NGONI EDWARD MUTOPO
versus
MUPFURUTSI GAME PARK
and
POWER MUPUNGA N.O

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 4 June 2019 and 12 June 2019

Urgent Application

N.T. Mazungunye, for the applicant
B Diza, for the respondent

MATHONSI J: The applicant simply has to make up his mind which party he desires to sue and who exactly it is he is having a fight with which fight he has brought to the door steps of this court. Indeed it is a celebrated principle of our civil practice and procedure that before a litigant cites a party in a summons or in application proceedings, it is important for that litigant to consider whether the party being cited has *locus standi* to be sued, that is *legitima persona standi injudicio*.

It is quite critical to also ascertain the correct citation of the party being sued in order to avoid citing the wrong party or a "party" that does not exist at all. This is done in order to save court time as well as to ensure that the court is not detained endlessly in determining procedural matters like misjonder or non-joinder of parties but in considering the substantive dispute.

The applicant either does not know the identity of the party disturbing its peaceful enjoyment and exploitation of his mining claims known as Dryden 60 situated on Umfuridzi Ranch in Shamva which he holds by Certificate of Registration No. 26401 and Licence No. 130081, or he simply does not care and would sue literally anyone in sight. I say so because in HC 2749/19 the applicant sued "Mupfurutsi Ranch" obviously alleging interference with his mining operations at his mining location. He obtained a court order from this court unopposed on 8 May 2019 in the following:

"It is ordered that:

1. The respondent through its employees, assignees and or anyone acting under the instruction of the respondent be and is hereby interdicted from barring applicant to access his mining claim, Dryden 60 situated in Umfuridzi Ranch (sic) Shamva Mashonaland Central Province and or to act in a manner that is likely to interfere with applicant's operations on the said Block of Mine.

2. Respondent is ordered to pay costs."

Whatever happened in the process of executing that order is not apparent from the papers, but for some reason, the applicant filed this urgent application on 24 May 2019 in which he cited "Mupfurutsi Game Park" and Power Mupunga N.O as the first and second respondents. Alleging that an act of spoliation was committed by the respondents on 20 May 2019 by locking the gates to his mining block and barring him and his employees from entering or accessing his mining location, the applicant sought interim relief in the following:

"TERMS OF THE PROVISIONAL ORDER
That pending the return date for the confirmation or discharge of the provisional order:
1. The 2nd respondent be and is hereby ordered to restore possession of a block of mine Dryden 60 in Umfurudzi Ranch Shamva to the applicant upon service of this provisional order by unlocking the gates to the said block of mine and allowed applicant unhindered access to his block of mine Dryden 60 (*sic*).

2. In the event that the 2nd respondent fail (s) or refuses (s) to comply with paragraph 1 of this provisional order, the Sheriff of Zimbabwe or his lawful deputy be and is hereby ordered to enforce this order by restoring possession of the said block Dryden 60 in Umfurudzi Ranch Shamva."

It became apparent during the initial hearing of this matter on 29 May 2019 that the applicant's papers were in tatters. Not only had he cited the first respondent which is clearly not a legal entity and thus cannot be sued, he had also not produced any evidence on the exact location of the mining claim. The entire application needed serious surgery. I then postponed the matter to 4 June 2019 to enable the applicant to seek an amendment of its papers as well as to engage the respondents with a view to amicably resolve the matter.

The applicant did neither. Instead on 3 June 2019, and without seeking to consent of the respondents or the leave of the court as required by r 132 of the High Court of Zimbabwe Rules, 1071, the applicant purported to amend the citation of the first respondent by its substitution with "Umfurudzi Park (Pvt) Ltd" by the mere filing of a notice of amendment, to wit:

"BE PLEASED TO TAKE NOTICE THAT
the applicant amends citation of the 1st respondent on the application as follows:

> The 1st respondent to be cited as Umfurudzi Park (Pvt) Ltd and to be referred as such in the application, Founding Affidavit and Draft Order."

Life is not that easy. The applicant required the consent of the respondents to effect an amendment and in the absence of such consent he should have sought the leave of the court to effect an amendment. The respondents did not consent to the proposed amendment. Their consent was not sought. I did not grant leave to amend. My leave was not sought or granted I could not grant that which was not sought. More importantly Umfurudzi Park (Pvt) Ltd, which I am told is a corporation in partnership with the Department of National Parks and Wildlife to manage the game park, did not consent to being joined as a party to this application. Neither was it served with the application. Notwithstanding such glaring defect in the application, Mr *Mazungunye* for the applicant, still ploughed through insisting that I should grant the relief sought against the respondents.

There is clearly no first respondent in this application because the one cited is not a legal entity and cannot be sued. The party named as the first respondent does not exist. MALABA J (as he then was) made it clear in *Gariya Safaris (Pvt) Ltd* v *Van Wyk 1996* (2) ZLR 246 (H) at 252 G that a summons citing a non-existent defendant is void *ab initio*:

> "The plaintiff is, of course, entitled to choose the person against whom to proceed and leave out any person against whom it does not desire to proceed. A summons has a legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names written in the summons as being those of the defendant, the summons is null and void *ab initio*."

See also *JDM Agro-Consul and Marketing (Pvt) Ltd* v *Editor, The Herald & Anor* 2007 (2) ZLR 71 (H) at 75 B-D; *Old Mutual Asset Management (Pvt) Ltd* v *F & R Travel Tours & Car Sales* HH 53-07 (unreported)

The applicant's saving grace in this matter is the citation of the second respondent. The application would have been dismissed as a nullity for that reason. The second respondent has been cited as the warden at the game park who is employed, of course by the Department of Parks and Wildlife Management. It is alleged that he locked the gated leading to the applicant's mining location thereby preventing the applicant and his employees from accessing the location. It is that act of locking the gates which is said to constitute an act of spoliation for which the applicant seeks spoliatory relief. To substantiate these allegations the applicant only produced a copy of his certificate of registration showing that he is the registered owner of a mining claim known as Dryden 60 situated approximately 1 km from beacons 35/5 in the

Shamva region, a description which helps no one especially in view of the defence relied upon by the second respondent.

The second respondent has vehemently denied that such a mining claim is located at the Umfurudzi Safari Area in which he is a warden. He has stated that he never locked any gates to the safari area insisting that the place where he is employed is a protected area which is fenced and gated, being a game park. Anybody desiring to enter has to be granted authority and should pay the prescribed entrance fee. On 20 May 2019 2 lorries arrived at the main gate to the Park insisting of entering and proceeding to a mining location. He was telephoned by security personnel at the gate who informed him of their presence. The applicant was not one of those that came.

According to the second respondent he directed security to allow one truck to enter upon payment of the requisite entry fee so that those using it could proceed to his office to discuss the issue. When they did he demanded that they produce proof that they have a mining claim within the protected area. They failed and he sent them packing. He denied that there is such a mine or gold ore lying anywhere within the safari area. He stated that upon making inquiries with the Provincial Mining Director as to whether such a mining location is found at the game park he received a letter from the Provincial Mining Director dated 31 May 2019 which reads in relevant part:

> RE: REQUEST ON MINING CLAIM LOCATION – DRY DEN
> The above matter refers. This office acknowledge(s) receipt of your letter dated 20 May 2019 in which you requested the locationof Dryden 60 Registration number 26401. Please be advised that our records show that Dryden 60 Registration Number 26401 is located in Ruia Range, however Ruia Range is not part of Mufurudzi Park. Please do not hesitate to contact the undersigned should you need more information."

The second respondent also produced a map showing the exact position of Umfurudzi Safari area and a number of ranches which are a distance away from the Safari Area known as Umfurudsi Ranches 1 to 8. If indeed Dryden 60 is situated at Umfurudsi Ranch as appears on the Certificate of Registration there is a reasonable possibility that the applicant is barking at a wrong tree. Whatever the case, in an application for spoliatory relief it is true that all that the applicant is required to establish is possession, namely that he or she was in peaceful and undisturbed possession but was despoiled through stealth or other unlawful means without his or her consent. As stated in *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 77 E the requirements for the grant of spoliatory relief are two-fold namely:

> "(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 *Krumer* v *Trustees, Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753.

On the other hand, the respondent can repel the application by raising essentially two defences namely:

(a) that the applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation; or

(b) that the respondent did not commit any act of spoliation.

See Silberberg and Schoeman, *The Law of Property*, 2 ed at p 138; *van den Berg & Anor* v *Lang* 2010 (1) ZLR 469 (H) at 473 C. Regarding the second defence, the respondent may, for instance, prove that the dispossession was not unlawful, was justified in terms of some or other statutory enactment or took place with the consent of the applicant.

In the present case I am not satisfied that the applicant has succeeded to prove spoliation or deprivation of possession. He has not discharged the onus resting on him to show that the act of keeping the gates to the Game Park closed constituted an act of spoliation. Everything seems to point to the mining claim being located elsewhere outside the Game Park. Even if I am wrong on that, the applicant has failed to show that it is in the Game Park. His papers are so insufficient they do not prove anything. It is a time – honoured principle of our law that he who alleges has the onus to prove. Having failed to prove his case, the applicant cannot obtain spoliatory relief.

The entire case of the applicant has been presented with such tardiness that not even the postponement of the urgent application for a week to allow the applicant to make a meaningful case could be of any help at all. It is an application that cannot be saved at all. It must fail.

In the result, it is ordered that the application be and is hereby dismissed with costs.

Chikwangwani Tapi Attorneys, applicant's legal practitioners
Mhishi Nkomo Legal Practice, 1st & 2nd respondents' legal practitioner