

BETMON INVESTMENTS (PVT) LTD
versus
DISHTIK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 7 February 2017

Urgent Chamber Application

R. F Mushoriwa, for the applicant
T Tabana, for the respondent

MWAYERA J: The applicant approached the court through the urgent chamber book seeking a spoliatory order. The back ground to the matter as discerned from the papers and oral submissions is that both the applicant and respondent have certificates of registration issued in terms of the Mines and Minerals Act. The applicant's documents are dated 2011 while the respondent's documents are dated 2016. It is apparent from the applicant's papers that the applicant is a registered owner of mining claims at Dotito at Chibara Hills, near Chitumbuko Primary School, as per registration certificates 39460BM and 39461BM as indicated on an attached map A2. The applicant argued that for 20 years it enjoyed peaceful undisturbed possession of the stated claims. The state of affairs came under threat on 1 February 2017, when the respondent entered the mining claims, placed building materials and recruited some villagers as employees. The respondent claimed to have registered claims over the same area. Consequently the applicant argued that the respondent has through placing their employees and equipment dispossessed the applicant of its peaceful and undisturbed possession without due process.

The law on spoliation is fairly settled. The primary consideration would be whether or not the facts presented meet the requirements of spoliation. The requirements for spoliation are (1) peaceful and undisturbed possession. (2). Illicit dispossession. See *Fredrick v Stelenbothe*

Divisional council 1977 (3) SA 113 and Mitsotso and Others v Commissioner of Police and Another 1993 (2) ZLR 392. In *Mitsotso* case, the judge quoted with approval the general principle stated by INNES CJ in *Nino Bonino deLonge 1906 TS 120* at 122 wherein it was stated:

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of possession of the property, whether movable or immovable.”

In spoliation applications the primary consideration is whether or not the applicant was unlawfully dispossessed of his or her peaceful possession. The consideration is not the nature of the applicant’s occupation but that the respondent should not take the law into its own hands. If it is shown that the respondent has without due process taken the law into its own hands, the court will summarily restore the status *quo ante* pending a necessary investigation into the merits of the dispute.

In the present case it is apparent the applicant was in peaceful and undisturbed possession of the mining claim and that the respondent interfered with such possession on 1 February 2017. The respondent moved in some employees and building material thereby depriving the applicant of possession forcibly or wrongfully against their consent. I am alive to the registration certificates of the respondents, acquired in November 2016. However, the question of the extent of area and ownership does not fall for determination in an application for spoliation. The ownership and extent of area is an issue which falls in the preview of the relevant mines authority. What is clear is that the respondent moved into a place in which the applicant enjoyed peaceful and undisturbed possession without a court order or without following due process. The fact that both parties were allocated certificate of registration in the absence of withdrawal of the applicant’s certificate of registration does not amount to lawful dispossession of the applicant. The applicant having ben *insitu* since 2011 sought the remedy of *mandament van spolie* upon realising, on 1 February 2017, that the respondent was out to unlawfully deprive the applicant of its peaceful and undisturbed possession. The applicant, immediately approached the court on 3 February 2017 so as to seek redress. The respondent, in 2016, after acquiring their own registration certificate proceeded to inspect the area but there was no evidence of disturbing peaceful possession then. The peaceful possession was under threat as from 1 February 2017 when building materials and employees occupied the applicant’s claim thereby dispossessing the latter.

In the circumstances of this matter, it is clear when the need to act arose the applicant sprung to action and approached the court through the urgent book. Spoliation by nature is urgent. Indeed were there is clear evidence that there is disturbance of peaceful possession and that the only available remedy is restoration of the status *quo ante* then redress in the form of a spoliatory relief ought to be issued.

The applicant rightly approached the court on urgent basis. The requirements of urgency are clearly met in his matter. See *Kuvarega v Registrar General and Another* 1988 (1) ZLR 188, *Dexprint Investments (Pvt) Ltd v Ace Properties and Investments (Pvt) Ltd* HH 120/02 and *Document Support Centre (Pvt) Ltd v Mapuwire* 2006 (2) ZLR. The nature of relief sought and the cause of action qualifies the matter with urgency. The applicant treated the matter as urgent, and sought the only available remedy of restoration of the status *quo ante*. It is clear that prior to the coming in of the respondents on 1 February 2017, the applicant, was in peaceful and undisturbed possession of the mining claim. However, on 1 February 2017 the respondents unlawfully and without the consent of the applicant forcibly and wrongfully deprived the applicant of its possession. To this extent the requirements of urgency and spoliation have been met, and thus the remedy of *mandament van spolie* ought to be granted.

Accordingly it is ordered that:

1. The respondent, its agents and assigns be and are hereby ordered to vacate and restore applicant's vacant occupation of the applicant's mine located at Chibara Hills, near Chitumbuko Primary School, Zambara Homes registered under numbers 39460BM and 39461BM within 48 hours of this order.
2. In the event that the respondent fails to comply with para 1 the Sheriff or his lawful deputy be and is hereby ordered to eject respondent and all those claiming occupation through it.
3. In the event that the Sheriff ejects in terms of para 2 of this order, he shall recover all costs of such ejection from the respondent.

Rubaya & Chtambudza, respondent's legal practitioners
Mushoriwa Pasi Corporate Attorneys, applicant's legal practitioners