

TEBEKWE SANDS (PVT) LTD

Versus

**MATOBVU INVESTMENTS (PVT) LTD
(Represented by Smelly Dube)**

And

**OFFICER COMMANDING MIDLANDS PROVINCE
(In her official capacity)**

And

**PROVINCIAL MINING DIRECTOR MIDLANDS PROVINCE
(In his official capacity)**

IN THE HIGH COURT OF ZIMBABWE

BERE J

BULAWAYO 23 MARCH 2016; 6 APRIL 2016; 2 NOVEMBER 2016
& 2 NOVEMBER 2017

Urgent Chamber Application

Ms R. Chimango, for the applicant

H. Garikayi, for the 1st respondent

L. Musika, for the 3rd respondent

BERE J: After hearing arguments I this case I granted the following order.

“Interim relief granted

Pending the return day, it is hereby ordered that:

1. The applicant and those claiming possession through it is hereby declared to have peaceful and undisturbed possession of Tebekwe Mine.
2. The 1st and 2nd respondents and those acting through them are hereby ordered to restore applicant status *quo ante* prior to this spoliation such that applicant is returned its peaceful, occupation and use of Tebekwe Mine.
3. The 2nd respondent and/or those acting through her orders that withdrawal of the armed Zimbabwe Republic Police (ZRP) force at Tebekwe Mine henceforth.
4. The 1st respondent and or those acting through her return all the keys to Tebekwe Mine represented by the deponent and allow the applicant to run its operations without interference.”

At the time I granted this order I gave an *ex tempore* judgment. I have now been requested to provide my full reasons for the order that I gave. Here they are.

This application was brought at the backdrop of the forced closure of the applicant's mine in which the 1st respondent as director of 1st respondent was alleged to have played a pivotal role.

In his founding affidavit, the deponent to the applicant, Michael George Hughes, had alleged that he was the director of the applicant and that the deponent to the 1st respondent, one Smelly Dube was also the director of the 1st respondent.

The applicant alleged that on 11 March 2016 1st respondent through its director Smelly Dube in the company of armed police officers (colloquially referred to as "the black boots") had in typical military style invaded the applicant's company premises and closed its operations. The deponent alleged that when this happened Smelly Dube was literally leading the operation and that it was her who took all the company keys and locked out its employees out. The deponent further alleged that Smelly Dube had proceeded to take all the keys to the applicant's stamp mill, barrel rooms, gold extraction, gold holding, and gold concentrate security rooms and ordered the applicant to stop all its operations.

The allegations went on to say that the 1st respondent who was being openly supported by the 2nd respondent was now illegally looting the gold resources at the applicant's mine.

The deponent also stated in his founding affidavit that the 1st respondent was now running the operations of the applicant with full protection of the 2nd respondent who has placed her officers at the mine to ensure that the applicant would not have access to same.

The deponent to the 1st respondent, in her notice of opposition filed in this court on 23 March 2016, while admitting to the existence of a tribute agreement at the applicant mine denied any wrong doing and said her hands were clean. To strengthen her position, the deponent annexed to her opposing affidavit a letter dated 11 March 2016 from the Ministry of Mines and Mining Development as the document which brought about the closure of the applicant's mine.

The deponent further stated that she was also grieving over the closure of the mine, as she like the applicant, was also suffering the same fate.

The 2nd respondent, Abigail Moyo the Officer Commanding Midlands Province filed her notice of opposition. She too denied the 1st deponent's claims and stated as follows"

"... Police were deployed at the said mine solely for the purposes of maintaining law and order. This came about after the intervention of the office of the Provincial mining Director, Midlands who issued a directive that all mining operations be stopped for failure to comply with various provisions of the Mines and Mineral Act (Chapter 21:05). A letter to this effect dated 12/03/16 was received and is attached hereto as annexure O1. Further to that when our officers were conducting regular checks they discovered that there were illegal gold miners at the mining site which also prompted the police to deploy its manpower to prevent illegal activities. Therefore the assertion by applicant that the police are now looting the mine for gold are not supported by facts on the ground.

When the matter was being argued, I realised that there was need to rope in the Ministry of Mines and Mining Development and I accordingly directed that they be served with the applicant's urgent application and file their response which they did.

The 3rd respondent represented by Mazemo Malcom filed its notice of opposition through the Civil Division of the Attorney General's office on 5 April 2017.

The 3rd respondent pleaded total innocence and stated *inter alia* as follows:

"Officers from my office conducted a routine inspection at Tebekwe Mine on 11 March 2016 for compliance with mining regulations. As a result of that inspection, the officers noted some violations of both the Mines and Minerals Act (Chapter 21:05) and Regulations and ordered the suspension of all mining operations. The suspension order was communicated to Mr G. Hughes who was present at the time of inspection through a handwritten letter signed by officers from my office attached hereto as annexure 'A'."

Annexure 'A' was a hand scribbled letter dated 11 March 2016 signed by T.W. Mangwengwende, K. Munatswa and C. Mazuru, all officers from the 3rd respondent. The letter outlined what the three officers stated were the results of their visit to the applicant's mine. The letter listed 12 breaches against the applicant which according to the officers led to them taking

the drastic action of closing the applicant's mine, assisted by the 2nd respondent without any court order.

Applicant's submissions

Ms R. Chimango who appeared for the applicant submitted that the applicant's mine had been closed in circumstances as described by his client Mr Hughes in his founding affidavit. She claimed that her client had not been furnished with any written correspondence as alluded to by both the 2nd and 3rd respondents. She maintained that the handwritten letter had not been served on her client before closure of the mine. Counsel further maintained that those documents were written after the closure in a desperate effort to sanitize the closure of the mine. Counsel put up a strong argument that if her client had been served with same as claimed by the 2nd and 3rd respondents the copy signed by the applicant's representative should have been availed to court. This submission made sense.

Counsel for the applicant further contended that there was no court order which authorized the closure of her client's mine which had prior to that closure enjoyed peaceful and undisturbed lawful operation.

Mr Garikayi, for the 1st respondent put up a brave argument and maintained that his client the 1st respondent was innocent and had done nothing wrong and played no active part in the closure of the applicant's company.

Counsel also sided with and sang from the same hymn book with the 3rd respondent by suggesting that it was the 3rd respondent's officials who initiated the closure of the applicant's mine.

Mr L. Musika who appeared for the 2nd and 3rd respondents sought to project the 2nd respondent as an institution that was merely carrying out its normal functions in furtherance of the objectives of the 3rd respondent.

The legal position

Perhaps, before I make an attempt to assess the submission made in this case it is imperative that I set out the legal framework that governs issues of spoliation as spelt out in the applicant's founding affidavit.

It is now settled that an applicant who desires a spoliation remedy or what is often referred to as *mandamen van spolie* will have to demonstrate that prior to the alleged deprivation, the applicant was in peaceful and undisturbed possession of the property or item dispossessed of and that the applicant did not consent to the deprivation. See *Davis v Davies*¹; *Botha and Another v Barrett*² and *Manga v Manga*.³

In *Manga vs Manga*, the Supreme Court did recognize that even where one of the two joint possessors of a thing illegally took exclusive possession of that thing a *mandament van spolie* would lie at the instance of the other deprived possessor in the same way as if the applicant had enjoyed exclusive possession.

Assessment

The applicant's application in this case was simply that through collusion the 1st, 2nd and 3rd respondents had wrongfully and unlawfully evicted or kicked out the applicant out of its property.

The affidavit of the 2nd and 3rd respondents did not bring anything new to this case but merely confirmed that the respondents had through combined operation forcibly closed the applicant's mine. As regards the involvement of the 1st respondent, the applicant in its founding

¹ 1990 (2) ZLR 136 (HS)

² 1996 (2) ZLR 73 (S)

³ 1991 (2) ZLR 251 (SC)

affidavit made specific averments against the 1st respondent, *viz*, that the 1st respondent was leading the onslaught against the applicant's closure and that it was her who forcibly took the keys from the applicant's company employees. Other than providing a bare denial and attempting to shift the blame to the 2nd and 3rd respondents, (who appear to have been roped in to sanitize the unlawful applicant's closure), I did not hear the 1st respondent controverting the specific allegations made against her. She made an unimpressive attempt of shedding crocodile tears in her opposing affidavit by suggesting that she was also affected by the closure of the applicant. The court could not be detained by her concocted story for if indeed she had nothing to do with the closure of the applicant company, there would have been no need for her to have physically taken the company keys from the applicant's employees. She could not explain her presence at the scene of the alleged eviction.

I do not believe, as argued by *Mr Musika* for the 3rd respondent that there are any provisions in the Mines and Minerals Act as well as the allied regulations which give its officials the powers to act as complainants, prosecutors and judges at the same time. Such powers if ever they exist would be a serious threat to the Constitution of this country which recognizes the separation of powers.

That the closure of the applicant was well planned by the three respondents is further demonstrated by the desperation in creating and back-dating handwritten documents which the respondents sought to poison the court's mind with by suggesting were the documents which were used to close the applicant's operations.

The applicant maintained throughout that contrary to the position of the respondents no written document was ever given to it before its forced closure. In a desperate effort to counter the applicant's position all the respondents sought to rely on an evidently and hurriedly handwritten letter from the 3rd respondent's officers. The fallacy of the respondent's arguments in trying to project the letter as a genuine document is demonstrated by the fact that whereas its date of writing was given as 11 March 2016 (obviously slotted in to try and coincide with the date the applicant was closed), the manufacturer of that letter forgot to adjust its date of issue and

put in the 22nd of March 2016. It is not unusual that when people are determined to mislead, they forget to cover their tracks. This letter exposed the respondents.

Even if it were to be argued by the 1st respondent that she had an interest in the applicant's operations, this would not assist her in the light of my findings on her role in the closure of the applicant. Given the authority of *Manga vs Manga (supra)*, she cannot escape the spoliation remedy desired by the applicant.

In conclusion, it is really a pity that at a time when this country is desirous of maintaining the few entities that remain active, operating, there are people like the three respondents who do not see such importance. They are busy conspiring to destroy such operations.

It was for these reasons that I granted the order and subsequently confirmed same on 12 May 2016.

Mugwagwa & Partners, applicant's legal practitioner
Garikayi & Company, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd and 3rd respondents' legal practitioners