AVOSEH INVESTMENTS (PRIVATE) LIMITED

Versus

SANDAWANA MINES (PRIVATE) LIMITED

And

SHERIFF OF THE HIGH COURT – GWERU

And

THE MINISTER OF MINES & MINING DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21 December 2023 & 4 January 2024

Urgent application for a spoliation order

M. Dube, for the applicant
T. Sena, for the 1st respondent
S. Jukwa, for the 3rd respondent

DUBE-BANDA J:

[1] This is an urgent application for a spoliation order. The applicant seeks an order couched in the following terms:

> Terms of the final order sought
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> i. The 1st respondent be and is hereby permanently interdicted from interfering with the applicant's mining activities at applicant's mining claim being Sandawana AV 6 situated at Mberengwa District without a court order.
> ii. The 1st respondent to pay costs of suit at an attorney and client scale.
>
> Interim relief granted
>
> Pending determination of this application the applicant is granted the following relief:

i. The 1st respondent and all those claiming occupation through it be and is hereby ordered to forthwith vacate applicant's mining claim namely Sandawana AV6 situated at Mberengwa District upon service of this order paving way for the applicant to re-occupy the said mining claim.

ii. Failing compliance with paragraph (1) above, the 2nd respondent (with the help of Zimbabwe Republic Police if necessary) be and is hereby authorized and empowered to evict the 1st respondent from the applicant's mining claim namely Sandawana Av 6 situated at Mberengwa District.

Service of the provisional order

Service of this provisional order together with the urgent chamber application shall be effected on the respondent by a messenger in the employ of applicant's legal practitioners.

[2] The application is opposed by the first and the third respondents. The second respondent did not participate in these proceedings, and I take it that it has taken the position to abide by the decision of this court.

Background facts

[3] This application will be better understood against the background that follows. The applicant and the first respondent were involved in a dispute over a mining claim. In Case No: HCH 6627/23 (*per* MHURI J) this court sitting in Harare issued an order for the eviction of the applicant from a mining claim called Sandawana AV8. The order reads as follows:

i. The urgent court application for eviction be and is hereby granted.

ii. The respondent (it's equipment, goods, property and other chattels) and all those occupying it, be and are hereby directed and ordered to forthwith vacate the applicant's Mining Lease Number 3 and Lith 15 mining claim (Registration Number 8172 BM) and all the areas formally falling within the respondent's called Sandawana AV8 (Registration Number 17332) which was terminated by this Court under judgment HH 539/23).

iii. In the event that respondent does not comply with paragraph 2 above, the Sheriff of the High Court (together with such officers of the Zimbabwe Republic Police he

may require) be and are hereby authorised to eject the respondent aforesaid with all the persons acting on its instructions from the mining area which used to be respondent's impugned Sandawana AV8 (Registration Number 17332 BM) and the applicant's Mining Lease Number 3 and Lith 15 mining claim (Registration Number 8172 BM).

iv. The respondent shall pay the applicant's costs of suit on a legal practitioner and client scale.

[4] It is common cause that the respondent referred to in the above order (HCH 6627/23) is the applicant in this application. The Sheriff executed the court order on the 17 November 2023. In this application the applicant contends that pursuant to the order in HC 6627/23 the Sheriff evicted it from its mining claim called Sandawana AV6, which it contends is at a different location from Sandawana AV8. It is further contended that it was in peaceful and undisturbed possession of Sandawana AV6 preceding what it describes as an unlawful eviction. This application for a spoliation order is premised on the contention that the applicant was evicted from Sandawana AV6 instead of Sandawana AV8 and therefore seeks its restoration and occupation of what it calls its mining claim. It is against this background that applicant has launched this application seeking the relief mentioned above.

The submissions

[5] It is common cause that the applicant was evicted by the Sheriff of this court in the execution of a court order. It is on this basis that I asked counsel to file heads of argument to address the issue whether an eviction executed by the Sheriff in pursuance of a court order may be challenged and set aside under the common law remedy of *mandament van spolie*. In the founding affidavit the applicant avers that:

> *Para. 15.* I am advised by applicant's legal practitioners that for an application of this nature to succeed the applicant (sic) set out the following legal requirements:
> *Para. 15.1.* That it was in peaceful and undisturbed possession of the property and;
> *Para. 15.2.* That the applicant was unlawfully deprived of such dispossession.
> *Para. 16.* I am submit (*sic*) therefore that:
> *Para. 16*. The applicant was in peaceful and undisturbed possession of Sandawana AV6 before being dispossessed. The applicant has never been threatened with eviction since

assuming ownership and occupation of the said claim. The parties had a dispute but that dispute related to a different claim being Sandawana AV8 and that was the dispute adjudicated by the Harare High Court under case number HCH 6627/23.

Para. 16.1.2. The eviction of the applicant was unlawful in that same was not carried out in terms of a court order. The court order that the 1st respondent had related to eviction of the applicant from Sandawana AV8 and not Sandawana AV6.

[6] In its heads of argument, the applicant repeats the argument that it was in peaceful possession of Sandawana AV6 and it was unlawfully dispossessed by the Sheriff. It was argued that the dispossession was unlawful in that it was not in terms of a court order. It was contended further that the court order authorised and sanctioned the eviction from Sandawana AV8, however the writ was executed at Sandawana AV6. The applicant argued further that in the circumstances it was entitled to anchor its cause of action on the common law remedy of a *mandament van spolie*.

[7] Per *contra* the first respondent argued that *mandament van spolie* is a remedy available to a party that has been unlawfully deprived of possession against its will and without resort to due process. And it is not available where an extant court order is enforced by the Sheriff in the execution of a writ. It was contended further that pursuant to the service of the writ of execution, the applicant neither appealed the order sought to be executed nor applied for a stay of execution. According to the first respondent the applicant's remedy is a stay of execution, not a spoliation order. Further, the first respondent argued that this application is predicated on a lie that the Sheriff executed the eviction at a claim not specified in the court order. It attached a return of service that shows that applicant was evicted from Sandawana AV8. The first respondent argued that the remedy of *mandament van spolie* is thus not available to the applicant. The third respondent argued that an execution of a writ of eviction by the Sheriff is not tantamount to unlawful deprivation of possession, and that the remedy of *mandament van spolie* is not available to reverse a lawful execution carried out by the Sheriff.

The law and analysis

[8] *Mandament van spolie* is the wrongful deprivation of another's right of possession. It is a possessory remedy. In this jurisdiction the requirements for *mandament van spolie* are settled. Briefly, an applicant needs to prove that: (i) he was in peaceful and undisturbed possession of

the property; and (ii) that he was deprived unlawfully of such possession. See *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ at p 79 D-E; *Streamsleigh Investments (Pvt) Ltd v Autoband (Pvt) Ltd* 2014 (1) ZLR 736 (S) at p 743. The purpose of this common law remedy is to prevent people from taking the law into their own hands i.e. self-help. Critical to the remedy of spoliation is the notion of due process of law, i.e., to protect the person who apparently has a possessory right and to prevent disturbance of public peace. Due process requires that legal matters be resolved according to established rules and principles and that individuals be treated in accordance with the law.

[9] The Constitutional Court of South Africa in *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) held that;

> "The essence of the ***mandament*** van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."

[10] The Sheriff executes a writ issued by a court. The Sheriff is an officer of court and operates as the practical implementer of court decisions. He ensures that the decisions of the court are executed. The writ of execution is directed at the Sheriff and must be executed by the Sheriff. The Sheriff does not operate outside the parameters of the writ issued by the court. In *casu,* the first respondent followed due process of law and did not resort to self-help to evict the applicant. The eviction of the applicant was in pursuance of a writ of eviction lawfully obtained in terms of a court order. The court order is clear and unambiguous in that it provided that if the applicant failed to vacate the mining claim in terms of the court order, the Sheriff was given authority to do everything in his power to give effect to the order.

[11] I take the view that even if the Sheriff had made a mistake and executed the writ at Sandawana AV6 (which is not the case in *casu*), such could not anchor a cause of action premised in *mandament van spolie*. I say so because in such a case it could not be said that the Sheriff took the law into their own hands i.e. embarking on self-help. Particularly in a case like this where the party against whom the writ was issued and executed is the party cited in the

court order. The Sheriff will still be executing a writ of eviction issued by the court, *albeit* mistaken as to the premises to execute such writ. In such a case, in my view the Sheriff's eviction, on good cause shown may be suspended or stopped *via* the remedy of stay of execution. Spoliation covers a completely different jurisprudential terrain altogether, i.e., where a party resorts to self-help and takes the law into their own hands and threaten public peace. The Sheriff is not resorting to self-help, and he is not taking the law into his own hands. He is not threatening public peace. No due process is transgressed. It is for these reasons that I do not agree that the eviction executed by the Sheriff may be subjected to judicial scrutiny and oversight through the remedy of a *mandamus van spolie.* In my view the common law remedy of spoliation is not available in a case where the writ has been executed by the Sheriff. I do not accept that the remedy of spoliation can be extended to cover evictions executed by the Sheriff. It is for these reasons that this application is still-borne. There was therefore no spoliation and the application falls to fail on this basis alone.

[12] For completeness, there is a factual issue that must be considered and resolved. It is whether the eviction was executed at Sandawana AV8 or Sandawana AV6. The burden of proof is on the applicant to satisfy this court that the writ was executed at Sandawana AV6. See *Pillay v Krima* 1946 AD 946 at 952-3. Mr. *Dube* counsel for the applicant argued that the eviction was carried out at Sandawana AV6, and not Sandawana AV8 as sanctioned by this court in HCH 6627/23. On the other hand, Mr. *Sena* for the first respondent argued that the eviction was carried out at Sandawana AV8 as decreed by the court. The first respondent placed before court a copy of the return of service by the Sheriff which states thus:

> "Warrant of Ejectment enforced as instructed, in the presence of Mr Joy Magaya a Senior geologist at Sandawana Mine. The respondent and all those claiming occupation through it were successfully evicted from mining claim called Sandawana AV8. Vacant possession given to the Applicant's through Applicant's employee Mr J Magaya ID number 27-136522 T 22." (My emphasis).

[13] It is trite that the return of service by the Sheriff constitutes *prima facie* proof that service was effected in terms of the return. *Prima facie* proof implies that proof to the contrary is still possible. However, in the absence of proof to the contrary, *prima facie* proof will, generally become conclusive proof. In *Gundani v Kanyemba* 1988(1) ZLR (S) 226, the Court said:

> "But what the second series of cases I have referred to laid down, and this is important in the local context, was that the return of service of an officer of the court, whether he be the sheriff, the deputy sheriff or the messenger, was to be accepted as prima facie proof of what was stated therein, capable of being rebutted by clear and satisfactory evidence. That is a view with which I respectfully agree."

[14] The jurisprudence is that a return of service may only be rebutted by clear and satisfactory evidence. There is no underscoring that an applicant must make out its case in the founding affidavit. The requirement is that an applicant must provide adequate facts in the founding affidavit to find favor with the court. Because those are the facts which the respondent is called upon to answer. See (See *Fuyana v Moyo* SC 54-06, *Muchini v Adams & Ors* SC 47-13 and *Austerlands (Pvt) Ltd v Trade and Investment Bank Ltd & Ors* SC 80-06).

[15] In *casu* the applicant, in its founding papers has not placed clear and satisfactory evidence to gainsay the return of service. The *ipso dixit* that the writ was executed at Sandawana AV6 is insufficient and woefully inadequate to rebut the *prima facie* proof that the eviction was carried at Sandawana AV8. Therefore, the applicant has not discharged the burden of proof to show that the writ was executed at Sandawana AV6. Therefore, this factual question is resolved in favour of the first respondent. Again, on this point this application falls to fail.

Disposition

[16] I am of the view that the applicant has failed to make out a case for the relief sought in this application. The applicant was not directly evicted by the first respondent, it was evicted by the Sheriff while executing a writ. The actions of the Sheriff cannot be attributable to the first respondent, but to the court order he was executing. It is the court, not the first respondent that directed and authorised the Sheriff to execute the writ and carry out the eviction. The common law remedy of *mandamus van spolie* targets self-help which is so repugnant to our constitutional values that where it has been resorted to in dispossessing someone, it must be dealt with before any inquiry into the lawfulness of the possession of the person dispossessed. See *Ngqukumba v Minister of Safety and Security* (*supra*). The applicant should have appealed or rescinded the court order, whichever is applicable if it was aggrieved by the order in HCH 6627/23. The remedy of *mandamus van spolie* is not available in a case where the eviction was carried out by the Sheriff in the execution of a court order. Again, the applicant has failed to

prove that it was evicted at Sandawana AV6, not Sandawana AV8. It is for these reasons that this application must fail at this stage.

Costs

[17] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. The first respondent sought costs on an attorney and client scale. A court may award attorney and client costs against an unsuccessful party where his conduct has been unworthy, reprehensible or blameworthy or where he has been actuated by malice or has been guilty of grave misconduct either in the transaction under enquiry or in the conduct of the case. In this case it is clear that the applicant is playing a game. I say so because the applicant filed two applications i.e. HCH 6888/23 and HCH 7127/23 in this court sitting in Harare in an attempt to stall the execution of the order in HCH 6627/23. Both applications were ruled not urgent and struck off the roll of urgent applications. Again, the applicant launched this application in this court sitting in Bulawayo, without disclosing that similar applications have been filed in Harare. Further it withheld the return of service because it shows that the writ was executed at Sandawana AV8, not Sandawana AV6 as the applicant would want this court to believe. In my view the applicant's conduct can properly be described as unworthy, reprehensible or blameworthy to the extent where it merits an attorney and client costs being made against it. I can see no reason why the first respondent should find itself out of pocket for its legal expenses in circumstances where it was made to fight a legal battle crafted to mislead this court.

In the result, it is ordered as follows:

1. The application be and is hereby dismissed.
2. The applicant to pay the respondents' costs on a legal practitioner and client scale.

Dube, Mguni & Dube, applicant's legal practitioners
ChimukaMafunga Commercial Attorneys, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 3rd respondent's legal practitioners