HERBERT VAN DEN BERG **1ST APPLICANT**

AND

CYNTHIA BESWICK **2ND APPLICANT**

AND

FRANK LANG **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 19 OCTOBER 2010 AND 21 OCTOBER 2010

Mr S. Chamunorwa for applicant
Advocate Moyo for respondent

Urgent Chamber Application

MATHONSI J: This matter is characterised by a lack of disclosure of useful information as would enable one to make an informed decision on the facts.

The brevity of the papers filed and the obvious unwillingness of counsel to clarify the dispute that exists between the parties constitute a challenge indeed.

What can be gleaned from the papers and submissions made by counsel is that the parties entered into some kind of a partnership sometime in August 2009, which was not reduced to writing in terms of which they may have agreed to mine jointly at True Blue Mine in Filabusi. The detailed terms of the agreement are not clear but it would appear that the two

Applicants were to operate or mine from certain mining dumps while the Respondent did the same on other dumps. All the mining claims belong to the Respondent.

This understanding subsisted for some time but a dispute has arisen between the parties which has propelled the Applicants to institute summons proceedings against the Respondent out of this court under case number HC 1971/10 seeking confirmation of the existence of a partnership and a debatement of the partnership accounts. Alternatively, they seek damages for unjust enrichment. The summons issued on 27 September 2010.

In their declaration in that matter the Applicants allege that in terms of the agreement the Respondent was required to contribute in the form of the mining dumps or plants under his claim and accommodation for them. On their part they were to contribute capital of $10 000-00, expertise and labour. They do not allege that they did make the contribution in pursuance of the agreement.

Applicants further allege in the declaration that the Respondent now denies the existence of the partnership and has given them notice to vacate the house that they occupy and to cease all operations on the unnamed mining dump which they operate. The Respondent has entered appearance to defend that action but is yet to file a plea.

On 12 October 2010 the Applicants issued this urgent application which has been opposed by the Respondent. The Applicants allege in the founding affidavit deposed to my first Applicant and verified by the second Applicant, and is very brief indeed, as follows:

> "(5). The facts which give rise to the present application are that the Respondent has unlawfully and without our consent taken possession of two mining plants which have always been under the control of myself and the second Applicant. The mining plants which were taken over are called the 'OFFICE PLANT' which the

Respondent took over sometime in June 2010 and the 'SPORO PLANT' which he took over on 2 September 2010. As a direct, result of the Respondents take over of the said mining dumps, water supply to the mining plant called the 'DRC PLANT' which we are currently working on will be cut as soon as Respondent starts operating the SPORO PLANT which is likely to happen on the second or third week of October 2010. This will gravely affect our mining operations as we need water for the cyanidation process.

(6). I am advised, which advice I accept, that in an application of this nature, which is for a spoliation order, all I need to allege is that I was in undisturbed use, occupation or control of certain property and that my use, occupation or control has been interfered with. In that regard, I confirm that having been in undisturbed control of the mining dump and the Respondent has without my consent or that of the second Applicant taken it over."

The affidavit ends there and is signed before a commissioner of oaths. How the Applicants came to occupy the dumps, what they did on it and how the Respondent has "despoiled" them is not explained.

In his opposing affidavit, the Respondent says nothing about the existence of a partnership agreement between himself and the Applicants and any other relationship between them. By implication he seems to accept that Applicant once enjoyed possession of the two plants. He however premises his opposition on the fact that the mining claims belong to himself and his wife and that at the time he took them over "Applicants were not working on them and had long abandoned them". He seems to suggest, without saying it though, that to the extent that Applicants had abandoned the mines, himself as the owner of the claims, was at liberty to take over. He then firmly maintains that the Applicants lost possession not through his actions but through their own conduct of abandonment.

At the first hearing of this matter on 15 October 2010, *Mr Chamunorwa* who appeared for the Applicant requested a postponement to enable him to confer with Applicants on the allegations of abandonment which he was not aware of. It was drawn to his attention that he

may need to supplement his papers because as they stood they did not contain sufficient particularity as to clarify the relationship between the parties and what it is the Respondent is alleged to have done to constitute spoliation.

When the hearing resumed on 19 October 2010, no further papers had been filed and *Mr Chamunorwa* took the view that the Applicants' papers as they stood, made out a case for the relief sought. He had no explanation as to the alleged abandonment other than to argue that the onus to prove that abandonment extinguished possession rested upon the Respondent. For that proposition he relied on the case of Quarrying Enterprises (Pvt) Ltd v John Viol (Pvt) Ltd and Others 1985 (1) ZLR 77(H).

In that case Ebrahim J (as he then was) stated at 83 G-H:

> "Ownership is a fundamental concept of our law. It is acquired and extinguished only in certain circumstances. The Council maintains that it had the right to dispose of these blocks because;
>
> (a) they had been abandoned, and
> (b) they were found on its land.
>
> In order to prove that ownership has been extinguished by abandonment, it is necessary to prove an intention to abandon."

We can easily dispose of that argument as being without merit at all. The Quarrying Enterprises case is clearly distinguishable from the present case as it dealt with ownership and not possession.

It was submitted on behalf of the Respondent that the remedy of spoliation, being a quick remedy, should be resorted to immediately and cannot be brought several months after the alleged spoliation took place. I do not agree with this argument because in *Manga v Manga* 1991(2) ZLR 251 (S) at 255B the Supreme Court held that a delay of 5 months could not be

regarded as acquiescence by a party to dispossession. See also *Botha and Another v Barrett* 1996 (2) ZLR 73 (S) at 78 C.

In *Botha and Another v Barrett* (supra), the Supreme Court however stated at 78D that:

> "Although, depending on the length, the period of delay may not per se constitute a bar to the grant of a spoliation order, it could well be a relevant factor, in deciding whether the dispossession had been consented to."

Which brings me to the issue of whether the Applicants have made a case for a spoliation order. The requirements for such an order to be granted are two fold and have to be proved for a spoliation order to be granted. They were stated in *Botha and Another v Barrett* at 77 E as follows:

> "(a) that the Applicant was in peaceful and undisturbed possession of the property, and,
> (b) that the Respondent deprived him of the possession forcibly or wrongfully against his consent."

See also Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park 1948(1) SA 748 (C) 753.

A Respondent in an application of this nature can repel the application by raising essentially two defences. According to the learned author Silberberg and Schoeman, The Law of Property, 2nd Edition, Butterworths at page 138.

> "A respondent may, as a general rule, raise only the following defences in spoliation proceedings:
> (a) applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation;
> (b) respondent has not committed spoliation .
>
> With regard to the first defence the respondent may in an appropriate case prove that the applicant did not exercise the measure of physical control which was necessary to acquire or retain possession or that the intention to derive a benefit from holding the thing was absent. Regarding the second defence the respondent may, for instance,

> prove that his act of dispossessing the applicant was in fact not unlawful in that it amounted to counter spoliation, was justified in terms of some or other statutory enactment or took place with the consent of the applicant." (The underlining is mine.)

In casu, the Respondent has argued that the Applicants abandoned the mines and that at the time that he took them over they were not in possession at all as a result of their own conduct. The Applicants were given an opportunity to file supplementary affidavits to disprove this claim. They elected not to. In law this is a clear defence to the application for spoliation. I agree with Advocate Moyo for the Respondent that the Applicants have failed to prove a clear right as could be prosecuted by way of spoliation application.

While the time they took to bring this application may not, on its own, act as a bar to the grant of a spoliation order (*Botha and Another* (supra), it is relevant in showing the Applicants' disinterest in the mines. It would appear that this application was triggered by an unexplained fear that Respondent may cut water supplies to the "DRC PLANT" which Applicants hold dear and not by the take over of the "OFFICE and SPORO PLANTS". If indeed the takeover of these plants had been an issue, the Applicants would have protested at the time the first take over took place.

This application would have been viewed in a different light if it had been an application to protect the Applicants' right to water supply. It is not.

Having come to the conclusion that the Applicants have not been able to prove the essentials of a spoliation application, it is not necessary for me to deal with the other

procedural issues raised on behalf of the Respondent.

Accordingly, this application is dismissed with costs.

Calderwood, Bryce Hendrie and partners applicants' legal practitioners
Webb, Low and Barry respondent's legal praactitioners