DULY HUNI
versus
GEORGE PEDZISAI FICHANI

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 9 September 2021 and 5 May 2022

Urgent chamber application

Applicant in person
A Masango, for the respondent

MUREMBA J: I heard this matter on 9 September 2021 and dismissed it with costs in an *ex-tempore* judgment. I have now been asked for the written reasons thereof and these are they.

This was an application for a spoliation order. It is common cause that the parties have been involved in an ownership wrangle over four gold mining claims that are situated in Copper Queen, Gokwe North. They have been suing each other since 2012. However, in 2013 the applicant successfully obtained an ejectment order against the respondent and in 2017 the applicant managed to register the said mining claims in his name. The respondent averred that the registration was done fraudulently after the applicant had obtained a default judgment in HC 2666/17, the case in which he did not cite the respondent as a party despite the fact that said mining claims were registered in the respondent's name. The respondent averred that he is challenging the registration through an application for rescission of the said default judgment. The matter is still pending in this court.

In the present application the applicant averred that on 14 August 2021 the respondent in the company of some violent people whose identities are not known to the applicant came to the mining claims in question. They violently ordered the applicant to vacate the mining claims. The applicant averred that he showed the respondent his certificates of registration, but he remained adamant that the applicant should vacate. The applicant averred that he was not given a chance to remove his equipment. He left all his mining machinery and gold ore. He averred that there is a possibility that they can be stolen. The applicant averred that he had satisfied the requirements of a spoliation order *viz* that he was in peaceful and undisturbed

possession of the mining claims and that he was unlawfully deprived of them by the respondent. The applicant further averred that the circumstances of the case entitled the matter to heard on an urgent basis.

The respondent raised two points *in limine* which I dismissed for lack of merit. The first one was that the relief that the applicant was seeking was fatally defective for he was seeking a final relief on an urgent basis instead of seeking a provisional order. In *Blue Rangers Estates (Pvt) Ltd* v *Muduvuri & Anor* SC-29/09, it was held that an application for a spoliation order is an application which is *sui generis* and warrants the granting of a final order on an urgent basis. The second point *in limine* was that the matter was not urgent because the dispute between the parties had started way back in 2012. The respondent went on to give an account of how the parties had sued each other from back then to date. The respondent was clearly misguided because the spoliatory relief that the applicant was seeking was based on the events of 14 August 2021 the date which he said the respondent forcibly evicted him from the mining claims. The applicant filed the present application on 18 August 2021. Clearly the applicant filed his application without undue delay when the need to act arose. The point *in limine* was without merit, hence I dismissed it.

With regards to the merits I found no merit in the applicant's application for the following reasons. The respondent vehemently denied dispossessing the applicant of the mining claims in question on 14 August 2021. His defense was that on the day in question he was in Harare where he had come to attend court on 13 August 2021 after the applicant had sued him for an interdict. It is not in dispute that the parties attended court together on 13 August 2021 and that the applicant's application for an interdict was dismissed on that very day. The respondent averred that after court he did not go back to Gokwe on the same day. He only went back on 15 August 2021. He attached a supporting affidavit from his friend one Elias Sekani who averred that each time the respondent comes to Harare he stays at his place in Waterfalls and that on 13 August 2021 after court the respondent came to his place and only left on 15 August 2021. The respondent averred that the present application was based on false averments that he was in Gokwe North on 14 August 2021 when he was not. The respondent averred that he could not have gone to the mining claims when he was fully aware that they are currently registered in the applicant's name and when he (the respondent) was still in the process of challenging registration thereof.

It was my considered view that an application for a spoliation order being an application for a final order, the applicant had not proven on a balance of probabilities that the respondent had despoiled him of the mining claims. He needed to prove his case on a balance of probabilities.

In his founding affidavit he gave very little information about how the respondent despoiled him of the mining claims. At the hearing he mentioned that when he went to the mining claims in the morning of 14 August 2021 he found the respondent having already caused some disturbances. He stated that he learnt of this from his employees who had arrived at the mine first before him and were already carrying out mining operations. The applicant said that the respondent told him that since the applicant's application for an interdict had been dismissed he had come back to carry out mining operations at the mines. The applicant stated that that is when he together with his surbodinates went to make a report to the police. The police indicated that although they were taking his report, they were advising him to approach the courts as they had had enough of the parties' disputes. However, the applicant did not mention all of this in his founding affidavit. He did not even attach any supporting affidavits from his employees to corroborate or support his story and neither did he attach any documents to confirm making a police report against the respondent on that day. Supporting affidavits from the employees and documents from the police would have confirmed the applicant's story that on 14 August 2021 the respondent was in Gokwe North and not in Harare as the respondent averred. Without such affidavits and documents the case remained tilted in favour of the respondent who attached his friend's affidavit which confirmed the respondent's story that he was in Harare from 13 August 2021 to 15 August 2021. Without any corroborative evidence it was difficult to simply accept the applicant's story. He needed to place before the court evidence which placed the respondent at the scene on 14 August 2021. At the hearing the applicant further stated that the respondent was still at the mining claims and was carrying out mining operations. Surely, it should have been easy to place proof of such evidence before the court. The police could have confirmed this since they had taken the applicant's report. This is a case where the parties have been suing each other left, right and centre and malice by either party cannot be ruled out. As it is, their stories were poles apart. The applicant was saying that on the material day they were together in Gokwe North, whilst the respondent

was saying that he was in Harare and nowhere near the mining claims in Gokwe. There is a distance of more than 150km between the two places. So, both of them could not have been telling the truth. Under the circumstances the applicant needed to do more to prove that he was despoiled of the mines by the respondent who vehemently denied it and gave the court the impression that he is aware that as long as the mining claims are still registered in the applicant's name, he cannot invade them. The respondent averred that from 2017 when the applicant obtained registration of the mining claims in his names, he has never been to the mining claims. If this is true, one is then left wondering why the applicant keeps coming back to the courts alleging invasion of the mining claims by the respondent. This serves to demonstrate that between the two, there is one who is very cunning and vindictive. In the absence of concrete evidence it is difficult to tell which one it is. This is why I dismissed the applicant's application for a spoliation order. He could have been telling the truth, but he did very little to prove his case. He did not prove it on a balance of probabilities.

I, thus dismissed the applicant's application with costs.

Muronda Malinga Legal Practice, respondent’s legal practitioners