



IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Civil Appeal Case No: 15/2014

In the appeal between:

**THE REGIONAL ADMINISTRATOR,
LUBOMBO REGION**

FIRST APPELLANT

**THE REGIONAL COMMANDER,
LUBOMBO REGION**

SECOND APPELLANT

**THE REGIONAL SECRETARY,
LUBOMBO REGION**

THIRD APPELLANT

**THE COMMUNITY DEVELOPMENT
OFFICER, LUBOMBO REGION**

FOURTH APPELLANT

MORRISON MBULI N.O.

FIFTH APPELLANT

SWAZILAND GOVERNMENT

SIXTH APPELLANT

ATTORNEY GENERAL

SEVENTH APPELLANT

AND

COSHIWE MATSENJWA

FIRST RESPONDENT

SOLOMOM MATSE

SECOND RESPONDENT

CATHERINE GAMEDZE

THIRD RESPONDENT

SITHEMBILE GAMA

FOURTH RESPONDENT

JABU SIHLONGONYANE

FIFTH RESPONDENT

THEMBISILE MATSE

SIXTH RESPONDENT

SIBONGILE NDZIMANDZE

SEVENTH RESPONDENT

NOMSA MBHAMALI

EIGHTH RESPONDENT

Neutral citation: *The Regional Administrator & Six Others v Coshiwe Matsenjwa and Seven Others (15/2016) [2016] SZSC13 (30th June 2016)*

CORAM: **M.C.B. MAPHALALA, CJ**
 DR B.J. ODOKI, JA
 K. NXUMALO, AJA

Heard : 13th May 2016

Delivered : 30th June 2016

Summary

Civil Appeal – spoliation proceedings – legal principles governing spoliation proceedings considered – the construction material in the possession of the respondents was forcefully removed by the appellants on the basis that the Traditional Authorities had not authorised the construction of the community hall on the land in question – held that the appellants were not entitled to take the law

into their own hands and forcefully remove the building material without a court order – appeal dismissed with costs on the ordinary scale including certified costs of Counsel in terms of Rule 68 (2) of the High Court Rules.

JUDGMENT

M.C.B. MAPHALALA, CJ

[1] The respondents lodged an urgent application on the 20th May 2015 seeking an order directing the appellants to restore possession of building material. They further sought an order directing the appellants to pay costs of suit at attorney and client scale, such costs to include costs of counsel as duly certified in terms of Rule 68 (2) of the Rules of the High Court; they prayed that the costs should be paid by the appellants jointly and severally, the one paying the others to be absolved.

[2] It is common cause that the respondents are members of a development committee of Mhlabubovu area under Maphungwane Chiefdom in the Lubombo region. The building material was kept at the homestead of the first respondent at the instance of the development committee; and, it was

used in the construction of a community hall situated about one hundred metres away from the homestead of the first respondent. The builder would come every morning to collect the building material which he would use on a particular day for the construction of the community hall.

[3] It is not in dispute that on the 15th May 2015 the third and fourth appellants arrived at the homestead of the first respondent in the company of seven police officers who were armed with guns. They were driving in different motor vehicles. They had been sent by the Lubombo Regional Administration to collect the building material from the homestead. They took the building material with them notwithstanding that they had no court order to do so.

[4] It is not disputed by the appellants that the project of constructing the community hall commenced in 2005 with the consent of the late Ngongolwane Maziya who was the Acting Chief of the area, immediately after the death of Chief Loyiwe Maziya. It is further not denied that the Chief's Inner Council which was working closely with the Acting Chief was aware that the Traditional Authority had given consent to the construction of

the community hall. Similarly, it is not disputed that the project stalled in 2006 and could not be completed because the development committee had run out of building material. The Rural Development Fund under the Ministry of Tinkhundla was supplying the building material to the development committee. Additional building material was sought and supplied to the development committee sometime in 2015.

[5] The appellants contend that in 2009 the Land Management Board, under the Chairmanship of Prince Hlangabeza stopped the construction of the community hall on the basis that the land was earmarked for ploughing. However, neither Prince Hlangabeza nor any member of the Land Management Board has deposed to an affidavit in support of the appellants in this regard. The respondents deny that such a meeting was held by the Land Management Board where the construction of the community hall was stopped. Similarly, there is no evidence that Chief Maliwa Maziya, the current Traditional Authority and his Inner Council ever summoned the respondents and told them to stop the construction.

[6] The appellants do not dispute that the first respondent was in lawful and undisturbed possession of the building material on the 15th May 2015 in her capacity as a member of the development committee. It is further not disputed that she was keeping the building material at the instance of the

committee because her homestead was in close proximity with the building site. Similarly, it is not in dispute that the building material was supplied to the committee by the Rural Development Fund under the Ministry of Tinkhundla for the construction of the community hall. The building material was taken by the appellants from the respondents forcefully and without a court order.

[7] There is a lot that has been said by the parties relating to the chieftaincy dispute in the area. However, the cause of action for the decision of this Court is spoliation proceedings. In the record of proceedings there is a Letter of Appointment signed by King Mswati III and Ingwenyama in which he appointed Chief Zamcolo Nkosinathi Maliwa Maziya to be the Chief of Maphungwane Chieftom with effect from the 3rd November, 2010. The Letter of Appointment was signed by the King and Ingwenyama on the 4th November 2010, and, the appointment was made in terms of section 233 of the Constitution. Despite the reference in the court record of a chieftaincy dispute, none of the parties have denied that His Majesty King Mswati III and Ingwenyama did make the appointment.

[8] The respondents contend in their replying affidavit that the land on which the community hall is built was earmarked for community development projects by the Traditional Authorities of the area before the appointment of Chief Maliwa; and, that two other businesses, a hammer mill and a poultry

shed have been constructed adjacent to the community hall. The respondents further contend that the two businesses are operational. The appellants did not apply to court for leave to file a further affidavit as required by Rule 6 (13) of the High Court Rules in order to respond and dispute this allegation made by the respondents that the land on which the community hall is being built was designated for community development projects by the Traditional Authorities. Accordingly, this evidence remains unchallenged, and, should be admitted.

[9] In the case of *Swaziland Commercial Amadoda Road Transportation and Others v. Siteki Town Council*¹, Justice M.C.B. Maphalala JA, as he then was, dealt with the principles of law governing spoliation proceedings as follows:

“[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 in 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

¹ Civil No. 254/2012 (HC) at para 17 and 18

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.”

See the cases of *Dumisa Malungisa Dlamini v Msibi Timothy*² as well as *Makhubu v Maziya*³.

[10] His Lordship Ebrahim JA delivering the majority judgment of the Supreme Court in *Gibson Ndlovu v Siboniso Dlamini and Another*⁴ had this to say:

“ . . . It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

(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.

² 1987 – 1995 (2) SLR 121 at 122-123 (HC)

³ 1982 -1986 SLR 99 (HC) at 100-101

⁴ Civil Appeal No. 30/2011 at para 2

[11] Having come to the conclusion that the cause of action in this matter relates to spoliation proceedings, the court *a quo* did not misdirect itself in coming to the conclusion that it had jurisdiction to entertain the matter. The court *a quo* was correct in its finding that the principle of “*mandament van spolie*” comes from the Roman-Dutch law, and, that this principle has no application in Swazi Law and Custom. The learned Justice in the Court *a quo* was correct in his finding that the present matter does not fall for decision by the Swazi Courts on the basis that such courts only apply Swazi law and Custom in accordance with section 11 of the Swazi Courts Act⁵. This legislation provides the following:

“11. Subject to the provisions of this Act a Swazi Court shall

administer -

(a) the Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland;

(b) the provisions of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79/1950 or any law repealing or replacing the same, and in force within the area of jurisdiction of the Court;

(c) the provisions of any law which the Court is by or under such law authorised to administer. (Amended L.34/1966.)”

⁵ No. 80 of 1950

[12] This country is a constitutional democracy guided by the rule law; hence, all government functionaries as well as law enforcement agencies and individuals are bound by law. Nobody should take the law into his own hands. It is still open to the appellants to institute legal proceedings to stop the construction of the community hall if such construction is not sanctioned by the Traditional Authorities of Maphungwane Chiefdom. However, the appellants are not entitled to take the law into their own hands and forcefully remove the construction material from the building site without a court order.

[13] The High Court has unlimited original jurisdiction in civil and criminal matters⁶ including revisional jurisdiction⁷ over subordinate and specialised courts as well as tribunals exercising a judicial function. In addition the High Court has appellate jurisdiction over the subordinate courts as well as the Swazi Courts⁸. The remedy of *mandament van spolie* originates

⁶ Section 151 (1) (a) of the Constitution.

⁷ Sections 139 and 151 (1) (c) and (3) of the Constitution; section 4 of the High Court Act 20/1954;

⁸ sections 33 Swazi Courts Act No. 80 of 1950; section 5 of the High Court Act No. 20 of 1954;

from the Roman-Dutch law, and, it is justiciable before the High Court; such a remedy is not excluded from the jurisdiction of the High Court⁹.

Similarly, the High Court has jurisdiction to enforce the fundamental human rights and freedoms entrenched in the Constitution¹⁰. Consequently, it is important to emphasize that judicial power vests in the Judiciary, and, that an organ or agency of the Crown cannot be conferred with final judicial power¹¹. Accordingly, the appellants could not deprive the respondents of the building material in the absence of a court order authorising the removal of the property.

[14] In the circumstances the appeal is dismissed with costs on the ordinary scale including costs of counsel as certified in terms of Rule 68 (2) of the Rules of the High Court.

M.C.B. MAPHALALA
CHIEF JUSTICE

⁹ Section 151 (8) of the Constitution;

¹⁰ Sections 14, 35 and 151 (2) of the Constitution.

¹¹ Section 140 of the Constitution.

I agree

DR. B.J. ODOKI
JUSTICE OF APPEAL

I agree

K. NXUMALO
ACTING JUSTICE OF APPEAL

For Appellant

Principal Crown Counsel
Mr. Vusi Kunene

For Respondent

Advocate Lucas Maziya
Instructed by
Attorney Luke Malinga

DELIVERED IN OPEN COURT ON 30 JUNE 2016