

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No. 601/2008

MDUDUZI MATSEBULA

Applicant

And

DUMSANINDZINISA

1<sup>st</sup> Respondent

DANIEL DLAKUBI

2<sup>nd</sup> Respondent

BENSON MAVUSO

3<sup>rd</sup> Respondent

MASIKO NKAMBULE

4<sup>th</sup> Respondent

Coram:

S.B. MAPHALALA – J

For the Plaintiff:

MR. V. DLAMINI

For the Defendant:

MR S.C. SIMELANE

JUDGMENT

[1] The Applicant has filed an application for a spoliation order by which he seeks an order for the restoration of a refrigerator which was allegedly taken from him against his will and without a court order.

[2] The Respondents on the other hand contend that the Applicant consented to the taking of the refrigerator. This is confirmed by all the Respondents who have stated that he did so, whilst providing security for his liability towards the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

[3] In argument before me an issue arose between the parties as to what should be the approach when you have two versions which are mutually destructive. It appears from the papers that the court is faced with two mutually destructive versions advanced by the parties. The Applicant has stated that he was in peaceful possession; he was deprived possession against his will. Further that he did not concede that he owed 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Lastly, that his refrigerator was being used at the time it was removed by the Respondents.

[4] On the other hand the Respondents allege that Applicant admitted that he owed them and that he consented to the taking of the refrigerator. Further, that 1<sup>st</sup> and 2<sup>nd</sup> Respondent contends that, they found the refrigerator not in use.

[5] In order to unveil this mystery the Applicant's Counsel has cited the case of *National Employers Mutual General Insurance Association vs Gany 1931 A.D. 199* where Wessels JA held that:

"Where there are two stories mutually destructive, before the onus is discharged the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clarke is not satisfactory in every respect, it must be clear to the court of first instance that the version of the litigant upon whom the onus rests is the true version".

[6] Counsel for the Applicant contends that however, it has to be noted that the quotation above applies in situations where there are no probabilities. The approach that is applicable is the one that was stated by Esteen AJP in the case of *National Employer's*

*General Insurance Co. Ltd vs Jagers J 984 (4) S.A. 437 (E) at 440 E - F* where the following is stated.

"Where the onus rest on the Plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the version advanced by the Defendant is therefore false or unmistaken and falls to be rejected. In deciding whether that evidence is true or not, the court will weigh up and test the Plaintiffs allegations against the general probabilities".

[7] It is contended for the Applicant that it is more probable that Applicant consented to the taking of a refrigerator which he knew did not belong to him? Are Applicant's witnesses and Applicant lying when they say the refrigerator was being used and that the Respondents removed food items inside the refrigerator such that Applicant had to request that one of his witnesses store for him the food items?

[8] On the other hand the Respondents contend that the allegations by the Applicant are disputed and therefore the truthfulness thereof may not be determined on the affidavits. Such dispute was foreseeable to the Applicant and ought to have been anticipated. In the circumstances the application ought to be dismissed with costs.

[9] Having considered the facts of he matter and the principles of law as enunciated in the leading case of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1153 (1)1* have come to the view that oral evidence be lead on the narrow point of divergence.

[10] In the result, for the afore-going reasons I order that oral evidence be led on this narrow point of divergence. Costs to be costs on the merits of the case.

Pronounced at the High Court sitting at Mbabane this 29th..... day of August 2008.

**SB MAPHLALALA  
JUDGE**