Judgment No. S.C. 211/98
Civil Appeal No. 177/97

(1) TOBIAS MUSARIRI

(2) HWANGE SAFARIS (PRIVATE) LIMITED v

BRUNA MINERALS EXPLOITATION (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, NOVEMBER 5, 1998 & JANUARY 25, 1999

J C Andersen SC, for the appellants

T A Cherry, for the respondent

SANDURA JA: This is an appeal against the orders made by the High Court in three matters which were heard together and which involved the same parties. In this judgment I shall call the first matter "the main action", the second matter "the provisional order application", and the third matter "the contempt of court application".

The background facts in this case are as follows. The first appellant ("Musariri") is a safari operator in Hwange District. He is the managing director of the second appellant. The respondent is a limited liability company carrying on the business of mining in the same district. Its managing director is Dr Pessina.

The dispute between the parties concerns two areas of State land in Hwange District which are separated by a veterinary fence. The area on the northern side of the fence is State Land C, whilst the area on the southern side of the fence is the Deka Safari Area.

The respondent is the registered owner of 650 base metal mining claims and sites, known collectively as the RHA Claims. These claims are situated partly on State Land C and partly in the Deka Safari area. At the relevant time, State Land C was under the control of the Minister of Lands, Agriculture and Water Development ("the Minister of Lands"), whilst the Deka Safari area was under the control of the Minister of Environment and Tourism ("the Minister of Environment").

The RHA Claims were first registered with the Mining Commissioner in Bulawayo in 1931 but were abandoned in 1961. They were, however, re-pegged and re-registered in 1966 by and in the name of the respondent. The respondent has no knowledge of who owned the claims between 1931 and 1961.

However, in May 1969 the respondent sold the claims to a South African company, Rietfontein Mines, which in turn sold them to Blanket Mines in 1973. The respondent subsequently re-purchased the claims from Blanket Mines in December 1993 and has held them since then.

Since July 1966, when the claims were re-pegged and re-registered in the respondent's name, they remained current and valid. At no stage were they abandoned, forfeited, cancelled or expropriated.

In June 1993 Musariri concluded a lease agreement with the Minister of Lands, in terms of which he leased about 10 500 hectares in State Land C for fifteen years for "game ranching and safari operations". Later, he and some officials from the Ministry of Lands drove to the area to view it and select the site where a safari lodge would be constructed. They drove to State Land C, traversed it, crossed the veterinary fence and entered the Deka Safari area, where Musariri selected the site where his safari lodge was to be built. That site was on one of the respondent's mining locations.

However, when Musariri met Dr Pessina, the respondent's managing director, Dr Pessina warned him that the site which he had selected was in his (i.e. Dr Pessina's) area. Thereafter, Musariri contacted an official in the Ministry of Lands who informed him that Dr Pessina was in the area illegally and should be ignored. Musariri took that advice.

Consequently, the respondent issued a summons against the appellants ("the main action") claiming, *inter alia*, their eviction from the area. However, before the matter came up for trial, Musariri concluded a lease agreement with the Minister of Environment, in terms of which Musariri was authorised to conduct safari operations and other activities in the disputed area.

Thereafter, the respondent filed the provisional order application, calling upon Musariri and others to show cause why they should not be restrained from interfering with the respondent's mining operations. The provisional order, which was subsequently granted, operated as a temporary interdict. It restrained

Musariri and others from interfering with the respondent's mining operations in any way.

Some time after the granting of the provisional order, the respondent filed another application in the High Court against Musariri, i.e. the contempt of court application, alleging that Musariri had ignored the temporary interdict and was in contempt of court.

The three matters, all of which were contested by the appellants, were subsequently heard together and various orders were made. I now wish to examine each matter in order to determine whether the learned trial judge was right in making the orders which are now challenged on appeal.

The Main Action

In this matter the learned trial judge ordered as follows:-

"1. That the defendants and all those claiming through them be and are hereby evicted from claims RHA 8536 BM and 9140 BM, Hwange District.

2. That the first defendant pays $332 to the plaintiff with interest thereon at the prescribed rate from the date of service of summons to (the date of) full payment.

3. (That) the defendants jointly and severally pay the costs of suit, (the) one paying the other to be absolved."

The main witness for the respondent was Dr Pessina. His evidence was as follows. He is the respondent's managing director and has lived in the Deka Safari area for many years. In August 1993 he met Musariri in the area and had a brief conversation with him. During that conversation he informed Musariri that the

site on which he intended building his safari lodge belonged to Blanket Mines, but did not tell him that he was in the process of negotiating the purchase of the claims from Blanket Mines by the respondent. He indicated to Musariri that he was going to Bulawayo and would discuss the matter further after his return.

When Dr Pessina returned from Bulawayo some days later, he found a stranger on his residential premises. The stranger was Musariri's worker who had occupied his worker's quarters. He also discovered that some diesel and oil which, he was informed, belonged to Musariri had been stored in a shed on the premises. When he asked the worker what he was doing on the premises the latter gave him a letter from the Ministry of Lands which stated that he (Dr Pessina) was occupying the area illegally, and that Musariri was the new lessee. Dr Pessina took the letter to the Mining Commissioner in Bulawayo but, before leaving, he told the man occupying the worker's quarters that he would have to pay rent for the accommodation. However, it does not appear from the evidence that any rent was agreed upon, though Dr Pessina said that if he was not mistaken the man offered to pay $200 per month.

Musariri's evidence, briefly stated, was as follows. In the company of the officials from the Ministry of Lands he traversed State Land C and entered the Deka Safari area where he selected the site where his safari lodge was to be built. That selection was approved by the officials accompanying him. As far as he was concerned, whether the site was in State Land C or Deka Safari area was irrelevant because he had selected the site in the presence of the relevant officials who raised no objection. He denied the allegation that he had stored his oil and diesel in a shed on

the respondent's premises. In addition, he denied the allegation that he had agreed to pay any storage charges.

In the circumstances, there is really no dispute between the parties as to whether Musariri's lodge was built on the respondent's mining location. Indeed, in his heads of argument Mr *Andersen*, who appeared for the appellants, conceded that the safari camp is within the boundaries of claim RHA 8536 BM and that the respondent, therefore, has all the rights of the registered holder of a mining location.

Nevertheless, Mr *Andersen* submitted that the learned trial judge should not have ordered the eviction of the appellants because in this case there was no conflict between the holder of the surface rights (Musariri) and the holder of the mining rights (the respondent) over the area of the mining location. He submitted that the Minister of Environment was quite entitled to lease to the appellants the surface rights of the Government over the mining location. In order to test the validity of these submissions it is necessary to examine the provisions of the Mines and Minerals Act [*Chapter 21:05*] ("the Act").

The surface rights of miners are set out in s 178(2) of the Act, which reads as follows:-

> "178 (2) Every miner of a registered mining location shall have and possess the following respective surface rights -
>
> (a) the right, subject to any existing rights, to the use of any surface within the boundaries thereof for all necessary mining purposes of his location; …".

On the other hand, the rights of the landowner over the mining location are set out in s 179 of the Act, which reads as follows:-

> "179 Subject to subsection (12) of section *one hundred and eighty*, the owner or the occupier of land on which a registered mining location is situated shall retain the right to graze stock upon or cultivate the surface of such location insofar as such grazing or cultivation does not interfere with the proper working of the location for mining purposes."

It cannot be doubted that the only rights which the landowner can lease to another person are those which he himself has over the mining location. *Nemo dat quod non habet* - no-one gives that which he does not have. It follows, therefore, that the only rights which the Minister of Environment could have leased to the appellants are those set out in s 179 of the Act. Those rights do not include the right to erect a safari lodge on the mining location.

In my view, the learned trial judge was right when he said:-

> "The defendants (now the appellants) can only claim the right of possession if they prove that they had existing rights in the land at the time the plaintiff (now the respondent) registered the mining location. They failed to prove such existing rights. Evidence showed that the ground on which the safari lodge was erected was not in State Land 'C'. It was not in (the) contemplation of the parties when they entered into the lease agreement. The first defendant (now the first appellant) had no colour of right at the time he started the occupation of the land."

Furthermore, the appellants did not comply with the provisions of s 190(2) of the Act before erecting the safari lodge. That section reads as follows:-

> "190 (2) No person shall erect upon any registered mining location any building for the purpose of trading in any way with the public or for any other business not legitimately connected with and necessary for the purposes of such location, or carry on any such business upon such location, except when authorised thereto by the Secretary (of Mines) with the consent of the holder of such location and, unless the title deed of the land on which such

> location is situated is such that the consent of the owner of the land is not required, with the consent of the owner of the land."

The first point which I would like to make is that the safari lodge was not erected for a business legitimately connected with and necessary for the purposes of the mining location. Secondly, the erection of the safari lodge was not authorised by the Secretary of Mines. Thirdly, the safari lodge was erected without the respondent's consent. The argument that Dr Pessina must have given tacit approval of the occupation of the mining location by the appellants because he charged rent for the occupation of his worker's quarters by Musariri's worker is not a valid one. In his evidence Dr Pessina said that when he found the man occupying the quarters he felt that it was inhuman to evict him, and therefore decided to charge rent instead until the question of the occupation of the mining location was resolved. That can hardly constitute tacit consent to the occupation of the mining location by the appellants.

The same argument applies to the storage charges claimed by the respondent in respect of the appellants' fuel and oil allegedly stored on the respondent's premises. Doctor Pessina said that the fuel and oil had been brought to his premises in his absence and stored in a shed without his concurrence. He then decided to impose storage charges, pending the resolution of the dispute relating to the occupation of the mining location.

In the circumstances, I am satisfied that the decision by the learned trial judge to grant the eviction order was correct.

However, the order that Musariri should pay the sum of $332 to the respondent stands on a different footing. In my view, the evidence led at the trial did not establish that there was any agreement that Musariri or his worker would pay rent for the worker's quarters or that there would be payment for the alleged storage of Musariri's fuel and oil on the respondent's premises and how much the charges would be. Doctor Pessina's evidence on this issue was unsatisfactory. The order to pay the sum of $332 must, therefore, be set aside.

The Provisional Order Application

In terms of the provisional order granted against Musariri on 8 March 1995, Musariri was called upon to show cause why he and his workers should not be restrained from, *inter alia*, in any way interfering with or hindering the proper conduct of the respondent's mining operations. The order also acted as a temporary interdict.

The provisional order, insofar as it restrained Musariri and his workers from denying the respondent's officers, invitees and customers access to the respondent's mining claims along any of the roads leading to or from the claims, was subsequently confirmed by the learned trial judge in the court *a quo*. The propriety of that decision has now been challenged on appeal.

The following evidence was before the learned trial judge. The provisional order was granted on 8 March 1995. Subsequently, on 19 September 1995 the respondent's ore-laden truck was impeded by a locked and chained gate across the road on the northern side of the safari camp. The lorry was on its way to Tshontanda Siding to deliver the ore to the railway station. The gate had been

erected shortly after the granting of the provisional order. As the respondent's lorry stopped at the gate, it was surrounded by Musariri's workers who refused to unlock the gate. Because the fully-laden lorry could not have used the alternative route due to the steep slopes on the route, the respondent's employees were obliged to break the lock on the gate in order to have access to the road leading to Tshontanda Siding where the ore was to be delivered.

On the return journey, the lorry could not pass through the gate because Musariri's workers had blocked the road with a tractor and trailer. As the lorry was then empty it was compelled to return to the homestead using the alternative but unsuitable route.

On these facts there can be no doubt that the learned judge correctly confirmed the provisional order.

The Contempt of Court Application

In this matter, the events of 19 September 1995, already set out above, clearly established that Musariri was guilty of contempt of court. He ignored the temporary interdict granted on 8 March 1995, in terms of which he and his workers were restrained from in any way interfering with or hindering the proper conduct of the respondent's mining operations. Even when he gave evidence at the trial he said that he would not allow the respondent's vehicles to use the road in question. In this regard, the learned trial judge commented as follows:-

> "Even at the time he gave evidence in court he said (he) would not allow the plaintiff's vehicles to use the access road. The first defendant was determined not to obey the court order and there is need to coerce him into obeying it."

Those comments were completely justified.

In my view, the finding that Musariri was guilty of contempt of court and the fine imposed cannot be faulted.

In the circumstances, subject to the deletion of para 2 of the order of the court *a quo*, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Muvingi & Machaya, appellants' legal practitioners

Ben Baron & Partners, respondent's legal practitioners