

IN THE HIGH COURT OF

HELD AT MBABANE

CASENO.1779/06

In the matter between:

PAULINA T. NDWANDWE

APPLICANT

And

SYLVIA MALINGA

1st RESPONDENT

THE MASTER OF THE HIGH COURT **2nd RESPONDENT**

CORAM

Q.M. MABUZA -J

FOR THE APPLICANT

MR. J. MAVUSO

JUDGMENT 12/06/07

[1] Before me is a spoliation application which came with a certificate of urgency seeking an order in the following terms:

1. Dispensing with the usual forms and procedures relating to the instituting of proceedings and allowing this matter to be heard as matter of urgency.

2. Condoning the Applicant's non-compliance with the Rules of the above Honourable Court.

3. That a rule nisi do issue calling upon the Respondent to show cause on a date to be fixed by the above Honourable Court, why:

i) She should not be ordered to restore to the Applicant, possession of the 20 herd of cattle, registered under Likima dip tank, as number 53, unlawfully taken by her and or alternatively at her instruction on the 17th May 2006, at Likima Dip Tank.

ii) She should not be ordered to pay the costs of this application.

iii) Further and/or alternative relief.

4. That paragraph 3. i) above operate with immediate interim effect pending the finalization of the matter.

4. That in the event the Respondent refuses to restore possession, the Deputy Sheriff be allowed to enlist the assistance of the Royal Swaziland Police, in repossessing the said cattle, where ever same may be found.

5. Further and in the event the Respondent resists repossession, the Deputy Sheriff be allowed to enlist the assistance of the Royal Swaziland Police, in repossessing the said cattle, where ever same may be found.

[2] The facts as appear **ex facie** the papers are that the Applicant had a son Mandlenkosi Malinga who was married in community of property to the Respondent. One child was born of this marriage. The said Malinga subsequently died. During the subsistence of the marriage the Respondent and the deceased lived with the Applicant. The deceased had some cattle at his mother's homestead.

[3] It seems to me that the real issues in this matter are about rights to the cattle and ownership thereof. The answering and replying affidavits have information that is very detailed and should properly be ventilated by leading oral evidence. However, the application before Court

prevents this procedure being adopted because it is spoliation proceedings. In order to ventilate all these issues that have been subsequently revealed the Applicant should have brought ordinary motion proceedings or proceeded by way of action. She could have interdicted the Respondent from disposing of the cattle until the matter had been fully heard. The Applicant can still pursue this remedy.

[4] As the matter stands now, the estate of the deceased was formally reported. The Master of the High Court lawfully issued Annexure "A". Annexure "A" is a letter from the Master of the High Court to the Veterinary Assistant of Likima dipping Tank Mnjoli the area where the Applicant lived and dipped the said cattle. In the letter which is dated 8/5/06 Master states:

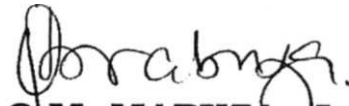
"You are hereby authorized to transfer 15 head of cattle from the deceased's name to Sylvia Philisiwe Malinga the deceased's wife and 5 head of cattle to Siyabonga Malinga. The said cattle are registered under Kraal No. 53."

[5] Armed with this letter the Respondent proceeded to the said dipping tank on the 17/5/06 collected and removed 19 head of cattle and not 20 head as alleged by the Applicant. My finding is that the directive from the Master of the High Court prima facie vitiates the alleged unlawfulness of the taking of the cattle until proved otherwise.

[6] The Applicant did not come to Court with clean hands as she omitted to inform the Court that the cattle which were the subject matter of these spoliation proceedings were registered in the name of the deceased. She did not cite the Master of the High Court because she had failed to report the death of the deceased. She did not even disclose that the Respondent was her daughter-in-law or that she had expelled her from her home. She even failed to disclose that the Respondent was a widow because her husband who was Applicants son had died leaving the Respondent a widow. She did not even disclose that the deceased her own son was dead nor that he had a child with the Respondent nor that he even had other children who would likely have an interest in the cattle. The contents of the replying affidavit were provoked by the Respondents answering affidavit otherwise this Court granted interim relief not having been apprised of the full facts of the matter. The Court would ordinarily show its

disapproval by censuring the Applicant by ordering her to pay costs on a punitive scale. I cannot do this because she has Counsel who should have assisted her to make full disclosure.

[7] In the event the application for spoliation is dismissed and the rule is hereby discharged. The Applicant is ordered to pay the costs hereof.


Q.M. MABUZA -J