SIYASEKA MINING SYNDICATE

versus

SEVENTH DAY ADVENTIST CHURCH

and

ONIAS TENDERERE N.O.

Headmaster Nyahuni Adventist high School

HIGH COURT OF ZIMBABWE

CHAREWA J

HARARE, 3 & 9 July 2020

**Urgent Chamber Application**

*Mr T G Kuchenga,* for applicant

*Mr N Chimuka, with him Mr T Sena and Mr N Sithole,* for the respondents

CHAREWA J: This is an urgent chamber application in which applicant seeks spoliatory relief on the grounds that respondents interfered with its possession/occupation of its mining block by wrongfully and unlawfully destroying its temporary structures and preventing it from exploiting its mineral rights.

*In limine*

At the commencement of the hearing, respondent raised the preliminary point that there is no application before the court because the certificate of urgency is invalid, having been commissioned on 30 June 2020, before the commissioning of the founding affidavit on 1 July 2020. Therefore, in accordance with the decision in *Chidawu* v *Jayesh Shah* SC12/2013, and the High Court decision in *Condurago Investments t/a Mbada Diamonds* v *Mutual Finance* HH 630/15, the founding affidavit did not exist prior to the certificate of urgency, thus rendering that there is no application before the court. Further, respondents intimated that the fact that paragrapgh 1.c. of the certificate of urgency, in stating the date of occupation of the mining claim as 17 June 2020, contradicts paragraph 10 of the founding affidavit which avers that the date of occupation is in fact 10 June 2020, presages that the certificate of urgency is improper, and that bolsters that the application is incurably bad.

In its response to the preliminary point, applicant asserted that firstly, the date of occupation is inconsequential in an application for spoliatory relief. What is important is the date of spoliation and whether prior to that date, applicant was in peaceful and undisturbed occupation/possession. That date being 27th June 2020, the difference on the dates of occupation in the certificate of urgency and the founding affidavit is a typographical error, which was not noted as the papers were prepared hurriedly, and is therefore, in any event, not material. Further, applicant submits, a certificate of urgency is mere confirmation of urgency and is not evidence of the substance of the claim. In any event, even if the date of occupation /possession is accepted as 17 June 2020 in terms of the certificate of urgency that still proves that applicant was in undisturbed occupation/possession as at that date and was despoiled as at 27 June 2020.

Secondly, applicant avers that such error in dates of occupation between the founding affidavit and the certificate of urgency is not material, given that both the certificate of urgency and founding affidavit are on all fours that the spoliation was committed on 27th June 2020. Whether occupation/possession was with effect 10 June or 17 June, the result is the same: that when the act of spoliation occurred on 27 June, applicant was in peaceful and undisturbed possession.

Further applicant submits that the difference in commissioning dates between the founding affidavit and the certificate of urgency results from the requirement that a deponent be physically present on commissioning. The deponent to the certificate of urgency was available on the date the draft papers were ready while the deponent to the founding affidavit was only available the following day. Besides, the difference of twenty four hours between the commissioning supports that the papers were prepared and ready for signature on the same day and therefore that the deponent to the certificate of urgency had occasion to read the draft application and founding affidavit before formulating his opinion on urgency.

Finally, applicant submits that this technical issue should not stand in the way of the interests of justice, which require that the matter be dealt with on the merits.

*Ruling on preliminary point*

I am not persuaded of the veracity of the preliminary point raised by respondents. Firstly, I agree with the applicant that commissioning is predicated on the availability of a deponent to append his/her signature before the Commissioner of Oaths. Therefore that the founding affidavit was commissioned on 1 July 2020, suggests to me that the deponent thereto was not available to present himself before the commissioner of oaths until that day. It does not suggest that the founding affidavit was not available, on the previous day, to the deponent to the certificate of urgency to read and understand the tenor of the intended application and formulate the opinion that it was urgent.

Besides *Chidawu* v *Jayesh Shah (supra)* is certainly not authority for the proposition that a certificate of urgency is invalid if it is commissioned prior to the commissioning of the founding affidavit. Rather, it is authority for the proposition that a certificate of urgency is invalid if the deponent thereto does not actually apply his own mind to the facts and reach the conclusion that a matter is urgent. Respondents *in casu* do not allege that the deponent to the certificate of urgency did not in actual fact apply his own mind to the circumstances of the case to reach his own independent opinion that the matter is urgent.

While the case of *Condurago Investments* (supra) case is relevant to the *raison d’etre* underlying the preliminary point, it is distinguishable from the current matter. The certificate of urgency therein predated the founding affidavit by four days, a period which could not be explained by unavailability of the deponent to a founding affidavit in an urgent matter, whereas *in casu* the time lag is barely twenty four hours, in circumstances where the explanation therefor is reasonable in the circumstances.

Further, I agree with applicant that it matters not that the date of occupation/possession was the 10th or the 17th June. The important date is the date of spoliation, and whether, prior to that date applicant was in peaceful and undisturbed possession. In that regard, I find it reasonable that the “conflict” between the founding affidavit and certificate of urgency is an error arising from the very need to prepare and file the application urgently, thus cutting short the time to properly proof read and cross check the documents.

In the premises I find the preliminary point to be without merit.

Facts

Applicant is the registered holder of mining block, being 10HA/GR named Chivake “A”, situate on Glen Noe Farm, approximately one (1) kilometre north north east of the confluence of Chivake and Nyamanyoka Rivers, held under Licence No. 037253AA, dated 20 February 2020. First respondent is the registered owner of Glen Noe Farm, and Nyamahuni Adventist High School, situate thereon. Second respondent is the headmaster of Nyamahuni Adventist High School.

It is common cause that the respondents, or one or other or both of them reported the applicant’s members/employees to the police for trespass on or about the 12th of June 2020. It is also common cause that the respondents subsequently reported applicant to the Environmental Management Authority for non-compliance with the Environmental Management Act [*Chapter 20:27]*. It is further common cause that applicant did not erect any permanent structures at the aforesaid mining block and that respondents have made it difficult, if not impossible, for applicants to exploit its rights in accordance with its certificate of registration of a mining claim by resorting to the police and EMA, and by destroying applicant’s makeshift structures.

Urgency

Respondents submitted that they had no submissions to make on urgency given that applicant acted within twenty one (21) of its cause of action having arisen, and further that, since this is a spoliation application it is perforce urgent. Therefore, there being no dispute that by its very nature an application for spoliation is urgent, and given that applicant, by its own account, was despoiled on 27 June 2020, and by respondents account, on 25 June 2020, and this application was filed on 1 July 2020, there can be no doubt that the matter is urgent and that applicant treated it as such.

The issues

Given the foregoing, the question this court must address is whether applicant was at any stage in peaceful and undisturbed possession/occupation of its registered mining block, and if so, whether the steps taken by respondents to interfere with such possession or occupation were wrongful and unlawful.

Parties’ submissions on the merits

Applicant submits that it took occupation of its mining block on 10 June 2020 to commence works to exploit its mineral rights. On 12 June 2020, there was an alleged incident of trespass by its employee onto first respondent’s farm and a report was accordingly made to the police by the respondents. However, applicant remained in possession of the mining site. It was only on 27 June 2020 that second respondent caused the destruction of applicant’s structures (which were makeshift and temporary in nature) and physically removed applicant’s employees from the mining block without a court order or even police assistance.

Further, applicant submits that it is a fundamental principle of law that no one is allowed to take the law into their own hands (See *Ninobonino* v *De Lange* 1906 TS 120 @122). In addition, it submits that in applications of this nature it only needs to show that it was in peaceful and undisturbed possession (the legality of which is immaterial as is the ownership of the property involved). *In casu*, applicant is the holder of a registered claim for which it has six months, until 20 July 2020, to commence work on the mine or risk forfeiture. In preventing applicant from working on the mine, respondents did not follow the legal and acceptable route, and are thus likely to cause applicant irreparable harm which can only be prevented by a spoliation order.

On their part, respondents submit that applicant was not in peaceful and undisturbed possession as its employees/syndicate members **were prevented** (my emphasis) from taking peaceful and undisturbed possession. It further submits that applicant **lost possession** (the emphasis is mine), on 12 June 2020 when the police came and evicted them. And when applicant resurfaced on 25 June 2020, second respondent reported to EMA Murehwa who confirmed that applicant did not have an environmental Impact Assessment Report and thus could not commence to work the mine. As a result, applicants **voluntarily loaded its assets onto a scotch cart and left the site on 27 June 2020** (once again my emphasis). Respondents aver that applicant did not have any assets to exploit the mine apart from wantonly cutting down trees, nor had they constructed any houses or other accommodations. Finally, respondents submit that they were not aware of any mining rights on the farm by applicant until they received this application.

The law

The law regarding spoliation is trite. Firstly, a spoliation order is final in nature and can only be granted when a clear right is established in the applicant’s favour.[[1]](#footnote-1) Secondly, there are two requirements that must be satisfied in an application for a spoliation order:

1. That the applicant was in peaceful and undisturbed possession/occupation;
2. That respondent deprived him of that peaceful and undisturbed possession/occupation wrongfully and unlawfully against his consent.[[2]](#footnote-2)

Consequently, the legality of the possession/occupation or issues of ownership are irrelevant.[[3]](#footnote-3) Now, with regard to mining claims, it is not a legal requirement that the holder of a mining claim should consult or inform the holder of land rights (though this is desirable) before commencing exploitation of mineral rights, as long as the holder of mineral rights is acting within the scope of the provisions of legislation governing exploitation of mineral rights. Neither is it a requirement that in order to take possession/occupation of a mining claim, the holder must erect permanent structures. In fact, the requirement is that after exhaustion of its claim, the holder must restore the land as near as possible to its original position. Of necessity, this intimates that any structures must be of a temporary nature, or of a nature easy to dismantle.

In any case, in the event that the holder of mineral rights has or is committing some infringements, such as failure to obtain an environmental impact assessment report, the land holder cannot take the law into his own hands either through EMA or the police but must obtain the necessary court orders. Therefore in order obtain to obtain a spoliation order one need only show unauthorised use of force.[[4]](#footnote-4)

Analysis

On the merits, it cannot be gainsaid that the applicant, being the holder of a registered mining claim, has a clear right. In the circumstances, I find the respondents’ story quite unbelievable. They claim to have reported applicant to the police for trespass on 12 June 2020, and that applicant lost possession then on police orders, but the police have no power of ejectment without due process. In any case, how can a holder of a mining right commit an act of trespass on his mining block? So if the police did eject applicant, that was an act of spoliation as it was wrongful and unlawful.

To make respondents’ story more incredulous, they allege that applicant was prevented from taking occupation/possession when it “resurfaced” on 25 June 2020, yet claim that applicant only “voluntarily left” the site on 27 June 2020. If applicant did not take occupation on 25 June 2020 as alleged, where was it for the two days until it left? The further question that arises is, when applicant resurfaced, why did respondents go to EMA to report environmental damage by applicant, instead of going back to the police to complain that the trespassers are back? Besides, this conduct by respondents rely their assertion that they were unaware of applicant’s business until they were served with this application.

Further, respondents aver that applicant was not in fact despoiled but that it abandoned its mining claim voluntarily on 27 June after it had received a visit from EMA on 25 June which had ordered it to vacate the farm as applicant did not have an environmental impact assessment report. Rather than being helpful to respondents, this assertion creates more challenges for them, viz: it is the respondents which made a report to EMA. Therefore that EMA ordered applicant to vacate the site raises the presumption that applicant was as at 25 June, in peaceful and undisturbed possession. In any event EMA does not have the power to evict anyone without following due process. Besides, no explanation is proffered by respondents as to what applicant was doing between EMA’s order for eviction on 25 June until it “voluntarily” left on 27 June 2020.

I must also state that I find it incredible that applicant voluntarily left the site two days after EMA’s supposed order, in circumstances where respondents claim that applicant had no appreciable assets, and had not commenced any mining development apart from cutting down trees. This begs the question: what was applicant doing for two days when it had no assets to pack except the little that was loaded in a scotch cart? Rather, it is more reasonable to believe that applicant was forcibly made to leave on the 27th of June rather than on the 25th of June.

In fact, since it is not in contention that applicant left on 27 June 2020, it means that it was in peaceful and undisturbed possession until that date, or at any rate, between 25 and 27 June, thus supporting applicant’s averments. In addition, no report from EMA or its “eviction” order was availed by respondents. The presumption is that this is a cooked up story: respondents (whether through EMA or on their own) despoiled applicant on 27 June 2020.

It was for the respondent to seek, from a court of competent jurisdiction, an order of compliance with the Environmental Management Act. Therefore that applicant acted through EMA to order applicant off the site does not make the eviction legitimate, but that such order by EMA was wrongful and unlawful.

Finally, I note that respondents make no submissions that restoration of possession/occupation is not possible, or that applicants despoiled respondents, or interfered in any way with its rights of ownership outside the parameters of the Mines and Minerals Act Chapter 21:05. Rather, the concession by respondents, that applicant “lost” possession supports that in fact, applicant were in peaceful and undisturbed possession prior to respondents’ actions.

In any case, the respondents’ story is fraught with contradictions. In one breath they claim that applicant did not have peaceful and undisturbed possession, in another breath they allege applicant lost peaceful and undisturbed possession of its mining block, and in yet another breath, they claim that applicant was prevented from taking peaceful and undisturbed possession. It seems respondents are not being candid with the court. They cannot approbate and reprobate. Either applicant was in peaceful and undisturbed possession or it did not have peaceful and undisturbed possession at all or it had it and lost it or was prevented from having peaceful and undisturbed possession. It is important note that possession is not a time bound concept, or a concept solely predicated upon buildings or accommodation of a permanent nature. In the circumstances of this case I cannot but find that respondent was in peaceful and undisturbed possession of its mining block and was wrongfully and unlawfully deprived of the same by respondent.

**Disposition**

Consequently, it is ordered that

1. The eviction and/dispossession of the applicant by the respondents of Mining Block being 10HA/GR Chivake “A” on Glen Noe Farm without an order of court is declared wrongful and unlawful.
2. The respondents are ordered to return peaceful and undisturbed possession of Mining Block being 10HA/GR Chivake “A” on Glen Noe Farm to applicant within twenty four hours of service of this order.
3. Respondents shall jointly and severally, the one paying the other to be absolved, pay the costs of suit.

*Makururu & Partners,* applicant’s legal practitioners

*Chimuka Mafunga Commercial Attorneys,* first and second Respondent legal practitioners

1. See *Blue Ranges Estate (Pvt) Ltd v Jamaya Muduviri & Anor,* 2009 (1) ZLR 368 [↑](#footnote-ref-1)
2. *Botha & Anor v Barret* 19996 (2) ZLR 73 @ 79 D-E [↑](#footnote-ref-2)
3. *Magadzire v Magadzire* SC 196/1998 [↑](#footnote-ref-3)
4. *Base Minerals v Mabwe Minerals* SC 29/15 [↑](#footnote-ref-4)