

TRYNOS NKOMO

Versus

SIFANJANI MOYO

And

**THE PROVINCIAL MINING DIRECTOR,
MATABELELAND SOUTH PROVINCE, NO**

And

THE OFFICER IN CHARGE, CID MINERALS GWANDA NO

And

THE OFFICER IN CHARGE, ZRP, WEST NICHOLSON NO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 11 & 13 OCTOBER 2016

Urgent Chamber Application

Z. Ncube for the applicant
B. Diza for the 1st respondent
Musika for 2nd, 3rd & 4th respondents

MAKONESE J: On the 16th September 2016 I granted a provisional order in the following terms:

“Interim Relief granted

Pending the finalisation of this matter, the applicant be granted the following relief:-

1. The 1st, 3rd and 4th respondents and their agents, nominees or employees be and are hereby ordered forthwith to release to the applicant his gold ore as well as the processed 760 grammes
2. The 1st respondent, his agents, nominees or employees be and are hereby interdicted from going within 500 metres radius of the applicant’s mine.”

It was brought to my attention that on the 26th September 2016, 1st respondent filed a notice of opposition and intended to anticipate the matter and be heard. I directed that the matter be set down for hearing on 11 October 2016. I have heard arguments from both parties. The 1st respondent contended that the application ought to be dismissed on the following grounds:

1. The matter is *lis pendens* in the High Court at Harare under case number HC 9130/16
2. There is a mis-joinder of parties in that 1st respondent was not properly cited
3. The requirements of a spoliation were not established by the applicant.

Factual background

1st respondent contends that he is part of a syndicate known as Sixo Mining Syndicate. 1st respondent further avers that sometime in August 2016 the syndicate was authorized to work upon certain mining claims at Olympus Block Plot 1, West Nicholson. Such authority was given under the hand of the farm owner upon which the mining claims were situate. 1st respondent avers that applicant sought to partner with them in working the mining claims, for the purpose of extracting gold ore. For one reason or the other the arrangement did not materialize and the 1st respondent applied for a mining licence in respect of the claims in dispute. It is now common cause that on 9th September 2016, the applicant was issued with a Registration Certificate in respect of the mining claims under certificate number GA 6665, known as Bunny Luck 2. The 1st respondent contends that applicant clandestinely obtained the mining licence. I need not dwell much on this aspect as it was not disputed that both 1st respondent and applicant lodged their applications around the same time. The applicant secured the mining licence. 1st respondent did not receive a response from the Provincial Mining Director. That to me appears to have been the source of the conflict. Applicant approached the High Court at Harare under case number HC 9130/16. The order sought in that matter was for an interdict couched in the following terms.

“Interim Relief

Pending the return date of this matter, the applicant be and is hereby granted the following relief in the interim:

1. The 1st respondent be and is hereby ordered not to remove the three truck loads of gold ore that he illegally mined at applicant's mining location, Olympus Block, West Nicholson, Gwanda. In the event that the 1st respondent has already removed the three truck loads of gold ore from Olympus Block he be and is hereby ordered to return the said three truck loads to Olympus Block forthwith and off load them.
2. The 2nd respondent be and is hereby ordered to release to the applicant the one gold ore truck load that was removed from applicant's mining location, Olympus block by the police.
3. The 1st respondent be and is hereby ordered to off load all the four truck loads of gold ore that he illegally mined at Olympus Block.
4. The 1st respondent be and is hereby ordered not to interfere with applicant's mining location at Olympus Block, West Nicholson, Gwanda unless in terms of the law.
5. The 1st respondent be and is hereby ordered to pay costs of suit on an attorney and client scale."

The application was placed before MWAYERA J who ordered as follows:

- “1. The application is not urgent
2. The applicant shall bear the costs of suit.”

The issues for determination have been properly set out in the 1st respondent's head of argument filed by Mr *Diza*. I shall proceed to determine the issues in turn.

Whether the matter is *lis pendens*

I am of the view that the matter filed at High Court, Harare under case number HC 9130/16 was concluded and resolved once the learned judge ruled that the matter was not urgent and ordered the applicant to pay the costs of suit. The matter that was filed at Harare is an application for an interdict. The matter that is before me is for an order for spoliation. Mr *Ncube* appearing for the applicant pointed out that he did not appear on behalf of the applicant at Harare. He is not privy to the legal advice given to applicant when the application was filed. It was his view that the principle of *lis pendens* did not apply in this matter because the relief sought in this matter is substantially different from that sought in Harare.

Herbstein and Van Winsen in *The Civil Practice of the Superior Courts in South Africa*, 5th Edition at page 311, state as follows:

“The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of *res judicata*, which in turn are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint.”

In the case of *Chizura v Chiweshe* HB-80-03, the court held that:

“It is clear that the principle of *lis pendens* or *lis alibi pendens* is not an absolute bar. It is discretionary upon the court to decide whether it is just and equitable that it must be allowed to proceed.”

The principle of *lis pendens* will not succeed when the previous action has been withdrawn. The principle is naturally extended to cover matters that have been resolved by the court. In this matter the court ordered that the matter was not urgent and ordered the applicant to pay to costs of suit. There is therefore no case pending in another court. It is my view that the principle of *lis pendens* has no application on the facts in this matter.

In *Loader v Dursot Brothers (Pvt) Ltd* 1948 (3) SA 136, ROPER J clearly stated that:

“The court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist ...”

Whether there is a mis-joinder of parties

The applicant contends that he took action against 1st respondent in his personal capacity because it is 1st respondent, his agents, assignees and nominees who have dispoiled him of his use of the mining claims. It is 1st respondent and his agents who have loaded gold ore into trucks from the mining location. Rule 87 (1) of the High Court Rules, 1971 provides as follows:

“No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

1st respondent avers that he has no personal interest in the matter. It is the syndicate that has an agreement with the farm owner, it is so argued. In my view, nothing turns on this issue. The applicant has identified that 1st respondent and his agents and assignees have been milling

gold ore. The mere fact that the syndicate was not cited does not defeat the applicant's claims. I conclude that the issue of mis-joinder has no merit.

See the case of *Burdock Investments (Pvt) Ltd v Time Bank of Zimbabwe Ltd and Ors* 2003 (2) ZLR 437

Whether the requirements of spoliation have been satisfied

The applicant avers in his founding affidavit that he is the lawful owner of Bunny Luck 2 mining claim by virtue of a certificate of registration dated 9 September 2016. Applicant has furnished documentary proof of his proof of title which has not been refuted. Applicant goes further to state that on 7th September 2016, 1st respondent and his assignees or employees or agents loaded 3 truckloads of gold ore from his mining claims. The 1st respondent does not actually deny the extraction of gold ore from the claims that are registered in the applicant's names. The 1st respondent clearly has no lawful authority to extract or mill ore from the applicant's claims.

The legal position as regards spoliation is well settled in our law. All the applicant has to allege is that he was in undisturbed use, occupation or control of the property, and that such use and occupation has been interfered with. The 1st respondent and his agents had no lawful right to disturb applicant's use and occupation of the mining claims. See the case of *Karori (Pvt) Ltd and Another v Mujaji* HH-23-07; *Chisveto v Minister of Local Government & Town Planning* 1984 (1) ZLR 248 (H) and *Nienaber v Stuckey* 1946 AD 1049.

An application for spoliation is urgent by its very nature. It exists to preserve law and order and to prevent self-help in the resolution of disputes. In matters involving gold ore the matter becomes the more urgent in that once gold ore is extracted from a mining location and transported for milling purposes, the party that has been despoiled will have no other recourse.

In the present matter I was satisfied that the two essential elements of a spoliatory order were established, namely, that applicant was in peaceful and undisturbed possession of mining

claims lawfully registered in his names. Applicant was despoiled of the possession of gold ore from the mining claims. Trucks loaded with gold ore were intercepted from the mining location. The question of ownership does not arise for determination in spoliation proceedings.

In the result, I conclude that the provisional order granted on 16th September 2016 is still extant.

Ncube & Partners, applicant's legal practitioners
Mhishi Legal Practice c/o Sengweni Legal Practice, 1st respondent's legal practitioners
National Prosecuting Authority, 2nd, 3rd & 4th respondents' legal practitioners