

REPORTABLE (74)

(1) FISANI MOYO (2) VALENTINE MINE
v
(1) BLANKET MINE (1983) PRIVATE LIMITED (2)
ZIMBABWE REPUBLIC POLICE GWANDA (3)
PROVINCIAL MINING DIRECTOR N.O

**SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHITAKUNYE JA & MWAYERA JA
BULAWAYO: 23 MARCH 2022**

D Dube, for the appellant

J Tshuma, for the first respondent

No appearance for the second and third respondents

Judgment No. SC 87/22
Civil Appeal No. SCB 39/21

1

GWAUNZA DCJ

[1] This is an appeal against the whole judgment of the High Court of Zimbabwe handed down on the 31 August 2021, and ordering the eviction of the appellants and all those claiming occupation through them, from a mining claim labelled Valentine 56. At the end of the hearing, the court dismissed the appeal with costs and indicated that full reasons for the judgment would follow in due course. These are they.

[2] **BACKGROUND FACTS**

The first respondent applied to the High Court for a spoliation order on the basis that it had been in peaceful and undisturbed possession of a mining claim known as Valentine 56 before being despoiled of it by the second appellant, a company

registered in terms of the laws of Zimbabwe. The deponent to the appellants' joint opposing affidavit, one Thomson Moyo, averred that the second appellant was claiming mining rights, through the first appellant. The appellants opposed the application on the basis that the first appellant was the registered owner of the mining claim. *Per contra* the respondents' case was that the appellants, sometime in May 2021, took unlawful occupation of the mining claim and began mining activities thereon. The first respondent had been conducting exploration on the same mining claim in the form of diamond drilling from 2020 until May 2021. It was its case that valuation of the drilling results was underway and while awaiting these, they had temporarily ceased drilling activities on the claim. The results were required in order to determine how best to proceed with the diamond drilling. During this temporary cessation of drilling, the appellants had taken occupation of the disputed mine and started conducting mining activities thereon. This led to a dispute between the first appellant and first respondent as they both claimed they had mining claims to the property. As a result of the dispute, the assistance of the third respondent was sought, leading to the issuance by him of an injunction ordering all parties to cease mining at the mining location. The third respondent also summoned the parties for purposes of negotiating a settlement of the dispute.

- [3] At the meeting, the second appellant through Thompson Moyo, refused to sign the settlement consent form. The first respondent sought the assistance of the police to no avail, prompting it to file an urgent chamber application in the High Court for a spoliation order against the appellants. It was the first respondent's case that despite the third respondent issuing an injunction in terms of s 354(5) of the Mines and Minerals Act (*Chapter 21:05*), and the dispute not having been resolved, the

appellants continued to be in occupation of the mine, carrying out mining activities thereon.

[4] In their defence, the appellants argued that there was never any forceful occupation of the disputed mine as the mining activities were being conducted on the first appellant's duly registered claim. It was their view that the injunction in question was irregularly issued, which is why it was under challenge before the courts in case number HC 731/21. The appellants argued further that the application for spoliation was fatally defective since it was a disguised application for eviction and could, accordingly, not be heard on an urgent basis. This was because, so the argument went, the courts have held that eviction should always be by way of action. They further argued that there were material disputes of fact that could not be resolved on the papers before the court *a quo*. They also argued that a juristic person was incapable of despoiling anyone.

Judgment No. SC 87/22
Civil Appeal No. SCB 39/21

3

[5] The third respondent in his supporting affidavit submitted that the records in his office confirmed the first respondent as the registered holder of Valentine 56 mining claim. This was supported by the ground verifications of the mining claims that his office had conducted.

[6] The court *a quo* found that the argument that the application ought not to be heard on an urgent basis was a sterile argument which sought to emphasise form over substance. It found that the application was for a spoliation order and that the dispute as to who owned the mining claim was a matter for another day. The court *a quo* further found that the fact that restoration of possession entailed removing the

appellants from the mining claim did not make the application any less spoliatory in nature. It found that the first respondent was in undisturbed and peaceful possession of the claim before it was despoiled of it by the appellants. Consequently, the court granted the order sought by the first respondent.

[7] Disgruntled by the judgment of the court *a quo*, the appellants filed the present appeal on the following grounds:

- i) The court *a quo* grossly erred at law in granting an application for eviction on an urgent basis.
- ii) The court *a quo* misdirected itself in granting relief against the first appellant without any averment that it had unlawfully dispossessed the first respondent.
- iii) The court *a quo* grossly erred in granting relief when it was not shown that the first respondent was in physical control of the mine in dispute. Judgment No. SC 87/22
Civil Appeal No. SCB 39/21
- iv) The court *a quo* misdirected itself by granting relief on an urgent basis when it had not been shown that the first respondent had treated the matter with urgency.

[8] ISSUES FOR DETERMINATION

- i) Whether the court *a quo* misdirected itself by granting relief on an urgent basis, and
- ii) Whether the court *a quo* erred in granting the application in favour of the first respondent.

[9] **Whether or not the court *a quo* misdirected itself by granting relief on an urgent basis.**

The appellants argue that the court *a quo* erred in granting an application for eviction on an urgent basis. Referring to the application in the court *a quo* as one of eviction

rather than spoliation, the appellants argue that the first respondent's founding affidavit in the court *a quo* stated that the application was for eviction and that an application stands or falls on its founding affidavit.

[10] Like the court *a quo*, this Court is not persuaded by the appellants' submissions in this respect. On p18 of the record, the first respondent expressly stated that the application was one for a spoliation order. The appellants it seems, have also ignored the fact that the first respondent further stated in its founding affidavit that the application was seeking an order restoring peaceful and undisturbed possession of the mine, a circumstance which is a major requirement for a spoliation order. The first respondent therefore correctly argues that the appellants have 'mischaracterised' the application that was made in the court *a quo*. The whole application *a quo* was speaking to the elements of a spoliation order rather than those for an application for eviction. Eviction of the appellants was sought as a natural consequence of the spoliation order that the first respondent was seeking against them. It is settled law that a spoliation order aims to restore the parties to the *status quo ante*, a process which would, in appropriate circumstances, require the removal of the spoliators from the property in issue. This result would necessarily not convert an application for spoliation into one for eviction.

[11] Taking the foregoing into account, the court finds no fault with the finding of the court *a quo*, expressed thus in its judgment: -

“The fact that such restoration entails removing the respondent does not make the application any less a spoliatory one.”

The court is accordingly satisfied that the application was properly brought before the court *a quo*, and determined, on the basis of urgency. Ground of appeal number 1, being without merit, is hereby dismissed.

[12] The appellants further argue that the court *a quo* misdirected itself by granting relief on an urgent basis when it had not been shown that the first respondent had treated the matter with urgency. In other words, the appellant appeals against the finding of the court *a quo* that the matter was urgent. This court in a number of decisions has ruled that the finding of urgency on its own cannot constitute a substantive ground of appeal (See *Nyakutombwa Mugabe Legal Counsel v Mutasa & Others* –SC 28/18 at p8). This is because that finding has no bearing on the merits of the application or judgment. The latter can thus not be impugned or rendered incorrect by the mere fact that the matter was improperly heard as an urgent application (See *Constantine Guvheya Dominic Chiwenga v Marry Mubaiwa* SC 86/20 at p 10.) In any case, as emphasised by this Court in *Equity Properties (Pvt) Ltd v Ashanti Global BVI Ltd & Anor*- SC 101/21 at p11, the decision as to whether an application is urgent, is a matter in the discretion of the court *a quo*. Such a decision cannot lightly be interfered with by this Court except on grounds of gross misdirection or irregularity. No such grounds have been advanced nor proven *in casu* (see, among others, *Econet Wireless (Pvt)Ltd v Trust Co Mobile (Pty) Ltd & Anor* SC 43/13).

It follows from this that ground number 4 of the appellant's grounds of appeal is ill conceived and lacks any merit.

The first issue is accordingly determined against the appellants.

[13] **Whether or not the court *a quo* erred in granting the application in favour of the first respondent.**

The appellants argue that the court *a quo* grossly erred in granting spoliatory relief when it was not shown that the first respondent was in physical control of the mine in dispute. Further, that the requirements for the granting of a spoliation order could not have been met in the absence of the element of physical control.

The essential requirements of spoliation are set out in the case of *Botha & Anor v Barret* 1996 (2) ZLR 73 (S) where the court held that:

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

- i) that the applicant was in peaceful and undisturbed possession of the farm; and
- ii) that the respondent deprived him of the possession forcibly or wrongfully against his consent.”

Judgment No. SC 87/22
Civil Appeal No. SCB 39/21

[14] It is also important to take note of *Silberberg and Schoeman's The Law of Property;*

Second Edition at p 114 which defines possession as follows: -

... a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by a person and a person's mental attitude towards the thing... whether or not a person has physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact. (*my emphasis*)

In casu, it is common cause that the first respondent had physically occupied the mine shortly before the dispute arose. Further, despite the fact that it had ceased physical occupation for the reasons already stated, it retained the intention to resume such occupation and benefit from the mine. The appellants took advantage of this temporary cessation of mining activities by the first respondent, to itself take possession of the mine in issue. Significantly the appellants have not disputed the fact

that the first respondent fully intended to come back and resume operations on the mining claim once the results of the valuation were received.

[15] On the basis of the *dicta* cited above, the first respondent accordingly, never relinquished possession of the mine. Its intention to continue to possess and benefit from mining activities on it was, in the court's view, clearly demonstrated. The court in the event finds that the court *a quo* did not err in its finding that the first respondent had been despoiled. Therefore, grounds 2 and 3 of the appeal must fail.

The appeal, in the final analysis, has no merit and ought to be dismissed. Costs will follow the cause.

[16] **DISPOSITION**

Judgment No. SC 87/22

Civil Appeal No. SCB 39/21

8

The appellants have failed to disprove the evidence that the first respondent was in undisturbed and peaceful possession of the mine in question. Further, the application before the court *a quo* was not one for eviction but for a spoliation order, and was accordingly, properly considered on an urgent basis.

It was on the basis of the foregoing that the court dismissed the appeal with costs.

CHITAKUNYE JA: **I agree**

MWAYERA JA : **I agree**

Mathonsi Ncube Law Chambers, the appellants' legal practitioners

Web Low and Barry, the first respondent's legal practitioners

Judgment No. SC 87/22
Civil Appeal No. SCB 39/21