

EXMIN SYNDICATE

Versus

LUKE DUBE

And

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

And

**THE OFFICER IN CHARGE ZIMBABWE REPUBLIC
POLICE – FILABUSI, N.O**

And

**THE OFFICER COMMANDING ZIMBABWE REPUBLIC
POLICE, MATABELELAND SOUTH, N.O.**

And

THE SHERIFF OF ZIMBABWE, N.O.

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 24 MARCH AND 31 MARCH 2022

Urgent Chamber Application - Spoliation

S Huni, for the applicant

D. Dube, for the 1st respondent

Ms N. Dube with S. Jukwa, for the 3rd and 4th respondents

MAKONESE J: This is an application for spoliation. 1st respondent has opposed the application and raised several preliminary objections which if sustained would be dispositive of the matter.

The order sought by the applicant is in the following terms:

“IT IS ORDERED THAT:

1. The first respondent and all persons claiming occupation, rights, title and interest through him, shall remove or cause the removal of themselves and all such persons occupying the mining claims Tigress held under registration number 10098BM and as identified by the 2nd respondent.
2. Failing such removal, the Sheriff of this Honourable Court (5th respondent) be and is hereby authorised and directed to evict 1st respondent and all persons claiming occupation, rights, title and interest through and under him from the mining claim being Tigress number 10098BM as identified by the 2nd respondent.

3. 2nd respondent shall identify the mining location Tigress number 10098 BM for 5th respondent to enable him to serve and execute this order on the correct mining location.
4. The 3rd and 4th respondents be and are hereby directed to provide an escort and any other physical assistance necessary for the 5th respondent during the service and execution of this order.
5. The 1st respondent and all those claiming with or through them are barred from carrying out any mining activities on the mining claim Tigress registration number 10098 BM.
6. The 1st respondent is ordered to pay the costs of suit on an attorney and client scale.”

FACTUAL BACKGROUND

The applicant and 1st respondent are engaged in litigation in various cases under case numbers HC 261/21, HC 274/21, HC 826/21, HC 884/21, HC 1024/21, HC 127/22, HC 127/22, HC 131/22, HC 190/22, HC 373/22, HC 325/22. In the midst of this flurry of cases filed in this court, applicants have filed this Urgent Chamber Application for a spoliation order. 1st respondent has been conducting mining operations on claims situate in Insiza District, Matebeleland South, on claims known as Lion West 25, registration number 9133BM and extracting gold ore from these claims since 2005 when the claim was registered with the Ministry of Mines. It is not disputed that applicant is the holder of mining claims known as Tigress, registration number 10098BM. The two mining locations are adjacent to

each other. Sometime in February 2022 a dispute arose between applicant and 1st respondent. 1st respondent insisted that he was carrying out mining operations on his mining claims, Lion West 25 for the past 17 years without interruption and that there was no encroachment. On 8th March 2022, the 2nd respondent wrote to the parties indicating that they had adjudicated on the dispute and made a finding that 1st respondent had encroached onto applicant's mining claims. 1st respondent has taken the matter to this Honourable Court. 2nd respondent advised that applicant should seek an interdict from this court since the matter was pending in this court. Under case number HC 325/22, applicant has instituted contempt of court proceedings in respect of an earlier order of this court. The matter is still pending. Under case number HC 373/22 1st respondent instituted a Court Application for a Declaratory Order seeking an order declaring that its title to Lion West 25 is valid and lawful. This matter is pending in this court. Applicant contends that he was lawfully handed possession of the mining claims in issue by the Deputy Sheriff on 1st February 2022. Applicant further contends that on 16th February 2022 the 1st respondent recruited a mob of 15 to 20 individuals who forcibly removed the applicant from its mining claims. This version is disputed by the 1st respondent who contends that under case number HC 190/2022 he obtained an order to evict persons who had violently taken over his mining claims. 1st respondent contends that he carried out the removal of invaders on his claims in accordance with a court order obtained in this court. 1st respondent denies that he dispossessed applicant's employees of the (Tigress) mining claims. In response to the specific allegations of spoliation, 1st respondent denies that he despoiled the applicant and contends that he is still operating from the same mining location he has been working on since 2005. In any event 1st respondent avers that it is trite law that a

holder of Base metal registration certificates such as the applicant cannot seek to interfere with exclusive gold mining rights held by the applicant. In that regard, 1st respondent points out that he has filed an application for a declaratur which is currently pending under case number HC 373/2022.

Before dealing with the merits of the application it is necessary to address the preliminary points raised by the 1st respondent.

POINTS IN LIMINE

WHETHER OR NOT APPLICANT HAS USED THE WRONG PROCEDURE

1st respondent contends that it is procedurally incorrect for applicant who has instituted contempt proceedings under case number HC 325/22 which are pending before this court to turn around in the same breath and allege and pursue a spoliation order. 1st respondent argues that the correct procedure in the circumstances would have been to file an Urgent Chamber Application to have the proceedings heard on an urgent basis instead of filing an Urgent Chamber Application for a Spoliation order. In response applicant states that there is nothing precluding it from proceeding with spoliation proceedings. It is argued that the proceedings are mutually exclusive. It is my view that whilst there may be nothing preventing the applicants from proceeding with contempt of court proceedings at the same time pursuing an order for spoliation this seems to me to be inundating this court with a multiplicity of actions. The applicant claims that this matter is urgent. It has not escaped my notice that contempt of court proceedings were initiated in this court on the 23rd of February

2022. 1st respondent filed its Notice of Opposition on the 25th of February 2022. The applicant has not prosecuted that matter to date. On 14th March 2022, more than two weeks later, this urgent application for spoliation was filed. No explanation is given by the applicant why the contempt of court proceedings were not pursued. This does not render the current proceedings a nullity. The court does not, however, encourage the filing of multiple actions concerning the same dispute. I would not uphold this point *in limine*.

WHETHER OR NOT THERE ARE MATERIAL DISPUTES OF FACT

1st respondent contends that there are material disputes of fact which cannot be resolved on the papers. 1st respondent states that he is in occupation of its own mining claim namely Lion West 25, which mining location is exclusive from Tigress Mine registration number 10098BM and Lion West 2 Mine registration number 9133BM. Further, 1st respondent contends that he has gold mining rights over the area which is mutually exclusive to applicant's nickel rights, which are base mineral rights. Applicant denies that there are material disputes of fact. Applicant alleges that 1st respondent makes bare denials regarding the alleged spoliation. Applicant alleges that the averment that declaratory proceedings have been sought by the 1st respondent does not create disputes of fact for the purposes of the relief sought. Further, applicant avers that the court is not being asked to look into the substantive rights of the parties but to restore the *status quo ante* until the matters relating to the substantive rights of the parties which are pending have been determined. This assertion by the applicants is a tacit admission that there are disputes related to the parties' competing claims. I am alive to the fact that in matters of spoliation the court is required to determine

whether one party has been despoiled. The requirements for spoliation are trite. The court must be satisfied that the applicant was in peaceful possession and that he has been despoiled. Therein lies the problem. On the facts of this case which are common cause, the 1st respondent has been operating on the said mining location for the past 17 years. 1st respondent claims that he has not despoiled the applicant. He denies using force and violence as alleged by the applicant.

What a dispute of fact entails was well articulated in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 H where the court held that:

“A material dispute of fact arises when material facts alleged 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.”

The matter was dealt with by MALABA CJ in *Riozim (Pvt) Ltd v Falcon Resources (Pvt) Ltd and Anor* SC 28-22, where the learned Judge stated at page 7 of the cyclostyled judgment that:-

“... the mere allegation of a possible dispute of fact is not conclusive of its existence. From decided cases, it is evident that a dispute of fact arises where the court is left in a state of reasonable doubt as to which course to take in resolving the dispute matter without further evidence being led.”

It is my view that there are no disputes of fact in this matter which are not capable of being resolved on the papers without adducing *viva voce* evidence. This point *in limine* cannot succeed.

INCOMPETENT ORDER SOUGHT

1st respondent contends that the order sought by the applicant is incompetent in view of the fact that it seeks to smuggle in a dispute through an order couched as one for spoliation by roping in 2nd respondent to identify the mining location, Tigress registration number 10098BM for 5th respondent to enable him to serve and execute his order on the correct mining location. 1st respondent notes that the matters filed of record and pending before this court HC 373/22 and HC 325/22 are premised on the need for the proper identification of the correct mining locations of the disputed mining claims together with the disputed mining rights of the parties concerned being determined.

1st respondent avers that the premature pointing out of mining locations renders the pending matters filed of record *brutum fulmen*. Applicant denies that the order sought is incompetent. Further, applicant alleges that 2nd respondent has already determined the boundaries of the respective mining locations. Applicant avers that 1st respondent has already invaded applicant's mining location. There can be no doubt that the order sought in paragraph 3 is evidently incompetent for a number of reasons. 1st respondent maintains that he is operating from his mining location at Lion West 25. He has never conceded that he is on Tigress Mine. The pointing out of the boundaries as proposed by the applicants gives credence to the fact that the boundaries of the respective mining locations has not been

properly established. There is merit in the point *in limine*. The basis of an order for a *mandamante van spolie* is to restore the applicant to property that has been despoiled. To suggest in paragraph 3 of the Draft order that:-

“2nd respondent shall identify the mining location known as Tigress number 10098BM for 5th respondent to enable him to serve and execute the order on the correct mining location.”, leads credence to the inference that the mining claim to be restored to the applicant is not easily ascertained. 1st respondent’s assertion is that he is working on his correct mining location. If the Draft Order suggests, as it does, in paragraph 3 that 2nd respondent must point out the “correct” mining location, the competency of the order for spoliation in those circumstances, is put into issue. To that extent the point *in limine* raised by the 1st respondent does have merit and is upheld. This does not however, dispose of the matter.

FATALLY DEFECTIVE DRAFT ORDER

1st respondent avers that the order sought by applicant is fatally defective and cannot be enforced in view of the fact that it is established law that a holder of a Base metal Registration Certificate such as the applicant who holds mining title in Tigress Registration number 10098BM cannot seek to interfere with existing gold mining rights held by 1st respondent. 1st respondent alleges that the rights enjoyed by the applicant and 1st respondent in respect of their registration certificates are mutually exclusive to the parties. 1st respondent contends that applicant has no authority or recognisable legal mining rights to mine and extract gold from 1st respondent’s mining location. 1st respondent forcefully argues that the

order sought is fatally defective as it seeks the eviction of a gold miner and the elevation of base metal miners over exclusive gold mining rights. 1st respondent avers that this is a contentious matter in which the court is tasked with making a finding under case number HC 373/22.

Applicant's response to this point *in limine* is that in spoliation proceedings the court does not concern itself with the substantive rights of the parties. Spoliation proceedings are concerned with the restoration of the parties to the *status quo ante*. See *Blue Rangers Estates (Pvt) Ltd v Muduvuri* SC 29-09. This point *in limine* was not well taken as it seeks to drag the court into the substantive issues to be decided by the court at a future date.

MATERIAL NON-DISCLOSURE OF FACTS

1st respondent avers that the applicant conveniently neglected to disclose that there are pending matters before this court which revolve around the same dispute concerning the nature of the rights enjoyed by the applicant and 1st respondent. Further 1st respondent points out that the pending matters seek to clarify the nature of the rights of the parties and the corresponding rights of the parties. 1st respondent avers that the non-disclosure is aimed at bungling together, smuggling and compressing all these pending matters into this present matter which is prejudicial to 1st respondent. In essence, 1st respondent alleges that applicant has not disclosed that case numbers HC 373/22 and HC 325/22 are matters whose finalization would bring finality to the dispute between the parties.

In response to this preliminary objection, applicant states that applicant makes extensive reference to case number HC 373/22 in paragraph 25.5 of its Founding Affidavit. In any event, the matter is incorporated by reference on the face of the application. In paragraph 25.5 and 26 of its Founding Affidavit, reference is made to case number HC 325/22 as referenced on the face of the application.

In general, the court is always entitled to make reference to its own records and proceedings and to take note of their contents. In this case, I have had the occasion to retrieve and examine the cross-referenced files to ensure that I am alive to all the disputes before the court related to this matter. This approach was recommended in *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC).

The point *in limine* regarding non-disclosure is a non-issue as the applicant has made reference to the matters currently before this court.

URGENCY

Spoliation proceedings are by their very nature urgent. An order for a *mandamante van spolie* seeks the restoration of property that has been despoiled and the restoration of the *status quo ante*.

1st respondent avers that applicant did not treat this matter with the urgency that it deserves. It is stated by 1st respondent that the Certificate of Urgency is defective in that it does not assist the court as far as formulating an opinion on whether or not the matter is urgent. The Certificate of Urgency does not state when the need to act arose which is the

point of departure in ascertaining the urgency of the matter. It is alleged that applicant failed to act from the date of the purported “spoliation” being the 16th of February 2022. Applicant only approached this court a month later, on an urgent basis. Applicant instead chose to file a Chamber Application for Contempt of Court under case number HC 325/22 on 23rd February 2022. This matter has not been set down for hearing. Opposing papers have been filed in that matter but the applicant has not taken steps to have the matter concluded.

It would seem that this matter was filed on an urgent basis as an afterthought. The law on urgency has been well established in *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H).

I am satisfied, that applicant did not sit on its laurels in seeking to enforce its perceived rights. Applicant treated the matter with urgency at all times. The urgency envisaged by the rules is met by the averments in the Certificate of Urgency and the Founding Affidavit. This point *in limine* is dismissed.

The point *in limine* which I upheld deals with the competency of paragraph 3 of the Draft Order. It does not affect the application in its entirety. I must therefore proceed to determine this matter on the merits.

THE MERITS

WHETHER THE APPLICANT HAS SATISFIED THE REQUIREMENTS FOR SPOLIATION

The issue to be decided is whether or not the requirements of a spoliation have been satisfied. *Neinaber v Stucky* 1946 AD 1049 is authority for the principle that the right to the restoration of possession of the property must be established as a clear right and not a *prima facie* right before spoliation can be made. The right must not be open to doubt. At page 1053-4 GREENBERG JA said:-

“The learned Judge in the court below followed what was said by BRISTOWE J in Burnham v Newneyer (1917 T.P.D 630 at p 633) viz: “where the applicant asks for a spoliation order he must make out not only a prima facie case, but he must prove facts necessary to justify the final order – that is that the things alleged to have been taken have been spoliated were in the possession and that they were removed from his possession forcibly or wrongfully against his consent.”

I agree with what was there said as to the cogency of proof required. Although a spoliation order does not decide what apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo ante be restored, it is to that extent a final order and the same amount of proof is required as for the granting of a final interdict and not a temporary interdict.”

In this matter what is central to this dispute is the assertion by the 1st respondent that he holds a certificate of registration for Lion West 25 mine registration number 43214. 1st respondent avers (and it is not disputed) that he holds a valid mining certificate to extract gold ore from the mining location. It is not disputed that 1st respondent has been operating

from that location for the past 17 years. Section 58 of the Mines & Minerals Act (Chapter 21:05) provides that:

“When a mining location or a secondary reef in a mining location has been registered for a period of two years it shall not be competent for any person to dispute the title in respect of such location or reef on the ground that the pegging of such location or reef was invalid or illegal or that provisions of this Act were not complied with prior to the issue of the certificate of registration.”

1st respondent denies the alleged spoliation and avers that he is mining from the area he has always operated from. 1st respondent contends that he is armed with a court order under case number HC 190/22 which gives him restoration of the mine known as Lion West 25. Applicant alleges that the order was served on certain individuals not connected to it. I am mindful of the fact that the facts disclose competing claims over the mining locations of the respective parties. In spoliation proceedings the court does not concern itself and must not delve into the substantive rights of the parties. The simple point made is that there are competing interests. The applicant does not have a clear right to an order for a *mandamante van spolie*. The alleged spoliation is denied.

In *Diana Farm (Pvt) Ltd v Madondo N.O & Anor* 1998 (2) ZLR 410 at 413 the court stated as follows:

“The law relating to the basis on which a *mandamante van spolie* will be granted is well settled. In *Davis v Davis* 1990 (2) ZLR 136 (H) at 141 ADAM J quoted with

approval the following statement by HERBSTEIN J in Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748 (C) at 753:

“two allegations must be proved, namely (a) that applicant was in peaceful and undisturbed possession of the property and (b) that the respondent deprived him of the possession of the property and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.”

The court went on to say that:

“The onus is on the applicant to prove two essential elements set out above. Past the second element is lack of consent. In Botha & Anor v Barrett 1996 (2) ZLR 73 (S) at 79-80, it was said by GUBBAY CJ:-

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

- (a) that the applicant was in peaceful and undisturbed possession of the property;*
- (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.”*

It is trite that in spoliation proceedings the lawfulness or otherwise of the possession challenged is not in issue. Spoliation simply requires the restoration of the *status quo ante*, pending the determination of the dispute between the parties.

CONCLUSION

Applicant has in my view, failed to satisfy the elements for the relief sought in that it was not shown by clear proof that it was forcibly deprived of possession of its alleged mining claim. The point was made that applicant holds certificates to base minerals and has been extracting nickel on its own claims. 1st respondent has been extracting gold ore on its mining location for close to 20 years. The mining rights of the parties are mutually exclusive. The issue for the determination of those mining rights is not before me. I do not propose to make any determination as regards those competing rights. To the extent that 1st respondent is armed with an extant order of this court which has not been set aside under case number HC 190/22 wherein Lion West 25 mining location was restored to 1st respondent, Applicant has not established a clear right for an order for a *mandamante van spolie*. An order for spoliation has the effect of a final order. Herbstien & Van Winsen “*The Civil Practice of the Supreme Court of South Africa 4 Ed* state at page 1064 that:

“A *mandamante van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in spoliation application is whether there has been a spoliation. The order that the property be restored finally settles the issue between the parties.”

In the circumstances , for the foregoing reasons, the following order is made.

1. The application be and is hereby dismissed.

2. The applicant is ordered to pay the costs of suit.

Coghlan & Welsh, applicant's legal practitioners

Mathonsi Ncube Law Chambers, 1st respondent's legal practitioners