

NKOSIPHILE KHUPHE

Versus

M N SYNDICATE t/a COARSBRIDGE WEST MINE

And

MINING COMMISSIONER – MATABELELAND SOUTH N.O.

IN THE HIGH COURT OF ZIMBABWE
NDLOVU J
BULAWAYO 14 & 17 MARCH & 4 MAY 2023

Urgent Chamber Application

S. Nkomo for the applicant
H. Moyo for 1st respondent
P. Kunaka for 2nd respondent

NDLOVU J. This matter was placed before me as an Urgent Chamber Application. I soon directed that the Applicant serve the Respondents and the matter be set down for arguments. That was done.

On the set date there was a Sheriff's Return of Service and all the parties' representatives were in attendance. The 1st Respondent's counsel applied for a postponement of the matter to enable his client to appropriately and meaningfully respond to the application because according to him, his client had not been served with the application and had become aware of the application from the Ministry of Mines and Mining Development Offices by chance. According to the 1st Respondent's counsel, one Zenzo Dube indicated on the copy of the Sheriff's Return of Service he had received from Applicant's counsel at the Bar and indicated as the 1st Respondent's Mine Manager and had received the service on behalf of the 1st Respondent was unknown to the 1st Respondent. While I was still trying to process what the counsel was saying, my eyes were drawn to the copy of the Sheriff's Return of Service filed of record and I realized that, that Zenzo purportedly served was indicated as Zenzo Moyo and not Dube.

Counsel for the Applicant acknowledged the discrepancies, had no explanation to make or try to make, but duly consented to the application for a postponement. I granted the application for a postponement. I remained concerned about the varying contents of the copies of the Sheriff's Return of Service and more about service on an unknown individual to a concerned party. My concerns however were somewhat soothed by the fact that the Zenzo Moyo indicated on the copy filed of record is apparently registered nationally under a given I.D. Number and therefore whoever may want to investigate this issue will have somewhere to start from. After hearing the matter I reserved judgment.

Soon thereafter the parties started writing letters and requesting the Registrar to bring those letters to my attention. I was taken aback by the conduct of the parties. When my Assistant brought up the existence of the first letter telephonically to my attention, as I was in Harare with the file, I got to know that the letter was about a complaint by one party against the other, I then deliberately refrained from wanting to know the full contents of the letter. Two other letters came by and I equally did not read them because I was surprised by the wisdom or lack of it on the parties' part in adopting this alien way of litigation, (litigation through letters or submission through letters long after oral arguments), capable of improperly influencing the Court outside the province of arguments lawfully and procedurally made at the hearing session.

I, therefore, write this judgment unaware of and not concerned with the contents of those letters. Parties and Legal Practitioners in particular must refrain from this kind of conduct. Court business, lest they have forgotten, is serious and procedural business.

THE APPLICATION

This is an application for a Spoliation Order by the Applicant against the 1st Respondent. The Applicant and the 1st Respondent are in the business of mining in the District of Gwanda in Matabeleland South Province. The application is opposed by the 1st Respondent.

APPLICANT'S CASE

He is the registered owner of a mining claim named Sally B. Mine, registration number **GA5216 Gwanda**. Attached to that mining claim is an area measuring 10 hectares. According to the Applicant he and his employees were in peaceful and undisturbed possession of this area as he was carrying out activities which are required by law for purposes of an application for registration of the site. On 6 March 2023, he lodged with the Ministry of Mines and Mining Development an application for a milling site attached to GA521. On 8 March 2023, he lodged this Urgent Chamber Application. He alleges that on 7 March 2023, the 1st "Respondent with" its employees, agents, and assignees came to his mining location he has been in peaceful and undisturbed possession of and unlawfully, disposed of him by forcibly chasing him and his employees from the location and the 1st Respondent is now extracting gold ore and causing damage to the mine.

One Togaranashe Chirozva deposed to a Supporting Affidavit to the Founding Affidavit and stated that the events of the 7th of March were at the Applicant's mine and that those who despoiled them started to extract gold ore and continued to do so.

1ST RESPONDENT'S CASE

The 1st Respondent's case is that the Applicant's mine is situated almost 10km from its milling area and the correct position is that the area in which the Applicant is proposing to mill is actually being operated by the 1st Respondent who operates 1 x Stamp Mill and 2 x Hammer Mills which are thereat. The area is already fenced by the 1st Respondent. On 7 March 2023, the Applicant engaged the Zimbabwean Police to evict the 1st Respondent from the site. Police Officers attended to the site and left without, fulfilling the Applicant's wishes after they were shown documents proving that the 1st Respondent's presence at the site is lawful and legitimate. It did not despoil the Applicant.

2ND RESPONDENT

The 2nd Respondent did not file an opposition to this application. The conduct of the 2nd Respondent is rather unfortunate and regrettably unproductive. As records custodians of everything related to mining in this country filing a response in applications like this one assists the warring parties in getting to know the official position so that they decide timeously, whether or not to continue with the litigation. The 2nd Respondent's active participation in these applications will also assist in the speedy resolution of such matters by the courts because the courts would be having a clearer position to begin from because the 2nd Respondent's explanation of a given situation per the official records kept by them cannot be ignored by a Court without good cause. We implore the 2nd Respondent to actively participate in such litigation. Maybe the time has come to engage other means to excite that desired kind of participation through other legitimate means.

POINTS IN LIMINE

The 1st Respondent took 4 points *in limine* and they are:

1. Defective Service---

I have already alluded to the issue of the clearly defective service or defective return of service above. I see no reason on a practical level, why the 1st Respondent would raise the same as a point *in limine*. I dismiss the point *in limine* taken without spending more energy on it because it is not capable of disposing of the matter before me.

2. Matter not urgent

I dismiss this point *in limine* outright. Practical consideration of this aspect might assist. The file was placed before me in chambers before the service of the application on the Respondents. I went through the file and at my disposal were two options. Either I,

- a) Ruled that the matter was not urgent OR
- b) Considered it to be urgent and directed that the application be served on the Respondents and the matter be set down on the roll of urgent matters.

I took the latter option. For the 1st Respondent to come to Court and argue that the matter is not urgent, in my view, is arguably unproductive and time expenditure. In any case, spoliation applications are by their very nature urgent.

3. *Incompetent order sought*

I equally dismiss this point *in limine* for the simple reason that what the 1st Respondent argued under this heading is the very defence it has on the merits of the matter. I find no wisdom in front-loading a defence under cover of it being a point in limine. Counsels are discouraged from this approach in litigation. *Telecel Zimbabwe (Pvt) Ltd v. POTRAZ & Otrs HH 446/15* is a go-to authority for counsel who finds him or herself under immense temptation to take a point *in limine*. A point *in limine* must be capable of disposing of the matter. In addition to the above, it is pertinent to note and appreciate a matter cannot be disposed of without hearing the litigants on the merits simply because the Draft Order is framed in gibberish.

4. *Apparent falsehoods and failure to disclose material facts.*

It is arguable that this can properly be taken as a point in limine. Litigation is a contestation of facts and a contestation of what the applicable law says on the given or proven set of facts. Material non-disclosure is frowned upon by courts for a reason. It avails the ommitter to sanction by the Court, usually by way of a punitive scale of costs. It however does not as a matter of principle non-suit a litigant to be heard on the merits. In any case, it is when addressing the merits of a case that a litigant in opposition will put her version of the facts forward. On the facts of this matter, I dismiss this point *in limine*.

THE LAW

To obtain a spoliation order the following must be alleged and proved by the Applicant

- 1) *That he or she was in peaceful and undisturbed possession of the property. AND*
- 2) *That the Respondent deprived him or her of that possession forcibly or wrongfully against his or her consent.*

Botha & Anor V. Barret 1996 (2) ZLR 73 @ 80

The Applicant must prove a clear right in order to succeed as opposed to a *prima facie* right because relief for spoliation is final in nature and cannot be sought on an interim basis.

What emerges from the parties' evidence can be reconciled and summarized and the following appears.

The parties are in the same mining area. Their respective mines are about 10km apart. The Applicant is desirous to set up a milling site in an area he alleges is attached to his mine known as Sally B Mine. The area in question is fenced and is currently being used by the 1st Respondent. The period of such use has not been disclosed by either party. To execute his desire, the Applicant on 6 March 2023 applied for a milling site to the Ministry. The area he had in mind when he made the application is the one fenced and operated on by the 1st Respondent. This is the area the Applicant says is attached to his Sally B mine. The Applicant has not even attempted to challenge the 1st Respondent's claim that it is the current occupier of the area in question and that it did not forcefully or wrongfully take the same from the Applicant, neither has the 1st Respondent challenged the allegation that the piece of land in question belongs to the Applicant.

DISPOSITION

The Applicant has failed to prove that he was in peaceful and undisturbed possession of the piece of land in question. It is the 1st Respondent which was in peaceful and undisturbed possession of the piece of land prior to 7 March 2023. The applicant has failed to prove wrongful and forceful dispossession of the property. The court does not and should not consider the right of the Applicant to be in possession of the property. That is not the test or requirement. In the circumstances, this application stands to fail and it fails.

ORDER

The application be and is hereby dismissed with costs.

Mathonsi Ncube Law Chambers, applicant's legal practitioners.

Joel Pincus Konson & Wolhuter, 1st respondent's legal practitioners.

Civil Division, Attorney General's Office, 2nd respondent's legal practitioners.