

TECHSHED INVESTMENTS (PVT) LTD

Versus

MUSA MPOFU

And

THE ZIMBABWE REPUBLIC POLICE MATABELELAND NORTH

And

SHERIFF OF THE HIGH COURT OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 17 & 24 FEBRUARY 2022

Urgent application

M.E.P. Moyo for the applicant
B. Robi for the 2nd respondent

DUBE-BANDA J: This is an urgent application. This application was lodged in this court on 21st January 2022. It was placed before me on the 24th January and I directed that it be served on the respondents together with a notice of set-down for the 27 January 2022. On the set down date Mr *Robi* counsel for the 1st respondent applied for a postponement of the matter. The application was not opposed and I postponed the matter to the 16th February 2022 for a hearing. The application is opposed by 1st respondent. The 2nd and 3rd respondents neither filed opposing papers nor participated in the hearing and I take the view that they content in abiding by the decision of this court.

In this application for a *mandamus van spolie*, and applicant seeks a final relief couched in the following terms:

1. 1st respondent and / or their agents shall restore undisturbed possession and control of the following to applicant;
 - a. Happy Valley Mine C registration number 37375 within 48 hours of the grant of this order, failing which the Sheriff of the High Court of Zimbabwe or his lawful deputy or assistant in Bulawayo be and is hereby authorised,

directed and ordered to take all such steps and measures as are legally necessary to take possession of the said mining claims from respondents or any person claiming through him and place it in the possession of applicant.

2. 1st respondent and / or his agents and anyone claiming through him be and are hereby ordered not to interfere with applicant's possession and control of Happy Valley Mine C registration number 37375.
3. 1st respondent to bear costs of suit on an attorney-client scale.

Factual background

This application will be better understood against the background that follows. The facts of this matter appear in the applicant's founding papers and 1st respondent's opposing papers. Applicant avers that it entered into a sale agreement with a syndicate called Emandleni Syndicate (Syndicate) in respect of Happy Valley Mine C registration 37375. The mine is now registered in the name of the applicant. 1st respondent is a member of the Syndicate. Applicant avers that it still owes the Syndicate some money in respect of the sale agreement. Applicant contends that it took possession of the mine in February 2020. It is contended that on the 21st January 1st respondents, his assignees and agents forcefully and unlawfully evicted applicant's representatives and workforce from the mine.

In the opposing affidavit 1st respondent denies that he took occupation of the mine, or instructed anyone to take occupation of the mine. He denies that he evicted applicant's representatives or workers from the mine. It is contended that a company called Lucky Heather (Pvt) Ltd entered the mine on the 6th January 2022. 1st respondent avers that Lucky heather (Pvt) Ltd is not acting on his behalf or instructions.

In its answering affidavit applicant contends that it did not authorise Lucky Heather (Pvt) Ltd to be at the mine, and if this company is at the mine it was authorised by 1st respondent. It is against this background that applicants have launched this application seeking the relief mentioned above.

In his opposing affidavit 1st respondent raised a number of points *in limine* to which I now turn.

Points in limine

In his opposition affidavit 1st respondent raised the following points *in limine*, viz that there is no application before court; no authority to act; the matter is not urgent; non-joinder and misjoinder. The point *in limine* regarding misjoinder was abandoned and no further reference will be made to it. In order to expedite the proceedings, I ruled that both counsel make submissions on the case as a whole to prevent piecemeal adjudication.

No application before court

1st respondent contends that there is no application before court. It is submitted that the founding affidavit was not deposed to by Petros Muzamba (Muzamba) the alleged deponent. It is further submitted that the founding affidavit was fraudulently obtained, and that without a founding affidavit there is no application before court.

The facts anchoring this point *in limine* are that in the notice of opposition there is a supporting affidavit deposed to by Muzamba. This is the same person who deposed to the founding affidavit in support of the application. In this affidavit he confirms that he is an employee of the applicant. He is employed as a storeman. He avers that he does not know anything about the contents of the applicant's founding affidavit and that he did not attest to the founding affidavit that is attributed to him. He avers that he was merely instructed to sign the last pages of the affidavit and did not see the rest of the pages of the affidavit. He says the founding affidavit says he is the mine manager, which is incorrect, the manager is one Albert Nzanza. He avers that the founding affidavit was fraudulently acquired from him and he dissociates himself from its contents.

The same person i.e. Muzamba deposed to an answering affidavit in support of the application. In the answering affidavit he avers that he has read the notice of opposition and the affidavit attributed to him therein. He says the affidavit does not reflect what he was told of its contents, he did not attest to it before the alleged commissioner of oaths. At all times he was with Mr *Robi* 1st respondent's counsel.

Muzamba further avers that he stands by the issues attributed to him in the founding affidavit except in so far as refers to him as the mine manager. He was approached by 1st respondent's legal practitioner who requested to meet with him. He met the legal practitioner at their offices i.e. the lawyer's offices. He says the legal practitioner advised him that he was

in trouble for deposing to an affidavit and referring to himself as the mine manager when he was not a manager. He is not the mine manager, but at the time the incident complained of occurred he was the most senior employee at the mine, and that is the reason why he was mistakenly referred to as the mine manager.

Mr *Moyo* counsel for the applicant made a request that Muzamba testifies and explain to the court the circumstances that made him to depose to three seemingly conflicting affidavits. The request was not opposed, and in fact it was supported by Mr *Robi*. Rule 58(12) of the High Court Rules, 2021 provides thus:

In any application the court or a judge may permit or require any person to give oral evidence if the court or a judge, as the case may be, considers it will be in the interests of justice to hear such evidence.

I considered that it would be in the interests of justice to hear his oral evidence. I granted the request and Muzamba took the witness stand to give oral evidence. I restricted his testimony to the circumstances that made him depose to three affidavits before court. I gave counsel an opportunity to question him, and I strictly controlled this questioning as I noted that counsel intended to make forays into the merits of the dispute. This I did not permit.

In his oral and after some prevarication Muzamba testified that he knows the contents of the founding affidavit and agrees with the contents thereof. It is only in the answering affidavit that he took an oath before signing. In respect of the founding affidavit and the supporting affidavit in the notice of opposition he did not take an oath. He testified that he does not agree with the contents of the supporting affidavit attributed to him and does not agree with such contents. He signed the answering affidavit and agrees with the contents thereof.

Mr *Robi* contended that there is no application before court. It is submitted that without a founding affidavit there can be no application. Counsel contended that Muzamba did not know the contents of the founding affidavit and he distanced himself from the contents of such affidavit.

Per contra Mr *Moyo* submitted that there is an application before court in that there is no basis to impeach the founding affidavit deposed to by Muzamba. Counsel argued that the conduct of Mr *Robi* is unethical in that it was irregular for him to contact and hold a meeting with the Mr Muzamba, applicant's witness. Counsel even speculated that some incentive might

have been given to Mr Muzamba to depose to the supporting affidavit in the notice of opposition. Counsel further contended that the answering affidavit shows Muzamba deposed to the founding affidavit before court.

The first inquiry is whether or not the conduct of Mr *Robi* in contacting and holding a meeting with Muzamba and then securing an affidavit from him is unethical? If deemed unethical, is the would affidavit obtained under such circumstances be admissible into evidence? B.D. Crozier in *Legal Ethics A Handbook for Zimbabwean Lawyers* 36 says:

When acting for a client in a matter, a legal practitioner should not communicate directly with a party with whom he knows is represented by another practitioner in that matter. He should not even discuss the case socially with the party in the absence of the other practitioner. He may, however, communicate directly with a party if the party's legal practitioner has not replied to his correspondence or has refused, for no adequate reason, to pass on his communications to the party.

Even if the party is not legally represented, but the matter has become or is likely to become contentious, a practitioner should not interview the opposing party, and certainly not in the circumstances in which he may have to give evidence about what that opposing party said.

In casu Mr *Robi* had a meeting with Muzamba, i.e. applicant's witness. He drafted an affidavit for Muzamba to sign. Counsel kept this meeting with Muzamba a top secret until such time that an affidavit was secured, it is only thereafter that he telephoned applicant's legal practitioners alerting them of the meeting and the affidavit.

My view is that Mr *Robi* had no right to secretly and under cover of darkness communicate with a witness of the applicant. Even if the meeting was at the instance of applicant's witness (as he alleges and disputed by Muzamba) he should have declined to meet the witness. Mr *Robi* knew that applicant was represented and that Muzamba was the key witness of the applicant. Meeting Muzamba and securing an affidavit from him was designed and calculated to defeat applicant's case by unorthodox means. This cannot be countenanced. As a legal practitioner Mr *Robi* had a duty to be truthful, honest, candid and fair to opposing litigants. I am of the view that by holding a meeting with Muzamba and securing an affidavit from him counsel failed in this duty. Mr *Moyo* contended that Mr *Robi*'s conduct was unethical. I agree.

I take the view that the supporting affidavit (deposed by Muzamba) to the notice of opposition is inadmissible in evidence. To hold otherwise would be to reward Mr *Robi's* unethical conduct. It will be detrimental to the administration of justice. It will bring the administration of justice into disrepute. It might pave way for litigation by unorthodox means, and by hook and crook. This court cannot permit legal practitioners to sneak under cover of darkness to scurry favour with the opponent's witnesses with the sole purpose of defeating their cases. This court cannot reward such conduct. The supporting affidavit to the 1st respondent's notice of opposition deposed to by Muzamba is inadmissible in evidence in matter. No further reference shall be made to it.

What has caused me trouble is what to do with the oral evidence of Muzamba. I decided not to attach any weight to such oral evidence. I say so because to attach weight to such evidence would be to indirectly take into account the contents of the affidavit I have ruled inadmissible. It would be to reward the unethical conduct of Mr *Robi*. In any event the oral evidence of Muzamba was not satisfactory. He was prevaricating. Contradicting. Shivering and showing signs of anxiety. Without the supporting affidavit of Muzamba and his oral evidence, there would be no basis to hold that there is no founding affidavit before court. Therefore, the point *in limine* that there is no application before court has no merit and is refused.

Urgency

1st respondent contends that this application is not urgent. It is argued that on the 6th January 2022, a company called Lucky Heather (Pvt) Ltd was granted permission to access the mine for the purposes of repairing the mining plant. It is averred that applicant only acted on the 21st January 2022. It is contended that the application was filed on the 21st January and only served on the 1st respondent on the 26th January 2022. The certificate of urgency is criticised for want of explaining the cause of inaction allegedly between the 6th to 21st January. It is argued that such shows that this application is not urgent. It is argued that the urgency is self-created.

Applicant contends that this matter is urgent and warrants the urgent attention of this court. It is argued that the act of spoliation occurred on the 21st January and this application was filed on the same day.

In my view there is no merit whatsoever in the contention that the matter is not urgent. Even if I were to accept that the act complained of occurred on the 6th January, I would still

find that the matter is urgent. Surely a delay of 15 days cannot be said to be inordinate as to constitute self-created urgency. A matter is urgent if, when the need to act arises, the matter cannot wait. That is the simple test for urgency. See: *The National Prosecuting Authority v Busangabanye & Anor* HH 427/15; *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (1) ZLR 232 (H) 243G; 244A-C. In my view there is no merit whatsoever in this point *in limine*, and it is dismissed.

No authority to act

It is contended that the deponent to the founding affidavit is not authorised to act for the applicant. It is incorrect to say the deponent is acting for the applicant. Applicant is being represented by its legal practitioners. Applicant has instituted legal proceedings in its own name and deponent is a mere witness in respect of the issues complained of. As a deponent or witness he can only be disqualified if he does not meet the requirement of Rule 58(4) of the High Court Rules, 2021 which provides that an affidavit filed in written applications “shall be made by the applicant or respondent, as the case may be, or by a person who can swear to the facts or averments set out therein.” See: *Bere v JSC and 6 Others* SC 1/2022. I take the view that Muzamba is a person who can swear positively to the facts of this matter. He is a witness. See: *Willoughby's Investments (Pvt) Ltd v Peruke Investments (Pvt) Ltd & Anor* HH 178/14. All in all, I take the view that this objection is entirely without merit and need not detain this court any further. It is accordingly dismissed.

Non-joinder

It is contended that the failure to join a company called Lucky Heather (Pvt) Ltd, the Minister of Mines and the Commissioner of Mines is fatal to this application. The argument is that if indeed any act of spoliation occurred, it was occasioned by such company, and that the Minister and Commissioner have a substantial interest in matters involving Mines.

This is an application for a *mandamus van spolie*. It is not a dispute about ownership of the mine. The allegations are that the spoliation was committed by the 1st respondent, and I see no basis of joining Lucky Heather (Pvt) Ltd, the Minister of Mines and the Commissioner of Mines. In any event Rule 32 (11) of the High Court Rules, 2021, provides that no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may determine the issues or questions in dispute so far as they affect the rights and interests of

the persons who are parties to the cause or matter. The point *in limine* of nonjoinder has no merit and is dismissed.

Merits

This is an application for a *mandamus van spolie*. It is trite that *mandament van spolie* is a possessory remedy which is available to a person whose peaceful possession of a thing has been disturbed. It lies against the person who committed the dispossession. The *mandament* is not concerned with the underlying rights to claim possession of the property concerned. It seeks only to restore the *status quo ante*. It does so by mandatory order irrespective of the merits of any underlying dispute regarding the rights of the parties. The essential rationale for the remedy is that the rule of law does not countenance resort to self-help. See: *Swimming Pool & Underwater Repair (Private) Limited & Ors v Rushwaya & Another* SC 32/12; *Ngqukumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC) para 10.

Two requirements must be met in order to obtain the remedy. Firstly the party seeking the remedy must, at the time of the dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent.

In the founding affidavit applicant avers that it had been in possession of the mine since February 2020. It is contended that on the 21st January 2020, 1st respondents and his assignees and agents forcefully and unlawfully evicted applicant's representatives and workforce from the mining claims without the consent of the applicant. In the answering affidavit it is averred that 1st respondent came to the mine on 19 February and informed the mine workers that he was now in charge of the mine. The deponent said he refused to open the concentration room, which prompted 1st respondent to cut the locks. Applicant did not allow Lucky Heather (Pvt) Ltd to enter the mine, and if such company is at the mine it is there at the instance of 1st respondent.

In his opposing affidavit 1st respondent avers that he never took occupation of the mine or mining claim. He never instructed anyone to take occupation of the mine as alleged. It is contended that access to the mine was obtained by a company called Lucky Heather. It is averred that Lucky Heather neither acted on behalf nor on the instructions of the 1st respondent. It is said Lucky Heather was granted access to the mine on the 6th not 21st January 2022. 1st

respondent contends that a case of *mandamus van spolie* has not been made and the application must be dismissed with costs on a legal practitioner and client scale.

Applicant is seeking a final relief and it must prove its case on a balance of probabilities. See: *Movement for Democratic Change & Ors v Timveous & Ors* SC 9/22. Further I have closely looked at the applicant's papers very closely. In the application it is contended that the dispossession occurred on the 19th January 2022. In the certificate of urgency it is averred that the dispossession occurred on the 21st January 2022. In the founding affidavit it is alleged that the dispossession occurred on the 21st January 2022. In the answering affidavit it is said the dispossession occurred on the 19th January 2022. The resolution appointing Muzamba to sign any affidavit in support of the application was signed on the 20th January 2022. Mr *Moyo* submitted that the date of disposition was the 19th January 2022, the reference to the 21st in the founding affidavit was a typographical error.

I do not accept that the reference to the 21st January 2022 in the founding affidavit is a typographical error. It is established an principle of our law that an applicant's cause stands or falls on the founding affidavit. See: *Chiangwa & Others v Apostolic Faith Mission in Zimbabwe & Others* SC 67/21; *Muchini v Adams & Ors* SC 47/13. The founding affidavit is clear that "on the 21st January 2022, 1st respondent and his assignees and agents in forcefully and unlawfully evicted applicant's representatives and work force from the mining claims in question without the consent of the applicant."

The founding affidavit is essentially sworn evidence before the court. My view is that if the founding affidavit contains a material error there must be an explanation in the answering affidavit to explain the circumstances under which the error occurred. Applicant filed an answering affidavit, and averred that the incident complained of occurred on the 19th January 2022. However there is no explanation at all as to why the founding affidavit speaks to the 21st January 2022. What also concerns me is that in the certificate of urgency it is averred that the dispossession occurred on the 21st January 2022. Counsel did not say that the date on the certificate of urgency is as a result of a typographical error. I juxtapose this with 1st defendant's contention that a company called Lucky Heather entered the mine on the 6th January 2022. I take view that this does not give credence to applicant's version.

The resolution appointing Muzamba to depose to any affidavit and sign any documents on behalf of the applicant was signed on the 20th January 2022. What this means, going by the

founding affidavit and the certificate of urgency is that the resolution was signed a day before the events complained of actually occurred, i.e. before the cause of action arose. Again, this does not give credence to applicant's case at all.

Applicant's founding affidavit is remarkably very brief. There are twelve paragraphs in all, and *paragraphs* one to eight give a background to the application. *Paragraphs* eleven and twelve highlight the applicable legal principles. It is only paragraphs nine and ten that deal with facts of the alleged spoliation and I reproduce them in full:

Para. 9

Applicant has been in undisturbed possession of Happy valley Mine C since February 2020.

Para. 10

On the 21st January 2022, 1st respondent and his assignees and agents in forcefully (sic) and unlawfully evicted applicant's representatives and work force from the mining claims in question without the consent of the applicant.

These averments are so brief and devoid of detail that one remains unsure of what exactly happened. There is an attempt in the answering affidavit to say "1st respondent came to the mine on the 19th February telling us that he is now in charge of the mine. He went on to cut the locks in the concentration room, after I refused to open for him." Another established principle of our law is that an applicant's cause stands or falls on his founding affidavit and not in an answering affidavit. See: *Chiangwa & Others v Apostolic Faith Mission in Zimbabwe & Others SC 67/21*. The *mandament van spolie* is an extraordinary and robust remedy. I take the view that a founding affidavit must give a true and detailed factual basis for the application. Especially in a case like this one where applicant seeks a final order and the application is opposed. There are two versions before court and applicant had not provided a detailed factual basis for this court to take a robust approach and accept its version and reject that of the 1st respondent.

It is trite that the *onus* rests with the applicant and is on a balance of probabilities given that the relief is final in effect. See: *Swimming Pool & Underwater Repair (Private) Limited & Ors v Rushwaya & Another SC 32/12*. On the basis of the factual material placed before court, I cannot find that applicant has established facts sufficient to persuade the court to rule in its favour. I cannot find that applicant has proved its case on a balance of probabilities. I cannot find that it is entitled to the relief sought. It is on this basis that this application must fail.

Each side sought costs against the other on a legal practitioner and client scale. It is trite that the issue of costs falls within the discretion of the court. In exercising this discretion however, the court is guided by a number of settled principles which all support the achieving of fairness and justice between the parties. The general rule is that costs follow the cause. However, *in casu*, I take the view that the 1st respondent is not entitled to costs of suit. I say so because the conduct of this respondent and its legal practitioners in holding a meeting and securing an affidavit from applicant's witness is appalling. It is unethical conduct. It is for this reason that notwithstanding the dismissal of this application I deny 1st respondent costs.

In the result, I make the following order:

This application be and is hereby dismissed with no order as to costs.

Mathonsi Ncube Law Chambers applicant's legal practitioners
Macharaga law Chambers 1st respondent's legal practitioners