DEXTER TAWONA NDUNA
versus
RIO ZIM LIMITED
and
LANGTON NDLOVU
and
ZIMBABWE REPUBLIC POLICE OFFICER IN CHARGE CHAKARI
and
PROVINCIAL MINING DIRECTOR MASHONALAND WEST N.O.
and
THE COMMISSIONER GENERAL OF POLICE
and
MINISTER HOME AFFAIRS N.O

HIGH COURT OF ZIMBABWE

MANGOTA J

HARARE,2 September, 2021 & 15 September 2021

Urgent application

T.C. Masawi, for the applicant
T.S. Manjengwa, for the 1st respondent
T.G. Chigudugudze, for the 2nd respondent
C. Chibi, for the 3rd - 6th respondents

MANGOTA J: The applicant applied, through the urgent chamber book, for spoliatory relief. He alleges that he is the holder of exclusive prospecting rights licence in a block of gold mine claims known as Danley Mine in Chakuri. He claims that he was in peaceful and undisturbed possession of the mining claims and was carrying out his prospecting operation when, on 24 August 2021, the first and third respondents despoiled him of the same. These, he avers, unlawfully took occupation of the mine stating that the fourth respondent authorized them to despoil him. The second respondent, he alleges, has commenced illegal mining activities on his claim. He couched his draft order in the following terms:

"TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final Order should not be made in the following terms:

1. The Sheriff or his Deputy is hereby ordered to prohibit the 1st and 3rd respondent (*sic*) from barring the applicant from undisturbed access and to restore the applicant's peaceful possession of mining location namely Danley Mine, Chakari Kadoma situated at coordinates 35K08042458000693 and 35K 080439800613.
2. The Sheriff or his Deputy is hereby ordered to remove the 2nd respondent and all those claiming occupation and to restore the applicant's peaceful possession of mining locations namely Danley Mine, Chakari, Kadoma situated at coordinates 35K08042458000693 and 35K08043898000613.
3. The Sheriff is empowered to seek the services of the Zimbabwe Republic Police in removing the 2nd respondent and all those claiming occupation from the mining location stated in paragraph 1 above.

INTERIM RELIEF GRANTED

Pending determination of this matter on the return date, the applicant is granted the following relief-

1. The 1st and 3rd respondents allow the applicant access to the site namely Danley Mine, Chakari, Kadoma situated at coordinates 35K0804258000693 and 35K08043898000613 restoring the applicant peaceful and undisturbed possession.
2. The 3rd respondent be barred from continuing mining operations at the site namely Danley Mine, Chakari, Kadoma situated at coordinates 35K08042458000693 and 35K0804388000613 and be ordered to vacate the mining premises."

The applicant's application leaves a lot to be desired. He, for instance, prays for an interim relief in an application which he filed under the remedy of *mandament van spolie*. The superior court has already made a pronouncement which is to the effect that a provisional order is incompetent in a spoliation application. Spoliation, it has been settled, is final in nature: *Blue Rangers Estate (Pvt) Ltd* v *Munduvuri & Anor*, 2009 (1) ZLR 368 the headnote of which states that:

> "A spoliation order cannot be granted on evidence of a *prima facie* right. Once the order was made and fully executed, it was discharged."

It follows, from the above-stated set of circumstances, that the applicant's draft order which contains the interim, and the final, relief is not only defective. It is fatally defective. It is so defective that it cannot be brought back to life. It dies a natural death which counsel for the applicant remained complicity. His attention was drawn to the incompetency of leaving the draft order in the form that it was couched. He paid no heed to wise counselling which was freely availed to him much to the detriment of his principal who is the applicant *in casu*.

The applicant premises his application on two prospecting licences which Government issued to him on 25 January, 2021. These appear at page 13 of the record. They are marked

Annexure A1and A2. They confer authority upon him to prospect for minerals. Their contents do not refer to any mining area. They are open-ended, as it were. They allow him to prospect for minerals in the length and breadth of the country, so to speak.

The applicant's statement which is to the effect that the licences confer upon him authority to prospect for minerals at Danley Mine, in Chakari, Kadoma ("the mine") is a mis-statement. The licences do not mention the mine at all. One is left to wonder as to how he is able to connect the licences to the mine when those do not refer to it. There is no nexus which exists between the mine and the prospecting licences.

The founding papers of the applicant tell a lie about themselves. The inconsistences which are inherent in them bear ample evidence of the observed matter. An examination of those will drive home to any reader of them the matters which are characteristic of the same. I state the inconsistencies hereunder as follows:

> " A NOTICE AND GROUNDS OF APPLICATION
>
> 1. The applicant is the registered holder of exclusive prospecting rights in certain mining claims situated in the Chakari area of Kadoma known as Danley Mine area……
> 2. The applicant has been in peaceful and undisturbed possession of the mining claim and carrying out his mining activities thereat.
> 3. The 1st respondent with the aid of the 3rd respondent barred the applicant from entering the mining claim and carrying out of mining activities.
> 4. The 2nd respondent has invaded the applicant's claim and has illegally occupied the applicant's claim and started carrying out illegal mining activities thereon thereby interfering with the applicant's peaceful possession of the claim without his consent." (emphasis added)

The applicant, it is evident, portrays the picture that he has a claim at the mine. He insists that the second respondent invaded his claim. He produces no evidence which shows that he has any mining claim in any part of Zimbabwe, let alone at the mine. The prospecting licences which he attached to his application, it has been observed, have no relationship at all with the mine. Nor do their contents translate into conferring upon him the right to any claim in Zimbabwe. All they do is to allow him to prospect for minerals in Zimbabwe.

Going by the premise that the applicant occupies no claim at all at the mine or in Zimbabwe, the relief of *mandament van spolie* which he is moving for cannot remain open to him. He cannot be despoiled of what he does not possess or what he has never taken occupation of. That he never took any occupation of the mine is evident from a reading of paragraphs 10.2 and 10.3 of his founding affidavit. Those portray the effort which he is making to refrain from disclosing the date

that he took occupation of the mine, if he did. All what he alleges is that he was in peaceful and undisturbed possession of the claims "carrying out his prospecting operations."

The fallacy of the statement which the applicant makes in the last sentence of the above-mentioned paragraph can scarcely be wished away. I have already made a finding which shows that he has two prospecting licences but has no claim(s). Even if he had such, he cannot prospect on a claim. He would have prospected for him to have a claim. The two licences which Government lawfully issued to him cannot give him a mine as he would have me believe. All they give to him is the right to prospect for minerals and not more than that. The licenses are not synonymous with the claim which Government issues to a holder of tittle on a mine/ mines. The two are separate and distinct from each other. The statement is, therefore, misplaced. The applicant cannot prospect on a claim. He only has a claim after he has prospected and successfully applied for the same.

> "B. CERTIFICATE OF URGENCY
> 1.1. The applicant is the registered holder of certificates of registration for mining locations namely Danley Mine area ….. and is entitled to exclusive exploitation thereof.
> 1.2. Since the granting of the certificated (*sic*), the applicant has enjoyed peaceful and undisturbed possession and occupation of the said mining locations.
> 1.3. On the 24th August 2021, and without the applicant's authority, a valid court order or other right of entitlement at law, the first respondent with the aid of the third respondent barred the applicant's mining claim prohibiting the applicant from carrying on his mining activities ……"

It is evident, from a reading of the above exercepts, that the applicant chose to remain without condour. He knows that he has no title to any mining location in Zimbabwe. He knows, further, that the prospecting licenses which he lawfully holds do not allow him to mine anywhere, let alone at the mine. Despite his said knowledge, he proceeds to portray to the reader of his founding papers that he has a mining location from which he was dispoiled. He does not explain how he could be dispoiled of what he never held. He, in fact, makes a concerted effort to wrap the issue of prospecting into that of mining. The right to prospect for minerals is not synonymous with the right to mine. The two are separate and different from each other.

C. FOUNDING AFFIDAVIT

This gives the impression that the applicant went to where he claims he operates from for some unknown duration and was barred from operating on what he terms his claim. Paragraphs

10.1, 10.2 and 10.3 of his founding affidavit are relevant in the mentioned regard. He states, through counsel and during submissions that he was not at the mine. His statement gives birth to the question which centers on how he was despoiled when he did not go to the mine. The confusion becomes obvious when regard is to had to paragraph 10.3 wherein he states that:

> "On or about the 24th of August 2021, I went to the mine to go about my normal business there and the first and third respondents barred me from operating on my claim without my consent and had thus halted all mining activities" (emphasis added)

One is left to wonder as to what the applicant intends to bring home when he makes two contradictory statements as he does. He states, on the one hand, that he did not go to the mine. He asserts on the other, that he went to the mine on 24 August 2021. He forgets to explain the manner in which the respondents prevented him from operating on what he refers to as his claims. He does not, in short, bring out any details of their conduct against him, if such ever took place.

The applicant's lack of mention of the details which relate to his alleged dispoiling is characteristic of the narration of a litigant who has no story to tell other than making bare allegations against his advesery. His lack of description of the manner that he was despoiled, if he was, is not without a reason. He cannot tell of what he did not personally experience. That, in all probability, is the reason for not giving a full account of what he alleges occurred to him. I cannot place a finger on his narration of events and make any sense out of it. I cannot do so because he allows his statement, as contained in his founding papers, to unfold in dribs and drabs. The papers, in short, tell a blue lie about themselves. No amount of panel-beating of them can bring about a coherent story. They remain thoroughly unbelievable: they do not sustain any meaningful story. They are therefore discarded because they relate to a made up set of circumstances: *MDC Alliance* v *Macheka & 8 others*, HH423/20.

The first respondent, it is observed, is a legal entity. The third respondent is a natural person who is in charge of a police station. How a legal entity and a natural person were able to dispoil the applicant remains a matter for anyone's guess. The applicant's statement brings to the fore the dangers which are inherent in allegations which are made by a person who has not put his mind to what he wants to say. They more often than not come to the surface when the person who makes them chooses to create a case out of nothing in the vein hope that neither the court nor his adversary will analyse his averments and tear them to pieces, so to speak.

The unchallenged statements of the first and second respondents are that they, with the assistance of the third respondent, removed thirty-two persons whom they allege invaded their respective claims at the mine on 24 August, 2021. The third respondent's narrative is to an equal effect. He asserts that his officers who are members of the police force who work under his command did not prohibit the applicant, a holder of a prospecting licence, from prospecting for minerals. His officers, he alleges, arrested thirty-two illegal miners who were illegally mining at Brilliant 2 and 4 Mines, which respectively belong to the first and second respondents. He states that he charged the illegal miners under the law of Criminal Trespass as defined in s 132 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]. These, he avers, were referred to court where they were released on bail and remanded to 10 September 2021. He indicates that the removal and arrest of the illegal miners was/is lawful, He goes by way of deductive logic and states that, if the applicant alleges that the arrest of the thirty-two illegal miners amounted to spoliation on the latter's part, the conclusion which one reaches is that the illegal miners were acting for the applicant.

The applicant does not make mention of the thirty-two persons whom the police arrested and took to court where they were placed on remand. None of his founding papers makes any mention of these miners. He profers no reason at all for leaving them out of the equation of his application. He only refers to them as his workers during submissions. He does so through counsel and in answer to the question whether or not he went to the mining location on 24 August 2021. He states that he did not but his workers did. These are the thirty-two miners whom the police arrested and placed on remand.

The effort which the applicant makes to approbate and reprobate is very intriguing. He states that he went to the mine on 24 August 20121. He states, in the same breadth, that he did not go there but his workers did. He does not produce any evidence which shows that the thirty-two persons whom the police arrested are his workers. Nor does he state why he left them out of the equation of his application. He remains at paints to associate with, and dissociate himself from, them. He does so not without a reason. He remains alive to the fact that the persons whom he refers to as his workers committed an offence when they illegally took occupation of the respondents' claims. He realises that his association with them would land him into trouble.

The applicant made three critical statements through counsel. These are that:

(a) he was not at the mine on 24 August 2021; and

(b) the thirty-two persons whom the police arrested and placed on remand were his workers – and

(c) the thirty-two persons were prospecting for minerals for him.

The effort which the applicant makes in trying to re-create his narration of events shows a lot of resourcefulness on his part. He knows very well that the thirty-two persons could not do any prospecting work when they were not under the supervision of any qualified and licensed prospector. He knows that the law prevented them from doing so. He, no doubt, intended to create an almost credible story when he attached to his application the photograph and particulars of one Bornfree Masvingise who is described in the particulars which appear at p 14 of his papers as an approved prospector. Because of the haste with which he prepared and filed his application, he refrained from referring to Bornface Masvingise. He was asked as to the meaning and import of Bornfree Masvingise's photograph and its relevance to the application. He had no ready answer to the same. He moved, out of confusion, that the same be expunged from the record and his motion was granted.

The three statements which the applicant made through council do no hold. They are not authored by him. They are authored by his legal representative. He did not take any oath to make them for the applicant. They are, therefore not evidence and are expunged from the record as being irrelevant to the application.

Equally irrelevant to the same is the application which counsel for him made from the bar in terms of which he moved me to amend the founding affidavit of the applicant so that where the contents of them refer to first and third respondents it should read first and second respondents. The legal practitioner who represents a litigant, it is trite, cannot alter the affidavit of his principal who swore to its contents. The legal practitioner's application, in the mentioned regard is, once again refused for the reasons which I stated.

The founding papers of the applicant contain a lot of unsatisfactory features. It is for the observed reason, if or no other, that he made a concerted effort to build his case as it progressed. This became obvious during argument. His effort to change his story at every turn of his submissions undid his case more than it strengthened it. It is trite that the application stands or falls on its founding papers: *Minerals Identity* v *Commisioner General of Police,* HH-626-20.

The probabilities of the present application bring to the fore the disingenuousness of the applicant. This is that he:

(i) lawfully applied for, and procured, two prospecting licences;

(ii) engaged one Musa Tauya whom the first respondent refers to in para. 18 of its opposing affidavit; and

(iii) instructed Musa Tauya to engage thirty-two persons whom the police arrested and removed from the respondents claims to carry out illegal mining activities on the mentioned claims.

The above-observed matter is *in sync* with the statement of the first respondent which stated that, when Musa Tauya was questioned on the case of illegal miners whom the police arrested he refused to answer most of the questions and he told the police to direct their questions to his superior. It stated that he gave his superior's phone numbers to the police who failed to get in touch with Tauya's superior.

The applicant, it appears, maintained the position of a partner *en commandite*. He, in the observed manner, abused the two licences which Government issued to him. He also abused Musa Tauya and the miners for his own desired end-in-view. He acted in a dishonourable manner.

The application is everything which an urgent application should not be. It contains an incoherent narration of events. It is contradictory in many respects. It is panel-beaten in other respects. It is a complete sham which cannot be condoned let alone accepted. The application is dismissed with costs.

Masawi & partners, applicant's legal practitioners
Wintertons, 1st respondent's legal practitioners
Mangeyi Law Chambers, 2nd respondent's legal practitioners
Civil Division of the Attorney General's Office,3rd - 6th respondents legal practitioners