TASIP MINING SYNDICATE
and
SIMBARASHE MANGWENDE
and
TAWANDA MANGWENDE
versus
WILLIAM SAVANHU
and
MINISTER OF MINES AND MINING DEVELOPMENT N.O.
and
MINISTER OF LANDS N.O.

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12 & 23 November 2021

Urgent Chamber Application

S Chabuda, for the applicants
P Marava, for the 1st respondent

MUREMBA J: At the hearing of this matter I dismissed all the points *in limine* that the first respondent raised. After hearing the matter on the merits I dismissed the applicants' application. I have now been asked for the written reasons thereof and these are they. I will start with the points *in limine*.

1. The first one was about the applicants having used the wrong form instead of using Form Number 23 because R 60 (1) of the High Court Rules, 2021 states that where a chamber application is to be served on an interested party it shall be in Form Number 23 as modified. The first respondent's counsel abandoned this point after I had made it clear that this matter had been brought on a certificate of urgency and that as such in terms of R 60 (3)(d) the application was not meant to be served on interested parties. The application was served on the respondents on the instructions of the court.

2. The second point *in limine* was that the matter was not urgent. It was clear from the application that the events which jostled the applicants into filing the application were the

events of 4 November 2021 whereby it is alleged that the applicants were despoiled of their compressor, mining dumper trailer and a certain piece of its mining location at Plot 26 Wapley Farm, Shamva by the first respondent. The first respondent averred that the matter was not urgent because the dispute between the parties started as far back as 2018. I dismissed the point *in limine* because even if the dispute between the parties had started in 2018, the applicants were entitled to approach the court on an urgent basis for redress if there was a recent event of spoliation by the first respondent. By nature, an application for a *mandament van spolie* is urgent.

3. The third point was that the applicants were not in peaceful and undisturbed possession of the property. I dismissed this point *in limine* because it being one of the requirements which should be proven by an applicant in an application for spoliatory relief, the issue cannot be raised as a point *in limine.* It is obvious that it is an issue for determination on the merits of the case. The raising of this issue as a point *in limine* displayed Mr *Marava's* lack of appreciation of what points *in limine* are.

4. The fourth point *in limine* was about the certificate of urgency. Mr *Marava* submitted that although the certificate of urgency was not defective, it contained *mala fide* facts. Mr *Marava* submitted that on this basis the certificate of urgency should be disregarded, but the matter should not be struck off. Whatever, Mr *Marava* meant by the court disregarding the certificate of urgency, but proceeding to hear the matter left me confused. I did not understand it. How can the court disregard a certificate of urgency and still proceed to hear the matter? In terms of r 60 (4) (b), in a certificate of urgency a legal practitioner is simply supposed to give reasons or an opinion as to why he or she believes that the matter is urgent. The opinion is formulated on the basis of the facts as provided by the applicant(s). The legal practitioner does not or is not expected to formulate his opinion on the basis of facts other than those given by the applicant(s). It is therefore illogical for anyone to submit that a certificate of urgency should be disregarded on the basis that it contains *mala fide* facts and at the same time submit that the hearing of the matter on the merits proceeds. What this implies is that the legal practitioner who prepared the certificate of urgency manufactured his own facts upon which he then formulated his own opinion on the issue

of urgency, but then no such submission was made *in casu*. It follows therefore that the certificate of urgency was prepared on the basis of the facts given by the applicants. The certificate of urgency cannot therefore be attacked on the basis that it contains *mala fide* facts without an argument being made that the facts in the founding affidavit of the applicants are also *mala fide*. This point *in limine* was certainly meaningless.

5. It appeared to me that Mr *Marava* is one legal practitioner who believes that raising points *in limine* is a must and is fashionable yet at the same time he has no good appreciation of what points *in limine* are.

THE MERITS

6. The first applicant is the legal holder of the title, rights and interests in a mining location known as Penhill 39 and Penhill 40 within Warpely Farm in Shamva. The second and third applicants are partners in the first applicant. The first respondent is the land occupier of Plot 26 Warpely Farm. The second respondent is the Minister of Mines and Mining Development. The third respondent is the Minister of Lands.

7. The history of the matter shows that a dispute pertaining to the boundaries arose between the applicants and the first respondent some time back. The applicants once sued for the eviction of the first respondent from his homestead in case H.C 355/19, but they were not successful.

8. *In casu* the applicants averred that on 4 November 2021 they were in peaceful and undisturbed possession of their compressor, mining dumper trailer and a certain piece of its mining location at Plot 26 Warpley Farm, Shamva measuring 1.5 hectares.

9. Whilst in such possession, and on the aforementioned date, the first respondent commenced erection of steel barriers which protruded and encroached into the mining location fencing parameter. In doing so, the first respondent dispossessed the applicants of possession of their mining compressor and mining dumper trailer that are within the first applicant's

mining location together with mining space of approximately 1.5 hectares in extent wherein an open mine shaft belonging to the applicants is situated. The applicants averred that the dispossession was without their consent and due process of the law.

10. The applicants averred that they are no longer in control or have access of the despoiled piece of land and the shaft within it together with the aforesaid mining equipment. The compressor and dumper trailer remain idle inside the closure created by the first respondent. The area despoiled was being explored by the first applicant since 2012.

11. In response the first respondent did not deny that on the 4 November 2021 he erected steel bars as averred by the applicants. His defence to the application was that he was in the process of challenging the legality of the applicants' title in respect of the said mining blocks. He averred that he had since applied for the cancellation of the mining blocks which he averred were not lawfully acquired. The said application was attached as an annexure to the notice of opposition.

12. The first respondent also averred that the pegging of the mining blocks was done incorrectly as the applicants did not follow the law in pegging the mining blocks and MAFUSIRE J alluded to this in the eviction judgment between the parties in HH 522/20. The applicants did not seek and obtain the written consent of the first respondent as the farm occupier when they were pegging the mining blocks as is required by the law.

13. The first respondent averred that he is the legal holder of rights in respect of Plot 26, Warpely Farm. He obtained the rights in 2005. The applicants only came to the mining blocks in 2011 and unprocedurally pegged their mining blocks without complying with s 31 of Mines and Minerals Act.

14. The first respondent averred that the applicants were never in peaceful and undisturbed possession of the compressor, dumper trailer and the said piece of land as the land in question was always being possessed by him as he is the holder of the rights to the land. He further averred that on 4 November 2021 he erected a steel fence on the land he had

always been in possession of and left the applicants' unlawfully erected fence untouched and also the mining compressor and dumper trailer which were inside the unlawfully erected fence. The first respondent averred that the steel fence that he erected covers only the front side of the homestead and is not 1.5 hectares as alleged by the applicants.

15. The first respondent averred that the steel fence he erected did not cover any open shaft as alleged by the applicants. The said shaft is within the fence that was unlawfully erected by the applicants. In addition the said mining location has always been the first respondent's homestead. He reiterated that the pegging of the mine was unlawfully done and as such all mining operations that followed were wrong.

16. The first respondent averred that the applicants continue to carry out their mining activities as usual. The applicants' access to their equipment was unhindered as these are inside the fence the applicants unlawfully erected.

17. The first respondent further averred that the applicants' averment that the alleged despoiled area was explored since 2012 does not mean that they were in peaceful and undisturbed possession of it. The applicants after pegging the mining blocks did not put any permanent beacons as required by the law. The first respondent only came to know of the existence of the mining blocks in 2018 when he wanted to erect a fence at his homestead. This is what prompted the disputes between the parties from 2018 to date. He averred that it is a requirement of s 31 of the Mines and Minerals Act that a pegger must leave a distance of not less that 450m between the homestead and the mining claim. The first respondent averred that the steel fence that he erected on 4 November 2021 is within the confines of his homestead and nowhere else.

18. In his judgment in HH 522-20 in para 17 MAFUSIRE J held that the first respondent's homestead is right inside the applicant's mining blocks and that the pegging of the mining blocks was done incorrectly over land that was not open to pegging. In para 19 he went on to say that the first respondent is entitled to challenge the citing of the applicants' mines,

especially where their operations are interfering with his own use and enjoyment of the land that he was officially allocated by government.

19. One of the defences against spoliation is that the applicant was not in peaceful and undisturbed possession of the thing at the time of dispossession. See *Banga* v *Zawe* SC 54/14. I am in agreement with the first respondent that the history of this case and the judgment by MAFUSIRE J show that the applicants were not in peaceful and undisturbed possession when the erection of the steel fence was made by the first respondent on 4 November 2021. When the applicants came to this land in 2012 and incorrectly pegged their mining blocks, the first respondent was already in occupation of the farm. The first respondent was therefore the first person on the land. From the time the first respondent got to know about the existence of the applicants' mining blocks in 2018, the parties started fighting. In 2019 the applicants sued for the eviction of the first respondent and did not succeed. The applicants cannot therefore argue that they were in peaceful and undisturbed possession of the land when they were the last to come to this land. They were neither in peaceful nor undisturbed possession of the land. In the judgment by MAFUSIRE J it was held that the first respondent was lawfully situated at the place where his homestead is and that the first applicant had not respected the distance of 450m in pegging its claim.

20. It is in view of the foregoing that I dismissed the application with costs.

Magaya & Mandizvidza Legal Practioners, applicants' legal practitioners
Marufu-Misi Law Chambers, first respondent's legal practitioners