

BLANKET MINE (1983) (PVT) LTD

Versus

FISANI MOYO

And

**VALENTINE MINE
(Represented by THOMSON MOYO)**

And

**ZIMBABWE REPUBLIC POLICE MATABELELAND SOUTH
GWANDA**

**PROVINCIAL MINING DIRECTOR
MATABELELAND SOUTH N.O**

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 29 JULY, 26 AUGUST AND 31 AUGUST 2021

Urgent Chamber Application

J Tshuma, for the applicant
S Nkomo with D Dube, for the 1st and 2nd respondents
No appearance for the 3rd and 4th respondents

KABASA J: This is an Urgent Chamber Application wherein the applicant seeks the following relief:-

- “1. The 2nd respondent and all persons claiming occupation through it shall remove or cause the removal of themselves and all such persons occupying the mining claim being Valentine 56 held under registration number GA 2786.
2. Failing such removal, the Sheriff of this Honourable Court be and is hereby authorised and directed to evict the 2nd respondent and all persons claiming through and under them from the mining claim being Valentine 56 held under registration number GA 2786.
3. The 3rd respondent be and is hereby directed to provide an escort and any other physical assistance necessary for the Sheriff, during the service and execution of this order.

4. The 2nd respondent and all persons claiming through and under him are interdicted and barred from continuing to carry out mining activities on the mining claim being Valentine 56 held under registration number GA 2786.
5. The 2nd respondent shall pay the costs of this application on the legal practitioner and client scale.”

It is important to give a brief background of how this matter, being an Urgent Chamber Application took almost a month and a half to be heard. The background is this:-

The matter was placed before me on Tuesday 29th June 2021. I then instructed that the applicant serve same on the respondents together with a notice of set down for 5th July 2021. The matter could not be heard on that date as I had to attend a meeting in Harare. It was then postponed to 12th July 2021. On that date the parties agreed on an order by consent which was to the following effect:-

- “a) All parties cease mining operations on Valentine 56 Mine claim and Valentine Q Mine claim forthwith.
- b) 4th respondent be and is hereby ordered to carry out a ground verification on the disputed ground and submit a report to this Honourable Court on the 16th of July 2021 and serve the parties.
- c) The court will set the matter down for finalisation.”

The parties arrived at this consent order so as to determine the real dispute between them with some measure of finality. It being an order by consent the court was of the view that this was premised on the parties’ desire to have an order dispositive of the matter. That report was duly availed and the matter was set down for 29th July 2021. Mr Nkomo was however ill-disposed necessitating a postponement to 26th August 2021.

On 26th August 2021 counsel for the 1st and 2nd respondents insisted on arguing the matter as originally filed, which was an application for spoliation. This position was at variance with the consent order. That being so because had counsel not consented to the 12th July 2021 order the matter would have been argued on that date and given the requirements of a spoliation order, the referral of the matter to the 4th respondent would not have been necessary.

I must express my displeasure at the manner in which counsel appeared to be bent on stalling the resolution of the matter.

That said, I propose now to consider the matter on the basis of the spoliation application. The applicant approached the court on the basis that it had been in peaceful and undisturbed

possession of a mining claim known as Valentine 56 GA 2786. It had been conducting exploration in the form of diamond drilling from 2020 until May 2021. The exploration results were to assist the applicant in determining how it was to proceed with its operations at this mine. The drilling was temporarily ceased and it was at that time that the 2nd respondent forcefully took occupation of the mine. The applicant engaged the 4th respondent who issued an injunction ordering cessation of operations at the mining location. Attempts to resolve the issue at that level hit a snag as 2nd respondent refused to submit itself to the process. Efforts to enlist the assistance of the police also hit a snag culminating in the applicant approaching the court for a spoliation order.

The 1st and 2nd respondents opposed the application. One Thomson Moyo deposed to the opposing affidavit wherein he stated that he was representing the 1st and 2nd respondents. The 1st respondent authorised Thomson to so act through a special Power of Attorney, which special Power of Attorney however referred to Valentine Q GA 5328 and not Valentine 56. No issue was taken on this and I do not intend to dwell on it.

In opposing the application the respondents took points *in limine*. These are:-

1. The application purports to be one for spoliation but it is actually an application for eviction and as such cannot be sought on an urgent basis.
2. The 2nd respondent is an artificial person and so is incapable of despoiling the applicant. The application is therefore fatally defective.
3. There are material disputes of fact as 1st respondent is the registered owner of Valentine Q mine and there is no clarity as to which mine the injunction issued by 4th respondent relates to.
4. The form used and the certificate of urgency are defective. The form is alien to the rules and the certificate of urgency does not show when the need to act arose, rendering it fatally defective.

As regards the merits the respondents' opposition referred to HC 731/21 claiming that there was no forceful occupation of applicant's claim and the 1st respondent is the registered owner of the claim, an issue which HC 731/21 is meant to address. The 1st and 2nd respondents have therefore not forcefully occupied applicant's mining claim.

I propose to deal with the points *in limine* first (*Heywood Investments (Pvt) Ltd t/a GDC Hauliers v Zakeo* SC 32-13). These points *in limine* will not be dealt with necessarily in the order they were raised.

1. Is the application fatally defective due to use of inappropriate form?

The form used by the applicant stated what the application was for and the relief sought. This form does not have the procedural rights a respondent is alerted to which an application which is to be served on other parties ought to have.

I take the view that as this is an Urgent Chamber Application, supported by a certificate of urgency, rule 242 (1) (d) applies. Granted the applicant did not attest to the fact that the matter was so urgent that it allowed for no time to serve the application on the respondents but the respondents were duly served with the application and the notice of set down allowed them to file whatever papers they deemed necessary. An Urgent Chamber Application filed in terms of r242(1)(d) is in my view Judge driven and this is what happened *in casu*. I ordered that the application be served on the respondents together with a notice of set down. The applicant complied and the respondents were able to file their opposing papers.

Is this point *in limine* therefore not just meant to emphasize form over substance? I think it is.

Mr Tshuma referred to MATHONSI J's (as he then was) judgment in *Telecel Zimbabwe (Pvt) Ltd v POTRAZ and Others* HH 446-15, where the learned Judge had this to say:-

“I take the view that rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designed to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules ...”

In *Zimbabwe Open University v Dr O Madzombwe* HH 43-2009 the learned Judge adjudged that the use of the inappropriate form impacted on the other party as the plethora of procedural rights found in Form 29 were missing. The argument on the use of the appropriate form was therefore not found to be a sterile argument which served no useful purpose.

I would therefore agree with counsel for the applicant's argument as contained in his heads of argument, that *in casu* this application is an Urgent Chamber Application and the fact that such is to be placed before a Judge without delay makes it a contradiction in terms to then

include procedural rights which include the *dies induciae* when the Judge before whom such application is placed can give directions on how the matter is to proceed.

HLATSHWAYO J's (as he then was) observation in the *Madzombwe* case that:-

‘The format used by the applicant did not contain “... the plethora of procedural rights that the respondent is alerted to in Form 29 nor the summary of the grounds of the application required in Form 29 B...” does not apply *in casu*.

I therefore hold that the argument on the use of the form is a sterile argument which seeks to put emphasis on form rather than substance. The respondents have suffered no prejudice as they were able to file their opposing papers allowing for the matter to be argued.

The certificate of urgency was also said to be fatally defective in that it did not state when the need to act arose. This could not be further from the truth.

In paragraph (b) thereof the certificate of urgency gave this narration:-

“In May 2021, the respondents took unlawful occupation of the mining claim and began mining activities on the mining claim. The respondents have prevented the applicant from accessing the mining claim or making use of the mining claim.”

Is it suggested therefore that because the words ‘The need to act arose in May 2021,’ were not used it means such was not stated? Such a contention is a sad indictment on the respondents’ counsel and one is tempted to say, as MATHONSI J did in the *Telecel* case (*supra*)

“Legal practitioners should be reminded that it is an exercise in futility to raise points *in limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter ...”

This point *in limine* was an exercise in futility. It has no merit and it is accordingly dismissed.

2. Is the application fatally defective due to the fact that 2nd respondent is an artificial person and therefore incapable of despoiling?

A company is a juristic person capable of suing and being sued. Fisani Moyo and Thomson Moyo are the people who claim to be owners of Valentine Mine. In HC 731/21 where Thomson Moyo is challenging the injunction issued by 4th respondent, he described himself as the representative of Valentine Mine, a duly incorporated company under the laws of Zimbabwe with capacity to sue and be sued.

The applicant's complaint is that this company through the agency of its representatives have despoiled it of its possession of Valentine 56. Fisani and Thomson Moyo were cited as the natural persons who own the juristic person known as Valentine Mine.

There was an attempt by *Mr Nkomo* to argue that Valentine Mine is a non-existent entity. This argument does not make much sense, given that Valentine Mine is the name of the applicant in HC 731/21, a court application which is yet to be heard. So is it being suggested that Valentine Mine is a juristic person for purposes of its own litigation but ceases to be one when it is the one being sued?

I must say I get the distinct impression that the respondents were determined to throw as many spanners into the works as possible and avoid dealing with the matter on the merits.

Valentine Mine through the agency of its owners are said to have despoiled the applicant. The applicant is a company and its being a juristic person does not mean it cannot be despoiled. By the same token the respondents being the "operators" of Valentine Mine are capable of despoiling. Any company being a juristic person can only act through the agency of its directors or representatives. These representatives were equally cited. I therefore do not see any merit in this point *in limine*. Counsel's efforts to tweak the argument by introducing a new issue altogether regarding the existence of this company is telling. Counsel sought to argue that Valentine Mine is just a trade name and not the name of the company.

Questions of law can be raised at any time but they should be valid questions of law. In *Muskwe v Nyajina and Others* SC 17-12 the court had this to say:-

"Undoubtedly a point of law can be raised at any time even though not pleaded. However, this is subject to certain considerations, one of which is that the court has to consider whether raising a point of law at this juncture would cause prejudice to the party against whom it is raised. ... The theme that runs through the principles is that a question of law can be raised at any stage of the proceedings provided it does not occasion prejudice to the other party."

Counsel sought to argue that because the relief sought is against Valentine Mine, which is a non-existent entity, it therefore means no relief can be obtained from "nothing." Were I to hold that such argument is valid, it would certainly prejudice the applicant. However, *in casu*, it is not enough to merely state that this cited party is non-existent, without more. It is not even stated what the company name is if it is not Valentine Mine. Furthermore, that same entity has instituted action claiming to be a legal entity.

I was also not referred to any authority for the proposition that a juristic person cannot despoil. In *Chrome Media Investments (Pvt) Ltd v Hopscik Investments (Pvt) Ltd* HH 336-20 the applicant sought spoliatory relief in respect of an immovable property where it operated business from which property was owned by the respondent. The applicant's application failed but not for the reason that the respondent, being a company could not despoil. So too *in casu*, the applicant is a company and its cause of action arises from allegations that it was unlawfully deprived of its possession by another mining company through the agency of the 1st respondent and Thomson who represent that company.

I am therefore not persuaded by the contention that a juristic person cannot despoil.

This point *in limine* falls on both scores, that it is not a legal entity and also that as a juristic person it cannot despoil.

Like the one before it, this point *in limine* equally lacks merit.

3. Material Disputes of Facts

The parties had initially agreed on a consent order directing the 4th respondent to conduct a verification process to establish to whom the mining claim belonged. It appears the respondents had a change of heart on the reason behind such a consent order. That order would not have been necessary in an application for spoliation as the requirements for a spoliation order are not concerned with ownership.

The 4th respondent's report is therefore not relevant for purposes of the spoliation application. This is so because the facts which are relevant in a spoliatory matter are facts relating to the spoliation itself and not about ownership. Ownership is not a relevant consideration in such proceedings.

Counsel for the respondents cited the case of *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* HH 92-09 where MAKARAU J (as she then was) had this to say: -

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In casu the issue revolves around the fact that the applicant was in peaceful undisturbed possession of the mining claim and had been drilling thereat before it was despoiled. Whether it is the rightful owner or not is not what a spoliation action looks at. The fact that the

respondents lay claim to the mining claim is not an issue a spoliation application considers. This is precisely why in *JC Conolly and Sons (Private) Limited v RC Ndhlukula and Anor SC 22-18 GARWE JA* said:-

“The law is settled that an order of spoliation is final in nature and that it determines the immediate right of possession of a particular *res*. It is frequently followed by further proceedings between the parties concerning their rights to the property in question.” (my emphasis).

In casu it is that immediate right of possession of the mining claim that this application is about. The issue of who owns it and who has the rights to it is a matter for another day, which day could have been sooner had counsel for respondents allowed the parties’ consent order to determine their dispute.

I am therefore not persuaded to hold that there are material disputes of facts which are unresolvable on the papers.

This point *in limine* equally fails as it has no merit.

4. Is the application one of eviction and so incapable of being sought on an urgent basis?

Spoliation by its very nature speaks to the unlawful deprivation of possession of a *res*. The relief is a restoration of that *res* into the possession of the one despoiled. If the *res* is a movable property then such movable property is restored to the applicant. If, as *in casu* the *res* is an immovable property and spoliation is proved, such restoration inevitably means the eviction of the one who despoiled.

The court looks to the cause of action, which cause of action must speak to spoliation to determine whether the applicant’s application is one of eviction or not.

The applicant *in casu*’s papers stated that “application is hereby made for a spoliation order directing the ejection of the 1st respondent and all those claiming occupation through him in terms of the draft order annexed to this application and the restoration of peaceful and undisturbed occupation of the applicant ...”

The certificate of urgency and the founding affidavit make reference to the fact that the applicant was in peaceful and undisturbed possession of the property and seeks to be restored

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

This point *in limine* equally lacks merit and is also dismissed.

I move now to the merits.

In *Banga and Another v Zawe and Others* SC 74-12 GWAUNZA JA (as she then was) cited *Kama Construction (Private) Limited v Cold Comfort Farm Co-operative and Others* 1999 (2) ZLR 19 (SC) which sets out the requirements for a spoliation order. These are

- (1) That the applicant was in peaceful and undisturbed possession of the thing.
- (2) He was unlawfully deprived of such possession.

The circumstances of such possession are not an issue in spoliation proceedings. I can do no more than respectfully agree with the learned JA where in *Banga and Another (supra)* she cites *Botha and Another v Barrett* 1996 (2) ZLR 73 (S) for the proposition that an applicant only has to show that he was deprived of possession forcibly and wrongfully against his consent.

The learned JA went further to say:-

“It is trite that in spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the status *quo ante*, pending the determination of the dispute between the parties. This principle is clearly stated thus by the learned authors Silberberg and Schoeman, *supra* at pages 135-136;

‘... the applicant in spoliation proceedings need not even allege that he has a *ius possidendi: spoliatus ante omnia restituendus est* ... All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession ...’

In casu the applicant’s Human Resources Manager who deposed to the founding affidavit, stated that the applicant had been diamond drilling at this mine from 2020 until May 2021 and had temporarily ceased such drilling awaiting results of the drilling valuation. Such results were to assist applicant in planning its mining activities.

Mr Nkomo in argument contended that such circumstances show that there was no despoiling. Is one to interpret the temporary cessation as tantamount to relinquishing of the

property such that no despoiling could therefore have been said to have occurred? Was the applicant in possession of the property?

In *Banga and Another v Zawe and Others* (*supra*) the learned JA stated thus:-

“According to the learned authors Silberberg and Schoeman’s ‘*The Law of Property*’, *Second Edition* at page 114:

“Possession” has been described as a compound of a physical situation and of a mental state involving the physical control or detention 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.”

Unfortunately the respondents did not raise this defence in their notice of opposition and so the applicant was not able to meet this issue of what was on the ground and whether as was the case in the *Banga* case (*supra*) there was no forceful dispossession. Sight must not be lost however that unlike the *Banga* case where there was a change of locks and keys to the gate and premises and the respondent (applicant then) appeared not to have been present to make a case for spoliation, *in casu* this is a mining claim and the applicant’s case is that it was drilling thereat. The respondents do not meet this case by stating what their defence is. Their assertion that it is actually their mine is not what the issue is but whether they despoiled the applicant where it was conducting its drilling.

I do not intend to delve into the facts of the *Banga* case(*supra*), suffice to say the fact that there had been an order for the respondent in that case to leave the portion of the farm he was utilising and remove his property therefrom and the lack of evidence of his presence thereat either in terms of his employees or property was suggestive of the fact that he had left in compliance with the order meant that there was therefore no spoliation. In *casu* the respondents do not address the fact that applicant was drilling on that claim and cessation of drilling was only so as to get results of the same. There was no evidence that applicant had relinquished possession either physically or mentally. The respondents’ pre-occupation with the issue of ownership showed a failure to appreciate that ownership is not what the matter is about but possession.

It is my respectful view that counsel for the respondents ought to have clearly stated what their defence was to the application for a spoliation order and not dwell on who owns the mining claim which applicant avers it was despoiled of. The defence to a spoliation application

should be clear from the opposing papers. In *casu*, the defence zeroed on ownership. In arguing the matter counsel sought to suggest that the 2nd respondent is a non-existent entity and further that the applicant had temporarily ceased drilling. This begs the question as to whether the respondents have a defence at all to the spoliation.

Valid defences to a spoliation application are: -

1. That applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession.
2. The dispossession was not unlawful and therefore did not constitute spoliation.

The applicant's attempts to seek the 4th respondent's intervention followed the events of May 2021 when it claimed the respondents had unlawfully dispossessed them of the claim where they had been working. The applicant sought police intervention when the 4th respondent's attempts to deal with the matter were spurned by the respondents. The respondents do not articulate what their defence is except to mention that they are mining within a claim they regard as theirs.

Mr Tshuma for the applicant correctly, in my view captured the nature of the respondent's defence as articulated in the opposing papers as being based on the fact that they are the holders of the mining claim.

I therefore come to the conclusion that the applicant's averments that it was in peaceful and undisturbed possession of the mining claim until May 2021 when it was unlawfully dispossessed of the same has not been controverted.

The remedy therefore is to order a return to what was obtaining before the spoliation. It is my considered view that this is the appropriate remedy. As for the interdict which the applicant alludes to in its draft order, such was not ventilated and I therefore will not grant an order that speaks to issues not properly articulated in the applicant's papers. In any event once granted a spoliation order serves to restore the status quo ante. Should the respondent violate such order that could give rise to contempt proceedings.

As regards costs, the matter exercised my mind in a manner that makes it difficult to hold that the respondents opposed the application out of sheer vindictiveness and calculated to put the applicant out of pocket.

For this reason the costs will be at the ordinary scale. There is however no reason to depart from the norm, costs follow the cause.

In the result, I make the following order.

The applicant's application succeeds in terms of the amended draft order.

Messrs. Webb, Low & Barry Inc. Ben Baron & Partners, applicant's legal practitioners
Messrs. Mathonsi Ncube Law Chambers, 1st and 2nd respondents' legal practitioners