



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No: 4306/10

In the matter between:

MEFIKA MATSEBULA

APPLICANT

and

MANDLA NGWENYA

RESPONDENT

Neutral citation: Mefika Matsebula and Mandla Ngwenya (4306/10) [2012] SZHC
142 (1 AUGUST 2012)

Coram: MABUZA J

Heard: 8/2/2012, 15/2/2012, 21/2/2012.

Delivered: 1 AUGUST 2012

Summary: **Spoliation – Mandament van spolie – Underlying rationale is that no one is entitled to take law into own hands – Respondent summary evicting applicant without court order.**

Practice – Affidavit unsigned by deponent - Oath administered to unsigned affidavit – Procedure prescribed by section 4 of Commissioner of Oaths Act 23/1942 read with regulations under section 6 – No regulations promulgated.

[1] The Applicant seeks the relief of *mandament van spolie*. To that end he obtained a *rule nisi* as follows:

- (a) That the Respondent is hereby interdicted and restrained from coming to and/or in any way whatsoever disturbing the applicant's peaceful possession of the land and/or plot at which the applicant's homestead is situate at Hawane area within the Hhohho Region.
- (b) That the Applicant and anyone acting on his behalf are hereby interdicted and restrained from coming within a radius of 100 meters from the applicant's homestead situate at Hawane area within the Hhohho Region.
- (c) That the Respondent be directed to pay the costs of this application.

The rule must now be discharged or confirmed.

[2] At the hearing hereof two points of law were raised and argued. The Respondent raised the issue of non-joinder and the Applicant raised the issue that the Respondents original affidavit did not bear the Respondent's

signature but that of the Commissioner of Oaths who is supposed to have administered the oath to the Respondent.

[3] Mr. Phiri for the Respondent stated that the Respondents original affidavit was signed but was not filed instead an unsigned affidavit was erroneously filed. He did not avail the original affidavit to the Court.

[4] The space above “deponent” of the Respondent’s affidavit is blank. The Respondent did not sign the affidavit in this space provided for his signature. Bongani B. Mdluli, the Commissioner of Oaths appended his signature above the words “Commissioner of Oaths”. There is no date accompanying the words “Thus signed and sworn before me at Mbabane on this Day of December, 2010, the Deponent having acknowledged that he knows and understands the contents of this affidavit.”

[5] It is my finding that Mr. Mdluli did not administer the oath to the Respondent.

[6] Having decided that the oath was not administered to the Respondent does that make his answering affidavit defective?

[7] I have perused the Commissioners of Oaths Act No. 23/1942 and the Justices of the Peace Act No. 63/1954 for assistance and found no help there. Section 4 of the Commissioners of Oath Act provides that:

“A Commissioner of Oaths may, within the area of respect of which he is under this Act appointed or declared to be a commissioner of oaths, administer an oath on affidavit or take a solemn or attested declaration whenever requested to do so ... or whenever any statement on oath or solemn or attested declaration is required by any law in force.”

Section 6 thereto deals with the Regulations and provides that:

“The Deputy Prime Minister may make regulations not inconsistent with this Act prescribing the form and manner in which oaths and declarations shall be taken, when not prescribed by any other law, and generally for the better carrying out of the objects and purposes of this Act.”

[8] I could not find any regulations made under this section even after enlisting the assistance of the Deputy Attorney General. One may correctly conclude

that no such regulations were promulgated and if that is the case the relevant authority is requested to rectify the anomaly

[9] All the legal authorities and decided cases I consulted on the issue presupposed that regulations were in place; Erasmus: Superior Court Practice; E2 – 2A (Topic: Administration of Oaths) *Exparte Cunningham* 1961 (4) S.A. 155; **S v Munn** 1973 (3) S.A. 734; **S v Msibi** 1974 (4) S.A. 821; **Engineering Requisites (Pty) v Adam** 1977 (2) 175.

[10] It has been a practice over the years that the form of oath that appears at the end of a litigant's affidavit is the oath that is commonly administered to deponents of affidavits.

[11] It is therefore my considered view that the form of oath on the Respondent's affidavit is correct, the defect lies in the fact that the deponent did not sign it and the Commissioner of Oaths signed it in the deponent's absence. In the premises I must exclude the Respondent's affidavit and uphold the point of law raised by the applicant.

[12] The respondent also raised a point of law of non-joinder. His argument was that the Attorney General of Swaziland should have been joined as a party to these proceedings because he has a substantial interest in the matter. In terms of the Kingdom's Constitution the Attorney General represents all chiefs in the country and by extension the Chief's Inner Council. Mr. Mngomezulu argued that as the proceedings were merely spoliation in nature, the Attorney General had no substantial interest at this stage of the proceedings.

[13] I agree with Mr. Mngomezulu. One of the characteristics of the remedy of *mandament van spolie* is that it is a possessory remedy. That being the case the legal process whereby the possession of a party is protected (iudicium possessorium) is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute is determined. (Erasmus: Superior Court Practice: E9 – 1.

The object of the order is:

“merely to restore the *status quo ante* the illegal action. It decides no rights of ownership ...” **Mans v Marais** 1932 CPD 3352 AT 356.

[14] Once the parties decide to take action against the Chief's Inner Council for determination as to the rightful allocatee of the disputed land, it is then that the Attorney General's assistance is required and joinder becomes necessary. In the circumstances the point in *limine* is hereby dismissed.

[15] I now turn to the merits of the matter. The background hereto is that the applicant resides at Hawane where he owns a three bedroom house in which he lives with his wife and three children. The land on which the house is built is Swazi Nation land. He says that the land was allocated to his father during the 1920's after he had fulfilled the requirements of *kukhonta* such as payment of the requisite beast. This fact is confirmed by the substantive Chief's Headman (Indvuna) of Nkhaba in his confirmatory affidavit Dikida Shabangu.

[16] He says that he and his family have been in peaceful undisturbed possession of the land and house until 2nd September 2010 when the Respondent demanded that he vacate the house and land as the land was allocated to his (the Respondent's) father some decades ago. On the 10th October 2010 at night the Respondent and his companions who were heavily armed

terrorized the Applicant and his family who were forced to eventually vacate the disputed premises in fear of their lives.

[17] The Respondent also lays claim to the land as attested to by his Headman Solomon Ngcabi Shabangu whose affidavit is properly attested to and commissioned. The Headman says therein that the Respondent's father, Solomon Ngwenya khontaed and paid the requisite beast for the same piece of land that the applicant lays claim to.

[18] In his replying affidavit the Applicant denies that Solomon Ngwenya the late father to the Respondent had any claim to the disputed land. The Applicant states that the late Simon Ngwenya "sisaed" cattle to Applicant's father and the disputed land was used to graze the cattle.

[19] The Applicant admits that the house that the Respondent refers to is a one room dilapidated shack which was built by the Respondent's father as shelter for his herd boy and not for the family who lived at Sidwashini in Mbabane.

[20] It seems clear to me that there is a dispute as to which of the litigant's father's is the rightful claimant to the disputed property.

[21] Unfortunately it is a notorious fact of which I shall take judicial notice that since Chief Bhekimpi of eNkhaba died his successor has not been appointed. Consequently there is a dispute as to which is the rightful substantive Indvuna between Dikida Shabangu and Solomon Mgcabi Shabangu. Both Headmen deposed to confirmatory affidavits each claiming that the party they are supporting was entitled to the disputed property.

[22] The issue in *casu* is not about who has a right of claim to the disputed property as his but that of spoliation which fact both the Respondent and Headman Solomon Shabangu fail to appreciate. It is about the illegal act perpetrated by the Respondent in forcing the Applicant to vacate his home.

[23] The nature of the remedy of the *mandament van spolie* is threefold: it is a possessory remedy; it is extraordinary and robust; it is a speedy remedy.

The object of the order is:

“merely to restore the *status quo ante* the illegal action. It decides no rights of ownership; it secures only that if such decision be required, it shall be given by a court of law, and not affected by violence. If before the spoliation either party needed a legal decision to establish his rights, he requires it just as much after, as before the order. He is in no better, and no worse position than he was before the spoliation.” Erasmus “Superior Court Practice” page E9 – 1.

- [24] The reason behind the practice of granting spoliation orders is that no one is allowed to take the law into his own hands and to dispossess another unlawfully of property. If he does so the court will summarily restore the *status quo ante* without investigating the merits of the parties’ rights to the thing. Voet 41 216; 43 177; **Nino Bonino v De Lange** 1906 TS 120 at 122; **Busisiwe Makhanya v Absalom Makhanya** Civil Case No. 1430/2004 unreported.
- [25] In **Greyling v Estate Pretorius** 1947 (3) S.A. 514 w AT 516; this rule is explained as meaning that “before the Court will allow any enquiry into the ultimate rights of the parties the property which is the subject of the act of spoliation must be restored, to the person from whom it was taken, irrespective of the question as to who is in law entitled to be in possession of such property.”

[26] In order to obtain a spoliation order two allegations must be made and proved: that the applicant was in peaceful and undisturbed possession of the property; and that the Respondent deprived him of the possession forcibly or wrongfully against his consent.

[27] In *casu* the applicant has shown that he was in de facto or in peaceful and undisturbed possession at the time of being despoiled. He has further shown that the Respondent deprived him forcibly of his possession of the disputed property. Spoliation takes place if the applicant is deprived by the actions of the Respondent of control over the property in question. See *Administrator, Cape v Ntshwaqela* 1990 (1) S.A 705 (A) at 719 – 20.

[28] The Headman Solomon Mgcabi Shabangu's (Solomon) confirmatory affidavit states that the Respondent's father khontaed and paid the requisite beast. He was given the piece of land which is disputed. He further states that the Libandla of Nkhaba received a report from the Respondent that the Applicant was constructing a house on the Ngwenya property and the Libandla resolved that he be informed to vacate the land.

[29] Solomon further states that on the 2nd September 2010 the Libandla went to the applicant to issue a final warning and to ensure that the applicant vacated the land. He states that the applicant vacated the land as instructed and was never forcefully removed.

[30] The applicant in his replying affidavit denies that the Libandla ever ordered or directed him to vacate his home. He says that on the 2nd September 2010 he was attacked and held under siege by the Respondent and about seven armed men who damaged his house and removed the roofing to his house and stole E5,000.00. He had to fire warning shots in a bid to scare or disperse the Respondent and his men.

[31] He concedes that he fled his home out of fear for his life and that of his family. He had to obtain a court order which enabled him to access and remove his belongings such as furniture and food from his home and now lives in a one room house per kindness of a Jele family at Hawane.

[32] Ordinarily there are several defences open to the Respondent which are not raised in his affidavit even if I had not rejected it. The confirmatory affidavit of Solomon does not take the matter any further. Paragraph 6

thereof would be relevant as evidence of non-peaceful and undisturbed possession. But this evidence is insufficient for such a defence to succeed; furthermore it is not corroborated and is denied by the Applicant.

[33] In the circumstances I find for the Applicant and hereby confirm the *rule nisi* with costs.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Applicant : Mr. S. Mngomezulu
For the Respondent : Mr. S. Phiri