(1) BASE MINERALS ZIMBABWE (PRIVATE) LIMITED (2) PETER VALENTINE (3) MUYENGWA MOTSI
vs
MABWE MINERALS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & BERE AJA
HARARE, JULY 15, 2014

F.M. Katsande, for the appellants

Mawere & Sibanda, for the respondent

GWAUNZA JA: At the end of the hearing in this matter, we dismissed the appeal and indicated that full reasons for the decision would follow. These are the reasons.

At the centre of this drawn out, highly contested and multifaceted dispute are certain mining claims cumulatively styled "Dodge" Mine.

The rights of various parties to the mining claims or part thereof have either been determined or are still pending in the High Court. It is pertinent to note that the claims brought before the High Court over the years, and dealing with different facets of the main dispute have not all been between the same parties as those *in casu*. Details of these claims are not relevant to a determination of this matter and will not further be considered.

What is relevant to this dispute is set out in the judgment of the High Court and is reproduced here for convenience.

Against the background of a dispute of rights in the same mine, between the second appellant as a 50 per cent shareholder in *Chiroswa Minerals (Private) Limited* and a certain *John Richard Grooves* ('Grooves') as shareholder of the other 50 per cent, the latter purported to sell the entire shareholding of Dodge Mine (*Chiroswa Syndicate*) to the respondent in *casu.* This was *on* 31 July 2012. The disputed mining claims had by this time assumed the name *Chiroswa Syndicate*. The second appellant took the view that he had been defrauded of his 50 *per cent* shareholding, and challenged the sale in *HC 4112/13.* The case was still pending before that court at the time the proceedings *a quo* were concluded. The learned judge *in casu* correctly did not delve into the merits or demerits of this dispute of ownership.

In addition to this dispute, *Grooves* was embroiled in earlier disputes with two other entities with whom he had previously entered into tribute agreements in relation to the same mining claims. He was at that time the sole shareholder in *Chiroswa Minerals (Private) Limited*. The latter dispute ended with an order of the High Court in *HH 261/11* to the effect among other things, that the tribute agreement between *Grooves* and the second appellant be registered with the Mining Commissioner. The registration was eventually effected on 13 February 2014. This was after a number of other claims, counter claims and an aborted appeal to this court had been filed and/or determined.

It is evident from the above that the sale to the respondent *in casu* of the 100 per cent shareholding in *Chiroswa syndicate,* by *Grooves* took place before the registration,

by the Mining Commissioner, of the tribute agreement relating to the same mines. The respondent, who had taken occupation of the disputed claims pursuant to the purchase of the 100 per cent shareholding from *Grooves* was conducting operations thereon all the time that the second appellant, *Grooves* and the Mining Commissioner were pursuing and defending the various suits referred to above. The respondent has also been carrying on operations at the disputed mine while case HC 4112/13, which is challenging the sale of the same claims to it by *Grooves,* is still pending in the court.

This then was the status *quo* at the time the appellants finally secured registration of the tribute agreement between *Grooves* and the second appellant Peter Valentine. The court *a quo* took up the narration of events from there and stated as follows:

> "Now armed with the above registered order the respondents (*appellants in casu*) entered Dodge mines where the applicant was operating from. They entered without a writ of execution nor were they accompanied by a deputy sheriff…….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 agreement 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."

Upon receipt of the letter of demand, the respondent in *casu* immediately filed with the High Court, an application for spoliation and interdict.

The respondent claimed, on the basis of what the law lays down as the essential requisites for a spoliation order that;[1]

(i) They were in peaceful and undisturbed occupation of the premises in question, and

(ii) The appellants despoiled them without its (respondent's) consent and without following court procedures or first obtaining an order of ejection served through the sheriff or his lawful deputy.

The respondent contended further that the appellant's forced entry onto the disputed premises was unlawful as clearly admitted by the third appellant in his opposing affidavit.

The respondent also sought an order ejecting the appellants and interdicting them from entering the disputed premises and interfering with their mining operations until the ownership dispute pending under case *HH 1414/14* has been resolved.

The court *a quo* granted the spoliation order and interdict, as prayed by the respondent, leading to this appeal by the disgruntled appellants.

The appeal essentially raises one issue for determination, which in my view is dispositive of the whole matter;

> Whether the court *a quo* was correct in finding that the appellant's entry on to the mining claims warranted the granting of *mandamus van spolie*, as well as the interdict.

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[1] *See Botha and Another v Barrett 1996(2) ZLR 73 (S) where at 77E, the requirements of a spoliation order are stated.*

The following facts are largely not disputed. Firstly, the appellants did effect entry onto the disputed premises without the backing of a court order or "due process". The deponent to the appellants' opposing affidavit, *Muyengwa Motsi* who is the third appellant in *casu*, admitted the same in his opposing affidavit *a quo*, when he stated;

> "Indeed I entered the mine premises. I did not need permission from anyone to do so. Applicant has been mining thereat illegally for the past 2 years. I did not use any false pretence. Indeed our intention has and continues to be to take over the mines and occupy same as can be envisaged (*sic*) by the numerous court orders granted in our favour which applicant blatantly refuses to recognise (see case no. *HC 26/11, HC 3208/13 and HC 1194/13).*"

Secondly, the appellants in addition to this, admitted to the deployment of armed guards by the entrance to the disputed premises. The third appellant stated as follows in his opposing affidavit;

> "*Ad* para 3
> … however the second 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 …"

Given these admissions, which seem to give credence to the respondent's claim that the appellants forcefully entered the disputed mine premises, the Judge *a quo*, I find, was correct in his observation to the following effect:

> "In a nutshell, this is an admission that the respondents have effectively entered the mine. They did so without any permission from anyone ……. In *casu* the applicant was dispossessed against his will and without the authority or order of, this court. In acting as they did, whether as principals 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 ejectment 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 ejectment. *See Ntshwacela v Chairman, Western Cape Regional Services Council, 1988 (3) SA 218 (C).*

I respectfully associate myself with and endorse these sentiments.

Having confirmed the court *a quo's* finding as to the unauthorised, forceful entry by the appellants 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 argument, as follows:

> "4.14 The only recognised defences to an action of spoliation are;
> - Denial of the *facta propanda*
> - Impossibility of restoration
> - Counter spoliation and
> - Failure to act within a reasonable time.
>
> See *Gondo NO vs Gondo* & Ors 2001 (1) ZLR 376 & *Silberberg and Schoeman (Supra) at 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. Indeed the appellants' case is to defiantly assert that they did not need anyone's consent to enter the premises and reclaim what they perceived to be their entitlement. The appellants elaborate their stance in this respect by stating in their heads of argument that they were "perfectly within their right" to recover the 6 claims 'summarily without the need for fresh court proceedings'.

It is argued for them as follows;

> "It would be manifestly absurd to suggest that the appellants needed to institute fresh proceedings and obtain a writ to implement the right already conferred on them in terms of the tribute agreement …"

The appellants also express the view that the respondent was not in peaceful and undisturbed possession of the premises because the respondent "was aware of the registration of the tribute agreement in terms of the judgment in HH 261/11". Lastly it is contended for the appellants that the deprivation of possession in the implementation of the 'provisions of a statute' does not amount to spoliation.

Apart from these contentions coming nowhere near establishing any of the defences recognised 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 *raison 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 the society.

The appellants have not pointed the court to any statutory provision that specifically provides for summary possession of disputed properties in circumstances such as these. Rather, *Mr Katsande* for the appellants cited the following *dictum* which re-affirms the purpose of the law on spoliation but decidedly contradicts, rather than supports, their case; (see *HH 261/11)*.

> "The reason being that the purpose of *mandamus van spolie* is to preserve law and order and to discourage persons from taking the law into their 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 …" (my emphasis)

The appellants clearly misinterpret the import of this statement, in particular, the highlighted part thereof. The appellants' understanding of these words seems to be that as long as a competent court of law has pronounced on the rights of opponents, all that is required by the winning party is to arm themselves with the order in question and then

proceed to personally execute it against the losing party. Any lawyer should know, and surely does not need to be told, that beyond the giving of orders by the court, there is a whole process that follows (in the absence of voluntary compliance thereof) in order for the orders in question to be executed. Hence the need, beyond securing one's legal rights, to petition the court for an appropriate order to facilitate enforcement through the Sheriff, his deputy or any other authorised officer of the court. The appellants *in casu* clearly sought to short circuit this process and take upon themselves a task that properly falls within the domain of others, that is, authorised law enforcement agents. Such actions not being supportable at law, I find that there is nothing to fault in the reasoning of the court *a quo*, and its finding, that the appellants had failed to prove a defence to the respondent's application for a *mandamus van spolie.*

This brings me to a consideration of whether or not an interdict was justified under the circumstances of this case. The learned judge *a quo* correctly set out the requirements thereof as follows:

(i) Clear or *prima facie* right though open to some doubt;

(ii) Well-grounded fear of harm if relief is not granted and if applicant can prove such right;

(iii) Balance of convenience must favour granting of relief, and

(iv) No other relief available to the applicant[2]

Though disputed and still the subject of litigation in the High Court I am satisfied that the respondent established a clear or *prima facie* right to possession of the premises in question. Its expressed fear that harm to it may ensue if the relief sought was not granted is in my view well grounded. The appellants placed armed guards at the entrance to

[2] *Enhanced Communication Network (Pvt) Ltd v Minister of Information, Posts and Telecommunications 1997 (1) ZLR 342*

the premises. The possibility of an explosive if not fatal situation, could thus not be ruled out. The appellants had been operating on the premises for a not insignificant period of time, and still faced legal challenges in the High Court, to its entitlement to the premises. It is evident that the balance of convenience tilted in favour of its being granted the order in question.

The learned judge was therefore correct in stating as follows;

> "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."

In all respects therefore, we found the appeal to be devoid of merit, hence our dismissal of it, with costs.

ZIYAMBI JA I agree

BERE AJA I agree

F.M. Katsande & Partners, appellants' legal practitioners

Mawere & Sibanda, respondent's legal practitioners