IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

Civil Case No. 1457/2006

In the matter between

T N Applicant

and

P A N Respondent

Coram: Annandale, AC J

For the Applicant: Mr. S. Magongo of Magongo & Associates

For the Respondent: Mr. T. Mlangeni of Mlangeni & Company

JUDGMENT 11

October 2006

[1] In a spoliation application, the Applicant sought and obtained an order directing the Respondent to return to him certain household items, by way of a rule *nisi.* Thereafter, the matter was postponed several times, with the interim order extended, to facilitate the filing of further affidavits and to eventually argue the issue as a contested application.

[2] The brief position of the Applicant is that pursuant to their marriage in terms of Swazi Law and Custom in May 2005, he rented a flat or a house for the Respondent at Mhlaleni. He says the matrimonial items subject to the application were bought by himself to make their life easy at the flat and that it formed a core of their livelihood. These items are a lounge suite, bed, kitchen unit, a wall unit, refrigerator, TV, radio, DVD player and cutlery.

[3] Thereafter, in March 2006 and without his knowledge or approval, the Respondent is alleged to have unlawfully removed the items to her parental homestead. He avers, as is essential in a spoliation application, that he was "*in peaceful and undisturbed possession of the items when unlawfully dispossessed by the Respondent*[7]*.* The Applicant added that at the time of seeking relief, he had nothing to live with as the removed articles are household necessities, forming part of his livelihood, which he used on a daily basis at their house.

[4] Finally, and also to add a measure of urgency to the matter, he alleged that the Respondent threatened to sell the items and also that he fears damage to it.

[5] On strength of this *prima facie* case of spoliation, a rule *nisi* was issued, with the Respondent called upon to show cause why the order, which had *interim* and immediate effect, should not be made final. In turn, the Respondent filed opposing papers, both on the merits and also raising some points of law. At the hearing of the matter, the legal points were abandoned. It related to averred absence of urgency as a month had passed between the removal and the application, also that she could not sell the items as they were subject to a hire purchase agreement in her name.

[6] On the merits, she acknowledges having lived at the flat in Mhlaleni, but not that the applicant rented it, rather that it was rented by herself since the applicant is unemployed and with no fixed monthly income. She also denies that the Applicant bought the items as stated by himself, rather that she bought it from various stores, in her own name. In support hereof she annexed some documentation as *prima facie* proof that from various retailers, she purchased various of the contentious items in her own name as purchaser on hire purchase or lease.

[7] Further items are stated to be the property of her daughter who recently completed her university studies and asked her keep it in storage for her. These further items are stated to have been retrieved by her daughter who has since found a teaching position which provided her with accommodation. In

support hereof her daughter filed a confirmatory affidavit.

[8] The Respondent further acknowledges that she removed the items without being authorised by an order of court but states that there was no need for it as the applicant at no stage had peaceful and undisturbed possession of it. Also, that at no stage after their marriage he lived in the flat from where she removed it, that they never lived together anyway and that before and after the marriage she occupied the flat, not both of them together.

[9] She has it that the Applicant lives in a fully furnished flat in Fairview North (not at Mhlaleni) and that he has done so before and after the marriage and that he still continues to reside there. In support of this, she filed a delivery note in respect of a computer she says she bought, again in her own name, which was delivered to him in Fairview North. She also relies on confirmatory affidavits, by her aforementioned daughter and that of one Sifiso Hlatshwayo, both who confirm that the Applicant and Respondent had separate residences throughout their marriage to date.

[10] The Respondent takes particular issue with the allegation by the Applicant that he used the items on a daily basis and that depriving him of its use leaves him with nothing to live with as he has his own separate abode, fully facilitated with all necessities.

[11] This aspect, in both sets of affidavits, remains superfluous insofar as spoliation proceedings go. It is not an essential

aspect to prove or disprove that the spoliation has resulted in hardship for the person who had peaceful and undisturbed possession.

[12] The Respondent concludes with a repeated denial of any threat to sell or damage the removed items, due to it being on hire purchase or lease and not yet fully paid, with liability for further payment still resting with her, further that she intends to use it for setting up a new abode for herself.

[13] The Applicant in turn chose to reply and takes the position that the Respondent is not an adult female (as stated in her affidavit) "...taking into account that she is married to me". This archaic perception of married women in the Kingdom remaining "perpetual minors" was not argued before this Court and does not require to be pronounced upon in the present matter. When an appropriate case arises it may well then have to be decided whether such a view as held by the Applicant is in consonance with the tenets of the Swaziland Constitution or not.

[14] The Applicant admits being unemployed but holds himself out as a self-employed director of a business concern which deals with the selling of imported cars. His version remains that he obtained the Mhlaleni flat and still rents it. Again, it is immaterial for purposes of the present spoliation application who pays for the flat. It is not access to the building which has been closed off to either party despoiling him or her from occupancy of the premises. What thus seems to be a factual dispute is an issue which remains non-determinative in the present proceedings.

[15] Concerning her averment of being the purchaser of the items in her own name and on credit, the applicant admits it to be so. His angle of the matter is that he gave her the money to pay for it as she is his wife who bought in her own name using his money. However, if she did so with an intention to defraud him or their matrimonial home, he wants the Court to "frown at her conduct". Nevertheless, he regards himself as head of the family and with the Respondent being his wife under Swazi Law and Custom, he says he retains marital power and control over the items.

[16] The Applicant takes vigorous issue with the contention that the two litigants live apart, especially so with himself said to reside in Fairview North in a fully furnished flat of his own. These premises, he says, are offices from where he conducts business.

[17] He maintains steadfastly to have been staying with the Respondent "on a full time basis at Mhlaleni as she is (his) wife and (he) had the marital power over the Respondent and as such she required a Court Order authorising her to remove the items". He also takes issue with the confirmatory affidavits filed by the Respondent and says it is not true that there was separate residence throughout the marriage. He further disputes her denial of an intention to sell the items, citing it to be the reason for urgency. Finally, he restates his view that the Respondent cannot be heard to say that she wants to "set up a new abode for herself in as much such as she is (his) wife and under (his) marital power".

The legal remedy of the *mandament van spolie* is of Roman Dutch origin and is intended to first restore illicitly deprived possession - spoliation - before the merits of the case are considered. (The comprehensive and instructive LLD thesis of Kleyn (University of Pretoria 1986) titled "DIE MANDAMENT VAN SPOLIE IN DIE SA RY" is not readily accessible due to the language barrier but details the history and origins of this remedy.) The *mandament* applies where a person is unlawfully deprived of the whole or a part of his possession of movables or immovables (NINA BANINO v DE LANGE 1906 TS 120); or where a person has been deprived unlawfully of his quasi-possession of a movable or immovable incorporeal (ROOIBAKOORD SITRUS (EDMS) BPK v LOUW'S CREEK SITRUS KOAP MPY BPK 1964(3) SA 601(T); or where a joint possessor has been deprived of his co-possession by his partner taking over exclusive control of the thing held in joint possession (ROSENBUCH v ROSENBUCH 1975(1) SA 121(W) and OGLODZINSKI v OGLODZINSKI 1976(4) SA 273(D)).

[19] In the present matter, possession of the items concerned is a disputed fact, with the Applicant alleging that they jointly possessed the things and with the Respondent stating the contrary, that she alone had possession to the exclusion of the Applicant. In NIENABER v STUCKEY 1946 AD 1049 at 1054-6 and PAINTER v STRAUSS 1951(3) SA 307(0) at 314-C it has been held that a person does not need to have had exclusive possession of the thing in question prior to spoliation to be remedied with the *mandament van spolie.* In ROSENBUCH v ROSENBUCH *{supra)* and OGLODZINSKI v OGLODZINSKI *(supra),* a husband obtained a spoliation

order against his wife who had taken certain articles with her when she left the joint household. Those items were possessed jointly by both the husband and wife.

[20] The litigants currently before court dispute joint possession, as stated above. The wife has it that the husband resided in a separate abode while he avers the contrary. As said, ownership in itself is a separate issue to decide, in due course if so needed, over and above the aspect of the alleged spoliation. *Spoliatus ante omnia restitutuendus est* remains the current issue at stake, and in order to do justice thereto, the applicant remains with the *onus* to prove his own possession, deprived by the Respondent, illicitly.

[21] Possession connotes the factual and mental domination of a (usually) corporeal thing by a person, in its simple context (LAWSA Vol. 27 1987, Butterworths, Joubert *et al* para 52). It is most commonly defined as the compound of a factual situation and of a mental state consisting in the factual control or detention of a thing *(corpus)* coupled with the will to possess the thing *(animus possidendi). A ius possidendi* denotes a right to possession of a thing, either from a personal right against the owner of the article or from a real right in it. When in actual possession, the person with a *ius possidendi* is justified to claim to have the thing in his possession. Accordingly, there are both *animus* and *corpus* elements of possession and in the matter at hand, these are in dispute.

[22] The Applicant claims that he had possession of the removed items by virtue of his occupation of the flat, an issue in dispute, jointly with the Respondent. The other side of the coin is that not only occupancy and a joint household is in dispute, but also that the Respondent claims the items to have been purchased by herself and for her own exclusive use, thereafter removed to be used in a new abode she wishes to establish. Further items are stated to belong to her daughter, which she only detained temporarily for the time being, but which her husband now seeks to have returned.

In order for the Applicant to be successful in obtaining an order to confirm the rule *nisi,* he has to prove, on a balance of probabilities, that he was in possession of the removed items at the time it happened and that he has been deprived of his peaceful and undisturbed possession by the Respondent, unlawfully so.

He thus is required to prove that he had factual control coupled with the intention to derive some benefit from the items, of which he was deprived through a disturbance of his possession without his consent and against his will.

The latter aspects are clearly established by the Applicant. He most certainly did not agree to the fact of removal and furthermore, regards his wife to be unable to do anything of the sort that she did, without his express consent. Chattels and properties, in his view, does not draw much of a distinction between a wife and objects, wherefore his wife, subjectively,

cannot by herself decide what to do with properties without his consent.

[26] It remains as crucial issue, despite the subjective views of the Applicant, whether he has actually shown himself to have had physical control over or peaceful undisturbed possession of the items he decries as having been spoliated. In his founding affidavit he states it to have been so, but when regard is to be given to the opposing papers, it is not as cut and dried as initially presented.

[27] The Respondent states that not only did she purchase the items in her own name, remaining with the responsibility to continue making payments for it, but also that she had exclusive domain over it, in her abode separately from that of her husband. She filed supporting documents to attest to her averments regarding purchase, but with the Applicant stating that it is paid for with money provided by himself.

[28] As said above, the issue to determine is not that of ownership but of possession. The Respondent is clear in stating an. *animus rem sibi habendi,* or an intention to acquire, hold and possess the items for her own exclusive use.

[29] It seems to me, on a careful scrutiny of the starkly contrasting versions of the litigants, that it will only really be possible to positively decide these issues once oral evidence has been heard and a proper assessment of credibility can be made. The allegations of the Applicant are bald of substantiation, in comparison to the version of the Respondent.

When considered in totality, it seems to me that the scales are balanced against the Applicant, that he fails to persuade on a properly evaluated balance of the probabilities that he indeed had peaceful and undisturbed *possessio* at the time the items were removed by the Respondent.

[30] For present purposes, it is thus the finding of the Court that the Applicant has failed to discharge the burden of proof to entitle him to a confirmation of the *interim* rule. This does not imply that a factual finding of ownership is made, nor that the Respondent is entitled to do with the removed items in any manner she chooses to do.

[31] Otherwise and simply put, the Applicant is found to not have proven spoliation to the extent that a final order can be made by which the Respondent could be compelled to first return the items to him, by returning it to her flat, before anything else may be decided on it. The Respondent has, in my view, been able to amply demonstrate that *prima facie,* the Applicant was not by himself, nor through her, in peaceful undisturbed possession of the items at the time of dispossession, or that he exercised factual control over it, controlling it with the intention to secure some benefit for himself, even though he alleges it to have been so.

[32] The Applicant remains at liberty to take the matter further by way of a vindicatory action, or one for damages, or whatever advice he may chose to act upon, in order to seek satisfaction of his feelings of having been done in, but he cannot succeed, in the present matter, with a *mandment van spolie.*

[33] It is for these reasons that the rule *nisi,* which called upon the Respondent to show cause why it should not be confirmed, by necessity has to be discharged, with costs to follow the event.

ACTING CHIEF JUSTICE
JACOBUS P. ANNANDALE