IN THE HIGH COURT OF SWAZILAND

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CASE NO. 92/95

IN THE MATTER BETWEEN

MANDLENKOSI E. MTSETFWA 1ST APPLICANT

MCITHAZWE JOHN MTSETFWA 2ND APPLICANT

VS

PIET KRY MTSETFWA RESPONDENT

CORAM: S.B. MAPHALALA - A J

FOR 1ST AND 2ND APPLICANT: MR LUKHELE

FOR RESPONDENT: MR MDLULI

JUDGEMENT

(21/04/98)

This matter came before court by way of motion for an order in the following terms:

i) Directing the respondent to restore, ante omnia the field ploughed and the wattle tree plantations, planted by William Nakani Mtsetfwa and Albert Mangena Mtsetfwa in Mponono area, Manzini District of which the applicant were in peaceful and undisturbed possession of which they were unlawfully disposed by the respondent.

ii) Directing the respondent to pay costs of this application.

iii) Granting further or other relief.

The two applicants filed affidavit in support of their application. The gist of their evidence is that one Mshele Petros Ntsetfwa who was their grandfather but now deceased was allocated a piece of land is Swazi Nation land by his local chief at Mponono area. The said Mshele then divided the area among his sons William, Nkani and Albert Mangena who were in occupation of this land in their life time. Upon the death of William Nkani and Albert Mangena, the two applicants inherited the piece of land. They deposed that they have been in peaceful and undisturbed possession of the land.

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In or about 1993 the respondent wrongfully, unlawfully and intentionally dispossessed the applicants of the land on which their deceased father grew wattle trees. The respondent dispossessed them of these fields where they have been growing their crops in that he uprooted them and planted his own crops. The applicants further stated in their affidavit that the respondent is still in possession of the aforesaid land.

In opposition the respondent filed an answering affidavit and raised two points in limine, thus:

"3.1 submit that this matter pertains to Swazi National land; hence, it should have been brought before the Swazi National Courts;

3.2 there is a strong dispute of fact as to ownership and/or lawful possessor of this piece of land; hence oral evidence is required to enable the court to arrive at a just decision.

The respondent further deposed in his affidavit that Mshele Petros Mtsetfwa never khontaed and/or owned any piece of land nor was he ever allocated any piece of land. The deceased lived with his five wives, two of which had been given land by their relatives, namely, Lomekhuzo Dlamini and Ntonjana Ndzabukelwako.

The land in question was given later by Logada Shongwe. He states further that the said land was given to him by chief Ndunawekufa Ngwenya after the death of his father, his wife Landzabukelwako and her two sons. The deceased never allocated any land to anybody since he never owned any and therefore applicants could not have inherited any land.

Respondent further avers that applicant could not possibly have inherited the said land because the land belonged to Mshele Mtsetfwa who had been respectively allocated by their relatives. The applicants never took possession of the land hence, they were never in peaceful and undisturbed possession of the land nor they ever ploughed on the land. This land belonged to his mother Lomekhuzo Dlamini and his step-mother Ntonjana Ndzabukelwako, respectively. The fathers of the applicants, William and Albert, unlawfully dispossessed him of the said land and grew wattle trees. He then laid charges against them at Bhadzeni Chief's kraal in 1979 and the chief confirmed that he was the person entitled to cultivate this land. In the circumstance, the applicants had no right to revive this matter because the Bhadzeni chief's kraal ruled in his favour, hence he is in lawful possession of the said land.

The aforementioned are the facts before me. The matter had been postponed on numerous occasions for the respondent to lead evidence to prove ownership of the land. These postponements were from the 17th November, 1995. The matter came before me on the 27th June, 1997 for arguments. The attorney for respondent applied for leave to file minutes of the Libandla at Bhadzeni held on the 14th July, 1997. Leave was granted to the respondent to file

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the minutes as it was submitted from the bar that the witness who was to give evidence as to the ownership of the land had since died. The gist of the minutes is that after the Libandla had deliberated over the dispute between the respondent and William Mtsetfwa his brother resolved that William should remove the wattle trees from the disputed land. Eight men were chosen to monitor the handing over of the land to the respondent.

In arguments before me Mr Lukhele for the applicants contended that the notice of motion is clear that the order sought for restitution is ante omnia. This requires that the applicant's control must be restored summarily and without an investigation into the merits of the dispute, and defences which are based upon the merits are therefore inadmissible. The allegation by the respondent that the land belonged to him is irrelevant. Similarly, that the court is not concerned with what the chief of Bhadzeni and his Libandla said in this matter. There is no proof on a balance of probabilities that chief Nduze was the proper chief to deliberate over the matter, moreso, since the chief has not given evidence before court, viva voce.

Mr Mdluli for the respondent contends that the applicant took an unreasonable time to bring this matter to court. According to the applicant's founding affidavit at paragraph 8 the alleged spoliation took place in 1993 whilst the notice of motion was only filed on the 19th January, 1995. For this proposition that such a matter should be brought within a reasonable time he cited the writings of Silberberg on the Law of Property at page 144. He further argued that the respondent did not dispossess the applicants of the law

but he was executing a lawful order granted by the inner council. The ruling of the inner council was a lawful order. The act of the respondent was a lawful one.

These are the issues confronting the court. The principle upon which the mandament van spolie is based is expressed in the maxim spoliatus ante omnia restituendus est. which means that the person whose control has been taken unlawfully must be re-instated before the merits of the case are examined (see Nino Bonino vs De Lange 1906 T.S. 120. 1250) the point of departure is that any dispute over control of a thing must be settled in court and that nobody can be allowed to enforce his claim to control by taking the law into his own hands, because this will lead to chaos and a breach of peace.

Silberberg Shoeman on the Law of Property explains the significance of this principle for legal policy, thus:

"In the final analysis the protection of possession is part and parcel of the protection of peace in a community, which could not be maintained if every person who asserts that he has a real right to a particular thing which is in another person's possession would be entitled to self help".

The present proceedings is brought under the maxim spoliatus ante omnia restituendus est.

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However, in law, this principle is subject to a limited number of exceptions. The principle will not, for example be applied in a case where self help is justifiably resorted to (see Meyer vs La Graube 1952 (2) SA. 55 (N)).

In the present case I am inclined to agree with Mr Mdluli for the respondent that when the respondent took possession of the land he was following an order made by a legally constituted inner council who conferred the land to him after deliberating over the matter. This is clear from the minutes of the Bhadzeni Libandla of the meeting of the 14th July, 1979 where at the foot of the minutes it is stated thus:

"The council then resolved that William should remove the trees. Eight men were chosen to monitor the handing over of the land to Piet (the applicant)".

There can be no spoliation if the removal of the property was lawful. (See Lee and Honore Family. Things and Succession (2nd Ed) paragraph 262 and the authorities there cited).

On the question raised by Mr Mdluli that the applicants have taken an unreasonable time in bringing this matter to court. The alleged spoliation took place in 1993 whereas the notice of motion was filed on the 19th January, 1995. Two years after the fact. Authorities on the subject place a reasonable time to bring such actions as within a year. However, it does not mean that a party who brings his application after a year has elapsed is precluded to do so. In a South African decision of Javin vs National Housing Commission 1977 (3) S.A. 890 the dictum was that an applicant has to show special circumstances why he could not bring his suit within the year. In the present case no special circumstances have been advanced to the court why applicants took two years to enforce their claim.

For the reasons I have outlined above I dismiss the application with costs.

S.B. MAPHALALA

ACTING JUDGE