



IN THE HIGH COURT OF SWAZILAND

Civil case No: 254/12

In the matter between:

**SWAZILAND COMMERCIAL
AMADODA ROAD TRANSPORTATION**

FIRST APPLICANT

THOKOZILE MASANGO & 80 OTHERS

SECOND APPLICANT

AND

SITEKI TOWN COUNCIL

RESPONDENT

Coram:

MAPHALALA M.C.B., J

For Applicants
For Respondents

Attorney Mduduzi Mabila
Attorney Manene Thwala

Summary

Civil Procedure – application for a *Mandament Van Spolie*- applicants alleged to have been evicted from the premises without court order and against their consent – requirements of spoliation discussed – application granted with costs.

JUDGMENT
28.03.2012

- [1] An urgent application was instituted seeking an order granting the applicants special leave to institute these proceedings without complying with section 116 (1) and (2) of the Urban Government Act No. 8 of 1969; they further sought an order directing the respondent to forthwith restore possession of the Siteki Bus Rank to the applicants.
- [2] This application was heard on the 10th February 2012, and, a consent order was made removing the matter from the roll; the court further directed that the status *quo* should be maintained pending finalisation of the application. The respondent acted contemptuously and defied this court by failing to maintain the status *quo*; it effected the demolitions until they were completed notwithstanding the Court Order.
- [3] The first applicant is the supreme transport body in the country and the sole representative of the transport industry representing members who serve the public with transport. The second applicant constitutes a group of vendors conducting business at the Siteki Bus Rank. The applicants have been conducting their businesses at the Siteki Bus Rank since 1980 with the full knowledge of the respondent.
- [4] The applicants allege that since 1980, they have conducted their businesses at the bus rank peacefully and without disturbance until 6th February 2012 when they were evicted and denied access to the bus rank

by the respondent who dug trenches at the entrance and exit points of the bus rank. The applicants argued that the conduct of the respondent amounted to self-help because they did not have a court order to evict them from the premises or to demolish their structures; they further argued that they did not consent to the eviction or demolition of their structures.

[5] The applicants argued that the matter was urgent on the basis that they were unable to conduct their businesses at the bus rank; and, that they were losing a lot of money yet they have financial obligations to discharge. They further argued, correctly, that it is trite law that spoliation matters are by their very nature urgent because nobody is entitled to take the law into his own hands since this would result in a state of anarchy and unlawfulness.

[6] The applicants acknowledge that any action instituted against a Municipal Council has to comply with the provisions of section 116 (1) and (2) of the Urban Government Act; however, they argued that the urgency of the matter required that compliance with these the provisions should be waived if the relief sought should not be rendered nugatory or an exercise in futility.

[7] The application is opposed by the respondent. In *limine* it argued that the first respondent as an entity has no *Locus standi* to sue for the relief under the “*mandament van spolie*” because it has never been in possession of the premises. Secondly, that the first applicant has failed to demonstrate its legal interest in the management of National Road Transportation operations in as much as there is already in existence, a legal entity established for that purpose under the Road Transportation Act of 2007. Thirdly, that the application is fatally defective for non-joinder of the Road Transportation Council which is a statutory body established by law to manage road transportation operations. Fourthly, that the second applicant has failed to set out clearly the entities and /or persons which it purports to represent including the exact nature and scope of its mandate.

[8] On the merits the respondent reiterated that the first respondent has no “*locus standi*” to represent transport operators in this country, and, that such capacity is vested on the Road Transportation Council, a statutory body established by Legal Notice No. 9 /2010 in terms of the provisions of section 36 (g) of the Road Transportation Act of 2007; and that it is this body that is lawfully empowered to represent all transport operators in this country.

[9] Similarly, the respondent argued that the second applicant has no legal capacity to institute the present legal proceedings on behalf of the other eighty vendors who are capable of suing on their own. It was argued that the respondent has a private contractual relationship with each vendor whose terms may not be similar with the others. It referred to “annexure 1” being a list of vendors who have registered to use the new market.

[10] The respondent contends that it has a duty to manage and control the affairs of the town, and, that in the exercise of those powers conferred by section 55 (i) (d), it initiated the process of relocating the market and the bus terminus from the old site in plot 48 to the new site in Plot 995. However, the respondent does not deny that the applicants have been conducting their businesses at the Old site since 1980 or that it does not have a court order to evict the applicants from the premises and demolish their structures. It argued that it received an adverse public health report with regard to the premises that they were no longer fit to be used by applicants and members of the public because they were now a health hazard to both traders and consumers who were predisposed to health risks, and that the establishment was not conducive for carrying on a food trade; it further stated that the new market was completed and lying idle as a white elephant.

[11] However, the respondent does not deny holding several meetings with the Bus Rank Committee representing transport operators and the Market Committee representing the vendors; the purpose of the meetings was to persuade the applicants to relocate to the new market. The respondent concedes that it was not successful in persuading the applicants to relocate; hence, it issued an ultimatum for the applicants to relocate and commence their businesses on the new site as from the 6th February 2012.

[12] Notwithstanding the points in *limine* raised by the respondent, it is apparent from the evidence that the respondent recognises the applicants as the representatives of both the transport operators and vendors using the Old Site; the respondent concedes to have held a series of meetings with the two committees with regard to the relocation to the new site. At paragraph 7.12 of its Answering Affidavit, the respondent states the following:

“7.12 Council notified them that the new bus rank shall be in operation on the 6th February 2012 and further asked the executive to participate during the marking of parking for the different destinations for the various public transport, i.e. taxis, buses, kombis, for hires and pick-up zones.”

[13] In their Replying Affidavit, the applicants contend and reiterate that they have been mandated by their members who are transport operators in the country to bring the proceedings on their behalf; they argued that they cannot join the Road Transportation Council in the proceedings without demonstrating the interests it represents in the matter. They argued that in terms of the establishment of the Road Transport Regulations of 2009, the functions of the Council are to exercise the overall management of the road transportation operations; advise the Road Transportation Board, director of the Road Transportation department and the Minister of Transport on the regulation of the public road transportation services; to nominate persons to be appointed by the Minister as members of the Road Transportation Board or the Road Transportation Appeals Board; as well as to perform such other functions as may be necessary to give effect to its functions under these regulations.

[14] However, it is not clear from the Opposing Affidavit why the first applicant; being a voluntary association, cannot represent its members in a matter which directly affects them; it is not denied by the respondent that the first applicant represents transport operators who conduct business in the country. In addition, the respondent has held a series of meetings with the bus rank committee representing transport operators where the Secretary General of the first applicant attended and made

submissions for the postponement of the relocation pending further consultations and deliberations. In the circumstances, the respondent is estopped from challenging the *locus standi* of the Applicants.

[15] Similarly, the second applicant reiterated that she has “*locus standi*” to represent the other eighty vendors in the proceedings. Not only does the application reflect that the second applicant is accompanied by eighty vendors, a schedule marked “A” is annexed to the Founding Affidavit with the names of all the vendors accompanying the second applicant. She deposed to a supporting affidavit in which she stated that she is a vendor carrying on business at the Siteki bus rank and that she has been authorised by the rest of the eighty vendors who conduct business with her at the market to institute these proceedings. Incidentally, the respondent does not deny the mandate of the second applicant but merely challenges the mandate without any legal basis. The respondent concedes holding a series of meetings with the Market Committee representing the vendors with regard to the relocation, and that no agreement was reached; subsequently, the respondent issued an ultimatum evicting the applicants from the bus terminal and later demolishing their structures. It is inconceivable and incompetent for the respondent to deny “*locus standi*” of the second applicant when it recognised the market committee during negotiations. The respondent is

estopped from denying the *locus standi* of the second applicant in the circumstances.

[16] The application does not challenge the authority of the respondent to manage and control the affairs of the Town Council; similarly, this application has nothing to do with the overall management of the road transportation operations. In the exercise of its powers vested in terms of the Urban Government Act of 1969, the respondent has to abide by the law of the land. The issue for determination by this court is whether or not the respondent resorted to self-help and despoiled the applicants without a court order or without their consent.

[17] It is trite law that the essence of the “*mandament van spolie*” is that the person who has been deprived of possession must first be restored to his former position before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts. In order for peace to prevail in a community and to be maintained, every person who asserts a claim to a particular thing should not resort to self-help I order to gain possession of the thing. The motion proceedings are ideal and expedient for this remedy since it is urgent in nature with a quest to restore the status *quo ante* before the equities and merits of the case are

considered; any delay would defeat the unique and summary nature of the remedy.

[18] There are two essential requirements which the applicants must prove: Firstly, that he was in peaceful and undisturbed possession of the thing; and, secondly, that he was unlawfully deprived of such possession. It suffices for the applicant in this first requirement to show that he had factual control of the thing coupled with the intention to derive some benefit from the thing. Furthermore, he must prove an act of spoliation, that he had been deprived of his possession of the thing without a court order or against his consent:

- ***Mangala v. Mangala* 1967 (2) SA 415 at 416**
- ***Michael Nkosingiphile Soko v. Swaziland National Fire and Emergency services & Another* High Court civil trial No. 2397/10 unreported**
- ***Dlamini Malungisa v. Msibi Timothy* 1987 SLR 121 (HC) at 122-123**
- ***Makhubu v. Maziya* 1982-1986 SLR 99 (HC) at 100-101**
- ***Thulani Matsebula v. Alfred Boy Boy Mndzebele Alfred and Another* High Court civil case No. 211/06 (unreported)**

[19] From the evidence before me, it is apparent that the applicants and their members were conducting their businesses at the Siteki bus rank since 1980; and, this is not denied by the respondent. It is also apparent that the applicants had been in peaceful and undisturbed possession and freely conducting their businesses openly to the knowledge of the respondent until their eviction on the 6th February 2012. It is common cause that the respondent did not have a court order to evict the applicants; it did not even obtain their consent to effect the evictions. Worse still the respondent demolished the structures erected by the vendors on the premises without a Court Order.

[20] In the circumstances, the application is granted with costs on the ordinary scale; and, the rule is confirmed.

M.C.B. MAPHALALA
JUDGE OF THE HIGH COURT