

ELLIOT MLALAZI

Versus

ERNEST GREEN

And

**OFFICER IN CHARGE,
ZIMBABWE REPUBLIC POLICE, INYATHI**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 13 & 16 NOVEMBER 2017

Urgent Chamber Application

S. Nkomo for the applicant
N. Mangena for 1st respondent

MAKONESE J: It is untenable for this court to grant interim relief whose effect would be to sanction an illegality. In recent times, this court has been inundated with claims revolving around mining disputes. The courts have to exercise extreme care in granting orders that may “innocently” appear as orders for spoliation, when in fact the applicant has not even established a *prima facie* right in terms of the law.

The applicant filed an application under a certificate of urgency on the 8th November 2017. An amended provisional order filed on the date of the hearing of this matter sought the following order:

“Interim relief granted

Pending the confirmation or discharge of this provisional order, the applicant is granted the following relief:

1. Applicant be and is hereby restored possession of Cottage 5 Mine, Inyathi.
2. The applicant be and is hereby ordered to continue lawful mining operations at Cottage 5 Mine, Inyathi.
3. Respondent or any officer at 2nd respondent’s station be and are hereby ordered not to deny applicant access to Cottage 5 Mine, Inyathi.

Terms of final order sought

1. The 1st and 2nd respondents be and are hereby permanently interdicted from unlawful interfering in any manner with applicant's mining operations at Cottage 5 Mine, Inyathi.
2. 1st respondent to pay costs of suit on an attorney – client scale.”

Factual background

Applicant avers that on the 9th June 2017 he purchased Cottage 5 Mine, Inyathi from one Thadeus Ndawana of Rook Syndicate. Applicant states that he immediately took possession of the mine and that he has been in undisturbed possession of the mine since then. Applicant has tendered a handwritten agreement of sale attesting to the agreement of sale. In terms of the agreement a deposit of US\$10 000, was paid to the seller leaving a balance of US\$4 000 to be paid on an unspecified date. Thadeus Ndawana died on the 2nd of November 2017. On 1st November 2017 1st respondent, who was in the company of police officers from Inyathi police station descended on applicant's mining location and demanded that he produces documentation and “paper work” to prove his claims to the mine. The applicant conceded at the hearing of this matter that he had not secured the certificates of registration because there were outstanding amounts to be paid to the Mines Department. In other words, the concession by the applicant is to the effect that he does not have the relevant papers to work upon the claims. Applicant's position is that he was in possession of these claims and that he has been despoiled of possession. That is the applicant's version. The 1st respondent, on the other hand avers that he purchased the mining claims in dispute from the Rook Syndicate which comprised the late Thadeus Ndawana, Nondulo Khono and Sabelo Sibanda. This fact is confirmed by the supporting affidavit of Lucy Ngwenya , annexed to applicant's founding affidavit. The deponent Lucy Ngwenya states in paragraph 6 as follows:

“The said mine is registered under Thadeus Ndawana, Nondalo Kona and Sabelo Sibanda trading as Rook Syndicate. However, the latter decided to leave the business and my late husband was the only one who was operating it at the time he sold it to applicant.”

1st respondent's version is that although he has been sued in his personal capacity, his involvement in the matter has been for and on behalf of Tapiwa Mining Syndicate. 1st respondent avers that the mining claims belong to the syndicate. A letter dated 23 September 2011 indicates that Sabelo Sibanda, the seller, consented to the sale of the mining claims to the syndicate. A certificate of registration dated 6th December 2007 reflects that the registered holder of the claims is Tapiwa Mining Syndicate. Further, an inspection certificate issued in terms of section 202 of the Mines and Minerals Act (Chapter 21:05) indicates that the mining claims belong to Tapiwa Mining Syndicate. A letter dated 9th November 2017 addressed to the ZRP at Inyathi, by the Provincial Mining Director for Matabeleland North is in the following terms.

“Re: Clarification of ownership of Cottage 5 and Cottage 6 Reg numbers 44886 and 44887”

Cottage 5 and Cottage 6 were transferred from Rook Syndicate to Tapiwa Syndicate (Ernest Green and Timothy Green John Shultz) on the 6th of September 2011 and both claims are up to date.

*J. Moyo
Provincial Mining Director Matabeleland North”*

1st respondent contends that in early November 2017 he made a report at the Police Minerals Unit at Inyathi concerning illegal mining activities at the mining location in dispute. 1st respondent avers that upon the report being made, applicant and all those at the mining location were instructed to cease their mining operations forthwith until such time as they could produce relevant licencing papers and certificates of registration. It is clear that applicant's mining operations are not supported by the existing registration certificates at the mining office. On the version of the 1st respondent, applicant was not despoiled of possession but was ordered to cease operations pending the production of the relevant documents. This is the background to this application. The question for determination by this court is whether the applicant has met the requirements for the grant of an interim interdict.

Points in limine

The first preliminary point raised by the 1st respondent is that the applicant is seeking an order to perpetuate illegal mining activities under the guise of a spoliation order. The applicant conceded that all the documentation placed before the court indicates that ownership of the mining claims belongs to Tapiwa Mining Syndicate. Applicant then makes the suggestion that while that may be correct, he is nonetheless entitled to an order for spoliation. Applicant made the startling proposition that even if the court finds that his operations are illegal, he is entitled to a spoliation order. In a sense, the applicant concedes that Thadeus Ndawana may have sold the claims clandestinely without the knowledge of the syndicate. Applicant however, urges the court to turn a blind eye to the fact the mining activities being undertaken by the applicant are clearly illegal. The mining operations are being conducted outside the mining laws of the country. Put differently, the applicant seeks to persuade this court not only to condone an illegality but to sanction an illegal act. This, regrettably, is not in accordance with the notions of natural justice. If the court were to grant the order sought this would be tantamount to allowing an illegal miner to continue with his illegal activities. By its nature, gold is finite resource capable of depletion fairly quickly. It is not possible to replace the gold ore extracted from underground. On this point alone, the court could dispose of the matter as the order sought has the effect of sanctioning an illegal act. This court cannot sanction an illegal act.

The second preliminary point raised by the 1st respondent is that spoliation is concerned with possession not activities on the mining location. Applicant is seeking an order of this court to authorize it to continue its illegal mining activities without satisfying the court that the act itself is authorized by the law. The applicant has not shown that he possesses the relevant documentation to undertake mining activities on the mining location.

Thirdly, the 1st respondent makes the point that the final order sought by applicant is for a permanent interdict which, much like the interim relief sought relates to the perpetuation of illegal mining activities. On that basis both the interim relief and final relief sought are incompetent. My view as already indicated is that a court of law must refrain from granting an

order whose effect is to sanction an illegal act, under the guise of spoliation. For the sake of completeness, however, I propose to deal with the merits of the application.

Whether the requirement for an interdict have been satisfied

The two essential elements for spoliation which must be made and proved are that:

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

In this matter, there is little doubt that the applicant is aware that the mining operations he is undertaking are not legal. The peaceful possession envisaged by the law is not one that is tainted with illegality. See the remarks of KUDYA J in *Gifford v Muzire & Ors* 2007 (2) ZLR 131 (H) at page 136 where he stated the following:

“... In my view, possession that is tainted with illegality cannot be peaceful and undisturbed.”

It seems to me quite obvious that, the mining activities being undertaken by applicant are illegal. The applicant is pleading with this court to permit the perpetuation of such illegal activities. This, the court may not do. I am not satisfied that the applicant was in peaceful possession of the mining claims.

It is abundantly clear from the background of this matter that the applicant does not have a clear right with respect to his activities on the mining claims. The simple purpose for applicant's activities on the claims is to conduct illegal mining activities. The 1st respondent's rights to those mining claims are supported by the Mines Department. There is documentary evidence placed before the court to prove 1st respondent's rights in the mining claims. Generally, where an applicant fails to establish a *prima facie* right, he is not entitled to an order for spoliation.

See *ZESA Staff Pension Fund v Mashambadzi* SC 57-02 and *Watson v Gilson Enterprised (Pvt) Ltd* 1997 (2) ZLR 318.

Disposition

I conclude that the basis of this dispute is that applicant was ordered to stop mining activities until he produced legal documentation justifying his activities. Based on the papers filed of record, applicant does not have such papers because they do not exist. Applicant cannot be seeking an order to continue with these activities despite his failure to produce the relevant papers. Applicant's operations on the mining location are tainted with illegality. By his own admission, applicant concedes that 1st respondent holds the certificates of registration in respect of the mining claims.

In the result, the application has no merit. The application is hereby dismissed with costs.

Mathonsi Ncube Law Chambers, applicant's legal practitioners
Messrs Coghlan & Welsh, 1st respondent's legal practitioners