

D.G.L. INVESTMENTS NUMBER TWO (PVT) LTD
versus
VONGAISHE MUPERERI MP
and
COMMISSIONER GENERAL ZIMBABWE REPUBLIC POLICE
and
MINISTER OF MINES AND MINING DEVELOPMENT
and
FIDELITY PRINTERS AND REFINERIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 6 MARCH 2018 AND 15 MARCH 2018

Urgent Chamber Application

Ms E Sarimana for the applicant
J Magodora for 1st respondent
L Dube with *L Musika* for the 2nd & 3rd respondents

MATHONSI J: After hearing submissions from counsel in this matter on 6 March 2018 I granted a provisional order in favour of the applicant, the interim relief of which is in the following:

“INTERIM RELIEF GRANTED

Pending the final determination of this matter, it is ordered:

1. That First respondent be and is hereby ordered to—
 - (i) Cease and desist from inciting, encouraging, inflaming, persuading in any way, any person or persons, from entering upon the premises of the Gaika Mine, Kwekwe.
2. That Second Respondent be and is hereby ordered forthwith to remove from the Gaika Mine premises any and all persons who are not employed by the applicant.
3. That Third Respondent be and is hereby ordered to temporarily suspend issuing any rights of whatsoever nature in respect of Gaika Mine or any part thereof, to any person and to deal with authorized representatives of applicant.
4. That Fourth Respondent be and is hereby ordered not to deal with anyone other than an authorized representative of applicant in respect of any gold won from Gaika Mine.”

By letter of 7 March 2018 to the Registrar of this court the legal practitioners representing the applicant requested reasons for the grant of the order that was issued. These are they.

The applicant is an incorporation which owns mining claims located in Kwekwe known as Gaika Mine acquired in June 2011, which for some reason it has not been mining for quite sometime, having closed the mine some time ago. It says that during the time that the mine was closed it was undertaking a multi-million dollar exploration drilling programme seeking to ascertain the resource in the mine with a view to developing the mine plan suitable for the exploration of the resource. That process is still on-going.

The first respondent, who is the Member of Parliament for Mbizo Constituency in Kwekwe where the mine is located wrote a letter to the applicant on 15 February 2018 advising the applicant of the takeover of Gaika Mine by a group of people himself and others were organising. The letter, which is signed only by the first respondent although its wording gives the false impression that it is authored by a group of people, reads in relevant part thus:

“REF: TAKE OVER OF GAIKA MINE BY THE KWEKWE COMMUNITY

We, the leadership of the Kwekwe Community working together with our elected representatives of the Mbizo Constituency, are advising you of the takeover of Gaika Mine by groups of young people. We have now organized these young people so that they maintain utmost discipline and do not damage this valuable asset in our area. However we advise that the community is frustrated by your actions because of the following:

- Duration Gold, your company started operations in 1983. You operated on open mine. Before this, Gaika mine operated underground. Many households were displaced, paving way for establishment of the entity with the pretext that it will create massive employment for the locals. However, it only operated until 1998 and closed without any convincing reasons. All machinery was removed from the mining site.
- This mine has been closed for a record of 20 years without any sign of reopening. We made numerous efforts directed to you to make a plan to amicably work with the community, but all our efforts did not yield anything. We did not even get a response from you acknowledging receipt of our request.
- We are reliably informed that you have no plans to reopen anytime soon. We are of the strong view that you closed in support of the opposition to the Government, in support of the regime change agenda.

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- Several proposals were submitted to you with no responses. Therefore our drastic decision has been informed by your non-commitment reopening of the mine (*sic*) which we strongly believe has the potential to empower our youths by creating employment and at the same time it will boost government Gold reserves.
- We have impressed on the youths that it is important we enter into a working relationship with you. We are still optimistic that you will join us with requisite papers and machinery for the betterment of our beautiful city of Kwekwe. If you are reluctant to work with us we propose that you tribute the mine to us.
Signed

Vongaishe Mupereri
On behalf of Mbizo
Constituency and the Kwekwe Community.”

Following that letter, Carel Hendrick Meyer the mine manager who deposed to the founding affidavit, says in excess of two hundred persons marched to the mine on 23 February 2018 and took over the mine as intimated by the first respondent. They entered the mine pit and immediately commenced mining operations including blasting in the pit during day and night notwithstanding that the pit is located in close proximity to Gaika Primary School thereby posing real danger to both school children and other people. The mining activities have continued unabated to this day.

Meyer states that a report was immediately made to Zimbabwe Republic Police in Kwekwe that there was trespassing and unlawful occupation of the mine with a request that the police should remove the unlawful occupiers. The officer in charge allegedly refused to act claiming that the matter was political.

Meyer bitterly complains that the police have a duty to enforce the laws of the country and as such cannot abdicate their constitutional mandate.

Following the takeover of the mine on 23 February 2018, the first respondent gave an interview to the Sunday News which was published in its edition of 25 February 2018 boasting that the capture of the mine was his brain child as he wanted the mine reopened in order to create employment for the people. He emphatically stated that he could not allow a situation where a company just closes under unclear circumstances.

These are the circumstances which prompted the applicant to make an approach to this court seeking recourse. Meyer makes the point that apart from the unlawful interference by

people being urged on by the first respondent, the applicant will suffer irreparable loss if the illegal gold mining is allowed to continue. Of course minerals are finite products. In addition to that the illegal activities are endangering members of the public and the illegal miners themselves. As it is clashes erupted at the mine during the afternoon of 2 March 2018 between different groups of the illegal occupiers and it is feared that one person died during the skirmishes. There is also a confirmed case of a passer-by who was struck and killed by a stone which flew out of the pit following a blast on Sunday 4 March 2018.

The application was opposed only by the first respondent. Mr *Dube* for the second and third respondents pleaded no contest submitting that they will abide the decision of the court. In his opposing affidavit the first respondent sought to distance himself from the mine invasion. He admitted penning the letter initiating the takeover but stated that he wrote it in a representative capacity as a Member of Parliament for the Constituency. It is disappointing that the Honourable Member of Parliament did not even attempt to point to any legal foundation upon which an MP is authorized to take over private property on behalf of his constituents or indeed to enter a mine belonging to a private company and commence mining operations. He did not even suggest that any attempt was made to obtain a mining licence underscoring not only the illegality of the takeover but also of the mining operations taking place at moment.

The first respondent was content to merely bemoan being singled out for legal action when there are more than 200 occupiers involved. Although he insisted that he had acted on behalf of the leadership of the community he did not bother to name the leadership in question nor the occupiers themselves. Appearing to contradict himself especially as he tried desperately to disown the occupiers, the first respondent proclaimed his intention as being “to represent downtrodden people” in his constituency and having “acted in the best interests” of his community.

Unfortunately the first respondent’s attempt at playing the modern day Robin Hood is illegal by Zimbabwean law. There can be no doubt that the first respondent is the leader of the event no matter how hard he tried to hide behind a finger. It is an event in which misguided people, no doubt being instigated by the first respondent, have resorted to self-help taking it upon themselves to occupy a mining concern belonging to the applicant without even a single document authorizing them to do so or to even undertake mining activities.

By his conduct, the first respondent may not be particularly evangelical about the rule of law but this country is a constitutional democracy in which that concept is sacrosanct. The first respondent, as a legislator, should be the first one to know that. One, or is it 200, cannot wake up one morning to find that they own a mining concern, without either purchasing it or obtaining authority from somewhere to own or mine. Not even a member of parliament has the magical power to clothe anyone with rights of that nature which the first respondent purported to do at Gaika Mine. But then, unfortunately that is what happens when the success of an MP is explained in mystical terms, when he or she is accorded this Robin Hood status imbued with the qualities beyond the ken of mortals. When everything is stripped to its mere bones it is then that it is exposed as an illegal activity.

This application takes the form of spoliatory relief which in our law is meant to reign in the rogue element in society, those with an affinity for taking the law into their own hands. It is fundamental to the basic precepts of any civilized society that people should not take the law into their own hands as allowing such to happen might degenerate into the law of the jungle where “only the fittest of the fittest” survive. Therefore spoliatory relief is a pillar of civil justice and chimes to a certain degree with the concept that public confidence in the administration of justice must be maintained at all times. See *Ngarava v Muringai and Others* HH 695-15.

In spoliation proceedings the applicant is required to prove possession and that there was a forcible or wrongful interference with that possession of the thing. I associate myself fully with the sentiments of REYNOLDS J in *Chesveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 240 (H) at 250 A-D:

“Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time that a competent court of law assesses the relative merits of the claims of each party.”

In this case, it is common cause that the applicant had possession of the mine which is why the first respondent approached it to announce the takeover. It is also common cause that the mine was taken over by a group of people, and although the first respondent tried to distance himself from the takeover, there can be no doubt that he instigated it. All the evidence points to

that and Mr *Madogora*, who appeared on his behalf, could not point to any basis for not holding the first respondent responsible other than saying he should not be singled out.

It is for the foregoing reasons that I drew the conclusion that a good case had been made for the relief sought and granted the provisional order in terms of the draft order.

Coghlan and Welsh, applicant's legal practitioners

Magodora and Partners C/o T J Mabhikwa and Partners, 1st respondent's legal practitioners

Civil Division, Attorney General's Office, 2nd & 3rd respondents' legal practitioners