OBERT CHANIKA

versus

MINING COMMISSIONER N.O.

and

DARWIN MINING SYNDICATE

and

WYCLIFF EVON GATAWA

HIGH COURT OF ZIMBABWE

DUBE J

HARARE, 21 March 2012

**Urgent Chamber Application**

*O.T Gaswa*, for applicant

*R. Hove,* for 1st respondent

*M.Matiyashe*, for 2nd and 3rd respondents

 DUBE J: This is an urgent chamber application. The matter was set down for hearing on21 March 2012 and an ex-tempo judgment given the same date. The respondents have requested for reasons for my decision. These are they;

The court set this matter down as an urgent matter as it was satisfied that the matter was urgent for the following reasons;

1) The applicant claimed that he had, in addition to being ejected from his mining claim,

been dispossessed of 21 tonnes of gold ore which respondents had taken to Kadoma. The

court was satisfied that there was a real danger of irreparable harm as there were fears that

the respondents would dispose of the gold ore.

2) Further, the court was satisfied that the applicant had treated this matter with urgency as

he lodged this application just a week after the alleged dispossession. The applicant

therefore asserted his rights timeously.

At the hearing of this matter respondent’s counsel did not initially challenge the issue of urgency, and sought to do so in his response when argument on the merits was already underway. Counsel later abandoned his challenge on urgency.

Applicant seeks the following interim relief;

 **INTERIM RELIEF SOUGHT**

Pending the determination of this matter, the applicant is granted the following interim relief:

1. The first and third respondents’ actions of forcefully and violently despoiling the applicant of its mining claim registered under **Certificate Registration Number 41986**, **Apex 48A** and the **21 tonnes** of mined gold ore is declared unlawful and is set aside.
2. The first, second and third respondents be and are hereby ordered to restore the applicant possession of the mining claim under **Certificate of Registration Number 41986, Apex 48A**, together with the **21 tonnes** of mined gold ore which was *in situ* at the claim as at 9th March 2012 pending hearing of the applicant’s complaint by the first respondent’s Complainants Committee.
3. The second and third respondents be interdicted from visiting or disturbing the applicant enjoyment of his mining claim as stated in para (2) above of this interim order.

The facts of this matter are briefly as follows;

The applicant avers that he is the registered owner of mining block number 41371 in Mount and Darwin and Mining block number 41986 was given to him as an extension of block number41371.He attached maps and certificates of ownership to those mining claims. Sometime in January 2012 the Mining Commissioner granted to the second respondent two mining blocks or claims which were reportedly pegged over the applicant’s claims. A dispute arose over the boundaries and ownership of the claims resulting in the mining commissioner reversing the decision to grant applicant an extension to his original claim and awarding a portion to second and third respondents. Applicant avers that he was in peaceful and undisturbed possession of mining claim No 41986 Apex 48A when on 6 March 2012 the second and third respondents violently and forcibly with the assistance of armed men, removed him from his claim and took possession of 21 tonnes of mined gold ore. The gold ore was taken to Kadoma were it was processed for gold. The appellant later lodged a complaint with the Mining Commissioner and the matter is still to be determined.

 Respondents aver that they were legally authorized to occupy, use and possess the mining blocks or claims by the mining commissioner and that the respondents therefore occupied the mining claims through lawful means. They maintained that they were acting under the decision of the 1st respondent who is the mining commissioner. The respondents deny forcing the applicant out of the mining claim and aver that he left the claim on his own after the issue had been discussed in the presence of the police and it was agreed that he should leave the claim in dispute. The second and third respondents conceded that they wrongfully and unlawfully took possession of the gold ore without the consent of the applicant. They are not opposed to an order compelling them to restore the gold ore to the applicant and are prepared to hand over the gold they realised after processing the ore. The court is required to rule on whether or not the applicant was forcibly removed from his mining claims and secondly whether or not the applicant is entitled to be restored to the *status ante.* Where a party claims that he has been despoiled, he must show,

a) that he was in peaceful and undisturbed possession of the property in issue and

b) that he was forced out without his consent.

A dispute of fact has arisen on the papers. The court has adopted a robust and common sense approach and decided to deal with the matter on the papers. This is an interim order which is subject to confirmation. The matter is going to be fully ventilated at the confirmation stage.

 Things that are inconsistent with ordinary human experience are properly rated improbable. That adage is applicable to this case. Respondent’s story that the applicant vacated the claims on his own is highly improbable and untenable regard being had to the following factors:-

1. That applicant left 21 tonnes of gold ore behind. No ordinary human being would leave such an amount of gold ore voluntarily and
2. Then turn around immediately and lodge a complaint with the mining

 Commissioner and

1. Subsequently mount an urgent chamber application claiming that he has

 been despoiled.

 In *Botha and Anor v Barret 1996 (2) ZLR 73 (S)* the court held that the delay in filing a complaint could be relevant in determining whether or not the applicant acquiesced to the deprivation. When one considers the applicant’s conduct of immediately reporting to the mining commissioner’s complaints committee within two days of the occurrence, it can hardly be said that applicant acquiesced to respondent’s occupation of the claim. In fact the complaints committee was expected to have determined the dispute by 9 March 2012 but failed to sit. This was barely three days after the applicant was supposedly despoiled. The probabilities are that applicant was forced out of the mining claim without his consent.

The respondent averred that the mining commissioner’s decisions are normally enforced by the Zimbabwe Republic Police and that in this instance the applicant was asked to move out by the police and complied. They maintained that he was never forced out to move out. The court is satisfied that the Applicant was in peaceful and undisturbed possession of the mining claim when he was allegedly dispossessed. He did not consent but was forcibly and unlawfully dispossessed without a lawful order. Even assuming that the police or the mining commissioner ordered him to vacate the premises as suggested by the respondents, that instruction or order would be irregular without a valid court order. The police have no authority to eject people from disputed premises without valid court orders. The applicant was not dispossessed by due process of law. Respondents took the law into their own hands and removed applicant from his claim forcibly without his consent. Submissions were made to the effect that the applicant was not in lawful occupation of the claim in dispute at that stage regard being had to the decision of the mining commissioner that respondents were entitled to that portion of the claim. The issue of ownership is not relevant at this stage. This court is concerned with the manner in which the applicant was allegedly dispossessed of the property. As enunciated by INNES CJ in *Nino Bonino*v*de Lange* 1906 TS 120 @ 122.

“No man is allowed to take the law into his own hands; no one is entitled to dispossess another forcibly or wrongfully and against his consent …. The court will (in that instance) restore the status ante”.

Another case in point is *De Jaqer and ors* v *Farah* and *Nestadi* 1947(4) SA 28@p35 where the court held that "What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is so interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondents' conduct that the occupation by the applicants carries with it penal consequences”

Although applicant may not be entitled to be occupying the part of the claim from where he was forced out, the respondent was not entitled to remove him from the claim forcibly without his consent and without due process of law. The respondents took the law into their own hands and that is unacceptable. An order for spoliation is still competent despite that the applicant was not in lawful occupation of the claim in dispute.

 Part of the relief sought related to the return of 21 tonnes of gold ore. It is not competent for this court to make an order for the return of the ore as such order is not capable of performance by reason of the fact that the gold ore is no longer in existence. The gold ore has since been processed by respondents into gold. A small quantity of gold amounting to 32 grammes was realised after the processing. Although this processed gold was offered to the applicants, the quantity realised is being disputed. I am unable to grant an order for restoration of the gold ore in these circumstances. Applicant can pursue other remedies in respect of the gold ore.

Applicant has shown, *prima facie* that he was despoiled and an interim order is granted on the following terms:-

 **INTERIM RELIEF GRANTED**

 Pending the determination of this matter, the applicant is granted the following interim relief:

1. The first, second and third respondents be and are hereby ordered to restore the applicant possession of the mining claim under Certificate of Registration Number 41986, Apex 48A, pending the hearing of the applicant’s complaint by the first respondent’s Complainants Committee.
2. The second and third respondents be and are hereby interdicted from interfering with the applicant’s enjoyment of his mining claim being claim Number 41986, Apex 48A.

*Chirimuuta & Associates*, applicant’s legal practitioners

*Wintertons*, 2nd& 3rd respondents’ legal practitioners