PULSERATE INVESTMENTS (PRIVATE) LIMITED
versus
ANDREW ZUZE
and
BARRINGTON RESOURCES (PRIVATE) LIMITED
and
THE PROVINCIAL MINING DIRECTOR –
MASHONALAND EAST PROVINCE N.O
and
THE MINISTER OF MINES AND MINING DEVELOPMENT N.O.
and
OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE-
MASHONALAND EAST PROVINCE N.O
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
MUNGWARI J
HARARE, 28 November & 8 December 2023

Urgent Chamber Application

W Ncube, for the applicant
T Magwaliba, for the 1st respondent
G Madzoka, for the 2nd respondent
None appearance for the 3rd to 6th respondents

MUNGWARI J: This urgent chamber application stems from a seemingly unending dispute. I remark so because from the papers before me, the acrimony between the parties has been on-going for a few years now.

The parties

The applicant in this matter is Pulserate Investments (Pvt) Ltd a company duly incorporated in terms of the laws of this country. It is represented in these proceedings by Salim Bobat, one of its directors who swore that he was empowered to do so by resolution of the applicant's board of directors. The first respondent is described as Andrew Zuze, a male adult, whose business address is unknown to the applicant. The second respondent is Barrington Resources (Pvt) Ltd, a corporate whose registration in accordance with the company laws of Zimbabwe the applicant, for reasons not disclosed in the papers, appeared to doubt. The third

respondent is the Provincial Mining Director of Mashonaland East Province, cited in his official capacity. The fourth respondent is the Minister of Mines and Mining Development, equally cited in his official capacity. The fifth respondent is stated as the Commanding Officer of the Zimbabwe Republic Police – Mashonaland East whilst the sixth respondent is the Sheriff of Zimbabwe cited for purposes of the enforcement of the order being sought by the applicant in this application if it succeeds in its endeavour to get it.

The applicant's case

To provide context to the dispute, the applicant began by giving a background to the application. It is that the second respondent supported by the first respondent initially accused the applicant of encroaching onto its mining location. Despite attempts by officials from the Ministry of Mines and Mining Development to mediate, the impasse spilled into the High Court. On 21 July 2023 MUTEVEDZI J made a determination in the case of *Barrington Resources (Pvt) Ltd* v *Pulserate Investments (Pvt) Ltd and Others* HH 446/23 *(Barrington Resources)* which favoured the applicant in this matter. The second respondent which was the applicant in the High Court lost its bid to be declared the rightful owner of the mining location in dispute. The ratio of the High Court in the *Barrington Resources* case was that the second respondent's purported acquisition of the mining claim from the first respondent had occurred in 2012 a time before it (second respondent) was formally incorporated. The purchase had been purportedly done without a pre-incorporation contract. The court found that in the absence of that pre-incorporation contract, the purported purchase was null and void. As a result it determined that the second respondent had independently acquired the mining location sometime after an entity called Hope Mining Syndicate the predecessor to the title acquired by the applicant had prospected and pegged the same location. It meant therefore that the applicant was in terms of s 177 of the Mines and Minerals Act [*Chapter 21:05*] the prior pegger to the claims under dispute. Dissatisfied with the outcome it lodged an appeal with the Supreme Court. On 7 November 2023, the Supreme Court dismissed the appeal with costs. It effectively restored the initial determination of this court. Consequently, that determination left the applicant as the sole holder of valid and extant rights to the mining location which the parties were haggling over. Buoyed by the restoration of its full rights on the mining location, the applicant contends that it obtained not only peaceful and undisturbed possession but full ownership of the mining location. According to the applicant, this undisturbed possession is illustrated by the events following the dismissal of the second respondent's appeal by the Supreme Court. It says that its legal practitioners wrote a letter to the second respondent's legal

representatives on 7 November 2023 demanding that the second respondent's immediate vacation of the disputed mining claim. With professional promptness, the second respondent's lawyers wrote back and advised that their client had already vacated the contentious mining blocks. They further stated that Andrew Zuze, the person from whom the claim had been purchased in the stillborn transaction had taken over. The applicant's agents who included the deponent to its founding affidavit in this case later visited the mining location. They discovered after being violently confronted by persons who indicated that they worked for the first respondent that the first respondent had purportedly returned to the mine despite having sold it in 2012. On 9 November 2023 the first respondent wrote to the third respondent, advising that in view of the decision of the Supreme Court, he had reclaimed his mining location and demanded that the third respondent restore his rights to the claims.

Pertinently, the applicant also indicated that before this court decided the dispute on 21 July 2023, the parties were bound by interim and final orders issued under case number HC 1968/23. On one hand, the interim order directed the applicant and the second respondent to both cease all mining operations and to peacefully co-exist at the disputed mining location whilst on the other the final order directed both of them to abide by the decision of the court in HC 8671/22 as the final resolution to their dispute concerning the ownership of the mining location. The orders, so the applicant contended further, were predicated on the court's final determination of case HC 8671/22. It is that dispute which resulted in MUTEVEDZI J's judgment in the *Barrington Resources* decision.

The applicant further stated that in disregard of the orders of the courts the first respondent actively aided by the second respondent has sprouted from nowhere to disturb the applicant's operations at the location. It added that clearly, the first respondent is unashamedly and deliberately engrossed in self-help whilst being encouraged to do so by the second respondent. In furtherance of its invasion of the applicant's mining claim, the first respondent through his agents deployed a front-end loader, an earth moving device used for excavation at the mining claim.

First respondent's opposition

Andrew Zuze, the first respondent filed a notice of opposition. His starting point was to make a request for the referral of what he called a constitutional issue which had allegedly arisen in these proceedings for determination by the Constitutional Court in terms of s 175(4) of the Constitution, 2013. The issue which he requested the court to refer was couched as follows:

1. Whether the common law action for *mandament van spolie* or spoliation order as relied upon by applicant is consistent with the right to a fair hearing and the right of access to courts as set out in s 69(2) of the Constitution of Zimbabwe to the extent that they deny an inquiry into the question of the right of parties to possession or ownership of the property the subject of the dispute;
2. Whether the action is consistent with the right to property as set out in s 71(2) and freedom from compulsory deprivation of property set out in s 71(3) of the Constitution to the extent that by denying an inquiry into entitlement to possess, the action in effect constitutes deprivation of property.

However, at the hearing, counsel for the first respondent said he was abandoning the request in its entirety. I accepted the withdrawal as did the applicant. The first respondent and the second respondent who had also latched on to this issue and raise it in its heads of argument did well to abandon it. It was a hopeless attempt at delaying the hearing of the application on the merits and would have amounted to an abuse of the court process which was likely to be censured with an award of costs to the applicant. The matter ended there.

Soon thereafter, the first respondent raised a plethora of preliminary objections.

He took issue with the application on the basis that:

a) The founding affidavit is defective because it was commissioned by one Tendai Mupangwa, the same legal practitioner who deposed to the certificate of urgency. The argument is that the legal practitioner lost his independence to stand as a commissioner of oaths when he elected to certify the urgency of the application and in the same vein lost his competency to certify the urgency of the matter the moment he decided to be a commissioner of oaths. The same argument was raised by the second respondent.

b) Further both the first and second respondents argued that the legal practitioner who swore to the urgency of the matter did so without showing that he had applied an objective and independent mind to it. They pointed to the following indiscretions as vindicating their attacks on the certificate of urgency:-

i. That the application purports to be one for spoliation yet the certificate refers to it as an application for stay of execution

ii. It does not traverse the date of the alleged spoliation

iii. It does not relate to whether prior to that date, the applicant was in occupation of the mining claims

iv. Its averments are generalised and do not uniquely relate to or engage the matter as one for spoliation

c) The form used to initiate the application did not warn the respondents of their bundle of procedural rights and the consequences of a failure to file any opposition to the notice of motion. The respondents also argued that an urgent chamber application must be accompanied by a provisional order on form no. 26 and that spoliation being final and definitive in nature may not be sued for through an urgent chamber application. As such the matter ought to have been brought as an urgent court application which would afford the parties the grant or refusal of final relief on an urgent basis.

d) That an application for spoliation which seeks a final order cannot be brought as an urgent chamber application but can only be initiated as an urgent court application was an argument that the respondents abandoned mid-stream. Counsel in the heads of argument indicated that guidance had been sought from existing authorities such as *Chiangwa* v *Apostolic Faith Mission* SC 5/23. In my view that concession was well made because it would have been a futile argument.

e) The application is afflicted with serious disputes of fact incapable of reconciliation on the papers. On one hand, the first respondent drew my attention to issues such as:

i. Whether the applicant ever took occupation of the mining claims in issue at all.

ii. If it did when it did so

iii. If it took occupation whether such occupation was undisturbed and was enjoyed peacefully.

iv. Whether the persons implicated by the applicant exist as a matter of fact

v. If they exist, whether they are known to, employed by first respondent or otherwise acted under his authority or on his behalf

vi. Whether first respondent took occupation of the mining claims directly from second respondent with its consent and participation in October 2023 before the judgment of the Supreme Court.

vii. Whether on or about 9 November 2023 and after the order of the Supreme Court applicant forcibly broke into the mining claims without the first respondent's consent

On the other hand the second respondent pointed to the issues stated below as those which constituted his perceived disputes of fact:

i. whether the first respondent is second respondent's proxy

ii. whether those two parties are colluding and

iii. whether the second respondent is still in occupation of the mining location in dispute

The third and fourth respondents indicated that they were not opposed to the application and would abide by whatever order the court would issue. The rest of the respondents did not file any papers.

The applicant's answering affidavit

In its answering affidavit, the applicant insisted that the law does not preclude a lawyer who commissions the founding affidavit from certifying the urgency of the application which is supported by the founding affidavit he would have commissioned. It equally insisted that the legal practitioner had clearly applied his mind to the issues and even related to annexures that were attached to the affidavit. In relation to the form of the application, the applicant contended that as is apparent, it used the correct form but through inadvertence the clause alerting the respondents to the procedural rights was omitted. It then offered an apology to the court and the respondents for the omission but further argued that the application could not be dismissed on that technicality because clearly, the respondents had not been prejudiced in any way as they filed their responses by 25 November 2023. It further contended that the respondents cannot clutch to a typographical error where the legal practitioner certifying the urgency of the application referred to stay of execution instead of spoliation. In any case, the applicant said it filed an erratum with the court which was served on both respondents before they had even raised it. On the allegation that there are disputes of facts in the application, the applicant's response was that there aren't any. The letters by both respondents and their actions are a clear testimony that they colluded to despoil the applicant. It went at length to controvert each and every allegation raised by the respondents in their opposing affidavits. It is not necessary to restate all of the applicant's averments therein.

I turn to deal with each of the preliminary objections in turn.

a. That the application is in the wrong form

As pointed out earlier, both respondents' contention was that the form used to initiate the application did not alert them to their procedural rights envisaged by Form 23 of the High Court Rules, 2021 (the Rules) which is the form prescribed for use in chamber applications intended to be served on an interested party. Rule 60(1) of the Rules specifies that every chamber application which must be served on interested parties must be on Form 23 with appropriate modifications. It is couched as follows:

60. Chamber Application
"(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form No. 25 duly completed and, except as is provided in sub rule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies:
Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 23 with appropriate modifications".

In this case, the applicant filed its application in a form which largely conforms to Form 25, a template that is used for initiating court applications and other chamber applications which need not be served on other parties. In fact the applicant acknowledged the indiscretion and apologised to the court and the respondents. It explained that it was a result of an inadvertent omission. It beseeched the court to condone the omission because it had not prejudiced the other parties.

Admittedly, the question of the use of a wrong form in initiating an application has stirred much debate in the courts. Various pronouncements have been made particularly by this court regarding that subject. There are decisions which are unequivocal that the use of the correct form is mandatory. For instance in the case of *Base Mineral Zimbabwe (Pvt) Ltd & Anor* v *Chiroswa Minerals (Pvt) Ltd & Others* HH 559-14 at p. 7 – 8 of the cyclostyled judgment MAFUSIRE J remarked that:

> "The proviso to rule 241(1) permits the modification of Form 29 where the chamber application has to be served. What would constitute 'appropriate modifications' is not stated. Why then does it become important that every time a chamber application has to be served, the applicant should abandon Form 29 B and switch over to Form 29? In my view, once the chamber application becomes one that must be served, then the respondent is entitled to a period within which to file opposing papers. The 'appropriate modifications' would include in my view a fusion of the contents of Form 29 and those of Form 29B. In other words, it becomes a hybrid, containing both '... the plethora of procedural rights .....' of Form 29, including the *dies induciae*, and a summary of the grounds of application of Form No. 29B".

The distinction between Forms 23 and 25 was explained by the Supreme Court in the case of *Ysmin Tacklah Mahomed* v *Tawurayi Marvin Kashiri* SC 41/21 at p. 6 of the cyclostyled decision where, explaining the differences between Forms 29B and 29 which are the predecessors of Forms 25 and 23 respectively that court remarked that:

> "The difference between Form 29B and Form 29 is that the former specially prescribes the insertion of a summary of the grounds of the application *ex facie* the application and predicates the application on a draft order. The latter, unlike the former, is a "Take Notice" form predicated upon a draft order specifically premised on a "plethora of procedural rights"[1] alerting a respondent of the time frame within which to take action and the appropriate documentation."

[1] The court quoted with approval the dictum in *Zimbabwe Open University v Mazombwe* 2009 (1) ZLR 101 (H).

The above authorities mean that where a chamber application must be served on interested parties, the applicant must dump Form 25 and necessarily use Form 23 with appropriate modifications. In *Ysmin Mohomed* (*supra*) the Supreme Court added that:

> "It is significant that the proviso designates the use of Form 29 and not Form 29B in peremptory language for chamber applications to be served on interested parties. In my view, this specific designation "ousts" the inclusion of "the summary of the grounds of the application" required on the face of Form 29B. The appropriate modifications contemplated in the proviso have nothing to do with the *ex facie* contents required by Form 29B but have everything to do with the different time frames or *dies induciae* within which the notices of opposition are required to be filed. The appropriate modifications are not a requirement for applications predicated on Form 29. Their absence or omission would not render the application for condonation and extension of time within which to file an appeal defective let alone fatally defective."

As can be gleaned, the modifications mainly have to do with the *dies induciae* or the time limits within which certain things have to be done. If an applicant omits to use Form 23 with the appropriate modifications the major prejudice that may be occasioned on a respondent is that he/she may miss the timelines within which he/she must file the notice of opposition. It would appear that the use of Form 25 instead of Form 23 or vice versa results in an applicant bringing his/her motion either as a court application instead of a chamber application or vice versa. Previously this court has taken the stance that the failure to use the correct form is fatal to an application. It would be struck off the roll on that basis alone. See for instance the case of *Walter Mapuranga* v *Josam Alikanjera Linde* HMA 34/22. What is critical in my considered opinion is the import of R 58 (1). It provides as follows:

> "(13) Without derogation from rule 8 but subject to any other enactment, the fact that an applicant has instituted—
> (a) a court application when he or she should have proceeded by way of chamber application; or
> (b) a chamber application when he or she should have proceeded by way of a court application;
> shall not in itself be a ground for dismissing the application unless the court or judge, as the case may be, considers that—
> (c) some interested party has or may have been prejudiced by the applicant's failure to institute the application in proper form; and
> (d) such prejudice cannot be remedied by directions for the service of the application on that party with or without an appropriate order of costs."

Put in another way, the above rule simply says the use of Form 23 instead of Form 25 or vice versa shall not standing on its own be a ground for the dismissal of an application. The court or a judge may only dismiss the application if he/she/it considers that prejudice has been occasioned to another party by the applicant's omission to initiate the application in the prescribed form and that such disadvantage cannot be corrected by the court/judge instructing that there be service on the prejudiced party or by an order of costs against the offending party.

In the case of such prejudice occurring it can be remedied by directions for the service of the application on that party with or without an appropriate order of costs. Recently CHITAPI J, in the case of *Chikwinya and Ors* v *Mudenda N.O & Ors* HH 48/22, had occasion to explain the implication of r 58 (13). He put it in precisely the above terms. If there was any debate about HIS LORDSHIP'S interpretation, it was terminated by the Supreme Court's approval of it in *Cossam Chiangwa* v *Apostolic Faith Mission in Zimbabwe* (supra) when it held that:

> "The above *ratio dicidendi* puts to rest the complaint by the appellant about the use of the wrong procedure. From the above it is apparent that the rule was designed to ensure that justice delivery prevails. It also has the added advantage of curbing the associated problem of dismissing or striking off matters which may have merit solely on the basis of procedural mishaps. The rule gives the court discretion to allow access to a party who has not approached the court in the proper form provided there is no prejudice to an interested party. In exercising its discretion the court must have regard to the exceptions set out under r 58 (13) (c) and (d). It follows that the bringing of an application either as a chamber application or a court application does not automatically in itself amount to a basis for the dismissal of the application unless there is prejudice. The court must consider whether the wrong procedure will prejudice an interested party and if such prejudice cannot be cured by giving directions for the service of the application on that party with or without an appropriate order of costs."

I have already indicated that the applicant brought its application in Form 25 instead of Form 23 with appropriate modifications. It accepted its error and apologised for it. At a case management meeting held to deal with the application, I exercised the discretion reposed in me by Rule 58(13). To ensure that there was no prejudice to the respondents I satisfied myself on whether the applicant had served the application on them and gave both of them timelines within which they had to file their responses. On the strength of that rule and the above authorities, I am satisfied that this is a case which must be decided on its merits and not on the technicality of a wrong form having been used to initiate the motion. The preliminary objection that the application was filed in the wrong form therefore lacks merit and is dismissed.

b. **That the founding affidavit is defective because it was commissioned by the same legal practitioner who deposed to the certificate of urgency**

Though the argument by the respondents appears novel, it is equally ill-conceived. It is that when the applicant prepared its founding affidavit, the deponent to the affidavit one Salim Bobat, took oath before the commissioner. That commissioner of oaths happened to be a legal practitioner. In their view, once Tendai Mupangwa, the legal practitioner, had acted as the commissioner of oaths he was disqualified from certifying as urgent, the application supported by the founding affidavit which he had commissioned. In other words the argument is that the

legal practitioner could only do one of the tasks and not both. But just from what law that argument is derived is not clear. In terms of s 7 of the Justices of the Peace and Commissioners of Oaths Act [*Chapter 7:09*], every justice of the peace is an *ex-officio* commissioner of oaths. The Ex-officio Commissioners of Oaths: Designation Notice, 1983: SI 648/1983 says every legal practitioner is a commissioner of oaths and can administer an oath anywhere in Zimbabwe. It follows therefore that Tendai Mupangwa had power to administer the oath taken by the deponent to the applicant's founding affidavit. There is equally no contention that he is a practising legal practitioner. Rule 60(4)(b) simply requires a chamber application brought on an urgent basis to be accompanied by a certificate from a legal practitioner supporting the urgency of the application on one or more of the basis indicated in subrule 3 (a)-(e). Authorities in turn have interpreted the implications of the requirement to have a certificate of urgency signed by a legal practitioner. There still exist in this jurisdiction, the two divergent views pertaining to whether the same legal practitioner representing an applicant in his suit can certify the urgency of the matter. The opposing schools of thought emanated from the notorious cases of *Chifanza* v *Edgars Stores & Anor* HB 27/05 and *Dodhill (Pvt) Ltd* v *Minister of Lands & Rural Resettlement & Anor* 2009 (1) ZLR 182 by CHEDA J and BERE J respectively. The reasoning expressed in the former case is that by being independent from the emotions associated with the litigation, a different legal practitioner is more able to exercise an independent assessment of whether or not the application is urgent. In the latter case, the court's view was that there is simply no requirement at law that the certifying legal practitioner ought to be different. That later reasoning was followed by this court in the case of *Andrew John Pascoe* v *Ministry of Lands and Rural Resettlement and Others* HH 11/17 where CHITAPI J explained that the above arguments are unnecessary and appear to stem from the misconception of the purpose of a certificate of urgency. He said it is not for purposes of assisting the judge to make a determination of the matter but must be regarded as a case management tool designed to assist the registrar on how to handle a chamber application. Where a legal practitioner has certified a matter as urgent the rules of court would require the registrar to place the application before a judge immediately. He concluded the issue with the following finding:

> "A judge before whom an urgent application is placed is not bound by the certificate of urgency. The urgency of the matter must be demonstrated by the applicant not in the certificate of urgency prepared by a legal practitioner but in the founding papers. A judge will consider whether the matter is urgent by reference to the applicant's complaint and the relief sought. A certificate of urgency performs the role of directing the registrar to place the application before a judge for consideration upon its filing. The fact that the certificate of urgency is relevant to case management is borne by the fact that a non-represented or self-acting litigant is not required to file one. The certificate of urgency is therefore in my view a tool for case

> management and a court's or judge's judgment should not be based on such certificate but on the founding affidavit and supporting documents if any."

I completely associate myself with the above reasoning. It makes no sense that a legal practitioner who exercises his powers as a commissioner of oaths to administer an oath taken by a deponent to a founding affidavit must be barred from certifying the application as urgent when the legal practitioner representing the applicant and who actually assisted in drawing up the founding affidavit and all other papers is allowed to do the certification. I do not see how a legal practitioner's independence is taken away by administering an oath to a person deposing to an affidavit which the practitioner is required to thoroughly read and from which he must formulate an opinion whether the application is or is not urgent. It would have been different and the argument would have made sense if the requirement were that the certifying legal practitioner is precluded from seeing or being aware of the contents of the applicant's founding affidavit. In the same vein, if administering the oath would take away a legal practitioner's independence and objectivity then reading the founding affidavit would certainly make the same practitioner a dimwit. My finding is that the objection is completely without merit. It is dismissed.

c. That the legal practitioner did not apply an objective and independent mind to the issues

The issue is tied to the above contentions. The respondents however added that the certifying legal practitioner did not apply an independent mind to the issues at hand. They cited a few indiscretions as pointing to that lack of objectivity. These included that he indicated that the application was for stay of execution when in reality it purported to be one for spoliation. They further alleged that the certificate does not traverse the date of the alleged spoliation and does not relate to whether or not prior to that date the applicant was in occupation of the mining claims.

It is granted that the rules and the authorities make it clear that a certificate of urgency is a *sine qua non* for an urgent chamber application. But I think if the argument in *Andrew John Pascoe* (supra) is followed to its logical conclusion, the reasoning that the certificate of urgency is solely for purposes of case management would become more apparent. An unrepresented litigant is allowed to file an urgent application without the certificate of urgency. The absence of that certificate does not on its own make the application less urgent than one where a certificate is filed. A certificate of urgency is exactly that. It depicts whether or not the application is urgent. In instances where the respondents are not challenging the urgency of a

matter they cannot clutch on to some tiny, superficial and typographical defects which may be detected in the certificate to completely defeat the application. Equally, a court or judge acting reasonably cannot be swayed to dismiss an application on the basis of such perceived deficiencies in a certificate of urgency. The applicant explained that the reference to a stay of execution in the certificate was a typographical error. It did so even before the respondents had latched on to the mistake. Spoliatory relief is by its nature urgent. See the case of *Chiwenga v Mubaiwa* SC 86/20 for the proposition that applications for spoliation are generally dealt with as urgent chamber applications. As such I am convinced that where a litigant is not challenging the urgency of a matter, such as in this case, he/she cannot use an irregularity in the certificate of urgency as a substantive ground on which to defend an application. In this case, once the respondents acquiesced to the fact that the matter was urgent there is no room for them to attempt to use the alleged challenges in the certificate of urgency to defeat the grant of the order sought by the applicant. They accepted the faultless reasoning that indeed the urgency of a matter is determined mainly be reference to the applicant's founding affidavit. In any case, the problems complained of appear to me to be perfunctory and inconsequential. For that reason, I am also left with no choice but to dismiss the objection as I hereby do.

d. That the application is afflicted with serious disputes of fact incapable of reconciliation on the papers.

The objection that there are material disputes of fact has become as fashionable as resisting an application on the basis of non-urgency. Invariably, many respondents wave the material disputes of fact allegation when confronted with an application against them. Some of the facts alleged to be in dispute in some instances are admitted by the same respondents. It is time that litigants particularly those represented by legal practitioners appreciate what this concept really means. A real and basic platform to understanding the existence of material dispute of facts is the case of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F-G. In that decision, this court attempted to distil the principle of material disputes of facts by making reference to both what they are not and what they are. The court said:

> "I am aware that the respondent has repeatedly and vehemently denied in his affidavit that the purchase price of the centre pivot was $20 million. It is my view that I is not the number of times that a denial is made or the vehemence with which a denial is made that will create a conflict of fact… A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

A number of key issues stand out from the court's remarks above. Firstly, it is not every dispute of fact which constitutes a material dispute. Some disputes of fact although apparent in a matter may not be material to the resolution of the issues the court will be faced with. Such disputes cannot hamstring a court from proceeding because it can still resolve the issues between the parties without the need to deal with such disputes. Secondly, a material dispute of fact only arises where an applicant has alleged material facts and the respondent has in turn controverted and dealt with those facts in a way so comprehensive that in the end the court is left with no ready answer to the divergent positions of the parties and needing further evidence to be able to give such answer. Where a respondent simply disputes the material facts put forward by the applicant but the court can readily put a finger to the dispute it must follow that there will be no material disputes of fact. In such circumstances, the court must proceed to resolve the issues on the papers.

It is crucial and significant that even where such disputes appear to exist, the courts are expected to adopt what has come to be called the robust common sense approach in the resolution of disputes of fact. What it means is that the court must strive to deal with the application and resolve it on the papers before it even in the face of conflicts of fact. The important consideration is that in adopting such an approach, the court must not prejudice another party. See the case of *Muzanenhamo* v *Officer in Charge law and Order and Others* CCZ 3/2013 for an exposition of the robust common sense approach. That authority suggests a two layered way of dealing with disputes of fact. The first rung of the method is to determine whether a dispute of fact indeed exists. If it does the second stage is to then decide if the parties' arguments can be reconciled on the papers without causing undue hardship on any of the parties.

In this case, the respondents have directed my attention to a number of issues which they allege amount to disputes of fact. One such issue is stated as whether the applicant ever took occupation of the mining claims in issue at all. A reading of the applicant's papers, the respondents' opposition and MUTEVEDZI J's judgment which extensively dealt with the dispute between the parties and made profound findings for and against each of them would however quickly dispel the notion that there could be any material dispute about whether or not the applicant was in occupation of the mining claims. The entire dispute between the second respondent and the applicant was premised on the applicant's alleged unlawful occupation of the second respondent's claims. These are the same claims that are the subject matter of this

spoliation claim. I am not sure whether the second respondent particularly is admitting that it perjured itself by alleging falsehoods that the applicant had pegged its claims over its entire two mining blocks. It is not alleging so in this application. I take it therefore that the averments made on oath in that case constitute a clear answer to the question which the respondents want to be viewed as a material dispute of fact. The first respondent cannot extricate himself from that situation. Contrary to his attempt to dissociate himself from those proceedings he deposed to an affidavit supporting the second respondent's application. He was therefore a part of the applicant in that case. Dealing with that alleged dispute of fact, the applicant argued that the issue was built around an unsustainable untruth that the applicant and the second respondent, at the time of their dispute were not occupying the same mining location but different and adjacent mining blocks. The applicant then referred me to paragraph 4 of this court's order under case HC 1968/23 attached to the founding affidavit in this case as annexure 'C'. That part of the order directed both the applicant and the first respondent (who are the second respondent and the applicant in this case respectively) to deploy not more than six workers each on the disputed mining location and that such employees were to be restricted to security personnel and the maintenance of equipment only. The applicant further directed the court's attention to paragraphs 9 and 12 of the second respondent's founding affidavit in HC 8671/22 in which it in no uncertain terms indicated that the applicant's block (ME 130 BM) covered the same area as its two mining blocks. If the applicant was not in occupation of the second respondent's mining claim, then the dispute resolved by MUTEVEDZI J would not have arisen. The respondents must be aware that this court is permitted to make references to its own records. In any case both them and the applicant made gratuitous references to their previous disputes and gave full backgrounds to the current impasse. In another case, this court also directed the applicant and the second respondent to co-exist on the same mining blocks until their dispute was resolved by the courts. They indeed co-existed on the same blocks until the judgment of this court in *Barrington Resources* was passed. In its basic form coexistence means the state of living together in the same place at the same time. The court would not have ordered them to co-exist in different places. The order would not have been capable of compliance with. The history of that previous dispute shows that at the time it was resolved by this court it had been ongoing for years.

What the above exposition simply shows is that a material dispute of fact cannot be manufactured by a respondent for purposes of fending off an application against itself. There is no dispute as to whether the applicant was ever in occupation of the mining claims in

question. That it is so is buttressed by the respondents' own admissions. Across several paragraphs of its opposition, the second respondent seeks to distance itself from the act of despoiling the applicant when it alleges that it handed over the disputed claims to the first respondent in terms of some agreement which they entered into but in the same breadth seeking to make it appear like the blocks it dealt in with the first respondent were something different. But that prevarication is unmasked by the correspondences it wrote to the applicant unequivocally stating that it had moved out of the contentious blocks and handed them over to the first respondent. In similar fashion, the first respondent accepts that he took over the blocks from the second respondent yet it is clear as illustrated above that the applicant had similarly been in occupation of the blocks. My finding therefore is that the alleged dispute of fact as stated above is nothing but a smokescreen by the respondents intended to ensure that the application is not determined on its merits. The resolution of this alleged dispute of fact disposes of the ancillary questions which had been posed such as when the applicant took occupation of the mining blocks and whether such occupation was undisturbed and peaceful. The latter question just like the allegation that it is in dispute whether the first respondent took over the blocks by force cannot be raised as preliminary objections because they can only work as substantive defences to a claim of spoliation. Others such as whether the first respondent took occupation of the mining claim from second respondent with its consent are inconsequential because as will be shown whether or not that was the case is not in issue.

The second respondent raised further issues which it said were disputed facts. It contended that it was a material dispute of fact whether the first respondent is its proxy and whether he was colluding with it. It further said it is another dispute of fact whether it was still in occupation of the disputed mining claims. But surely those issues cannot amount to material disputes of fact. The second respondent has stated under oath that it left the mining location. Whether first respondent is or is not its proxy is immaterial to this dispute. The applicant's story is that both respondents have no right to despoil it of its possession of the mining claims. If there is anything seriously disputed, the court's view is that it can employ the robust common sense approach to resolve any such conflict of fact. So in the end the claim that there are material disputes of fact looked at in its totality has no merit whatsoever. Once more I dismiss it.

The first respondent's opposition on the merits

The first respondent's argument is straightforward. He says he took occupation of the mining claims under dispute from the second respondent sometime in October 2023 after the

High court decision had invalidated his sale of the location to the second respondent on the basis that it had been done before the second respondent had been incorporated and was done without a pre incorporation contract. Put bluntly, the first respondent argued that he and the second respondent decided to return to the status quo that obtained before their sale agreement in 2013. He further said that he was entitled to occupy the blocks because he held title to them.

The second respondent's opposition on the merits

I must emphasize that based on its opposition, the second respondent seems willing to endure a real battering in a conflict that it seemingly has no involvement in. Whilst it vehemently asserted having left the disputed mine, it also furiously and vigorously fended off the applicant's claim.

The second respondent's contention was that it handed over the mining location to the first respondent in October 2023 before the finalisation of the *Barrington Resources* appeal by the Supreme Court. It added that in actual fact, the applicant has been in occupation of claims adjacent to those which the second respondent bought from the first respondent. When the dispute was settled by the High Court, the first respondent took over the operations of the mining claims. It was for that reason that the first respondent reached out to the second respondent for compensation in relation to the structures and equipment. It follows therefore that the applicant was never despoiled because the first respondent simply took over the locations which had been vacated by the second respondent. The hand over and take over process between the first and second respondents proceeded in the full glare of the applicant and its employees, so the second respondent's narration of events went on. Further it added that it did not have any obligation to advise the applicant of what it saw happening at the disputed locations. It rounded off by emphasising the point that the applicant was never in occupation of the claims surrendered to the first respondent. The co-existence which the courts had referred to related to the applicant's occupation of the claims adjacent to those of the first respondent and not inside them.

The common cause issues

From the above a number of issues become common cause. These are that:

a. The applicant and the second respondent who was being supported in that dispute by the first respondent were involved in protracted battle for control of the mining location in issue

b. This court found as a matter of fact that the applicant was the prior pegger of the disputed mining blocks. The second respondent had approached the court seeking a declaratur that it was the legitimate holder of title to the blocks
c. The second respondent was aggrieved by the decision of this court. It appealed to the Supreme Court which upheld the decision of the High court.
d. Pending the determination of their dispute in *Barrington Resources* by this court the applicant and the respondent had been directed by another order of this court to co-exist on the mining blocks that they were haggling over. They both abided by that order and peacefully lived on the same blocks until their case was concluded
e. The second respondent said it voluntarily vacated the claims sometime after the High Court ruled against it and before the Supreme Court dismissed its appeal. In fact it said that it vacated the premises in October 2023.
f. During the time the second respondent and the applicant were involved in the dispute alluded to, the first respondent was nowhere near the disputed blocks. In his mind he had long divested himself of that business.

The issue

The only issue which arises for determination is whether or not the first respondent despoiled the applicant of its mining claims.

The law on spoliation

The remedy of *mandament van spoilie* is intended to be a safeguard against citizens resorting to self-help measures. It is directed at encouraging them to endeavour to seek redress from the courts. Its operation illustrates its drastic and extra ordinary nature. It disregards the question of ownership of the property in dispute. The sole consideration is to assist a party once an act of spoliation has taken place. The objective is that the parties must be restored to their original positions pending the resolution of the substantive dispute between them. In other words spoliation is a remedy aimed at restoration of the previously existing state of affairs between the parties. It is for that reason that it is not forbidden to file for it through the urgent chamber book.

In *Banga and Anor* v *Solomon Zawe and Others* SC 54/14, the Supreme Court held that the two requirements and defences for the remedy of *mandament van spolie* are that:

(i) the applicant was in peaceful and undisturbed possession of the thing; and

(ii) he was unlawfully deprived of such possession.

The defences are that:

i) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and;

ii) the dispossession was not unlawful and therefore did not constitute spoliation.

Crucially therefore, what comes out from the above authority is that the essential elements for spoliation are that the applicant must have had possession of the thing and if he had, the possession must have been peaceful and undisturbed. In *Banga* (*supra*) GWAUNZA JA (as she then was) quoted with approval authors *Silberberg and Schoeman's 'The Law of Property', Second Edition* at page 114 where they defined possession as follows:

> "'Possession' has been described as a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by a person and a person's mental attitude towards the thing. … whether or not a person has physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact".

Possession is therefore in reference to both physical detention and mental control of the thing. To prove possession, the applicant need not even show that he was the owner of the thing. He is not required to prove the lawfulness of his possession. It is for that reason that it is accepted that even a thief can be despoiled as long as he/she can show that he /she was in peaceful and undisturbed possession of the thing in question. The legality or otherwise of an applicant's possession is not a consideration. Once that is settled the applicant must show that there was a wrongful or forcible dispossession. See the case of *Anjin Investments (Pvt) Ltd* v *Minister of Mines and Mining Development and Others* SC 39/20 for that proposition. It means therefore that the applicant need not show both wrongfulness and force. Establishing that one or the other existed would satisfy the requirement.

The application of the law to the facts

In this case I have already found that it was common cause that the applicant was in occupation of the mining locations under dispute. From the narration of events the acts of spoliation commenced on 10 November 2023. I refer to para(s) 36 and 37 of the applicant's founding affidavit. The applicant illustrates in those paragraphs the disguise in which the first respondent's acts of spoliation came in. The first respondent alleges that he was handed over the mine by the second respondent in October 2023. If that happened in the boardrooms it does not concern the court because on the ground the applicant remained in possession of the mining

claims. Its workers and other personnel remained on the site and peacefully so. I have already said the law on possession is that it must be exercised both physically and mentally. The applicant had employees who kept guard over the mining claims and mining equipment on site day and night. It cannot be denied that it was therefore in physical control of the premises. In addition, that it was the applicant which had deployed those people entails that in the minds of its directors the applicant equally had mental control of the mining claims. Things took a bad turn on 10 November 2023 when out of nowhere the applicant's directors were barred from entering the mining location. That acts of spoliation were allegedly carried out or led by men by the names of Washington and Jack Maraura. The two are alleged to have been all along working for the second respondent. The second respondent did not deny that assertion anywhere in its papers. It was the first respondent who denied knowledge of those persons. However that denial is betrayed by the first respondent's admission elsewhere that when the mining claims were returned to him it was his obligation to take back the mine and all the workers and that he indeed did so. It means therefore the second respondent's former workers were now under the command of the first respondent. For that reason the first respondent cannot deny the clear link between himself and Washington and Jack who orchestrated the spoliation. After admitting having gate crashed into the mine and barring the applicant from exercising its rights of possession, the applicant cannot approbate and reprobate the allegations in the founding affidavit. See para 44 of his opposing affidavit for instance. In any case, the first respondent does not deny being in occupation of the mining location in question. He erroneously believes that he is entitled to be in such occupation. I say erroneously because whatever right he claims to be exercising is not relevant in spoliation proceedings. He argued about having regained title of the mining claims after this court's judgment by MUTEVEDZI J and the Supreme Court appeal. That argument speaks to ownership of the claims. It is not a consideration in the determination of an application for spoliation. His reference to certificates of registration is equally misdirected. It is not important in this instance. Certificates of registration would be necessary to prove ownership. Spoliation does not concern itself with that. It deals with possession only. The facts of this case are totally against the first respondent. By his own admission, he divested himself of the mining claims in question in 2012. After that the mining claims became subject of dispute between the applicant and the second respondent. Those disputes spilled into court and were definitively dealt with. This court's decision in *Barrington Resources* (*supra*) which decision was confirmed on appeal by the Supreme Court is effectively that the applicant pegged the locations in dispute earlier than the second

respondent. What it did was to grant occupation of the claims to the applicant. The second respondent acknowledged that and said it left the claims. Even before it did, the applicant was in peaceful and undisturbed possession of the claims because the courts had directed co-existence between itself and the second respondent. Neither of them stopped the other from exercising their rights over the claims in terms of the directions given by the courts. In my view such possession was peaceful and undisturbed. It became even more peaceful and more undisturbed when the second respondent accepted that it had lost the court battles and moved out of the blocks. It was only on 10 November 2023 that the first respondent came in to forcibly bar the applicant's directors from entering the mining claims where its equipment and workers had been all along. There is evidence in the affidavits and in the form of photographs which shows that a physical confrontation took place at the premises at the time the spoliation is alleged to have taken place. Property was damaged and attempts were made on the lives of the applicant's directors. Jack Maraura who I have already said ostensibly worked for first respondent after he inherited him from the second respondent threatened to shoot the applicant's directors. He and his colleagues parked a front-end loader blocking access into the mining blocks. As such the spoliation could not have only been unlawful but was at the same time forceful and violent. If the workers still belonged to the second respondent, their actions would in the same vein still amount to acts of spoliation.

Earlier, when I dealt with the preliminary objections I rejected the first respondent's claim that he took occupation of the disputed claims in October 2023. As rightly argued by the applicant, besides his word that he did so, there isn't a shred of evidence that he was in such occupation. His acts only manifested on 10 November 2023 when his workers violently refused the applicant's directors entry into the mining claims.

Disposition

Much as it is unnecessary for the determination of this application, the first respondent's belief that he can simply return and march on to mining blocks where he alienated his rights more than ten years ago and whose title has passed on to other entities is a dangerous misconception of the workings of the Mines and Minerals Act. It is practically impossible and on its own would constitute a serious violation of the rights of others already in occupation of the mining locations. It amounts to resorting to self-help measures and only serves to vindicate the applicant's claim that he has despoiled it of its mining premises.

From the foregoing the applicant has managed to show on a balance of probabilities that it was in possession of the mining claims from which it has been despoiled. It further

showed that its possession of the claims prior to 10 November 2023 was peaceful and undisturbed. The evidence on the papers equally established that the first respondent whether acting as a surrogate of the second respondent or not deployed his workers to the claims to forcibly refuse the applicant's workers access into the claims. They did so forcibly and unlawfully. Against that background the applicant has satisfied the essential requirements which must be met before an order for spoliation can be granted.

Costs

The rule which the courts in this jurisdiction follow is that all things being equal costs should follow the cause. I have no basis to depart from that general understanding.

In the circumstances, it is directed that:

1. The application for a spoliation order succeeds
2. The first respondent and all other persons acting through him or on his instructions, be and are hereby ordered to restore to the applicant the undisturbed and peaceful possession of the mining location registered in its name as Good Days K ME 130BM in Mutoko District
3. In the event of the first respondent's failure to comply with this order then the sixth respondent with the necessary assistance of the fifth respondent and the Zimbabwe Republic Police in general, be and is hereby directed and authorized to do anything necessary, including removing any persons, equipment or structure interfering with the applicant's peaceful possession, enjoyment and mining activities at the aforementioned mining location.
4. The first and second respondents shall pay costs of the application.

Thompson Stevenson & Associates, applicant's legal practitioners
Mandieta, Wagoneka Law Chambers, first respondent's legal practitioners
Mafongoya & Matapura, second respondent's legal practitioners