

**IN THE SUPREME COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 88/23**

In the matter between:

**MUSA KHATHWANE  
ZETHU KHATHWANE**

**First Appellant  
Second Appellant**

and

<b>MATADAR INVESTMENTS (PTY) LTD</b>	<b>First Respondent</b>
<b>MARCO PAULO INVESTMENTS (PTY) LTD</b>	<b>Second Respondent</b>
<b>INDVUNA MMELI EPHRAEM DLAMINI N.O.</b>	<b>Third Respondent</b>
<b>ESICELWINI ROYAL KRAAL</b>	<b>Fourth Respondent</b>

Neutral Citation: *Musa Khathwane and Another v Matadar Investments (Pty) Ltd and Others (88/2023) [2024] SZHC 73(3 April 2024)*

**CORAM:** S.B. Maphalala, M.D. Mamba *et J.M Van der Walt JJA*

**HEARD:** 26<sup>th</sup> March 2024

**DELIVERED:** 3 April 2024

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### *Summary*

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*Appeal – spoliation – ruling by Umphakatsi – a valid Umphakatsi ruling or order in lieu of a court order would suffice for purposes of adjudicating spoliation proceedings*

*Appeal – spoliation – ruling by Umphakatsi inapplicable to person or persons occupying or on premises sought to be evicted – in circumstances ruling cannot serve to ward off spoliation*

*Appeal – costs order - certified costs of Counsel - **Rule 68(2)** of the Rules of the High Court requires an application and that court be satisfied of certain requirements - order for such costs not merely there for the taking – in absence of such application, awarding of such costs not competent*

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## JUDGMENT

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*Cur adv Vult*  
(Postea: 3 April 2024)

### INTRODUCTION

[1] The application serving before the Court *a quo* was a spoliation application instituted by the First Respondent (hereinafter referred to as “MATADAR”) against the Appellants. The Second Respondent (hereinafter referred to as “MARCO PAULO”) as well as the Third Respondent (INDVUNA MMELI EPHRAEM DLAMINI N.O.) and the Fourth Respondent (ESICELWINI ROYAL KRAAL) were subsequently joined as parties.

[2] It was common cause that the Appellants sought to evict persons from certain business premises on Swazi nation land occupied by MATADAR, said premises which are situate on land allegedly “belonging” to the family of the Appellants. The eviction was founded on the strength of a ruling dated the 29<sup>th</sup> August 2019

by the Umphakatsi of the Esicelwini area (hereinafter referred to as the “Ruling.”)

2.1 The First Appellant is the executor of estate of the late Elias Khathwane, who passed away on the 18<sup>th</sup> February 2021 i.e., after the Ruling had issued. It appears that the Second Appellant is his wife.

2.2 It was common cause that the late Mr Khathwane during his lifetime had been entitled to the benefit and use of the land in question. Disputes arose as to whether **MARCO PAULO** and/or its sole shareholder **MANUEL DECAIRES** (hereinafter referred to as “**DECAIRES**”<sup>1</sup>) had either purchased, or rented the land from the late Mr Khathwane.

[3] The matter was heard by the Umphakatsi on the 18<sup>th</sup> May 2019, resulting in the Ruling in August 2019 to the effect firstly, that there was no lease or signed deed of sale and secondly, that **DECAIRES** did not *khonta* for any business in the area.

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<sup>1</sup> Elsewhere referred to as ‘DE CAIRES’

[4] Accordingly, it was directed by the Umphakatsi that **DECAIRES** be given notice to vacate the premises by the 29<sup>th</sup> October 2019 and that the land was to be given back to the late Mr Khathwane.

[5] On the 23<sup>rd</sup> February 2023 the Attorney-General wrote a Memorandum to the National Commissioner of Police to the effect that the Umphakatsi had ruled that **DECAIRES** “*and his privies*” be given notice to vacate the premises but that they had failed to comply. The Station Commander was urged to render assistance to the Indvuna and his Inner Council.

[6] In opposition to the above, there was an allegation by **MATADAR** and **MARCO PAULO** to the effect that the Ruling had had been overturned by the Chief of the area. The Third and Fourth Respondents, representing the traditional hierarchical authority, averred that the alleged setting aside by the Chief had been done fraudulently.

[7] The Court *a quo* decided the application in favour of MATADAR, *inter alia* holding that it had been established that it had been in peaceful and undisturbed possession at the relevant time and, practically speaking, that there was no Ruling because same had been overturned by the Chief of the area. Costs including certified costs of Counsel was awarded; an order for such certified costs was not sought in the Notice of Motion and Counsel before us were agreed that it had not been raised or argued *a quo*.

[8] Dissatisfied with the outcome, the Appellants filed the instant appeal on the following grounds:

- “1. The Court *a quo* erred in law in granting the spoliation order on the basis that the Appellants had no Court Order or Royal Order. There was no need for a Court Order or a Royal Order in the circumstances of the matter. The Appellants had in their possession an Umphakatsi (Chief Kraal) Ruling which they used to evict the Respondents.
2. The Court *a quo* erred in law to disregard the Ruling of the Umphakatsi for the eviction of the Respondents. It had no such powers but Traditional Structures.
3. The Court *a quo* erred in dealing with the matter in the summary manner it did as there was a dispute of fact on whether or not the Ruling of the Chief's Kraal (Umphakatsi) had been set aside by the Chief.
4. The Court *a quo* erred in law in disregarding altogether the affidavits of the Chief's Kraal, especially the Indvuna, on the existence or otherwise of the Ruling for the eviction of the Respondents.

5. The Court a quo erred in law to hold that there was no need to join the Royal Kraal. That was no longer an issue before the Court a quo as the Royal Kraal and the other parties were joined by consent of the parties as they had a direct and substantial interest in the suit. The Royal Kraal was necessary to shed light on the existence or otherwise of the eviction Ruling.
6. The Court a quo erred in law and in fact to award the Respondents certified costs of Counsel as that order was not prayed for in the Pleadings and the costs at that scale were not warranted."

## A THE UMPHAKATSI RULING

- [9] The Ruling was central to the issues to be determined and is reproduced herein in full:

"A" 14

MATTER BETWEEN: E.J. GENERAL DEALER AND MARCO PAULO ENTERPRISES

Case recorded on 18/05/2019 at Eitshwini royal kraal in front of Emalangeni, Induvuna Mmelli Ephraem Dlamini, senior council, Tloentla and Community members as traditional panel for hearing the matter.

Summary of the matter for final ruling or judgement.

- a) E.J. Khathwane of E.J. general dealer (applicant) in his evidence to the panel, submitted that on or about the year 1990, he made a communication of agreement with one Aparicio dos santos Cordos who was a director of Marco Paulo Enterprises (pty) Ltd.
- b) E.J. Khathwane submitted to the council that they agreed on a 5 year lease agreement with Aparicio dos santos Cordos, renewable (1990 to 1995). He gave the copy of the lease to the council which was signed by the two parties.
- c) The lease stated that Marco Paulo Enterprises would rent the premises at R 200 per month and 10% increment per year.
- d) Copies of two cheques were submitted to the council, which reflected a sum of R25 000.00 and sum of R70 000.00. The two cheques were equivalent to the rent for the first 5 years.
- e) Mr Manuel Decalves told the panel that he first bought 50% shares of Marco Paulo Enterprises and later on bought the other 50%, rendering him 100% owner of the company.
- f) E.J. Khathwane submitted that a lease was ever signed between Mr Manuel Decalves and himself. He insisted that he does not know Mr Manuel Decalves.
- g) Marco Paulo Enterprises did not "hanta" for any business at Komahasha. They only came to Komahasha to do business with Mr E.J. Khathwane of E.J. general dealer on a lease basis. Mr Cordos was only introduced to the inner council as a business partner for Mr Khathwane.
- h) The council asked Mr Manuel if he had any other documents to support his statement before the council. In response he said he did not have any apart from what was presented earlier before the council.

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- 1) Asked if there were any documents signed for the sale of the piece of land in question. No documents were produced.

Ruling is handed down as follows (25<sup>th</sup> August 2019)

- 1) It was found that Mr Manuel Decalves does not have any lease agreement with Mr E.J. Khathwane (from 1990 to date)
- 2) There is no signed deed of sale, between Mr E.J. Khathwane and Mr Manuel Decalves.
- 3) Mr Manuel did not "hanta" for any business at Komahasha - Umphakatsi
- 4) Mr Manuel Decalves was given 60 days from 25<sup>th</sup> August 2019 to 25<sup>th</sup> October 2019, to vacate the premises.
- 5) The piece of land, in question be handed back to Mr E.J. Khathwane

Recorded and signed at Seelaint Royal Kraal

Chief Khongolile Moe

05-12-2019

The Chief N.D. Bhebe, Lomahasha

stamp

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[10] It is noted therefrom that the grounds for ejectment were not limited to issues of ownership or a lease, but also included the failure to *khonta* for business rights.

[11] My brother Mamba JA (Mamba J as he then was) in a thoroughly reasoned judgment in the High Court case of *Chief Mgwagwa v Joshua Boy Mamba*,<sup>2</sup> held as follows:

*“[19] From the above authorities, it is plain to me that although a chief, acting alone or in-Libandla, does not run or operate a Court strictu sensu, he nonetheless operates as an adjudicating authority in terms of Eswatini Law and Custom. The decisions issued or pronounced by these fora have the force of law and are binding on the parties. Accordingly, it would be erroneous and legally unsound to hold that the appellant had no power or jurisdiction to issue the order for the removal of the respondent's goods from the land in question. Equally untenable is the suggestion that the requisite authority or sanction needed to defeat a spoliation application is only an order of a Court. That is an unjustifiably restrictive and narrow interpretation of the law. Any competent or adjudicating body would, in my judgment, have the power to sanction such an act. Additionally, a statute may specifically grant or authorise such a power.”*

[12] *In casu* the jurisdiction of the High Court was not challenged *a quo* or in the Notice of Appeal and no argument to the effect that

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<sup>2</sup> (1059/2021) [2022] SZHC 53 (28 March 2022)



the above case had been wrongly decided, was made before us. In the circumstances it safely can be accepted that a valid Umphakatsi ruling or order *in lieu* of a court order would suffice for purposes of adjudicating spoliation proceedings in the civil courts.

[13] The third ground of appeal relates to the dissent as to whether or not the Ruling had been set aside by the Chief. It was submitted on behalf of the Appellants that this constituted a material dispute of fact not capable of resolution on the papers and thus that the Court *a quo* erred in proceeding to adjudicate matter.

[14] This submission *prima facie* is persuasive. However, what requires closer scrutiny, is the fact that the Ruling refers to **MARCO PAULO** and **DECAIRES** only, and that it was directed therein that **DECAIRES** only be given notice to vacate, whereas the party or those occupying under it sought to be evicted, was **MATADAR**.

[15] Assuming, for purposes of argument, that the Ruling was of full force and effect and had not been set aside in a lawful or regular manner:

15.1 **DECAIRES** represented **MARCO PAULO**. The ruling was not phrased to include, for instance, any person holding title under **DECAIRES** and/or **MARCO PAULO**.

15.2 Mr Jele referred to Eswatini law and custom interpretation of such rulings, which would extend beyond the person named. No evidence to this effect was presented *a quo*. **Rule 45(1)** of the 2023 Rules of this Court confines new evidence on appeal to instances where new facts had come to the knowledge of the party after the decision appealed against had issued. This would preclude this Court from receiving new evidence, being in respect of interpretation of rulings in Swazi law and custom.

15.3 In any event, insofar as Eswatini law and custom would include family and persons in special relationships with the person named, the only nexus between **DECAIRES** and **MATADAR**

is an alleged lease which nexus, on the face of it, would be too remote.

15.3 The Attorney General in his Memorandum interpreted the Ruling to include **DECAIRES**'s "*privies*" as well.

15.3.1 "*Privies*", in simple terms, means persons connected together, or having a mutual interest in the same action or thing, by some relation other than that of actual contract between them. "*Privies*" can also hold particular meaning with reference for instance to estates.<sup>3</sup>

15.3.2 Not only were the word privies or words having same or similar meaning not employed in the Ruling but the word itself may cause problems when it comes to interpretation, especially interpretation by lay persons.

15.3.3 Had the Ruling specified vacating by **DECAIRES** and/or **MARCO PAULO** and/or **MATADAR** and/or all persons

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<sup>3</sup> See definition in *Black's Law Dictionary, 2nd Ed.*

holding title under or occupying the premises under them and ideally, had the Ruling been accompanied with, or contained, a list of names of persons in physical occupation, there would be no difficulty in identifying against whom the Ruling would operate.

- [16] Therefore, even if the Ruling was of full legal force and effect, it cannot be said to apply to **MATADAR** or other persons on the premises other than **DECAIRES**, from which it follows that the Ruling could not serve to ward off the spoliation of anyone but **DECAIRES**, and it is so held.

## **B CERTIFIED COSTS OF COUNSEL**

- [17] **Rule 68(2)** of the Rules of the High Court stipulates that:

*“(2)Where the court or the judge is satisfied, on application being made, that having regard to the nature of the case or any exceptional circumstance the costs allowable under section H of the tariff (costs of counsel) may be inadequate, the court or judge may direct that the taxing master on taxation is not to be bound by the amounts set out in that section, and where such a direction is given the taxing master may, if he thinks fit, allow on taxation such larger sums as he thinks reasonable.”*

- 17.1 An order for such costs therefore is not there merely for the taking.

17.2 It is common cause that no such application had been made by way of a prayer in the Notice of Motion or otherwise in the Court *a quo*. It cannot be made *ex post facto* in this Court.


[18] In the result, it is held that the portion of the Order relating to certified costs of Counsel was not competent in the circumstances.

## **C ORDER**

[19] Accordingly, it is ordered that:

1. The appeal on the merits is dismissed, with costs.
2. The appeal relating to the costs order is upheld and Paragraph (b) of the Order of the Court *a quo* is varied by deleting the following words therefrom:

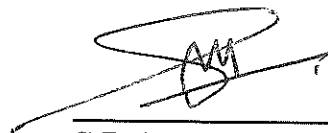
*“and shall include the certified costs of counsel in terms of rule 68 in so far as they relate to counsel for the 2<sup>nd</sup> Applicant.”*

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**J.M. VAN DER WALT**  
**JUSTICE OF APPEAL**

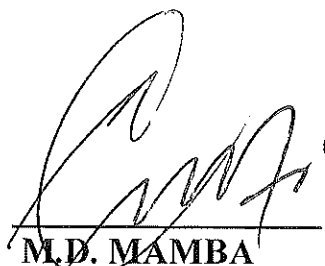
I agree

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**S.B. MAPHALALA**  
**JUSTICE OF APPEAL**

I agree

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**M.D. MAMBA**  
**JUSTICE OF APPEAL**

**Counsel for Appellants:** Mr N D Jele of Robinson Bertram Attorneys M  
**Counsel for the First and Second Respondents:** Mr S Bhembe of Bhembe  
Attorneys  
**Counsel for the Third and Fourth Respondents:** Mr S Hlawe of the  
Chambers of the Attorney-General