

MABWE MINERALS (PRIVATE) LIMITED
versus
BASE MINERAL ZIMBABWE
and
PETER VALENTINE
and
MUYENGWA MOTSI

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 3, 5, 6 and 7 March 2014

Urgent Chamber Application

F Mushoriwa, for applicant
F M Katsande, for respondents

TAGU J: This is an urgent chamber application for spoliation and interdict filed on the 25th of February 2014 by the applicant Mabwe Minerals (Private) limited whose director is Tapuwa Gurupira against the respondents Base Minerals Zimbabwe (Private) limited (1st), Peter Valentine (2nd) and one Muyengwa Motsi (3rd). The second respondent Peter Valentine is the majority shareholder and managing director of first respondent Base Minerals Zimbabwe (Private) limited. On 3 March 2014 the respondents filed their opposing affidavits. The applicant then filed his answering affidavit on 4 March 2014 and served it on the court just before the hearing of the application on 5 March, 2014.

Before dealing with this application it is necessary that I give the brief historical background of this matter as i understood it from the papers filed by the parties as well as the various court hearings referred to by the parties. It is this historical background that has a bearing on this application.

One John Richard Needham Grooves was the Managing Director and sole shareholder of Chiroswa Minerals (Private) limited-(Dodge mine 1- 6). He entered into a 10 year tribute

agreement with Morris Tendayi Nyakudya who was the Managing Director of Vambo Mills (Private) limited on 17 May 2005. This agreement was rejected by the Mining Commissioner on the ground that a 10 year tribute agreement cannot be registered. John Richard Needham Grooves then entered into a second tribute agreement valid for 3 years on 18 May 2005 with Vambo Mills. The tribute agreement was in respect of the same Dodge mine claims 1 - 6. These mine claims were later known as or referred to as Chiroswa Syndicate. These are the mine claims which are at the centre of this application. In May 2008 John Richard Needham Grooves appointed Second respondent Peter Valentine to manage Dodge mines. They then entered into a 3 year tribute agreement in respect of the Dodge mine claims. This agreement was not immediately registered with the Mining Commissioner because of the dispute that then arose between John Richard Needham Grooves and Second respondent Peter Valentine on one hand against Morris Tendayi Nyakudya and Vambo Mills (Private) Limited on the other hand.

On 21 September 2007 Second respondent Peter Valentine was appointed a director of Chiroswa Minerals (Private) limited and he became a partner in Chiroswa Syndicate. Second respondent Peter Valentine then became a 50% shareholder while John Richard Needham Grooves was the holder of another 50%. On 19 September, 2011 John Richard Needham Grooves then sold his 50% share of Dodge Mine claims 1 – 6 to TAG Minerals Zimbabwe (Private) Limited leaving a 50% share of Second respondent Peter Valentine. Applicant Tapiwa Gurupira was then director of TAG Minerals (Private) limited. Then on the 31st of July 2012 John Richard Needham Grooves sold 100% of Dodge mine to Applicant Mabwe Minerals (private) limited. This sale is being challenged on the basis of fraud by Second respondent Peter Valentine in case HC 4112/13. This case is still at the pre-trial conference stage, hence it is still pending before this Honourable Court. There is therefore a dispute of ownership which I am not prepared to go into.

Meanwhile when all this was going on the dispute between John Richard Needham Grooves and Second respondent Peter Valentine against Morris Tendayi Nyakudya and Vambo Mills was not finalised. This dispute was only finalised in the case of HH 261 / 11 by PATEL J, as he then was. PATEL J ordered among other things that the tribute agreement (Dodge mines 1 – 6) between John Richard Needham Grooves and Second respondent Peter Valentine be registered with the Mining Commissioner. This was resolved on the 15th of November 2011.

The Mining Commissioner did not register the tribute agreement timeously which led to the case heard before JUSTICE TAKUVA under HC 5208/13 on 24 July 2013. JUSTICE TAKUVA ordered among other things that the tribute agreement be registered. On 20 August 2013 the applicant Mabwe Minerals then made an Urgent Chamber application seeking to be joined as a party to the case heard before JUSTICE TAKUVA. This application was dismissed on the 23rd of August 2013 by JUSTICE CHIGUMBA under case HH 56 /14. The applicant Mabwe Minerals then noted an appeal to the Supreme Court against JUSTICE CHIGUMBA's judgment under case number SC 311/13. This appeal has since lapsed since the applicant Mabwe Minerals failed to comply with the rules of the Honourable Court.

On 13 February 2014 JUSTICE PATEL's judgment was then complied with and the tribute agreement in favour of the first respondent Base Minerals Zimbabwe (Private) Limited represented by Second respondent Peter Valentine was then registered.

For avoidance of doubt the relevant portions of JUSTICE PATEL's order read as follows-

“It is accordingly declared that:

1.
2.

It is further ordered that:

1.
2.
3.
4.
5. Within 10(ten) days of this order at his offices, the 1st defendant shall refer the tribute agreement entered into between the 1st and 2nd plaintiffs to the appropriate mining commissioner for approval and registration in accordance with the provisions of Part XVIII of the Mines and Minerals Act (Chapter 21:05)
6.”

The first plaintiff was John Richard Needham Grooves. The second plaintiff was Peter Valentine the second respondent in this matter. JUSTICE TAKUVA's judgment had the following relevant portions:-

“IT IS ORDERED THAT:

1. Upon service of the court application in case HC 233 /13 the 3rd respondent (Mining Commissioner) be and is hereby joined as a party to the contempt proceedings in the said case.
2.
3.
4. The referral by the 1st respondent of the copy mentioned in paragraph 3 hereof be and is hereby deemed to be a referral of the original tribute agreement cited in paragraph 5 of the order by the said Honourable MR JUSTICE PATEL.
5. Within 48 (forty eight) hours of the service of this order on them, each respondent shall take such measures as are expedient to ensure that the appropriate tribute agreement shall be processed and registered in compliance with paragraph 4 above.
6.
7.
8.”

Following threats of contempt the tribute agreement was then registered on 13 February 2014. Now armed with the above registered order the respondents entered Dodge mines where the applicant was operating from. They entered without a writ of execution nor were they accompanied by a deputy sheriff. From the history above the applicant was operating at this mine having purchased the said mine claims from one John Richard Needham Grooves. The validity of that sale is being challenged in case HC 4112 /13 as I alluded to above.

In *casu* what is common cause is that all along as the events were unfolding the applicant Mabwe Minerals (Private) Limited represented by its director Tapiwa Girupira was occupying and carrying mining operations at Dodge mines 1 -6. The respondents were not on the mine premises. There was also a peace order that interdicted Second respondent Peter Valentine from entering or interfering with mining operations at Dodge mines issued at Bindura Magistrates Court on 6 July 2012 which lapsed on 6 July 2013. It is further not in dispute that on 18 February 2014, 3rd respondent Muyengwa Motsi entered Dodge mine premises as a visitor and ended up taking some photographs. Then on 20 February 2014, the first respondent Base Minerals (Private) Limited and the second respondent Peter Valentine entered the mine premises in question with a gang of armed men. On that day applicant rushed to this Honourable Court and issued summons under case HC 1414/14 challenging the validity of the registration of the tribute in question. On 21 February 2014 the respondents then wrote a letter to applicants giving notice of their intention to take occupation of Dodge mines with immediate effect and to commence operations under the registered tribute

agreement. The letter was written when the respondents had already effected entry into the mine premises.

The relevant portions of the letter written by respondents' legal Practitioners are as follows-

“Dear Sirs

1. The above matter refers.
2. The Acting Mining Commissioner Harare has signed and registered the tribute agreement in terms of the judgment in case HH261/11.
3. The tribute agreement takes effect from 13 February 2014 being the date of its registration.
4. It is our understanding that Mabwe Minerals (Pvt) Ltd claim to have interests in Dodge Mine.
5. It is with this background that we write to advise that Base Minerals Zimbabwe (Pvt) Ltd intend to take occupation of Dodge Mine with immediate effect and commence operations under the registered tribute agreement we have referred to.
6. The necessary Plant, Machinery and Equipment will be delivered on site with immediate effect as time is of the essence.
7. Any operations currently on Dodge Mine save those by Base Mineral Zimbabwe (Pvt) Ltd must cease forthwith.
8. Similarly any movables including (but not limited to the work force, plant, machinery and/or equipment save those belonging to or authorised to remain in place by Base Minerals Zimbabwe (PVT) Ltd must forthwith be removed from Dodge Mine which must be vacated to make way for Base Minerals Zimbabwe(Pvt) Ltd to commence operations.
9. The immovable property will be subject to an inventory taken on terms mutually agreed upon by the parties and a proper handover takeover effected.
10. Failing agreement on such immovable property, the parties are at liberty to have recourse to the law.
11. Should any such plant, machinery and equipment remain on site within 24 (twenty four) hours of receipt of this letter, that will entirely be at owners' risk and Base Minerals Zimbabwe (Pvt Ltd takes no responsibility whatsoever for its safe custody and/ or state of repair.
12. It is to be hoped that all parties concerned will fully cooperate and respect the terms of the tribute agreement.

Thanking you.”

Upon receipt of the letter the applicant on the same day did not waste time. They reacted swiftly by not responding to the letter but by rushing to this Honourable Court to file an Urgent Chamber application for Spoliation and interdict.

I will now turn to the application. In its founding affidavit and submissions by Mr *Mushoriwa* the applicant submitted that the respondents have despoiled them. That the applicant was in peaceful and undisturbed possession of the Dodge mine. That when the respondents entered the mine premises they did so without their consent and without following court processes or court order or writ of ejectment served through the Sheriff or his lawful deputy. They are requesting that the respondents be ejected and interdicted from entering and interfering with their mining operations until the summons case HH1414/14 has been resolved. They contented in their answering affidavit that the respondents entered Dodge Mine illegally if regard is had to the opposing affidavit of the third respondent *Muyengwa Motsi* who is admitting that applicant was in peaceful and undisturbed possession of the mines in question.

Indeed I had sight of 3rd respondent *Muyengwa Motsi*'s affidavit. Paragraphs 2, 3 and 4 are very pertinent. *Muyengwa Motsi* said the following among other things-

“.....

Ad paragraph 2

Indeed I entered the mine premises. I did not need permission from any one to do so. Applicant has been mining thereat illegally for the past two years. I did not use any false pretence. Indeed our intention has and continues to be to take over the mine and occupy the same as can be envisaged by the numerous court orders granted in our favour which Applicant blatantly refuses to recognise (see case numbers HC261/11, HC 5208/13 and HC 1194/13 attached hereto).

Ad paragraph 3

.....However the 2nd Respondent is within his rights to place guards at the mine to ensure that all the ore that was mined illegally does not leave the premises.

Ad paragraph 4

.....There was no takeover of the mine. There was however guards placed on the mine to ensure that Applicant and or its agents do not remove the ore from the mine.

.....”

In a nutshell this is an admission that the respondents have effectively entered the mine. They did so without any permission from any one. This confirms Mr *Mushoriwa*'s averments that indeed the applicant all along has been at the mine carrying on mining operations and that when respondents entered the mine on 18 and 20 February 2014 they did so without following due process of the law despite that they had a tribute agreement registered in their favour. This was clearly an act of self-help. Hence were taking the law onto their own hands.

The applicant prayed for an order in the following terms-

“TERMS OF FINAL ORDER SOUGHT:

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. That Respondents, their agents and assigns be and are hereby interdicted from entering the Applicant's mine at Dodge Mine or in any other manner interfering with operations of the mine.
2. That the Respondents jointly and severally, the one paying the other to be absolved, pay the costs of this Application on a Legal Practitioner and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is granted the following relief-

1. That the Respondents, their agents and assigns be and are hereby ordered to vacate and restore Applicant's vacant occupation of the Applicant's mine called Dodge Mine in Shamva within 24 hours of this order.
2. That Respondents, their agents and assigns be and are hereby interdicted from entering into or disrupting operations at Applicant's mine called Dodge mine in Shamva.
3. That Respondents pay the costs of this suit jointly and severally, the one paying the other to be absolved, on the higher scale of legal practitioner and client only in the event that they oppose this Application.

SERVICE OF PROVISIONAL ORDER

This provisional order be served on the Respondents by the Deputy Sheriff or by Applicant's Legal practitioners.”

The respondents in their opposing affidavits and submissions by Mr *Katsande* averred that the respondents did not despoil the applicant. They argued among other things that they

were effecting the PATEL J judgement as well as enforcing a statutory provision which had registered the tribute agreement in favour of them. This was registered by the Mining Commissioner on 13 February 2014 in terms of the Mines and Minerals Act [*Cap 21.05*]. They submitted that they did not need a court order or assistance of the Sheriff to move onto the mine and start operations. Hence they argued that their actions were very lawful and that the applicant all along was aware of the existence of the PATEL J judgement and the tribute agreement. Their further contention was that the applicant was mining illegally.

The court was urged to disregard the definition of spoliation as given by the applicant since it was not entirely accurate. The court was urged to adopt the definition that was enunciated by MALABA DCJ in *Blue Ranges Estates (Pvt) Ltd v Muduvisi & Anor* 2009 (1) ZLR 368 at 377-8 when citing Herbstein & van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed at p 1064 that:

“ A *mandament van spolie* is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue as between the parties.”

The respondents also challenged the second relief of interdict which they said was not available to the applicants. That relief is said to be a reversal of the relief sought in the HC case 5460/13. On the issue of costs they argued that the merry-go-round that has characterised the applicant’s case is a tragedy comedy self –induced by the applicant and that the application be dismissed on a higher scale.

While both Mr *Mushoriwa* for the applicant and Mr *Katsande* for the respondents made interesting submissions on other issues concerning the ownership of the mines, I am firmly convinced that it is not necessary for me to resolve them in spoliation proceedings and I will not attempt to do so. The reason being that 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 as a competent court of law assesses the relative merits of the claims of each party thus it is my view that the lawfulness or otherwise of the applicant’s possession of the property does not fall for consideration at all. In fact the classic generalization is sometimes made that in respect of spoliation actions that even a robber or a thief is entitled to be restored

to possession of the stolen property. See *Karori (Pvt) Ltd & Anor v Mujaji* 2007 (1) ZLR 80 (H) at 109 D – E.

Which brings me to the issue whether applicant has made a case for a spoliation and interdict orders. The requirements for an order for spoliation to be granted are two fold and have to be proved. They were stated in *Botha and Another v Barrett* 1996 (2) ZLR 73 (S) at 77 E as follows:

- “(a) that the Applicant was in peaceful and undisturbed possession of the property, and,
- (b) that the Respondent deprived him of the possession forcefully or wrongfully against his consent”.

See also *Kramer v Trustees Christian Coloured Vigilance Council, Park* 1948 (1) SA 748 (C) at 753.

The respondent as a general rule may raise only the following defences in spoliation proceedings-

- (a) Applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation,
- (b) Respondent has not committed spoliation.

As to the relief for an interdict the requirements that an applicant has to satisfy are these-

- (1) Clear right or a prima facie right though open to some doubt,
- (2) Well-grounded fear of harm if relief is not granted and if applicant can prove such right,
- (3) Balance of convenience must favour granting of relief, and,
- (4) No other relief.

See *Enhanced Communications Network (Pvt) Ltd v Minister Of Information, Posts & Telecommunications* 1997 (1) ZLR 342.

As regards both reliefs claimed I am satisfied that all the requirements have been satisfied. It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any

inquiry or investigation into the merits of the dispute. See *Nino Bonino v de Lange* 1906 TS 120 at 122.

In *casu* the applicant was dispossessed against his will and without the authority of or order of this court. In acting as they did, whether as principles or agents, all respondents took the law into their own hands. They are guilty of what is called self-help. This court must insist on observance of the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be, to ejection proceedings, cannot be interfered with in his possession except by due process of law. If he is interfered with unlawfully the court will not condone such interference. It will redress the situation pending the taking of lawful action for ejection. See *Ntshwacela v Chairman, Western Cape Regional Services Council*, 1988 (3) SA 218 (C).

If the armed men or guards posted by respondents are allowed to remain on the mine or the gates there is well grounded fear that harm might occur if an interdict is not granted. The applicant is entitled to the reliefs he is seeking. The application will be granted.

Accordingly, the provisional order is granted in terms of the draft.

Mawere & Sibanda, applicant's legal practitioners
F.M. Katsande & Partners, respondents' legal practitioners.