

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No. 1694/2008

VULINCWALA MAVIMBELA

Applicant

And

MELUSI QWABE N.O.  
NELSON KHOZA

1<sup>st</sup> Respondent 2<sup>nd</sup>  
Respondent

Coram  
For the Applicant For  
the Respondent

S.B. MAPHALALA - J MR.  
T. NDLOVU MR. B.  
ZWANE

JUDGMENT 12<sup>th</sup>  
February 2009

[1] Before court is a spoliation application wherein the Applicant  
*inter alia*, seeks the return of his goods named in

annexure "A" and found at page 10 to 13 of the Book of Pleadings.

[2] The Applicant has filed a Founding Affidavit which outlines the facts surrounding the dispute between the parties. A number of annexures are also attached thereto.

[3] The Respondents oppose the application and the affidavit of the 2<sup>nd</sup> Respondent is filed where a number of points *in limine* are canvassed including that of urgency.

[4] The second point is that it is very clear that it was the Notice of Sale that made Applicant to move this application and that this is abuse of court process as Respondent is of the view that a Deputy Sheriff has to abide by sometime limits before advertising a sale in execution which time limits are to allow for persons that could be affected to action their claims. Applicant cannot claim he learnt of the attachment through the advertisement as he clearly states that the goods were taken in his presence.

[5] The third point *in limine* raised is that the application for stay of sale in execution is by its nature an application for an interim interdict and that an Applicant in such cases has to satisfy two elements, i.e that he has a *prima facie* right and that there is apprehension of irreparable injury. The Applicant has failed to

show that he has a *prima facie* right which if infringed would result in irreparable harm.

[6] Applicant claims ownership of the attached goods but has no proof of acquisition. He claims to have bought the goods through third parties but failed to get these persons to at least file affidavits confirming such. He on the other end fails to show that the goods purchased by these people were at least delivered at his premises assuming these were his premises.

[7] The Respondent further contends under this head that Applicant has supported his claim of ownership over some of the goods with fraudulent receipts as shown in the affidavit of Mr. Cassim.

[8] Having considered the arguments of the parties *in limine* I wish to firstly apologize to the parties for the long delay in issuing a judgment in this matter caused by the court's vacation in December 2008. On the first point *in limine* that of urgency, in view of the time that has elapsed and the intervening X-mas vacation I do not think that it will make any sense in determining this point on urgency but will consider the matter in the long form.

[9] On the other points *in limine* it appears to me that the gravamen of the argument of the Respondents is that Applicant has failed to prove that he was the owner of the goods attached. However, it appears to me that this argument cannot hold because in an application for spoliation *ante omnia* as in the present case the Applicant need only to prove two elements that firstly, he was illicitly deprived and secondly, of his possession.

[ 10] On the facts of the present case it is common cause that the Applicant was in possession of these items when there were attached by the Deputy Sheriff.

[11] The only question that remains for determination by the court is whether the attachment by the Deputy Sheriff was illicit for purposes of a *mandament van spolie*.

[12] It appears to me that the Applicant has failed to satisfy this important requirement for a *mandament van spoile*. The actions of the Deputy Sheriff cannot be said to be illicit when executing his duties under a warrant of execution duly issued under a court order.



**S.B. MAPHALALA**

PRINCIPAL JUDGE

[12] In the result, for the afore-going reasons the application is dismissed with costs.