**IN THE HIGH COURT OF SWAZILAND**
**HELD AT MBABANE**

**CASE NO. 4385/05**

**In the matter between :**

**HOSSAIN INTERNATIONAL INVESTMENTS** **APPLICANT**

**AND**

**MOSES NCALA** **RESPONDENT**

**CORAM: MAMBA AJ**

**FOR APPLICANT: MR. T. MASINA**

**FOR RESPONDENT: MR. T. THWALA**

**JUDGEMENT**
**27/01/06**

[1] This is an application for a Mandament van spolie or an order reinstating the applicant in the possession and or occupation of certain shop premises described as Shop No. 3A situate at Amalgam House, Ngwane Street, Manzini, from which the applicant had been ejected or evicted by the respondent on the 2nd day of November, 2005. The applicant avers that it has been illicitly deprived of its possession and or occupation of the property. The shop is owned by the respondent.

[2] The history of this application is as follows: The parties entered into a written agreement of lease over the property for a period of 3 years commencing on the 1st February, 2005. One of the terms of the lease agreement was that "the tenant shall not be entitled to cede or assign or to sub-let the premises or permit any other person or persons to occupy them or apportion them without

the Landlord's written consent first being had and obtained." (clause 2) The penalty for a violation or breach of this clause was that "the landlord shall be entitled, but not obliged to cancel this lease forthwith and retake possession of the premises."

[3] The first lease agreement between the parties was concluded in June, 1998 and the applicant took occupation of the premises then. This is bome out by the applicant's assertion in paragraph 9 of its founding affidavit which proclaims that "The applicant has been in peaceful and undisturbed possession of the stop (sic) [shop] since June 1998 until the 2nd November, 2005."

[4] At the beginning of September, 2005 the respondent states that he visited the leased premises and learned that the applicant had without his knowledge and consent, sub-let part of the premises to a third party or parties. He then by letter from his attorneys, terminated the lease agreement and gave notice to the applicant to vacate the premises by the 31st day of October, 2005 and return the keys thereafter to the respondent. The applicant did not respond to this letter and by the 2nd day of November, 2005 it was still in occupation of the premises and had not returned the keys to the respondent or respondent's attorneys.

[5] Faced with this standoff, "on the 2nd day of November 2005, and without a court order, the respondent unlawfully closed and locked the shop thus preventing the applicant from carrying on business" therefrom.

[6] Save for the allegation that the applicant had, in breach of clause 2 of the lease, sub-let a portion of the premises to a third party or parties, the above facts are common cause. In view of the very nature of a relief for spoliation, it is not necessary for me to determine whether or not in fact the applicant was guilty of the breach complained of.

[7] After the closure of the shop as aforesaid the parties discussed the issue between themselves and it was agreed that a new lease agreement would be entered into between the parties for a period of 12 months commencing on the 1st day of November 2005. This agreement was reached on the 10th day November, 2005. It is worth noting that whilst the discussions about a new lease took place, the shop remained locked and applicant's goods or merchandise remained therein.

Notwithstanding this later agreement, the respondent refused to restore occupation and or possession of the shop to the applicant. The result was this application.

The respondent has presented two defences to this application. Firstly, he admits that he closed the premises as stated above and says that he was legally justified in doing so because he had lawfully terminated the applicant's lease. In essence respondent says applicant had no right to be in occupation of the respondent's property at that time. With due deference to the respondent this is not an answer to a claim for a mandament van spolie. The mandament van spolie is a protection of the right of possession as contrasted with or compared to a right to possession. It is a protection against self-help, where people instead of seeking redress in court resort to self-help by taking the law into their own hands.

In **Nino Bonino V De Lange, 1906 TS 120 at 125** where the respondent had barricaded the billiard room occupied by the applicant, **Smith J** stated that: "Any state of circumstance more likely to lead to a breach of the peace than that, I find it difficult to conceive; because if a man finds property barricaded against him which he thinks he has a right to enter he is extremely likely to resort to force to effect an entrance. It seems to me the case may be put another way, which is this - that the law will not allow a man to be a judge in his own case. — Is the lessor to be allowed to be the judge in his own case and decide that there have been breaches in connection with this property? I do not think the court can uphold such a contention.

[10] Secondly, the respondent has submitted that, by engaging the respondent in negotiations for a new lease, after the closure of the shop by the respondent; the applicant had waived its rights to claim that it had been despoiled of the property. The case of **Nino Bonino** ***(supra)*** was cited as authority for this proposition, which at a glance sounds attractive. I have read this case and was unable to find therein anything in support of this proposition.

[11] In any event, it is clear to me in this case that the applicant did not permit the respondent to close the premises nor did the applicant condone such closure (after it had been carried out by the respondent.) The applicant did not vacate or remove its goods or merchandise out of the premises. It attempted first to solve the issue of the closure of its shop by engaging the respondent in a

discussion which discussion included the issue of a new lease agreement. The only aim and or effect of the new lease was to legalize, legitimize and or justify the applicant's occupation or possession of the shop in question. This did not put the applicant in possession of the property. Applicant had been in possession thereof as far back as 1998. This is the possession and or occupation that was violated and or interrupted on the 2nd day of November, 2005 and this is the violation that is complained of in this application.

[12] I am unable to hold that by talking to the respondent in an attempt to convince him to re-open the shop, the applicant condoned the respondent's closure of the shop. The issue of estoppel and or waiver is therefore not available to the respondent herein. He had no right in law to take possession of the shop in the manner that he did. He resorted to self help. That is the law of the jungle. To condone it would be to sow the seeds of chaos, disorder and anarchy. The respondent cannot himself be the judge of whether a breach of the lease has been committed "and having decided in his own favour to allow him of his own motion to prevent the applicant from having access to the premises. Only a court of law can do those things." **(Per INNES C.J in NINO BONINO (supra) at 123-124)**

[13] The order issued by the court on 29/11/05 is hereby confirmed with costs.

**MAMBA A J**