



IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 2785/2003

In the matter between

LOBAMBA LOMDZALA INKHUNDLA

DEVELOPMENT ASSOCIATION

Applicant

And

UMLANDVO WEMALANGENI ASSOCIATION

Respondent

Coram

Annandale, ACJ Mr.

For Applicant For

Mabila Mr.

Respondent

Maphalala

JUDGMENT 20th

February 2004

Following an Order of Court in spoliation proceedings, wherein it was ordered that a certain tractor be restored to the possession of the Umlandvo Wemalangeni Association ("*Umlandvo*"), the present applicant, Lobamba Lomdzala Inkhundla Development Organisation, ("*Lobamba Lomdzala*") now seeks to vindicate the same tractor and have the respondent deliver it back into the possession of Lobamba.

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A brief reference to the spoliation application that preceded the present matter is helpful to place this application in perspective. Therein, Umlandvo, which was formerly known as "*Qhubekani Bomake BakaLobamba Lomdzala Association*", stated that it secured assistance from the Regional Development Fund in 2002. The Fund, administered by the office of the Deputy Prime Minister in Mbabane, bought the tractor and implements "*for the applicant*" (now Umlandvo), and it was delivered to the Inkhundla of Lobamba Lomdzala, for onward transmission to Umlandvo. It further stated that during delivery, the then first respondent, one Sikelela Dlamini, was present and received the tractor on behalf of Umlandvo. However, the men applicant averred that Dlamini did not hand over the tractor to Umlandvo, as he would have said that it belongs to the Inkhundla and not to the applicant association.

According to the papers filed of record, a meeting was then held at the Deputy Prime Minister's office between the members of Umlandvo and the "*Mother Body*" of all the associations under the Lobamba Lomdzala Development Association. There, its chairman, Mr. Bheki Nxumalo, is said to have confirmed that Umlandvo requested the tractor and that it should be given to it. However, it was further heard at the meeting with Nxumalo that apparently, a "*former member of Parliament, Mr. Majahebutimba Dlamini had tempered (sic) with applicant's application form after it was submitted to him for a counter signature. He had directed that the tractor should be registered in the name of Lobamba Lomdzala Development Association. This was intended to deprive applicant of ownership and use of the tractor. This effectively meant that the tractor would belong to Lobamba Lomdzala Inkhundla and not (to) the applicant.*"

The applicant further stated that in its application for financial assistance (from the Regional Development Fund,) the Chief and the inner council, Indvuna Yenkhundla, Bucopho and the local member of Parliament had to "*signify*" (sic) in the application form that they know the members of the association as residents of the Inkhundla. In the event, the tractor was given to the applicant (Umlandvo) and delivered on the 14th January 2003, represented by Hlengiwe Dlamini, the chairperson of Umlandvo. At that time, it was registered in the name of Lobamba Lomdzala.

The next related events occurred in October 2003, when Police Officers, apparently sent by the Station Commander of Malkerns Police Station, came to the homestead of

Hlengiwe Dlamini, where the tractor was kept on behalf of Umlandvo. They are said to have disposed her of her possession, without an Order of Court, which resulted in the spoliation proceedings and resultant Order of Court.

Therein, the Court ordered the Police and the other respondents to release the tractor to Umlandvo.

Following compliance with the previously mentioned Order, Lobamba Lomdzala instituted the present matter.

In its founding affidavit, its chairman, Hector D. Soko, states that the Association has *locus standi* to sue Umlandvo to return the tractor, registered in the applicant's name.

To substantiate its claim of ownership, the applicant firstly relies on its application for a loan of E196 815, which it submitted to the Regional Development fund. The annexed copy of the grant application form reads that the Lobamba Lomdzala Inkhundla Development Association (the applicant herein), requested a grant in the aforesaid amount for a tractor for use by its members within the Inkhundla and individual subsistence farmers. The chairperson at that time, the 11th May 2001, was stated to be Mr. Bhekithemba Nxumalo, a different person than the deponent to the founding affidavit herein. *Ex facie* the form, the application was supported at both chiefdom and Inkhundla levels, and endorsed "*approved by the Regional Development Fund Committee*", by one Motsa on the 16th May 2001.

There is also a handwritten photocopy of an undated "*statement*", without any price details, from CP. Agencies of Manzini (a tractor dealer?), to the applicant, regarding "MF 375 52 w/Drive", a plough and a trailer. At the bottom of the document, there seems to be the name or signature of "*Sikelela Dlamini*, " who is said to be the Indvuna Yenkhundla who took delivery of the tractor. Presumably, it relates to the tractor in issue, further details of which probably appear in an illegible photocopy of a registration book, said to relate to the tractor, a 2002 model Massey Ferguson tractor, SD 392 HN.

The applicant's deponent further states that *"the applicant (sic)(presumably he meant to refer to the respondent) has no claim to title in so far as the tractor is concerned in that it is not an owner thereof, hence it should restore both ownership and possession of the same to applicant."* He also says that ownership vests in the applicant, as previously mentioned, and that it has never transferred ownership or any right in the tractor to anyone, least the respondent.

He criticizes the respondent's (the then applicant) allegations in the spoliation proceedings as *"devoid of truth."* He also has it against the fact that it was not stated why that association changed its name and did not file documentary proof in support. He adds that if it was so that the respondent (Umlandvo or Qhubekani Bomake Baka Lobamba Lomdzala, its stated predecessor) indeed secured funding or financial assistance from the Regional Development Fund, documentary proof would have been annexed to its papers, which was not done.

Before dealing with the response to the application, I deviate now to deal with the first factual disputes herein, albeit that it does not affect the merits of the matter *per se*.

In the applicant's founding affidavit, deposed to by its stated chairman Soko, who was not cited as a respondent in the spoliation proceedings in either his personal or representative capacity, states in paragraph 5.1 that: -

"It is worth mentioning that both Sikelela Dlamini and Obed Shongwe were neither given notice nor served with the said application."

They were the first and second respondents in the initial matter. They both filed confirmatory affidavits to the present application wherein they each state that:-

"I have read the affidavit of Hector Dumisa Dlamini (mv underlining) and confirm its contents in all material respects in so far as they relate to me".

This affects two-fold, in that firstly, nobody with the name of Hector Dumisa Dlamini has filed any affidavit in the application and secondly, these assertions are questionable. The first aspect might at best be explained by looking at the third confirmatory

affidavit, wherein one Majindane Dlamini states exactly the same as Sikelela Dlamini and Obed Shongwe, except that he does not refer to Hector Dumisa Dlamini, as the other two deponents did, but in turn he refers to Hector Dumisa Soko. With first names of Hector and Dumisa, perhaps the first two deponents might have wanted to actually refer to Soko instead of Dlamini, but they did not do. This may well be a trivial oversight and a typographical error, which has not been explained away or condoned, but the second aspect is more serious, regarding factual disputes, even though it does not go to the core of the application. Whether Obed Shongwe and Sikelela Dlamini are to be believed in confirming that they were neither given notice nor served with the application, as Soko asserts and they confirmed, remains to be seen.

In the initial matter, Mandla Dlamini, a messenger in the employ of attorneys Maphalala and Company, the then applicant's attorneys, deposed to a number of affidavits of service. With regard to the first respondent, Sikelela Dlamini, he stated on oath that he " *...duly served a Notice of Motion and founding affidavit to (sic) the first respondent's wife (Mrs. Dlamini) at her place of residence.* " He did likewise regarding the second respondent, Obed Shongwe, also serving his wife (Mrs. Shongwe) at her residence.

At face value, for the present applicant to assert that the two men were not served, and with them confirming it, though they refer to a different surname, creates a doubt as to who is to be believed - the two respondents or the attorney's messenger. In itself, it is not of major detriment to the present matter, but it does create more than just a mere uneasiness. It further influences the accuracy of the affidavits presented to the Court, requiring an extra measure of caution to be applied when reliance is to be had to the papers. For present purposes, I need not and do not make a finding as to whether Obed Shongwe and Sikelela Dlamini were indeed served with the first application, or not.

In its opposing affidavit, Hlengiwe Dlamini who deposed to it, does not state who he or she is and how it comes about that she speaks for the respondent association and on what basis she can deny and admit allegations in the founding affidavit. As deponent to the founding affidavit in the initial (spoliation) application, she says that she is the chairperson of Umlandvo, which assertion has not been gainsaid elsewhere. I will view

her affidavit in that light and first briefly deal with its contents on the merits, before reverting to her points *in limine*.

In her opposing affidavit, she admits "*the rest of the allegations*" of paragraph one of Soko's affidavit. By necessary implication, she thereby admits his allegation of being chairman of the applicant, contrary to her assertion in paragraph 2.4 where she says that Soko is neither a member nor does he hold an executive position with the applicant. It may be careless drafting of pleadings but nevertheless is self-contradictory.

She goes on to state what the real and obvious dispute is about - the ownership of the tractor is a factual dispute that requires to be properly canvassed and ventilated by the hearing of oral evidence. She says that the tractor belongs to the respondent and not to the applicant, which she avers to have been obtained "fraudulently". The allegation of fraudulent acquisition is based on an understanding that the loan application was tampered with and altered, as stated by Bheki Nxumalo in his supporting affidavit filed with the first application. Therein he stated that at the time that the loan application was made, he was the chairman of Lobamba Lomdzala and present at the Inkhundla when members of Umlandvo submitted the application form to the late M.P. Majahebutimba Dlamini for his signature. He says that the latter then ordered himself, the secretary and the treasurer to delete and substitute the name of Umlandvo with that of Lobamba Lomdzala, as the applicant for the tractor. He goes on to say that the late M.P. wanted the tractor to belong to Lobamba Lomdzala and not Umlandvo so that it could benefit all in the Inkhundla, without Umlandvo, who initiated the loan application, being aware of it. He later explained this aspect at a meeting in the offices of the Deputy Prime Minister in January 2003 when Umlandvo complained that Lobamba Lomdzala refused to hand over the tractor to it, that the D.P.M. directed him to give the tractor to the people who applied for it, by which way it was given to Umlandvo. By then, it was already registered in the name of Lobamba Lomdzala. He then vacated the office of chairman of Lobamba Lomdzala, but later in time, on the 3rd October 2003, explained the above scenario to the Police and the initial respondents, without the tractor then being released, hence the spoliation proceedings.

This does not settle the factual dispute over ownership, though it provides one possible explanation as to how it came about that the dispute over ownership came about.

Hlengiwe Dlamini adds that the delivery of the tractor to Sikelela Dlamini does not establish ownership either.

Further, the respondent disputes the value of inputs by Sikelela Dlamini, Obed Shongwe and Majindane Dlamini as they are said to have no direct and substantial interest in the matter, none of them acknowledged as members of the applicant but only with an indirect interest arising from their official positions.

For the reasons of the outcome of this matter, it is not necessary to make definitive factual findings on the correctness or not of the above issues. What is clear is that the ownership of the tractor is in real and serious contention. It is not impossible to decide on strength of the papers alone where ownership lies, but it would negate the principles of a fair hearing and of *audi alteram partem*, to now decide on the question of ownership and make a final determination. The applicant has not filed responding papers to Hlengiwe Dlamini's affidavit and various issues are raised that unbalance the assertions of the applicant association, but which may well be able to be addressed. The veracity of statements on affidavit cannot be sufficiently tested, as it stands at present, to positively and without uncertainty determine the issue of ownership.

Returning to the affidavit of Hlengiwe Dlamini, she raised various points *in limine* over and above the above stated disputes of fact.

Urgency is challenged on the ground that the respondent has used the tractor since January 2003, to full knowledge of the applicant, without any legal process having been instituted. This was only done as consequence of the spoliation and subsequent Order of court to restore possession *ante omnia*.

This is so, but one also has to take into account that spoliation proceedings came about as a result of the deprivation of peaceful and prolonged possession of the tractor. In a sense, the urgency was created by the self-help conduct of the first three respondents, acting in unison with the Police, which three respondents are now said to have nothing to do with Lobamba Lomdzala, which set the ball in motion.

She further takes issue with the legal standing of Soko to bring the matter to Court on behalf of the applicant. This is akin to seeing a splint in the eye of another, while a rafter is in the eye of the accuser. As mentioned above, Hlengiwe Dlamini is as tacit as can be in her own affidavit, as to her own authority or capacity to resist the application. She might have personal knowledge of the events and facts, but she leaves a huge gap in so far as her relationship with the respondent goes. Nowhere in her opposing affidavit does she lay a foundation as to why she in particular should be dealing with the affairs of the respondent. She further does not specifically ask that her affidavit in the spoliation proceedings be incorporated by reference in the present matter.

Even if she did so, she therein makes the assertion of being chairperson of Umlandvo, but without filing the constitution with a list of office bearers or any other papers to substantiate it. It does not imply that it should be found that she is not the chairperson, but it lacks an averment of her own *locus standi*, which she says that the opposition does not have. This aspect has also not been canvassed, but is not the basis for the outcome of the present matter.

She further makes a revelation of a novel legal concept in her points *in limine*, by stating in paragraph 2.3 that: -

"Legally, applicant should have applied for rescission of the judgment and not an Actio Reivindicatio in order to defend (sic) the spoliation proceedings brought by the respondent. The respondent cannot be directed by the Court to hand over the tractor to applicant when the Court Order giving possession of the tractor to respondent has not been rescinded, cancelled or varied by this Honorable Court."

This novel approach is reiterated in paragraph 10(a) of her affidavit.

"// is not legally possible for respondent to hand over the tractor to applicant in the absence of a Court Order rescinding the judgment obtained by respondent pursuant to the spoliation proceedings. Respondent is in possession of the tractor after successfully instituting spoliation proceedings against the

applicant. That Court Order has not been rescinded, cancelled or varied in anyway."

If this position has not been pleaded in all sincerity and argued in Court by her attorney as being "*trite law*", one could have been tempted to make light of it. That is not the case. What it does is to demonstrate a complete misunderstanding of law as is applicable to spoliation.

Since the outcome of this application is due to a real and factual dispute between the litigants and not due to the above quoted incorrect understanding of law, it will essentially remain *obiter* regarding the legal position following a spoliation restoration order, but it nevertheless requires a brief mention.

Spoliatus ante omnia restituendus est is of paramount importance in our law and also in the practical day to day life of Swazi citizens. Essentially, it serves to avoid the dangers inherent to taking the law into one's own hands, to do what was done in the case of the tractor in issue, by taking it away from the peaceful and undisturbed possession of another. Self-help does not make good a perceived wrong. Ultimately, even the possession of stolen items by a thief, under certain circumstances, remains to be protected, at least until the law can follow its course. It is the unlawful dispossession of anyone of mostly a thing, even by the true owner, that lies in issue. If a person has been improperly deprived of his possession, the Court will not consider a plea of ownership until the spoliation has been set aside, a restoration of the *status quo ante* the spoliation.

To found a claim for spoliation, firstly, it has to be shown that the applicant was in possession and secondly, that he was deprived of possession, wrongfully and against his wish (RDESENBERG V REESENBERG 1926 WLD 59 at 65. Also: NINO BONINO V DE LANGE 1906 TS 120)

The possession which was deprived must have been free and undisturbed. *Nec vi, nec clam, nec precario* used to be required but neither possession by force or secrecy need be alleged anymore. A *negotiorum gestor* would not ordinarily meet the requirements

of possession, which would entitle him to the *mandament*. On a claim for restoration, a claim on the merits cannot be set up as a valid defence.

In an *ex parte* application for the *mandament van spolie*, the complainant will ordinarily obtain a *rule nisi*, calling on the despoiler or respondent to show cause why possession *ante omnia* should not be restored. It is a robust remedy, with no discretion by the court and considerations of convenience are irrelevant (*RUNSEN PROPERTIES (PTY) LTD V FERREIRA 1982(1) SA 658(SE).*).

Such an order is final and not interlocutory and can be appealed. It does not form a final determination on the immediate right to possession, or of ownership but is the last word on the restoration of possession *ante omnia*. Almost inevitably, costs will follow the event, and not depend on the outcome of some other application or action.

The object of the exercise is to restore the unlawful deprivation of possession, not of ownership. The outcome of spoliation proceedings does not determine ownership at all, as the respondent seems to understand it. The order to restore possession of the tractor remains a final order, which has not been appealed, rightly so. The present application is a separate issue - a *rei vindicatio*, which is divorced from the *mandament*. That order does not form any bar to the present matter and does not require to be set aside, be rescinded or altered in any manner, to enable the present matter to properly be dealt with. This point *in limine* has no substance at all and it is summarily dismissed.

As found above, there remains a real dispute of fact as to the proper ownership of the tractor. On the papers, it is held that it cannot properly and sufficiently accurately be decided.

There are a number of ways in which the matter can be disposed of, but I have to bear in mind that the original purpose for which the tractor was made available by the "E40 Million Regional Development Fund" was to enable farmers to plough their fields and carry on the business of farming. The present dispute has resulted in the tractor not being available to serve the people for who it was bought - whether it is the applicant or respondent association.

At the time of the hearing, I called upon the legal representatives of the associations to endeavour drawing up an agreement to utilize the tractor in the interim. This was futile. I again do so. Pending the eventual outcome of this matter, the tractor can and should be used to the benefit of the farmer associations that dispute the ownership of the tractor. A practicable and workable agreement is to be earnestly sought, while protecting the interests of whoever may eventually be declared the lawful owner. Neither of the two adversaries should selfishly insist on the other not using the tractor. The two attorneys are to report to this Court in due course, presenting a workable arrangement for the interim period, as to how the tractor can be utilised, without prejudice to the other, until finality of ownership has been reached.

On a consideration of all the relevant factors and issues, the Court holds that the dispute of ownership is to be resolved by the hearing of this matter by way of *viva voce* evidence. The pleadings as it presently stands, is to form the basis of the matter, and may be amplified and further ventilated by the filing of further affidavits by each party, and may be responded to. The matter is then to be set down for hearing, after a proper pre-trial conference has been held. Costs are reserved, to be determined at the final outcome.

A handwritten signature in black ink, consisting of a large, sweeping horizontal stroke followed by a vertical line and a small flourish at the end.

ANNANDALE, ACJ