

HB 262-18  
HC 5563/18  
XREF HC 1755/18

RICNOB SUPPLIERS (PRIVATE) LIMITED

and

ALFRED CHINANAYI

**versus**

MIKE MANDIZERA

*And all those claiming title use and occupation through same at certain piece of land being Wallingford a situate in the district of Insiza measuring 946.4524 hectares*

**and**

MINISTER OF MINES AND MINERAL DEVELOPMENT

HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 16 OCTOBER 2018 AND 25 OCTOBER 2018

### **Urgent Chamber Application**

*T S Dzvettero* for the applicant

*M Ncube* for the 1<sup>st</sup> respondent

*L Dube* for the 2<sup>nd</sup> respondent

**MAKONESE J:** This application was originally filed at the High Court Harare on 14<sup>th</sup> June 2018. The matter was placed before KWENDA J. On the 18<sup>th</sup> June 2018 the parties appeared before the judge in chambers. It was ordered by consent that the matter be referred to the High Court at Bulawayo regard being had to the fact that the dispute arose at a farm in the Insiza District. It seems to me prudent, that where a dispute arises in a location where a court of competent jurisdiction is situate, that litigants take advantage of the court of competent jurisdiction, nearest to the place of occurrence of such dispute. In this particular instance, the case is easier managed from this court, where all interested parties reside. I am aware that all the High Courts in this jurisdiction are clothed with equal original, civil and criminal jurisdiction over all persons and all matters. It is my view, however, that litigants should not forum shop, as this is not only inconvenient, but expensive to the parties.

Applicants have lodged this urgent chamber application claiming that they were in peaceful and undisturbed possession of land commonly known as Wallingford Farm, being a portion of 78 hectares of Wallingford A situate in the District of Insiza. The applicants aver that during the month of June 2018 they were unlawfully dispossessed of their quiet and peaceful possession of the property in question by first respondent. The applicants contend that on 6<sup>th</sup> June 2018 the first respondent invaded their property by cutting down a fence on a quarry site, before gaining entry into the farm with the intention of commencing mining operations. The first respondent denies that he despoiled the applicant of its possession of the property. First respondent avers that he was issued with a prospecting licence by the second respondent on the same site and that he entered the property on the strength of the authority from second respondent.

### **Factual Background**

A brief background to this matter is that first applicant is in the business of processing quarry dump on seventy eight hectares on Wallingford Farm since 2017. The area is fenced and gated with notifications that it is private property and that it is applicant's area of business operations. On the 17<sup>th</sup> July 2017 the first applicant entered into a project with a Ndabezinke Tshuma (who was acting on behalf of May Tshuma the land owner), for the collection of quarry dust and quarry stones at the farm in question. The quarry is a dump site that had been abandoned some ages ago. In terms of the agreement between the parties first applicant would buy quarry dust and quarry stones on the farm and no other person or organization would be allowed to carry on the same type of business without the authority from the owner, Ndabezinke Tshuma. From July 2017 first applicant carried on with the quarry business without any disturbances. There is a principal homestead at the farm. The first applicant erected a fence around the quarry site in order to protect its equipment and operations. Gates were also erected to secure the site.

On or around the 6<sup>th</sup> June 2018, all hell broke loose. First respondent visited Wallingford Farm and cut the fence around the quarry site to gain access. He proceeded to pitch up a tent at the quarry site. He declared that he had been granted a permit by second respondent to carry out mining operations. The first applicant was taken by surprise. First respondent entered the site without the consent of the applicants. A report was made at Filabusi Police. The first respondent

was eventually charged and prosecuted for malicious damage to property. He was ordered to pay a fine of \$300 by a magistrate sitting at Filabusi on the 10<sup>th</sup> of October 2018. These are the narrow facts of this matter.

### **Spoliation**

The applicants aver that on or about the 6<sup>th</sup> of June 2018, first respondent, and those claiming ownership, and rights of use visited the quarry site at Wallingford farm, and cut a fence to gain entry on to the site. The fence that was cut had been erected to secure first applicant's equipment and operations. The first respondent acted unlawfully. As a result of the unlawful invasion and cutting down of the fence, the continued peaceful and undisturbed possession of the applicant and those claiming possession from it has been seriously compromised. The applicants aver that the matter is acutely urgent. The first respondent continues to threaten the peaceful possession of the applicants. The first respondent argues that the matter is not urgent. He contends that he obtained a prospecting licence from the second respondent and that his presence at the mining site is lawful. In support of his version, first respondent produced a letter dated 6 October 2018 addressed to the Zimbabwe Republic Police, Filabusi. It is important to observe that the letter was written after this urgent application had been lodged with this court and was awaiting determination. The letter is however important in that it reveals the real nature of the first respondent's defence to the allegations of spoliation. The letter is worded as follows:

*"The Officer In Charge  
ZRP  
Filabusi*

*RE: CONFIRMATION OF OWNERSHIP OF MINE: CRAFT MINE REG NO 17466BM  
AND PANGANI MINE REG NO 17467BM*

*Reference is made to the above subject matter.*

*This office received a complainant from Michael Mandizera dated 3<sup>rd</sup> October 2018 alleging that there were illegal miners working within a mining claim they have pegged and hold certificates to. In addition Mrs Tshuma the owner of Wallingford A Farm is refusing entry into their block to commence mining operations.*

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*May you assist to restore order at the claims by stopping all mining activities by the illegal miners since this office has issued a registration certificate in accordance with the Mines and Minerals Act [Chapter 21:05] to Michael Mandizera. He should be allowed to enjoy his mining rights without any interference from both the farm owner and the illegal miners as enshrined in the Mines and Minerals Act.*

*Please do not hesitate to contact this office for any clarification.*

*T Makuza  
Provincial Mining Director  
Matabeleland South  
For Secretary of Mines and Mining Development.”*

It is safe to conclude that this letter was authored at the behest and instigation of the first respondent. At the time the complaint was lodged he was aware that an application for spoliation had been lodged against him with this court. In taking a preemptive strike against the applicants the first respondent seems to confirm that the acts of spoliation complained of in fact did take place. This court is not going to be drawn into the dispute relating to ownership rights with respect to the mining site. This court is seized with an application for a *mandamus van spolie*. The single issue for determination is whether or not there has been a spoliation. If so, then the applicants would be entitled under the law to the relief sought.

The chain of events seems to confirm that applicants were indeed in possession of the mining site. First applicant was in actual physical possession of the property. The site was fenced and protected. First respondent unlawfully deprived first applicant of its possession of the quarry stone site and erected its own tent. There was an unlawful invasion of the property. First respondent did not have any possessory rights to the land in question. The land is private property and the first respondent and his agents are not invitees upon the land. Applicants indicate further, that second respondent has contravened section 31 (1) (a) and (g) of the Mines and Minerals Act. There is a principal homestead on the farm where workers reside. There has been no consent from the landowner, and the applicants to grant first respondent authority to carry out operations at the quarry site. First respondent had no right to trespass and cut down applicant's fence.

### **The Legal Requirements for spoliation**

The requirements for the relief of a spoliation order are well settled in our law:

- (a) the applicant must have been in peaceful and undisturbed possession of the property in question.
- (b) the respondents despoiled them of possession unlawfully without following due process.

The remarks of GWAUNZA (JA) (as she then was), in the case of *Base Minerals Zimbabwe (Pvt) Ltd and Others v Mabwe Minerals (Pvt) Ltd* SC 29/15 at page 6 of the cyclostyled judgment are relevant:

*“Having confirmed the court a quo’s finding as to the unauthorized, forceful entry by the appellant’s onto the disputed premises, what has to be considered next is whether the appellants established a defence acceptable at law, to such conduct. The respondent addresses this question in its heads of arguments, as follows:*

‘4.14 *The only recognized defences to an action of spoliation are:*

- *Denial of the facta probanda*
- *Impossibility of restoration*
- *Counter spoliation and*
- *Failure to act within a reasonable time*

*See Gondo No v Gondo and others 2001 (1) ZLR 376 and Silberberg and Schoeman ) ) at p 288 generally.*

4.15 *appellants have not raised these defences whether in the court a quo or on appeal and thus the appeal must fail.*

*There is merit in this contention. The appellants, as is evident from the papers before the court, did not justify their conduct on the basis of the defences mentioned....”*

In the present matter, the first respondent has not raised any of the recognized defence in an action for spoliation. Indeed the letter dated 6<sup>th</sup> October 2018 addressed to the ZRP at Filabusi at 1<sup>st</sup> respondent’s instance suggests that he intends to take over the quarry site without following due process. He is not armed with any court order. He seeks to forcibly remove the applicants from the quarry site. In order justify his unlawful entry onto the property the first respondent seems to rely on the prospecting licence he says he obtained from the Ministry of Mines. As stated before, the court must decide this matter on the facts before it without delving into the dispute that may exist between the parties.

I would, once again, refer to the sentiments expressed by GWAUNZA (JA) in the case of *Base Minerals Zimbabwe (Pvt) Ltd (supra)* at page 7 of the judgment, where the learned judge states:

*“Apart from contention coming nowhere near establishing any of the defences recognized by law in spoliation proceedings, I find that the appellants are effectively advocating for an environment where the “take the law into your own hands” adage becomes the norm. It hardly needs mention that this approach offends against the very rason d’etre of the law generally and a mandamus van spolie in particular, that is, the preservation, promotion and enforcement of law and order in and amongst members of society.”*

See also the case of *Botha and another v Barrett* 1996 (2) ZLR 73 (S) where at page 77E, the requirements of a spoliation order are stated.

The legal remedy of *mandamus van spolie* has been part of our law for generations. Its scope was admirably summarized in the old Transvaal full bench decision of *Nino Bonino v De Lange* 1906 TS 120 at page 122 where INNES CJ stated:

*“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 enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear.”*

In the circumstances, I am satisfied that the requirements for an order for spoliation have been met. I would accordingly make the following order.

1. Applicants, and those claiming possession through them, are hereby declared to have peaceful and undisturbed possession on part of seventy eight hectares of land commonly known as Wallingford Farm, situate in the District of Insiza measuring 946. 4524 hectares.
2. First respondent and those claiming occupation through same are hereby ordered to return applicants status *quo ante* prior to this spoliation such that applicants are returned their peaceful, quiet and undisturbed possession, occupation and use of seventy eight hectares of land commonly known as Wallingford Farm, situate in the District of Insiza.

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3. The first respondent shall pay the costs of suit.

*Antonio and Dzvettero*, applicants' legal practitioners

*Ncube and Partners*' 1<sup>st</sup> respondent's legal practitioners

*Civil Division, Attorney General's Office*, 2<sup>nd</sup> respondent's legal practitioners