

WISTMER INVESTMENTS (PVT) LIMITED
versus
NYASHANU MINING SYNDICATE
and
BLESSING HUNGWE
and
SYDNEY CHIDAMBO

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 25 February and 29 March, 2022

Urgent Chamber Application

S.M.Hashiti, for the applicant
K. Chimiti, for the respondent's

WAMAMBO J: The applicant through an urgent chamber application sought the following order which was granted as amended:

1. The respondents be and are ordered to allow applicant and its employees undisturbed access of the mining location being Bang 136 and Bang 137 registered number 46310 and 46311 respectively upon service of this order.
2. The respondents be and are hereby ordered not to interfere with the joint mining operations by the applicant at Mining Location Bang 136 and Bang 137 Concession registered under Registration Number 46310 and 46311 respectively
3. The respondents to pay costs of suit.

I duly gave reasons *ex tempore* for the order granted. The respondents have since lodged an appeal with the Supreme Court. Reasons for judgment have been formally requested. The reasons appear below.

The basis for the application is as follows:

The applicant entered into a joint venture mining agreement with the first respondent on 4 September 2020. The agreement forms part of the record as Annexure "B". According to the agreement applicant would contribute equipment and finance. The first respondent is a mining

consortium with certificate of registration NO. 031643 and 031644 respectively. The second and third respondents are members of the first respondent.

The parties have been operating jointly since September 2020 until 22 February 2022. On 22 February 2022 the second and third respondents visited the mine in question in the company of a group of what is referred to as hooligans. They then chased away applicant's employees from the Mine including applicant's security personnel who were safeguarding applicant's equipment at the mine. Second and third respondents sealed off the mining site and denied applicant access thereto. Applicant's representatives attempted an engagement with the respondents to no avail. Respondents confiscated the gold produced at the mine. A complaint was lodged at Mazowe Police Station by the applicant. The police advised applicant to approach the courts.

The applicant was in peaceful and undisturbed possession of the mining site since September 2020 until they were despoiled of such possession on 22 February 2022. The applicant's equipment was left unattended at the mining site while applicant's personnel were violently chased away by the respondents. The respondents took the law into their own hands and had no court order authorizing their actions.

Respondents opposed the application. Respondents filed an opposing affidavit deposed to by second respondent. Second respondent avers as follows:-

Along with third respondents assistance he coopted Moly Shoniwa and her son resulting in the registration of a mining claim. Mining commenced on a small scale and second respondent was effectively nominated as the accredited agent of the first respondent who held responsibility of communication and signing documents on behalf of the mining syndicate. On 10 February after convening a meeting he sought clarity on the status and relationship of applicant and first respondent. Third respondent produced a contract he signed on behalf of the syndicate. The syndicate members voted against the contract. Minutes of the meeting reflect inter alia as follows:-

“It was resolved that the syndicate cannot ratify the contract. The syndicate do not recognize the contract as a valid contract entered by duly authorized person to enter into the contract by the syndicate.....”

“It was resolved that the accredited agent should write to *WISTMER INVESTMENTYS PVT LTD* and inform them to collect their compressor, generator and round mills. Their personnel must also move out from the mining claims.”

The applicant entered into a legally void joint venture agreement with first respondent. The applicant voluntarily left the mining site upon the realization that no contract existed between her and the respondents. There was no harassment or dispossession of the applicant. There was no

meeting of the parties at Mazowe Police Station nor was there any confiscation of gold produced at the mining site.

Before me respondents averred that the matter is not urgent. I found that the matter is urgent because the alleged dispossession occurred on 22 February 2022 and this application was lodged on 25 February 2022. I also found that applicant acted when the need to act arose and also that the circumstances considered reflected a spoliation application which in the instant case called for an urgent intervention.

For the applicant to prove that he was despoiled he needed to prove that he was in peaceful and undisturbed possession of the mine and that he was unlawfully deprived of such possession. See *S. Hwatiringa v Patience Tavaruva HMA 27/21, Kuma Construction (Private) Limited v Cold Comfort Cooperative and Others 1999(2) ZLR 19 (S)*.

It is common cause that the applicant has had possession of the mining site pursuant to a joint agreement since September 2020. The resolutions by the respondents resulted in the eventual ouster of applicant. Applicant avers that he was forcibly ousted. Respondents aver that applicant left of her own accord.

I don't believe respondent's version. The reasons are that even according to the respondents a decision was taken to have applicant move out of the mining site. A decision was also taken that the applicant should collect their mining equipment. That the mining equipment still remains at the mining site gives credence to applicant's version that he was forcibly ejected. There is no reason why applicant would leave her equipment unattended if she left voluntarily. The probabilities point to a sudden and forced departure. I thus accept applicant's averments that her employees were forcibly despoiled.

The issue of whether or not the agreement "Annexure B" is null and void is an issue for another day, another fora. Issues of ownership are not relevant to spoliation proceedings. The respondents chose to enter into a contract with applicant through third respondent, chose to cancel it and chose to oust applicant. All this without a court order.

I find that even by the admission of second respondent applicant has been in occupation of the mining site since September 2020. I find that applicant was in peaceful and undisturbed possession.

I have already found that respondents are not telling the truth when they allege that applicant left the mining site of his own accord. Rather that he was forcibly ejected by the respondents.

A spoliation order seeks to restore the status quo. In this case applicant should be placed back at the mine where he was operating before being despoiled in *Oliver Masomera v Savanna Africa Holdings (under Provisional Judicial Management v Tamani Investments Private Limited and Others HH 83-88)* TAGU J at page 8 said:

“Assuming but not conceding that there was a tribute agreement that the second respondent was enforcing in an application for spoliation it is trite that the court does not concern itself with ownerships. At law even a thief may be despoiled and is protected by the law once the thief has been despoiled without due process. The duty of the court is merely to restore the status quo ante where one has taken the law into one’s own hands.”

For the above reasons I granted the order as regurgitated earlier.

Rubaya and Chatambudza, applicant legal practitioners
Machaya and Associates, respondents’ legal practitioners.