SWIMMING POOL & UNDERWATER REPAIR (PRIVATE) LIMITED
versus
JAMESON RUSHWAYA
and
ANNIE RUSHWAYA

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE: 14 October 2021 & 12 March 2025

Ex parte Urgent Chamber Application – Spoliation

Mr R. Kadani, for the applicant
Adv M Ndlovu and V Masvaya, for the 1st & 2nd respondents

MUSITHU J: On 12 January 2018, the applicant approached this court with an *ex parte* urgent chamber application for a spoliation order. The application was motivated on the following bases. The applicant accused the respondents of having unlawfully dispossessed it and its employees from exercising full control of mining operations at Glencairn Mine, a mining venture in which the applicant and the respondents had an interest (hereinafter called the mine). The applicant claimed that it had enjoyed quiet, peaceful and undisturbed possession of the mine without any interference from anyone since April 2016. The respondents' actions were tantamount to taking the law into their own hands without submitting to the jurisdiction of the courts and the law. The applicant was therefore approaching the court for restoration of the *status quo* before the respondents' claims, if any, were considered.

The applicant averred that the application should be determined without notice to the respondent as the risk of irreparable damage was so great that there was insufficient time to call the respondents to defend their unlawful action. There was also a risk of perverse conduct as the respondents were likely to defeat the purpose of the application. On 18 January 2018, MAKONI J (as she was then), granted the following provisional order:

> "**TERMS OF THE FINAL ORDER SOUGHT**
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> That you show cause to this Honourable Court why a final order should not be made in the following terms:-
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> 1. Applicant and its representatives nominees, employees, invitees and assignees are entitled to remain in peaceful undisturbed possession and use of Glencairn Mine also known as Tolrose Mine situate at Blagdon Farm Extension 2, Kadoma until such a time should it become necessary as a competent court issues an eviction order or any order having final effect against the applicant and in favour of the respondents.

2. The respondents and all other persons acting through them or on their instruction be and are hereby interdicted from summarily entering upon or remaining in occupation of Glencairn Mine also known as Tolrose Mine situate at Blagdon Farm, Extension 2, Kadoma, nor in any way threaten or interfering with the normal business or operations of the applicant, their employees, representatives, invitees and assignees in respect of Glencairne Mine without any valid court order.
3. The respondents shall pay the costs of this application on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

That pending confirmation or discharge of the final order applicant be and is hereby granted the following interim relief:-

4. The respondents and all other persons acting through them, be and are hereby interdicted and ordered not to interfere nor disturb applicant's peaceful possession of Glencairne Mine also known as Tolrose Mine situate at Blagdon Farm Extension 2, Kadoma.
5. Respondents and all other persons acting through them shall within 24 hours of this order restore possession of Glencairne Mine also known as Tolrose Mine situate at Bladgon Farm Extension 2, Kadoma, to the applicant and or its duly nominated representatives and to ensure that applicant conducts its mining business and restoring mining operations to the state prevailing prior the 7th January 2018.
6. Failing clause 2 above, the Sheriff or his lawful Deputy together with his assistants be and are hereby entitled and authorised to ensure that applicant retains possession of Glencairne Mine also known as Tolrose Mine situate at Blagdon Farm Extension 2, Kadoma without further delay. In the event that the Sheriff or his lawful Deputy or assistants encounter unwarranted resistance from the respondents or any person acting on their behalf or through them, is authorised and entitled to engage and solicit the services of the Zimbabwe Republic Police to enforce this order.

Service of the provisional order

7. That leave is hereby granted to the applicant's legal practitioners or the Sheriff of Zimbabwe and his lawful deputies and assistants to attend to the service of this order forthwith upon the respondents in accordance with the rules of this Honourable Court."

On 12 February 2018, the applicant applied for the confirmation of the above provisional order on the unopposed roll on the basis that the respondents, despite having been served with a copy of the provisional order, failed to file notices of opposition. On 28 February 2018, this court per Tagu J, confirmed the above provisional order and granted the terms of the final order sought as captured above.

The respondents latter approached this court for condonation for the late filing of an application for rescission of the default judgment granted by TAGU J, and the rescission of the default judgment itself. The application for condonation was filed under HCH 6178/23, while the rescission was filed under HCH 6602/23. The two applications were heard by ZHOU J on 5 March 2024. On 27 March 2024, ZHOU J granted the following order:

"In the result, **IT IS ORDERED THAT:**

1. The application for condonation in HCH 6178/23 is granted, and the late filing of the application in HCH 6602/23 be and is hereby condoned.
2. The application for rescission of judgment filed under case number HCH 6602/23 is granted.
3. The judgment granted in case number HC 280/18 be and is hereby set aside.
4. The applicants are given leave to file their opposing papers in HC 280/18 within ten days from the date of this order.
5. Costs are to be in the cause in case number HC 280/18."

The matter before me therefore seeks the confirmation of the above provisional order granted by MAKONI J following the rescission of the default judgment by TAGU J.

Factual Background to the Applicant's Case

The applicant's founding affidavit was deposed to by Patterson Fungayi Timba in his capacity as its director. He claimed that the applicant was the majority shareholder with a 61.5% shareholding in a company called Tolrose Investments (Pvt) Ltd (Tolrose or the company). That entity had vast mining interests through its major asset called Glencain Mine situated at Blagdon Farm Extension 2, Eiffel Flats, Kadoma. The respondents were minority shareholders holding between them 23.5% of the entire shared capital.

From 2010, the parties were involved in several legal disputes in connection with the ownership of Tolrose Investments and the mine. Several criminal and civil litigation were pursued between the parties. The respondents were accused of taking control of the affairs of mine and Tolrose as if they were the exclusive shareholders and directors of Tolrose. A court order granted by consent before this court per TAGU J on 26 June 2017, appeared to have resolved this conflict. That court order clearly delineated the parties' shareholding and roles in the company.

According to the applicant, prior to the aforesaid court order, the parties had appeared before a Commissioner of Mines who had also issued a determination on their dispute. The Commissioner determined that all mining claims constituting Glencairn Mine, which had been alienated by the respondents to their company called Xelod Investments (Pvt) Ltd (Xelod), were to be transferred back to Tolrose. The respondents and Xelod could not conduct mining operations at the exclusion of other shareholders and directors of Tolrose. It was on that basis that the respondents had ceased operations and mining activities at the mine and abandoned the mine residence.

From April 2016, the applicant represented by the deponent as its alter-ego, together with shareholders and other directors of Tolrose had enjoyed peaceful possession of the mine through exercising absolute control and management of the mine at the exclusion of the

respondents or their company, Xelod. The deponent claimed that the respondents initiated his arrest on a baseless murder charge, which was related to some offence that was committed in 2012. His accomplices had all been acquitted of the murder charge.

The deponent further claimed that his arrest was designed to ensure that during his absence, the respondents would return and take over the mine without any resistance. On 7 January 2018, some individuals known to be employees of the respondents invaded the mine in the company of some security guards and chased away the applicant's employees. The respondents' employees are also alleged to have stolen some carbon suspected to be holding above 1,3kgs of fine gold bullion after the effusion process. A report was made to the police in Kadoma, but no arrests were made.

The deponent claimed that he was made aware of the mine invasion but there was nothing he could have done as he was only released at night on 8 January 2018, after having been arrested on 5 January 2018. He was only able to engage with his legal practitioners on 11 January 2018, as he needed time to rest and recover from this ordeal. The deponent averred that the respondents had disturbed the applicant's quiet and peaceful possession of the mine. It was for that reason that the applicant had approached the court for an urgent *exparte* application for a spoliation order.

The Respondents' Case

The main opposing affidavit was deposed to by the first respondent with the second respondent associating herself with the deposition by the first respondent. The opposing affidavit raised the following preliminary points. The first was that the application itself was fatally defective because the applicant made the application for a spoliation order on a provisional basis. That was procedurally wrong because spoliation applications ought to be made on a final order basis. The second was that of material disclosure. It was averred that the applicant had failed to disclose the existence of two judgments, one from this court under HH 239/12 and another from the Supreme Court under SC 32/12. The two judgments had dismissed a similar application for spoliation.

The third preliminary point was that the relief sought in the final order was incompetent. The applicant sought the eviction of the respondents from the mine. At the time that the application was lodged, the respondents were directors and shareholders in Tolrose. The Supreme Court had in SC 32/12, made a finding that as shareholders, the respondents could not be evicted from the mine. In the same vein, as directors they could also not be evicted.

The fourth preliminary point was that the applicant had no cause of action. This was because at some point it sought to take occupation of the mine using a co-existence order from the Kadoma Magistrates Court. That order had been discharged by the court on the return date on the basis that it had outlived its purpose. The applicant did not gain access to the mine because the execution of the order had suffered a premature death. Tolrose Mine, represented by the deponent to the applicant's founding affidavit had also approached the Chinhoyi Magistrates Court on an *exparte* basis, seeking that the respondents be evicted and interdicted from doing mining operations at the mine. That application had been dismissed by that court.

The fifth preliminary point concerned the non-citation of Tolrose in these proceedings. It was averred that Tolrose Mine located at Blagdon Farm Extension 2, which was at the centre of the dispute was neither registered in the name of the applicant or the respondents. It was owned by a separate legal entity known as Tolrose Investments (Pvt) Ltd. Although the applicant and the respondent were in a wrangle for the control of Tolrose Investments, concerning its directorship and shareholding, that did not preclude it from being cited as a party in connection with its main asset being Tolrose Mine.

As regards the merits of the application, the respondents denied that the dispute between them and the applicant had been resolved. The consent order allegedly referred to by the applicant as having resolved their dispute was being challenged. The determination attributed to the Commissioner of Mines did not address the respondents. The determination referred to Xelod Investments. If the letter gave Tolrose the greenlight to operate the mine, by extension it also gave the respondents the power to proceed with mining operations, as directors and shareholders of Tolrose. In any case the mining authority would not pass a determination that ousted the **HH 239/12** and **SC 32/12**.

The respondents denied having caused the arrest of the deponent to the applicant's affidavit. They averred that the deponent to the applicant's affidavit was arrested for an offence he was alleged to have committed. Whether he committed the offence or not was for the police to investigate and for the courts to decide. The events as outlined by the applicant did not demonstrate an act of spoliation against the applicant. The respondents denied that they were ever lawfully evicted from the mine before the provisional order under challenge ousted them from possession of the same. The applicant had not explained how it reoccupied the mine after the handing down of judgments with adverse findings in **HH 239/12** and **SC 323/12**, and after the dismissal of its application for eviction filed at the Chinhoyi Magistrates Court.

The court was urged to dismiss the matter with costs *de-bonis propriis*, as a sign of its disapproval with the conduct of the applicant's legal practitioners.

THE SUBMISSIONS AND THE ANALYSIS

Whether the respondents' notice of opposition is properly before the court

At the hearing of the matter Mr *Kadani* for the applicant rose to motivate the applicant's preliminary point that the respondents were barred for their failure to comply with r 9(1)(2) as read with r 58(2) of the High Court Rules, 2021(the rules). Rule 9(1)(2) is concerned with the representation of parties, and it requires that a legal practitioner who intends to represent a party in legal proceedings must file a notice of assumption of agency. Rule 58(2) spells out the requirements that a court application or a notice of opposition must comply with. Counsel did not further elaborate on how this provision was infringed.

Mr *Kadani* submitted that the respondents' current legal practitioners were required to demonstrate that when they filed the respondents' notice of opposition on 9 April 2024, they were the legal practitioners of record for the respondents. The record of proceedings showed that the respondents' erstwhile legal practitioners, Mahuni Gidiri Law Chambers renounced agency on 4 July 2024. The respondents' new legal practitioners of record, Chitsa Masvaya Law Chambers, assumed agency on 20 September 2024. As of 9 April 2024, when the notice of opposition was filed, Mahuni Gidiri Law Chambers had not yet renounced agency. According to counsel, the failure to comply with the rules was fatal and the purported notice of assumption of agency was therefore defective.

In response, Mr *Ndlovu* for the respondents dismissed the preliminary point as being insignificant and irrelevant. According to counsel, a preliminary point had to have a bearing on the matter for it to be considered significant. The main consideration was whether the respondents' legal practitioners had sufficient instructions to brief him to appear on behalf of the respondents as their counsel of choice. Mr *Ndlovu* further submitted that the point was so insignificant so as not to prevent the hearing of the matter. He urged the court to condone the oversight in terms of r 7 of the rules.

Rule 9 which Mr *Kadani* contend was infringed, making the notice of opposition to be improperly before the court states in part as follows:

> "***9. Representation of parties***
> (1) If a legal practitioner acts on behalf of any party in any proceedings, he or she shall notify all other parties, by notice of assumption of agency, of his or her name and address.
> (2) Any party represented by a legal practitioner in any proceedings shall be at liberty to terminate such legal practitioner's mandate to act for him or her and thereafter act in person or appoint another legal practitioner to act on his or her behalf and whereupon he or she shall

> forthwith give notice to the registrar and all other parties of the termination and if he has appointed a further legal practitioner of the latter's name and address.
> (3) ……..
> (4) Upon receipt of a notice in terms of sub rule (1) or (2) or (3) the address of the legal practitioner or of the party, as the case may be, shall become the address of service of such party in such proceedings:
> Provided that any service duly effected elsewhere before receipt of such notice shall, notwithstanding such change, for all purposes be valid, unless the court orders otherwise.
> (5) A legal practitioner acting in any proceedings for a party may renounce his or her agency by giving reasonable notice to the party, the registrar and all other parties in the proceedings:…"

The need for legal practitioners to demonstrate the existence of a mandate to represent litigants cannot be over emphasised. The court must be satisfied that a legal practitioner who appears before it has the authority of the litigant to represent them in court. Court appearance on behalf of litigants comes with its own risks and responsibilities. The legal practitioner is entitled to charge a fee for their appearance. Mediocre legal representation may invite sanctions against the legal practitioner concerned or the client in the form of an adverse order of costs which can be on a punitive scale.

Rules of court exist to facilitate the expeditious resolution of disputes in a structured and organised manner. For that reason, they must be complied with. It is only in exceptional circumstances that the court will be persuaded to overlook a failure to comply with rules. Examples are those instances where the non-observance of rules will not impede upon the fair resolution of the dispute as well as cause prejudice to the other party. In *Museredza & 303 Ors v Minister of Agriculture, Water & Rural Resettlement & 10 Ors*[1], the Constitutional Court said of rules of court:

> "[26] Rules of court are put in place to facilitate the expeditious and fair dispatch of cases. The courts have an inherent power to regulate and protect their processes. This was reiterated in *Mukaddam v Pioneer Foods (Pty) Ltd, Mukaddam v Pioneer Foods (Pty) Ltd* 2013(5) SA 89(CC), at paras [28],[31], [32] and [34]. The Court made the following observations:
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> > "[28] ….Our Constitution guarantees everyone the right of access to courts which are independent of other arms of government. But the guarantee in s 34 of the Constitution does not include the choice of procedure or forum in which access to courts is to be exercised. This omission is in line with the recognition that courts have an inherent power to protect and regulate their own process in terms of s 173 of the Constitution, to which I shall turn in a moment.
> >
> > [31] However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the high courts. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and help in creating certainty in procedures to be followed if relief of a particular kind is sought.

[1] CCZ 1/22

> [32] It is important that the rules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the rules of courts is the attainment of justice….."

I associate myself with the above dictum. The primary purpose of rules is to assist courts and litigants in dispensing justice. At the same time, rules must also not act as an impediment in the dispensation of justice. It is for that reason that r 7 of the rules of this court permits a departure from the rules, by giving the court discretion to authorise or condone a departure from any provision of the rules. In doing so, the court must be satisfied that such departure is required in the interests of justice.

Having considered the circumstances of this case, I was satisfied that this was one such case that justified the application of r 7, as urged by counsel for the respondents. I say so for the following reasons. Although the respondent' erstwhile legal practitioners had not yet renounced agency at the time their notice of opposition was filed, at the time the parties appeared before me, such renunciation of agency had been filed. The new legal practitioners had also filed their assumption of agency. They proceeded to engage an advocate who appeared and argued the matter before me. I have no reason to believe that the new legal practitioners would have gone out of their way to engage an advocate to argue the matter without the leave of their clients. There was substantial compliance with the rules which persuaded me to condone a departure from the rules in the interests of justice.

For the above reasons, I determined that the applicant's preliminary point was devoid of merit and ought to be dismissed.

Whether the application is properly before the court

Counsel for the respondents submitted that there was no proper application before the court. This was because the relief sought by the applicant was final in nature, and it could not have been granted on a provisional basis. There was nothing called an interim order in spoliation proceedings. There was nothing called confirmation of a spoliation order. Mr *Ndlovu* further submitted that the application for a provisional order was a nullity at its infancy. It was void *ab initio* and so was the interim order that was granted. Counsel further submitted that the order ought to be discharged either through an application striking off the same or a robust and unitary decision which was a dismissal with costs.

In response, Mr *Kadani* objected to the respondents addressing the court on their preliminary points. He motivated his argument as follows. The provisional order which was subject to confirmation or discharge was granted pursuant to an urgent application for

spoliation relief. This was permitted in terms of r 241 of the old High Court rules, 1971, which was reproduced in the new rules as r 69(a). I pause here to observe that the reference to r 69(a) was clearly erroneous. Rule 69 deals with writs of execution, which provision is not relevant to the dispute before the court.

Be that as it may, Mr *Kadani's* point was that the submissions before me should be confined to the terms of the final order seeing as the hearing of the application served as the return date. It was further submitted that all the preliminary points as well as the question of urgency ought to have been considered at the initial hearing. Once the provisional order was granted, the preliminary issues would be dispensed with unless specifically rolled over or reserved for determination on the return date. Confirmation proceedings were earmarked to consider the merits of the final order.

It was further submitted that in the initial notice of opposition filed on 18 January 2018, the respondents did not take the points *in limine* that they now sought to present before the court

The submission that this court must not entertain the respondents' preliminary points since these ought to have been dealt with at the initial hearing of the matter is without merit. The notice of opposition filed on 18 January 2018 was opposing the confirmation of the provisional order granted by MAKONI J. As noted already, that provisional order was confirmed by TAGU J in default in motion court. Further, as already noted, the default judgment granted by TAGU J was set aside by ZHOU J who directed the respondents herein to file their notices of opposition within ten days of his order. What it meant was that even if the respondents had not raised any preliminary points in their notice of opposition filed on 18 January 2018, nothing precluded them from raising new preliminary points in the notice of opposition filed on 9 April 2024.

The judgment by ZHOU J gave the respondents a new lease on life. They were given a fresh start and were not precluded from raising new preliminary points. In any case, a point of law which goes to the root of the matter can be raised at any stage of the proceedings even on appeal, provided it is not one that is required by law to be specially pleaded in terms of any law.[2]

Having determined that nothing precluded the respondents from raising preliminary points of their choice, the next stage is for the court to determine whether this application is

[2] *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC)

properly before the court. It is not in dispute that spoliation proceedings are final in nature. For that reason, spoliatory relief cannot be sought on an interim basis. In *Chiwenga v Mubaiwa*[3], the Supreme Court explained the position of the law as follows:

> "The respondent approached the court *a quo* seeking a 'provisional' spoliation order on a *prima facie* basis. It is however trite that a spoliation order being final in effect cannot be granted as an interim order on the evidence of a *prima facie* right, as happened in this case."

The applicant herein also sought and was granted a provisional spoliation order on a *prima facie* basis. The granting of a provisional order does not terminate the proceedings. It marks the beginning of the case in as far as the determination of the substantive dispute is concerned. The matter assumes the character of an ordinary court application, with the respondents being permitted to file a notice of opposition and heads of argument. The applicant is also required to file an answering affidavit and heads of argument, and the matter is determined on a balance of probabilities.[4] In the *Chiwenga v Mubaiwa* judgment the court further explained the position of the law as follows:

> "The purpose of a provisional order is the same in our jurisdiction as in the other jurisdictions stated above. The purpose of a final order is different from that of a provisional order in that a final order is conclusive and definitive of the dispute. It finally settles the issues and has no return date. Once a final order is given the court issuing the order becomes *functos officio* and it cannot revisit the same issues at a later date.
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> It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date**.** The parties have an opportunity to argue the matter again on the return date."[5]

From the above dictum, the applicant could not competently sustain a claim for spoliation order on the basis of a provisional order. The standard of proof required in respect of a spoliation order is different from what must be established in respect of a provisional order. The court could not be invited to confirm that which the applicant was not legally entitled to by way of relief right from the outset. The application was a nullity in the eyes of the law. It was doomed from the outset. The court determined that there was merit in the respondents' preliminary objection.

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[3] SC 86/20 at p 11 of the judgment
[4] See *Nhende v Zigora* SC 102/22 at p 12 of the judgment
[5] At p 13 of the judgment

The next issue to be determined is what to do with this application in view of the incurable defect that afflicts it. The defect is so gross as to go to the root of the matter. In *Ahmed v Docking Station Safaris Private t/a CC Sales*[6], BHUNU JA held as follows:

> "The net effect of bringing a wrong application before the court is that there will be virtually nothing placed before it and, to that end, this application cannot stand."

Further down in the same judgment, the learned judge of appeal held as follows:

> "In view of these irregularities I found it proper to dismiss the application instead of striking it off the roll. In *Mudyavanhu v Saruchera* SC 75/15 GWAUNZA JA (as she then was) stated that;
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> > "It is noted that a number of matters have been struck off the roll by this Court on the ground that the relief sought was not exact in nature and that as a result the related notice of appeal was incurably defective. See *Ndlovu & Anor v Ndlovu & Anor* (supra). However, in this case, the court found that the appeal was not only incurably defective but wrong and bad in law. The appeal could therefore not properly be struck off the roll because the appellant had no avenue, legally or procedurally, to follow in case he was inclined to bring the same appeal before this Court." (my emphasis)
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> The grave irregularities that accompany this application warrant a dismissal. The applicant`s draft order is fatally defective and the application as a whole is wrong and bad in law. This application can only be dismissed"

The above sentiments are apposite to this matter. Taking a cue from the above authorities, this court also determined that the application was not only incurably defective, but it was also wrong and bad in law. For that reason, it must be dismissed.

COSTS

The general rule is that the successful party is entitled to costs on a scale which must be determined depending on the nature of the case and the way litigation was conducted. The court was urged to dismiss the application with costs on the punitive scale of legal practitioner and client. In the exercise of its discretion, the court found it befitting to dismiss the application with costs on the ordinary scale

Resultantly it is ordered that:

1. The application is hereby dismissed.
2. The applicant shall bear the respondents' costs of suit.

Atherstone & Cook, legal practitioners for the applicant
Chitsa & Masvaya Law Chambers, legal practitioners for the respondents

[6] SC 70/18 at p 4