

**SHENG AN MINING (PVT) LTD**

**Versus**

**MOHAMED DAKA**

**And**

**OFFICER COMMANDING – BULILIMANGWE POLICE DISTRICT PLUMTREE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 25 April 2024 & 9 May 2024

**Urgent application**

*T. Tavengwa* for the applicant  
*P. Sibanda* for the 1<sup>st</sup> respondent

**DUBE-BANDA J:**

Introduction

[1] This is an urgent chamber application for a spoliation order. The applicant seeks a final order couched in the following terms: (i) that the first respondent be ordered to immediately restore applicant to peaceful and undisturbed possession of Hope Fountain Milling Centre, Hope Fountain, Bulawayo (mine); (ii) that first respondent hereby ordered to immediately cause his employee who is now in possession of the mine to vacate the premises and hand over all keys and locks to the applicant; (iii) that the Sheriff be directed to evict anyone from the mine who does not claim occupation through the applicant; (iv) and that the first respondent to pay costs of suit on a legal practitioner and client scale.

[2] The application is opposed by the first respondent. The second respondent neither filed opposing papers nor participated in this hearing, and I take it that he has made a decision to abide by the decision of this court.

The background facts

[3] The applicant contends that it purchased Hope Fountain Mining and Milling Centre (“Mine”) from a company called Fools Investments (Pvt) Ltd. It says in November 2023 it was given vacant possession of the Mine and moved its heavy equipment and machinery to the site.

It contends further that there has been a dispute with the first respondent who claims to be the owner of the Mine. It says it is not sure how the first respondent came in possession of a letter dated 28 March 2024 from the Provincial Mining Director (“PMD”). The deponent to the founding affidavit avers that he explained to the police that Fools Investments (Pvt) Ltd was not in possession of the Mine, but it was in possession of the applicant. The police are said to have locked up residences for the employees, locked up offices and asked everyone to leave the mine. The applicant says it vacated the Mine under protest. It is against this background that the applicant filed this application seeking the order set out above.

The preliminary points taken by the applicant

[4] Mr *Tavengwa* counsel for the applicant in his submissions in reply raised points *in limine*. I take the view that points *in limine* must be taken at the commencement and not at the tail end of the hearing. In this matter Mr *Tavengwa* raised points *in limine* when making submissions in reply, such is undesirable. I say so because it has a tendency to lull the other party into thinking that there are no points *in limine* to be taken. And only to be taken aback when such points are taken at reply stage. Anywhere I heard applicant’s submissions in support of the points *in limine* and gave Mr *Sibanda* an opportunity to respond to the points taken.

[5] Mr *Tavengwa* raised two points *in limine*. I first consider the point turning on the contention that the opposing affidavit was defective and must be expunged from the record. This contention was anchored on the fact that the opposing affidavit does not have a date on which the commissioner of oaths administered the oath. It merely had one date when the deponent had signed the affidavit.

[6] In *Mandishayika v Sithole* HH 798/15 the court had this to say:

“An affidavit is a written statement made on oath before a commissioner of oaths or other person authorised to administer oaths. The deponent to the statement must take the oath in the presence of the commissioner of oaths and must append his or her signature to the document in the presence of such commissioner. Equally the commissioner must administer the oath in accordance with the law and thereafter must append his or her signature onto the statement in the presence of the deponent. The commissioner must also endorse the date on which the oath was so administered. These acts must occur contemporaneously.” (My emphasis).

[7] What comes out of precedent is that an affidavit must have a date on which the oath was administered. It is insufficient that the affidavit might have a date on which the deponent signed it. See *Ndoro & Anor v Conjugal Enterprises (Private) Limited & Anor* HH 814/22; *State v Hurle & Others* (2) 1998(2) ZLR 42.

[8] In *casu* the commissioner of oaths is clearly identifiable. See *Firstel Cellular (Pvt) Ltd v NetOne Cellular (Pvt) Ltd S-1-15*. But he did not endorse the date on which he administered the oath on the deponent. This is not a matter of formalism or of placing form of substance. It is matter of law and this court is bound by precedent. Precedent is clear that such an affidavit is defective, and without an opposing affidavit there is no notice of opposition. See *Twin Castle Resources (Pvt) Ltd v Paari Mining Syndicate and Ors* HH 153/21. The point *in limine* regarding the defective opposing affidavit and that there was no valid notice of opposition has merit and is upheld.

[9] In the circumstances of this case, the fact that there is no valid notice of opposition before court is not the end of the inquiry. I say so because this point *in limine* was raised after the first respondent had made his submissions. The submissions are on record. If it was not so, I would have non-suited the first respondent. In the circumstances, I will ignore the notice of opposition and still consider the submissions made by counsel in the determination of this matter. Further, the fact that an application is not opposed standing alone is no basis for granting the order sought, a court must still be satisfied that a good case has been made for the relief sought in the matter.

[10] Mr *Tavengwa* further submitted that the PMD had no authority in terms of s 358 of the Act to issue an injunction, suggesting that issuing an injunction could only be issued by the mining commissioner. Notwithstanding that I have found *supra* that there is no valid notice of opposition in this matter, this point *in limine* is still relevant and has to be determined because it is the applicant itself that placed before court a letter dated 28 March 2023 from the PMD to the Police Commissioner.

[11] I drew counsel's attention to the judgment in *Stonezim Granite Private Limited v The Provincial Mining Director Mashonaland East and Another* (1 of 2024) [2024] ZWSC 1 (11

January 2024), where the court (per MATHONSI JA) said there is no need for the office of PMD to be expressly set out in the Act because the provisions of s 343 of the Act are wide enough to encompass unnamed officers such as PMD. The court said a PMD can exercise the delegated authority of the Secretary to assume the functions, duties and power of a mining commissioner. In *casu* the PMD signed the letter as a delegate of the Secretary of Mines and Mining Development. Counsel did not persist with this point *in limine*.

#### Point *in limine* taken by the first respondent

[12] The first respondent raised a point *in limine* that the relief sought by the applicant was incompetent. In support of this objection, it was submitted that the applicant was not unlawfully disposed of possession of the mine, in that the police enforced an injunction issued in terms of s 358 of the Mines and Minerals Act. It was stated that the enforcement of an extant injunction issued by the PMD cannot anchor an application for a spoliation. And that the relief sought cannot be enforced against him because he was not in possession of the mine. It was Fools Investments (Pvt) Ltd which was in possession of the mine. I drew Mr. *Sibanda*'s attention to the trite position of the law that a point *in limine* is a point of law dispositive of the matter without a consideration of the merits. It is important to underscore that a point *in limine* is divorced from the substance of a case and must be determined before the merits are considered. See *Heywood Investments (Private) Limited T/A GDC Hauliers V Zakeyo* SC 32/13. A litigant cannot be permitted to argue the substance of the matter under the guise that it is a point *in limine*.

[13] In *casu* what the first respondent calls a point *in limine* is supported by the merits of the matter. Therefore, a consideration of what the first respondent calls a point *in limine* will itself entail an assessment of the merits. It was for these reasons that I informed counsel that this was not a point *in limine* and directed him to make submissions on the merits of the matter.

#### Submissions of the merits

##### Applicant's case

[14] The applicant contends that it purchased Hope Fountain Mining and Milling Centre (mine) from a company called Fools Investments (Pvt) Ltd. It says in November 2023 it was given vacant possession of the mine and moved heavy equipment and machinery to the site. It

contends that early in 2024 the first respondent, started making claims that he was the owner of the mine and that the applicant had no right to conduct mining activities at the mine. The applicant further avers that the first respondent said that Fools Investments (Pvt) Ltd was his company and the applicant and its employees had no right to conduct mining activities at the mine. Following skirmishes between the applicant's employees and the first respondent, it is averred that the latter came to the mine to deliver a letter from the Ministry of Mines and Mining Development. He is said to have been in the company of the police who indicated that they had instructions from the second respondent to evict the applicant from the mine. It is averred that on 5 April 2024 the applicant under protest vacated the mine. The applicant contends that it was in peaceful and undisturbed possession of the mine, and that the respondents unlawfully disturbed and deprived it of such possession.

#### First respondent's case

[15] Mr. *Sibanda* submitted that the first respondent did not have anything to do with the removal of the applicant from the Mine. It is the police who enforced an injunction issued by the PMD, and thus stopped illegal mining operations. Counsel referred to paragraphs 14 and 15 of the founding affidavit to show that applicant accepts that it was removed by the police. Counsel submitted further that the actions of the police were lawful. The first respondent sought the dismissal of the application.

#### The application of the law to the fact

[16] *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. See *Avoseh Investments (Private) Limited v*

*Sandawana Mines (Private) Limited and 2 Others* (4 of 2024) [2024] ZWBHC 8 (4 January 2024).

[17] 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.”

[18] On 28 March 2024 the PMD wrote a letter to the Police Commissioner. For completeness I reproduce the letter in its entirety. It is this:

The Police Commissioner  
Zimbabwe Republic Police  
Minerals Flora and Fauna  
Gwanda

Re: Suspension of mining operations at Fools Investments (Pvt) Ltd special grant No. 5167, Hope Fountain, Bulawayo.

We make reference to the above matter.

The Ministry of Mines and Mining Development hereby suspends all mining operations being conducted at Fools Investment (Pvt) Ltd site, special grant number 6167 which expired in 2021 and is pending renewal. Any mining activities taking place on site are illegal and are directed to be suspended with immediate effect.

The Zimbabwe Republic Police is required to ensure that any party to the illegal mining operations complies with this order.

Yours faithfully  
signed  
Tariro Ndlovu  
Provincial Mining Director  
For Secretary of Mines and Mining Development

[19] It is common cause that the mine subject to the injunction issued by the PMD is the same mine subject to this case. The PMD ordered that the mining operations at the mine were illegal and caused all operations to be suspended, and directed the police to ensure that the injunction was complied with. The police executed the injunction and stopped mining operations at the

mine. Section 358 authorises the police to execute an injunction issued by the PMD. The police in stopping mining operations did not act outside the parameters of the law. Due process was followed and it cannot be said that the respondents resorted to self-help in stopping operations at the mine. Again, it is not the first respondent who executed the injunction, it is the police. Mr *Tavengwa* submitted that the injunction directed the police to stop operations and not to remove the applicant from the mine. I take the robust view that this is inconsequential and cannot anchor a spoliation application. This is so because the police executed an injunction issued by the PMD. The police is a law enforcement arm of the State, and it cannot on the facts of this case be said it took the law into its own hands and did not follow due process. Therefore, the stopping of mining operations and removal of the applicant from the mine was lawful and cannot on this basis alone anchor an application of a spoliation order. It is for these reasons that this application has no merit and must fail.

#### Costs

[20] The awarding of costs is based on fundamental principles relating to the law of costs. There are two main principles in awarding costs. The first is the basic rule that the court within its discretion determines costs. The second rule is costs are generally awarded to a successful litigant who is indemnified for cost incurred as a consequence of litigating. In this case there is no reason why costs should not follow the result. However, 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. See *Nel v Waterberg Land-bouwers Ko-op Vereeniging* 1946 AD 597; *Public Protector v South African Reserve Bank* [2019] ZACC 29. On the facts of this case, it cannot be said that the applicant's conduct warrants costs on an attorney and client scale. Costs on an attorney and client scale are not lightly granted. This is so because such costs are not punishment for holding a legal position which does not find favour with the court. A litigant has a right to prosecute its claim or defence without the fear of being mulct with punitive costs should its position not find favour with the court. This would have a chilling effect on litigants who intend to pursue or defend claims, and will undermine the principle of the rule of law upon which this jurisdiction is founded. In this matter a case has not been made for costs on a legal practitioner and client scale.

Disposition

In the circumstances, I order as follows:

The application be and is hereby dismissed with costs on a party and party scale.

*Mutuso, Taruvinga & Mhiribidi*, applicant's legal practitioners  
*Dube Legal Practice*, first respondent's legal practitioners