE FACTS OF THE MATTER

[15] The facts of the matter that are not seriously disputed, are salient, or based on cogent documentary evidence comprising court orders, coordinates, maps and sworn affidavits, are the following;

- i) Pursuant to a dispute between the parties concerning the coordinates of their adjacent mining claims, the court *a quo* at the instance of the appellant ordered the second respondent, together with the parties, to attend at the disputed claims and ascertain the parties’ respective coordinates (HC276/21).
- ii) The second respondent thereafter determined that the first respondent had indeed encroached onto the appellant’s claim, Tigress, but his direction to the former to vacate the area encroached upon, was defied. The first respondent continued extracting gold ore from the appellant’s claim, Judgment No. SC 47/23
Civil Appeal No. SCB 48/22
- iii) The appellant thereafter successfully obtained a final order interdicting the first respondent from further encroaching onto its location and mining ore from it (HC884/21). Execution of this order by the Deputy Sheriff resulted in the first respondent being evicted from the disputed part of the appellant’s mining claim, leaving behind the stock piles of gold ore that it had mined from it;
- iv) The effect of the first respondent’s eviction from Tigress was to restore the appellant to full possession thereof, including control of the gold ore previously extracted by the first respondent;
- v) Sixteen days later, on the basis of a spoliation order in HC 190/22, obtained by the first respondent against persons unknown to the appellant, and concerning the first respondent’s claim, Lion West 25 - not Tigress - a gang of some 20 people forcefully dispossessed the appellant’s workers of the part of the appellant’s claim from which the first respondent had been evicted.
- vi) This included substantial amounts of the gold ore that was stockpiled at the location, which, on the instruction of the first respondent, was carted away in truck loads.
- vii) Efforts by the appellant to get the first respondent to desist from despoiling it thus yielded no results, leading to the unsuccessful filing by it of the urgent application *in casu* for spoliation against the first respondent.

[16] From the facts of the matter as outlined, the sole issue arising for determination in this appeal, in the court's view, is the following:

Whether, given the facts of the matter as outlined, the court *a quo* properly determined the application for a *mandament van spolie* that was before it.

The court will now consider this issue.

[17] The appellant contends in its heads of argument that the court *a quo* erred in three main respects. Firstly, although accepting that in spoliation proceedings the substantive rights of the parties are not relevant, since the court is only concerned with the restoration of the *status quo ante*, it nevertheless went on to improperly determine that there were "competing interests" in the mining location in question. Secondly, that on the basis of those competing interests, the court *a quo* held that the appellant had failed to establish a clear right to an order for spoliation. Thirdly that the court erred in failing to acknowledge that there was an extant order of the same court under HC884/21 which had already determined the boundaries of the appellant's mining location and further, led to the eviction of the first respondent therefrom.

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22 10

[18] This Ce court finds that there is merit in the appellant's contentions, as the following *excerpts* from the court's judgment make abundantly clear;

Applicant alleges that the order was served on certain individuals not connected to it. I am mindful of the fact that the facts disclose competing claims over the mining locations of the respective parties. **In spoliation proceedings the court does not concern itself and must not delve into the substantive rights of the parties.** The simple point made is that there are competing interests. The applicant does not have a clear right to an order for a *mandament van spolie*. The alleged spoliation is denied (*my emphasis*)

Later in the same judgment, specifically the Disposition, the court stated as follows;

The point was made that applicant holds certificates to base minerals and has been extracting nickel on its own. First respondent has been extracting gold

ore on its mining location for close to 20 years. **The mining rights of the parties are mutually exclusive**.....

To the extent that first respondent is armed with an extant order of this Court which has not been set aside under case number HC190/22 wherein Lion West 25 mining location was restored to first respondent, Applicant has not established a clear right for an order for a *mandament van spolie*.....

[19] The *excerpts* cited above, which in effect constitute the *ratio decidendi* of the judgment of the court *a quo* in dismissing the appellant's application for a spoliation order, serve to illuminate the court's misdirection in its determination of the matter before it. On the basis of the court's own correct interpretation of the requisite law on spoliation, an applicant must prove;

- i) that the he or she applicant was in peaceful and undisturbed possession of the property, and;
- ii) that the respondent deprived him or her of the possession forcibly or wrongfully against their his consent.

Instead of applying the law to the proven facts of the case, the court did exactly as it had noted should not be done, that is, concern itself with the substantive rights of the parties. Competing interests, in the court's view, go to the root of the dispute concerning the parties' rights or lack thereof, in the subject of the dispute. Their existence may in fact properly found an application for a determination on the substantive rights of the parties to or in the subject matter of the dispute. In other words, the type of application for a *declaratur*, that the first respondent submits it has already filed with the court in HC 373/22. The law as cited above is clear that spoliation is concerned only with restoring the *status quo ante* pending a determination on the merits of the main dispute between the parties. The existence or otherwise of competing interests in the subject matter of the dispute was therefore, *in casu* not relevant to a decision on whether or not spoliation had taken place. In the same vein the court delved into matters concerning the parties' substantive rights by

declaring that such rights were ‘mutually exclusive.’ Based on the same reasoning, the court also held that, as the first respondent had regained possession of his mining location pursuant to HC190/22, the appellant had not established a clear right to the spoliation order that it sought.

[20] It is thus evident that in order to reach its determination *in casu*, the court *a quo* went beyond the parameters constituting just cause for a *mandament van spolie*. Its pronouncements in this respect had the effect of pre-judging the application said to be pending before the same court, for a *declaratur* in HC 373/22, concerning the parties’ substantive rights in the disputed mining claim. Alternatively, the court may have improperly traversed and ruled on issues already determined in the proceedings leading to the final interdict issued against the second respondent in HC884/21. Not having been rescinded or appealed against, this order has final effect. The court *a quo* did this in circumstances where the applicant had not, and properly so, founded its claim for spoliation on any other ground except that it had been wrongfully and forcibly despoiled of its peaceful and undisturbed possession of mining claim in question.

[21] In this respect, the Court finds no merit in the contention by the first respondent that the court *a quo* dismissed the appellant’s application, not because of the existence of the competing interests, or the mutual exclusivity of their mining rights that it referred to, but on the basis that the appellant had not established a clear right to the spoliation order that it sought. This submission in the Court’s view misses the point that it is not necessary in spoliation proceedings for one to establish a clear right. Further, that in spoliation proceedings, the court is not called upon to consider or make a

pronouncement on the existence or otherwise of the parties' competing or mutually exclusive interests in the object of the dispute, much less base its decision on such a pronouncement. That pronouncement should properly be left to any subsequent proceedings in terms of which the parties' substantive rights would be determined. This position is clearly articulated as follows in *Herbstein & Van Winsen* "The Civil Practice of the Supreme Court of South Africa 4th Ed at page 1064:

A *mandament 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 spoliatio applicant whether there has been a spoliatio. The order that the property be restored finally settles the issue between the parties (*my emphasis*).

[22] Accordingly, the finding by the court *a quo* that the appellant had not established a clear right to a *mandament van spolie* due to;

- i) the existence of competing interests, and
- ii) the fact that the parties' rights in the disputed mining claim were mutually exclusive,

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

13

was both wrong at law, and a misdirection which cannot be allowed to stand. More damning is the court *a quo*'s improper reliance on an order in favour of the first respondent, which concerned neither the appellant nor its mining location, to reach the finding that the appellant had failed to prove a case for the *mandament van spolie* that it sought against the first respondent. The reliance on that order in HC190/22 was *non sequitur* and thus, improper.

[23] As a fact relevant to the proper determination of the spoliatio proceedings before the court *a quo*, the appellant submits in any case, that the issue of any competing interests in the disputed location had already been put to rest. This was supported by the court order which resulted in the eviction of the first respondent and also by ample

documentary evidence on record showing that the coordinates and boundaries of the parties' mining locations had been determined by the second respondent in the presence of both the first respondent and the appellant's representatives. Further, that on the basis of these reports, whose existence the first respondent did not dispute, and which remained extant since they had not been set aside, all doubt was removed as to the reality of the first respondent's encroachment onto the appellant's Tigress mine. That being the case, the first respondent who was thereafter directed to revert to his own Lion West 25 claim, should not have openly defied that directive and continued to mine and stockpile gold ore on the appellant's claim.

[24] The Court thus finds, on this basis, that the first respondent's defiance of the directive to vacate the appellant's location was done with full knowledge that he was forcefully working on the appellants claim, not his. The first respondent's defiance was further compounded by the fact that he continued mining on the appellant's claim even after the latter obtained a final order under HC884/21 interdicting him from further encroaching onto and mining from, the appellant's location. The continued defiance of even this order led to him finally being evicted by the Deputy Sheriff from the appellant's mining location. It is pertinent to note that the order was extant at the time the court *a quo* heard and determined the application *in casu* and remains extant to this day. Significantly, the order was extant at the time of the alleged spoliation.

[25] The facts outlined in para 15 above are what the court *a quo* should properly have taken into account in determining the first of the two issues that the applicant before it was enjoined to prove *ie*, that it was in peaceful and undisturbed possession of the property when it was despoiled. Had the court done so, it would perforce have had to

accept as proved, (since the documentary and actual evidence to that effect was not challenged or disproved), that indeed, the appellant was in peaceful and undisturbed possession of its claim, Tigress, until the events leading to the alleged spoliation took place. It was, in the court's view, somewhat of a puzzle that despite full evidence establishing these facts having been tendered before it, the court in its judgment totally disregarded it. The evidence crucially included the learned judge's own earlier judgment in HC884/22, interdicting the respondent from further encroaching onto the appellant's claim. Instead, the court placed reliance for its determination *in casu*, on a judgment (HC190/22) in favour of the first respondent that neither cited the appellant nor was concerned with its claim, Tigress.

- [26] The second factor that the appellant had to prove in its application for a spoliation order against the first respondent was that it was wrongfully or forcefully, and against its consent, deprived of its possession of the mining claim in question. The court *a quo* did not directly address the evidence adduced by the appellant in this respect. Had it done so, it would have found that the appellant had indeed proved its case in so far as that issue was concerned. It is not in dispute that in its application for *a mandament van spolie* (HC190/22), the first respondent cited persons unrelated to the appellant and having no connection with Tigress. The proceedings in question culminated in an order granted in default of appearance by the alleged despoilers of the first respondent (HC190/22). It has already been noted that the warrant of ejection thereafter obtained by the first respondent in terms of this order, was firstly and with no explanation, served on the appellant's workers at Tigress, and then unlawfully used by the first respondent - and not the Sheriff - with the aid of some 20 or so persons, to evict the appellant's workers from its claim.

[27] It is pertinent to note that the first respondent, who in reality could not dispute obtaining the inapplicable order in question, or its service on the applicant's workers, offered a bare denial to the assertion that violence had been employed and threatened against the appellant's workers by the 'mob' of 20 or so persons. This in effect was an admission that such a mob did illegally invade the appellant's claim. The respondent's repeated defence to the spoliation proceedings against him, which the court accepted, was that

- i) he had been mining on his claim, Lion West 25 for over 17 years without disturbance and the appellant, who was the holder of certificates to base minerals and has been extracting nickel on its own claims, did not have the right to interfere with his operations;
- ii) that he was properly armed with an extant court order (HC 100/22) Judgment No. SC 47/23 Civil Appeal No. SCB 48/22 which he had used to secure the restoration of his mining claim, Lion West 25 which he had been despoiled of, and
- iii) in relation to the admitted self-help in re-possessing the appellant's claim after evicting them therefrom, that his alleged despoilers had voluntarily left his mining claim, a circumstance that rendered nugatory, the services of the Deputy Sheriff.

[28] What is immediately evident from the defence proffered by the first respondent is that he does not dispute the essential elements of a *mandament van spolie*, that the appellant relied on for its claim, that is;

- i) that it was in peaceful and undisturbed possession of its claim, Tigress, courtesy of the court order in HC884/21 and his consequent eviction therefrom by the Deputy Sheriff on 1February, 2022; and
- ii) that on the strength of a court order and warrant of ejectment in HC190/22, which neither cited the appellant nor was related to its claim, Tigress, the first respondent with the aid of a gang of some 20 people, forcibly evicted the appellant's workers from Tigress, and
- iii) that having done so, the first respondent promptly commenced an operation that lasted many hours, to load and drive away around 400 truckloads of gold ore from the stockpile that he had been forced to leave behind upon his eviction from Tigress by the Deputy Sheriff.

[29] The 'defence' that the first respondent put up was thus in the court's view, and given the evidence before it, nothing short of a red herring. Firstly, it ignored the fact that while he may indeed have been mining for 17 years on what he believed to be his mining claim, Lion West 25, a delineation of the boundaries of the parties' claims had revealed that he had been encroaching onto the appellant's claim all that time. Secondly, the fact that he had wrongfully mined gold ore on the appellant's claim for a long time did not legitimise his encroachment onto the appellant's location. The same defence repeatedly referred to an order obtained in a matter between the respondent and persons other than the appellant, as the basis for despoiling the latter of its lawful possession of the disputed mine location. As for the self-help resorted to in this respect, the first respondent does not explain why, following the supposed voluntary departure of his alleged despoilers from his mining claim, he then turned his attention to a different mining claim, the appellant's, and different 'despoilers.'

Having enlisted the services of 20 or so persons, violence or the threat of violence, was then used by them to drive the appellant's workers off their mining location. How the first respondent and for its part, the court *a quo* could have conflated matters in this manner, beggars belief.

[30] Realistically therefore, given these circumstances, the appellant's cause of action in the proceedings *a quo* as well as the evidence supporting it, were not challenged or disproved. The court *a quo* should have accepted that for all intents and purposes the appellant did prove its case against the first respondent, that is, that he deprived it of its possession of the claim, Tigress, forcibly or wrongfully against its consent. What can reasonably be deduced from the first respondent's conduct is that he wished to continue mining gold ore on the appellant's mining location at any cost and against all possible odds. He thus defied orders to vacate the disputed part of the appellant's claim despite the coordinates and boundaries having been properly and in his presence too, delineated. He went on to defy a provisional court order that he had himself consented to, and continued to do so even after the interdict against him was confirmed. Realising that he had irretrievably lost the chance to have the order in HC884/21 set aside, the first respondent it seems, decided to change tactics. There is little doubt that this was driven by his continued desire to mine gold ore from the appellant's mining claim, Tigress.

[31] As has been established by the evidence before the court, the first respondent's changed tactics entailed the successful filing, some two weeks after his eviction from Tigress, of the urgent spoliation proceedings against persons totally unrelated to the appellant, and its claim, Tigress. Armed with the court order granted in this case, HC

190/22, the first respondent, in an act of self-help and aided by a group of some 20 or so persons, executed the order on a location (Tigress) and against persons totally different from those cited in the case in point. Given this conduct, the court's view is that it is not unreasonable of the appellant to conclude that the proceedings under HC190/22 were 'nicodimusly' instituted for the sole purpose of circumventing the order in HC884/21, and its effect, in order to give the first respondent's re-invasion of the appellant's claim some semblance of legitimacy.

[32] The first respondent, and the court *a quo* in upholding the first respondent's defence, seem to have missed the point that an earlier, extant order of the court, and its import, could only be circumvented on the basis of the law and procedures specially laid down for that purpose and properly applied. Crucially, it was important for the first respondent to appreciate that it is not legally permissible for one to take the law into their own hands in order to regain possession of a location from which one was legally evicted. The fact that all this was done under the guise of enforcing an order of the court, when such order was totally unrelated to the location in question, and its legal occupier, only served to compound the impropriety of the first respondent's conduct. The whole exercise taken as whole, smacks of a deliberate scheme to subvert and abuse court processes in order to achieve an end that was palpably unlawful and prejudicial to an opponent who was only trying to protect its own property. The court frowns upon such conduct. Additionally the Law Society of Zimbabwe may rightly be concerned that the first respondent was legally represented in all processes filed on his behalf in securing the order in HC190/22, and in having it executed against a person neither cited in the case nor occupying the property cited therein.

[33] Against this background, it is in the Court's view quite ingenious of the first respondent to steadfastly cling to the mantra that all it had done was to ensure the eviction from his own mining claim, Lion West 25, of those who had invaded and wrongfully despoiled him. The first respondent made this assertion without explaining how it was that the only eviction that had taken place was of the appellant's workers who were peacefully in occupation of the appellant's claim. It is also quite confounding that the court *a quo* accepted the totality of the first respondent's defence, and premised its determination of the matter before it, thereon. This was after the court turned a blind eye to the reality that the spoliation in question had occurred not at the mining location cited in HC190/22, but on the appellant's mining claim. The upshot of all this is that the court, for all intents and purposes treated the matter before it as if it was the first respondent, rather than the appellant, who had presented his case for spoliation against the appellant.

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22

20

The court *a quo*'s misdirection in this respect cannot be gainsaid.

DISPOSITION

[34] In view of the foregoing, the Court found that the appeal had merit and consequently, that the entire order sought by the appellant *a quo* should have been granted. As the evidence before the court has demonstrated, the court *a quo* failed to properly determine the application for a *mandament van spolie* that was before it.

Accordingly, the Court granted the order cited at the beginning of this judgment.

BHUNU JA : **I agree**

MUSAKWA JA : **I agree**

Coghlan and Welsh, appellants' legal practitioners

Messrs, Mathonsi Ncube Law Chambers, first respondents' legal practitioners

Judgment No. SC 47/23
Civil Appeal No. SCB 48/22