

REPORTABLE (03)

EX TEMPORE

(1) CHENAI MUNYORO (2) DYNs MUNYORO (3) DYANA
MUNYORO (4) MUNYORO MINING SYNDICATE (5)
PATIENCE MUNYORO (6) EDITH MUNYORO

v

(1) MINERALS IDENTITY (PRIVATE) LIMITED (2) RATIDZO
MUKARATI (3) COUNCILLOR MANYONGA (4) MUDYIWA
MASHONGANYIKA (5) MINISTER OF MINES AND MINING
DEVELOPMENT N.O

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA & CHITAKUNYE
HARARE: 29 NOVEMBER 2024**

K. Gama, for the appellants

T. Zhuwarara, for the first respondent

No appearance for the second, third, fourth, and fifth respondents

CHITAKUNYE JA:

1. This is an appeal against the whole judgment of the High Court (court *a quo*) dated 8 May 2024 under case number HCH 6856/23, in which the court *a quo* granted a spoliation order. In addition, the court granted a prohibition order in favour of the first respondent. Upon hearing this appeal, an extempore judgment was made with the court declining to exercise jurisdiction in the appeal. The appellants have sought written reasons for the decision. These are they.

THE PARTIES

2. The first appellant is Chenai Munyoro a female adult residing at Chitiyo Village, Makaha, Mudzi District. The second appellant is Dyns Munyoro a male adult and a brother to the first appellant. The third appellant is Dyana Munyoro (Nee Mandiseka), the mother to the first, second, fifth and sixth appellants. The fourth appellant is Munyoro Mining Syndicate, a syndicate of members of the Munyoro family who are the first to third, fifth and sixth appellants.
3. The fifth appellant is Patience Munyoro a female adult and member of the Munyoro family residing in Chitiyo Village, Makaha, Mudzi District. The sixth respondent is Edith Munyoro a female adult and member of the Munyoro family residing in Chitiyo Village, Makaha, Mudzi District. The first to the sixth appellants will, hereafter, be referred to as the 'appellants'. The appellants operate a mine at a mining claim known as Koodoo registered under certificate of registration number 42792 through the fourth respondent (the syndicate).
4. The first respondent is a 60% beneficial holder of rights and interests in the mining location registered under 14778 and known as Koodoo 10 Mine (the 'Koodoo 10 mine') in Makaha situated in the District of Mudzi. The first respondent is in partnership with one, John Nkomo, who is the owner of the Koodoo 10 mining claim holding a 40% share.

FACTUAL BACKGROUND

5. The brief facts giving rise to this appeal may be summarised as follows:

The appellants and the first respondent have had a long running dispute over Koodoo 10 Mine, Chitiyo village in Makaha, Mudzi District. The first respondent alleges that it has a valid and binding partnership agreement with one John Nkomo in respect of Koodoo 10

mine which is duly registered with the office of the fifth respondent. In terms of the said agreement, the first respondent exercises rights on the mine registered in John Nkomo's name under certificate of registration No. 14778.

6. In the court *a quo* the first respondent alleged that on 6 June 2023, despite it being the lawful holder of rights and interests in Koodoo 10 Mine claim, the first to third appellants came to the mining claim and chased away its employees leading to a stop in operations. They also took over the mine and started conducting illegal mining activities on the mining claim.
7. The first respondent further alleged that the appellants had, at some stage, applied to the fifth respondent for permission to relocate their mining claim under Certificate of Registration No. 42792 from Lawleys Concession to Makaha, Mudzi District, to an area falling under the Koodoo 10 mining claim which belongs to the first respondent. The appellants' application was rejected as it ran contrary to the mapping area upon which Certificate of Registration No. 42792 was issued. It also alleged that the appellants therefore had no right to be at Koodoo 10 mining claim.
8. Following the conduct of the appellants on 6 June 2023, the first respondent filed an urgent chamber application for spoliation and prohibitory relief on 9 June 2023 under case number HCH 3805/23. It averred that it was in peaceful and undisturbed possession of the mine and was despoiled by the first to the third appellants. The matter was set down before CHINAMORA J on 19 June 2023. The first to third appellants defaulted at the hearing of the application under HCH 3805/23 and the court granted the spoliation order in favour of the first respondent. The order also prohibited the first to third appellants and their agents from

interfering with the first respondent's mining operations at Koodoo 10 mine and to restore the undisturbed use, possession and control of the mine to the first respondent.

9. In response to the order by the court *a quo*, the first to fourth appellants filed an application for rescission of the default judgment under case number HC 4256/23 on 28 June 2023. On the same date of filing the aforesaid application for rescission, they also filed an urgent chamber application for stay of execution pending the hearing of their application for rescission under case number HC4261/23. The application for stay of execution was held not urgent and thus struck of the roll of urgent matters.
10. The application for rescission was subsequently granted by MUNGWARI J with the consent of the parties upon realizing that there was a need to interrogate the fourth appellant's assertion that the issue was one of a boundary dispute between its Koodoo mine claim and Koodoo 10 mine claim. The matter was subsequently allocated to MANYANGADZE J who, with the consent of the parties, ordered a case management and disposal process on procedural steps and terms agreed to by the parties. The steps and terms included, *inter alia*, that the parties carry out a mine inspection at Koodoo 10 mine claim and at what the fourth appellant considered to be its Koodoo mine claim under the supervision of the fifth respondent and a report of such visit was to be filed with the court. Following the mine visit the parties were to reconvene for a hearing on 8 August 2023. On the agreed date of 8 August 2023, the first to fourth appellants were again in default. The court *a quo*, per MANYANGADZE J, granted a default judgment in favour of the first respondent in which the first to third appellants were ordered to restore possession and control of Koodoo 10 Mine to the first respondent. In addition, the first to third appellants and all those claiming through

them were barred and prohibited from approaching the said mining claim and disturbing any mining operations thereat.

11. The appellants made another application for rescission of the default judgment granted by MANYANGADZE J on 8 August 2023 in case HCH 3805/23. They also applied for a stay of execution on an urgent basis. The appellants also applied for stay of execution of the default judgment. Their application for stay of execution of the latest default judgment was in vain as it was removed from the roll for lack of urgency by MUNANGATI -MANONGWA J. on 16 October 2023.
12. On 14 October 2023, and in spite of the extant court order of 8 August 2023, the first to sixth appellants, joined by the second to fourth respondents and over 30 other unnamed persons, arrived at Koodoo 10 mine where they brought down the perimeter fence which was erected around the mine and parked a ZANU PF marked black Ford Ranger double cab registration No. AFX 1471. They stopped operations at the mine. It was alleged by first respondent that the appellants were taking advantage of their ZANU PF positions to perpetrate outright acts of lawlessness at the mine.
13. This conduct propelled the first respondent to file an urgent chamber application under case number HCH6856/23 seeking a spoliation order for the restoration of its peaceful and undisturbed possession of Koodoo 10 mine and an interdict prohibiting the first to the sixth appellants as well as second to fourth respondents and their agents from interfering with its mining activities. The first respondent averred that the matter was urgent as further delays would embolden the respondents and cause irreparable harm to its mining operations.

14. The appellants opposed the application and contended that the first respondent failed to allege or prove dispossession, focusing instead on interference, which does not satisfy the requirements of spoliation and that spoliation protects against unlawful dispossession, not mere interference with use or control. The appellants further contended that the first respondent had no lawful claim to Koodoo 10 Mine, as the Ministry of Mines recognized Rabson Nkomo, not John Nkomo as the claim holder of the mine. The second respondent denied any form of involvement, asserting that she had no interest in the dispute. She averred that there was no evidence linking her to the alleged disturbances or the use of a vehicle to ferry ore. The fourth respondent opposed the application on the basis that no cause of action for spoliation had been established against him and that the founding affidavit lacked allegations of peaceful possession, specific acts of dispossession, or evidence of his involvement at the mine.

15. On 8 May 2024 the court *a quo*, per TAKUVA J, found that the application was urgent and that it had merit. The court *a quo* granted the spoliation order in favour of the first respondent and ordered the first to sixth appellants and second to fourth respondents and their agents to restore to the first respondent and its agents undisturbed possession, use and control of Koodoo 10 Mine. The court *a quo* also prohibited the first to sixth appellants as well as second to fourth respondents and any persons claiming any rights through them from approaching the mine site and disturbing any mining operations, directly or indirectly and also ordered the Sheriff of the High Court of Zimbabwe to evict them from Koodoo 10 mine. Members of the Zimbabwe Republic Police (ZRP) were also directed to ensure compliance with the order by the appellants and second to fourth respondents. The court *a quo* ordered

that they pay the first respondents costs jointly and severally, the one paying the others to be absolved, on the attorney-client scale.

16. The first to sixth appellants were aggrieved by the judgment of the court *a quo* and noted this appeal on 10 May 2024. However, subsequent to the judgment of the court *a quo* and the noting of the appeal, the appellants were evicted from the mining claim in dispute on 14 June 2024.

SUBMISSIONS ON APPEAL

17. At the commencement of the proceedings in this Court and in support of a notice of preliminary objection filed in terms of r 51 of the Supreme Court Rules, 2018, Mr *Zhuwarara*, for the first respondent, submitted that the matter is now moot as the appellants had been evicted from the mining claim in question. In this regard, he relied on the case of *Khupe & Anor v Parliament of Zimbabwe & Ors* 2019 (3) ZLR 915(CC)
18. *Per contra*, Mr *Gama*, for the appellants submitted that the appeal is not moot. He submitted that whilst the eviction of the appellants had been conducted by the Sheriff, this was in execution of an order by MANYANGADZE J in HCH 3805/23 and not in relation to the judgment under appeal. He further submitted that the order upon which the eviction was executed did not affect the fourth, fifth and sixth appellants as they were not cited as parties in that case. Counsel also submitted that the fourth appellant, being a company could not be evicted through its employees who are the first, second and third appellants. The thrust of counsel's submissions was that the eviction of the appellants did not have any effect on the judgment under appeal. This submission was made despite his concession that all the

appellants had vacated the mining claim in question through the eviction executed by the Sheriff on 14 June 2024.

19. In reply Mr *Zhuwarara* submitted that the arguments by the appellants do not take the matter any further. He submitted that the writ of eviction was in respect of the first to third appellants and all those claiming occupation through them. In execution of that order all the appellants were evicted and were thus no longer in occupation of Koodoo 10 mining claim. In the circumstances, there was no longer a live dispute between the parties. The cause for the dispute had been the appellants' occupation of the first respondent's mining location and once they vacated the premises it meant that there was no longer a live dispute that the court can relate to. This has rendered the appeal moot. It was his submission that any purported determination will be academic. Counsel also submitted that it did not matter how the dispute was resolved, the fact is that there is no longer an issue to determine. He further submitted that in any event, in accordance with the case of *Khupe & Anor v Parliament of Zimbabwe & Others (supra)*, factors which emanate outside the judgment may also lead to mootness of a matter.

ANALYSIS

20. Upon a careful consideration of the submissions, we hold the view that the preliminary point raised by Mr *Zhuwarara* has merit. We find no merit in Mr *Gama*'s contention that the issue of mootness does not arise because the eviction was in execution of the order in HCH 3805/23 and not in execution of the judgment under appeal. The concession by the appellants that following the judgment under appeal and the noting of this appeal, they are no longer on the mining claim in question puts to rest the issue of whether or not the matter

is now moot. That concession in effect confirms the first respondent's position that there is no longer any live dispute as it has regained peaceful and undisturbed occupation of its mining claim which is what it had approached the courts for.

21. The issue of mootness was aptly dealt with by the Constitutional Court in *Thokozani Khupe & Anor v Parliament of Zimbabwe & Ors* 2019(3) ZLR 915(CC) at p 7, where MALABA CJ stated as follows:

“A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. The position of the law is that if the dispute becomes academic by reason of changed circumstances, the Court's jurisdiction ceases and the case becomes moot. It is incumbent upon the court to determine whether an application [matter] before it still presents a live dispute as between the parties. . . . The position of the law is that a court hearing a matter will not readily accept an invitation to adjudicate on issues which are of ‘such a nature that the decision sought will have no practical effect or result.’”

The above legal position was followed in *MDC & Ors v Mashavira & Ors* SC 56/20 at p 33 where it was stated:

“...a court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy between the parties. Thus, if the dispute becomes academic by reason of changed circumstances, the case becomes moot and the jurisdiction of the court is no longer sustainable”

See also *Ndewere The President of Zimbabwe N.O & Others* SC 57/22 at p 13

It is clear from the above authorities that the issues that cause a matter to become moot may arise from outside the record. Thus, it matters not how the dispute between the parties is resolved.

22. *In casu*, though the appellants were evicted on the basis of an order granted in HCH 3805/23, the fact of the matter is that they are no longer on Koodoo 10 Mining claim. The first

respondent confirmed that there are no longer any disturbances to its occupation and operations thus ending the dispute between the parties.

23. This Court is aware that declining of jurisdiction after a finding that an appeal is moot is an exercise of discretion. A court may decide to hear a moot matter on the merits where it takes the view that it is in the interests of justice to do so. In *Ndewere v The President of Zimbabwe & Others (supra)* the court reiterated that a court may not hear a matter that is moot unless it is in the interests of justice to do so. What constitute ‘in the interests of justice’ will invariably depend on the circumstances of each case. The court in the *Ndewere* case (*supra*) referred to the South African case of *VINPRO NPC v The President of the Republic of South Africa & Ors (741/2021) [2021] ZAWHCHC 149* wherein the court opined as follows:

“[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include -

- (a) whether any order which it may make will have some practical effect either on the parties or on others;
- (b) the nature and extent of the practical effect that any possible order might have;
- (c) the importance of the issue;
- (d) the complexity of the issue;
- (e) the fullness or otherwise of the arguments advanced; and
- (f) resolving the disputes between different courts.”

24. The factors to consider in determining whether or not it is in the interests of justice to hear a matter that is moot are not exhaustive. The overarching consideration is whether or not it is in the interests of justice that the moot matter be heard on the merits. In *Chombo v Clerk of Court, Harare Magistrates Court (Rotten Row) & Others CCZ 12/20* at p8 MALABA CJ aptly stated that:

“A litigant seeking to have a matter that is moot determined by the courts must establish exceptional circumstances which justify the hearing of the matter. The

question is whether the applicant has established just cause for the matter to be considered as falling under the exception to the doctrine of mootness.”

25. *In casu*, the appellants’ counsel did not even begin to address the factors relevant in considering whether or not it was in the interests of justice to hear the matter on the merits. He was obsessed with the contention that as the eviction was in execution of the order in HCH3805/23 and not the judgment under appeal, the issue of mootness did not arise; oblivious of the effect of the eviction on the dispute that had led the first respondent to approach the court *a quo*. As noted above, such an argument was simply not sustainable in the circumstances. It was upon the appellants to establish that in spite of the mootness, it was in the interests of justice that the court proceeds to determine the appeal on the merits. Counsel for the appellants lamentably failed to address any factor that would persuade the court in deciding whether it was in the interests of justice to hear the moot matter on the merits or not. In the absence of such, it follows that no just cause could be established for the court to proceed with the appeal on the merits. The appropriate remedy is to decline jurisdiction as no useful purpose, other than to appease the appellants, would be served by hearing the appeal on the merits.

DISPOSITION

26. The appellants having conceded that they were evicted from Koodoo 10 mining claim and the first respondent having confirmed the eviction and that there was no longer a live dispute between the parties, the appeal has been rendered moot. In the absence of any cogent argument justifying the hearing of the appeal on the merits, the court finds no basis for proceeding to do so. The objection is thus upheld.

27. On costs, the respondent has been successful. We find no reason to depart from the norm, that costs follow the cause.

28. In the result, having found that the appeal is moot, the following order was issued:

1. The Court declines to exercise its jurisdiction.
2. The appellants shall jointly and severally, the one paying the others to absolved, pay the first respondent's costs.

GUVAVA JA : I agree

MAVANGIRA JA : I agree

Gama & Partners, appellants' legal practitioners

Chinawa Law Chambers, 1st respondent's legal practitioners