



**IN THE HIGH COURT OF SWAZILAND**

Civil case No: 1/2013

In the matter between:

**RAYMOND NKOSINKHULU DLAMINI  
JULIA DLAMINI**

**FIRST APPLICANT  
SECOND APPLICANT**

**AND**

**HELEN ZWANE  
PHASHA ZWANE  
ROBERT ZWANE  
THE MASTER OF THE HIGH COURT**

**FIRST RESPONDENT  
SECOND RESPONDENT  
THIRD RESPONDENT  
FOURTH RESPONDENT**

Neutral citation: *Raymond Nkosinkhulu Dlamini And Another And Helen Zwane  
And Three Others (1/2013) [2013] SZHC41 (2013)*

**Coram:** **M.C.B. MAPHALALA J,**

For applicant Attorney S.C. Dlamini  
For Respondent Attorney Lucky Vilakati

**Summary**

Civil Procedure – spoliation proceedings – the dispute relates to the estates of the deceased – the respondents were unlawfully evicted from the home of the deceased by the applicants – notwithstanding, applicants now seeking an order to formally evict the respondents – application dismissed with costs at attorney and client scale.

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**JUDGMENT  
28 FEBRUARY 2013**

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[1] The applicant filed an urgent application for the following orders: firstly, ejecting the first and second respondents from the homestead of the late Moses Dokotela Dlamini situated at Ezulwini area near Umphakatsi. Secondly, interdicting the first respondent from collecting rentals in respect of the outbuildings and directing that she account to the fourth respondent for monies already collected. Thirdly, declaring that the second applicant has the right to collect the rentals for the outbuildings pending the appointment of an executor of the deceased estate of Sydney Phinda Dlamini and Lucy Lindiwe Dlamini (born Zwane); fourthly, granting custody of the homestead of the late Moses Dokotela Dlamini, the deceased's furniture and household effects to the applicants pending the appointment of executors in the deceased estate. Fifthly, that the first, second and third respondents pay the costs of suit and the fourth respondent to pay costs only in the event of opposition.

[2] The applicants reside in a homestead which was built by the deceased situated at Ezulwini area next to the Umphakatsi; the land upon which the homestead is built was allocated to the deceased in 1967 through the "kukhonta system". The applicants claim that they have been living at the said homestead since it was built. The first applicant is sixty nine years of age and the second applicant is eighty years of age.

[3] The applicants allege that the deceased died in 1988; and, that the deceased was married to the second applicant and to the late mother of the first applicant

Lephlina Dlamini (born Mkhonta). They argued that in terms of Swazi law and Custom, the homestead is now owned by them jointly on the basis that the first applicant is the eldest surviving male offspring of the deceased and the second applicant is the only surviving wife of the deceased.

- [4] They further argued that one of the siblings of the first applicant Phinda Sydney Dlamini who passed away on the 19<sup>th</sup> February 1999 and was the second son of the deceased; and, that he had married Lucy Lindiwe Dlamini (born Zwane). Lucy died on the 10<sup>th</sup> December 2012. They alleged that Phinda and Lucy were married under common law followed by a marriage in terms of Swazi law and Custom in the same year 1985.
- [5] The first applicant alleged that he has a house within the homestead which is the subject-matter of these proceedings; and, that Phinda built his own house within the homestead and several out-buildings. The first applicant further alleged that the first respondent is a sister to Lucy and she lives in one of the out-buildings at the homestead.
- [6] The applicants also alleged that the second respondent is a daughter of one of Lucy's brothers, and, that she lives in Phinda's house. They alleged that some of the out-buildings are occupied by tenants and generate about E5 000.00 (five thousand emalangeni) per month in rentals. The rentals were collected by Lucy; at the end of November 2012, when Lucy was critically ill, the first

respondent collected the rentals without the consent of the owners of the homestead; and, that she has not accounted either to the applicants or the fourth respondent for the rentals.

[7] The applicants further alleged that after Lucy's funeral, they advised the first respondent to leave the homestead for her failure to account to them. They further allege that she is disrespectful towards them, has held all night long parties in which there has been rioting, rowdiness and drunkenness; that she uses insulting language towards them, running a tuckshop on the premises against their instructions to keep it closed until the appointment of executors in the estates of Phinda and Lucy, and that she lives with a man in the homestead who is unknown to them.

[8] They also alleged that during the night of the 28<sup>th</sup> December 2012 a rowdy party was held by the first respondent in the house in which the second respondent lives; the second respondent was not there but she gave access to the first respondent to hold the party. They argued that the third respondent and his relatives also gain access to the homestead through the first and second respondents.

[9] They argued that the activities of the respondents have created hostility between the two families of the applicants and respondents; and, that if the respondents do not leave the homestead fighting will break out between the two

families. They alleged that members of the community police and the police service have tried to mediate in the dispute but to no avail.

[10] They contended that the respondents were meddling in the affairs of the estates of Phinda and Lucy; the assets in the estates consist of rentals, the motor vehicles and household furniture. They argued that the matter was urgent to prevent the assets of the estates from being dissipated by the respondents. The second applicant filed a confirmatory affidavit in support of the first applicant.

[11] The application is opposed by the respondents. In *limine* they argued that they were served with the application on the 3<sup>rd</sup> January 2013, and, on the 4<sup>th</sup> January 2013, the Court gave them an opportunity to instruct an attorney and further file an opposing affidavit by the 9<sup>th</sup> January 2013. However, on the 5<sup>th</sup> January 2013 the applicants locked them out of the house where they were staying and denied them access; they did this without a Court Order or instructions from the fourth respondent. The applicants further destroyed the wall-fence separating the homestead in which they live with that of Phinda Dlamini.

[12] On the merits the first respondent admitted that the land on which the homestead is built was allocated to the late Moses Dlamini, who thereafter built the main homestead. She further argued that the deceased Moses Dlamini subsequently subdivided the land and allocated a portion thereof to Phinda

Dlamini who in turn built his homestead on the portion allocated, which is the subject – matter of this dispute. She argued that Phinda’s homestead belongs to his beneficiaries; and that in terms of Swazi Law and Custom, Phinda’s homestead and the land on which it is built cannot revert back to Moses Dlamini’s homestead let alone be under the control of the first applicant. Similarly, she argued that the first applicant belongs to another household, and his mother was LaMkhonta.

[13] The first respondent argued that his sister Lucy was married to Phinda, and, that she was staying with Lucy ever since she moved to Ezulwini area. She argued that Phinda built four houses for letting out to tenants and her sister built three additional houses for letting out to tenants.

[14] She stated that ever since she moved from the main house to a small apartment, she had been paying rental, and, that the total rental collected only amounts to E3 870.00 (three thousand eight hundred and seventy emalangeneni). She explained that during the lifetime of her sister Lucy she was responsible for collecting rental, paying for the living expenses of the second respondent as well as utilising the balance in accordance with the instructions of her late sister. She reiterated that the houses were constructed by Phinda and Lucy on land that was allocated to Phinda by his late father Moses Dlamini; hence, the applicants have no claim either to the land in question or the houses.

[15] She explained that the second respondent had been a dependent of Lucy during her lifetime when she was a student at the University of Swaziland. She further explained that the house where the second applicant lives was built for her by her son Phinda Dlamini. She further explained that she established and operated the tuckshop during the lifetime of Lucy. She denied holding overnight parties and stated that this was done by Sibusiso Mlotsa.

[16] She disclosed that Phinda had his own children who are now grown up who should be responsible for the homestead as well as his affairs including the winding up of the estates; they are Simangele Dlamini, Sikhumbuzo Dlamini, Hlubi Dlamini and Sibongile Dlamini. She stated that the estate of Phinda Dlamini was opened under file EH182/99, and, the estate of Lucy who died in December 2012 has already been reported to the Master of the High Court under file No. 276/2012. She further clarified that Lucy, before her death, directed that the motor vehicles be kept by the third respondent for safe-keeping; she confirmed that all the assets in both estates will be reported to the Master's office.

[17] She conceded that the dispute between the parties has been reported to the Chief's Inner Council of Ezulwini by the first applicant; however, she wondered why the applicants have taken the law into their own hands and evicted them from homestead. She alleged that the applicants have since

occupied the homestead of Phinda Dlamini which is the subject-matter of the court proceedings even before the matter has been concluded in Court.

[18] In their replying affidavit the applicants conceded that they locked the premises without a court order using their own padlocks on the 5<sup>th</sup> January 2013; they further conceded demolishing the wall that separated Phinda's home from the main homestead. Similarly, they conceded that the respondents arrived in the evening to find Phinda's houses locked, and, they couldn't gain entry. It is the evidence of the first respondent that the applicants forced them to remove their belongings from the residence; and, I have no reason not to believe her evidence in the circumstances.

[19] The applicants do not deny that the houses in dispute were built by Phinda who was married to Lucy or the fact that Phinda has his own children who should be beneficiaries of the estate. Similarly, they don't deny that the respondents were living on the premises during the lifetime of Lucy or that they are related to Phinda's wife.

[20] The dispute between the parties relates to the estates of Phinda Dlamini and his wife Lucy Dlamini (born Zwane). It is common cause that the houses, motor vehicles, furniture and household effects belong to Phinda Dlamini and his wife Lucy. Similarly, the children of Phinda Dlamini are beneficiaries to the estate



of their father. It is not in dispute that no children were born of the marriage between Phinda and Lucy.

[21] It is apparent from the evidence that the first and second respondents were forcefully evicted from the premises by the applicants without a court order; the applicants took the law into their own hands. It is only fair and just that possession of the premises be restored to the first and second respondents pending the winding up of the estates of Phinda and Lucy.

[22] In the case of *Swaziland Commercial Amadoda Road Transportation and Others v. Siteki Town Council* Civil case No. 254/2012 (HC) at paragraphs 17 and 18, I had occasion to state the following:

**“[17] It is trite law the essence of the ‘*mandament van spoile*’ is that the person who has been deprived of possession must first be restored to his former position before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order and restraining persons from taking the law into their hands and inducing them to submit the matter to the jurisdiction of the courts .In order for peace to prevail in a community and to be maintained every person who assets a particular thing should not resort to self help in order to gain possession of the thing. The motion proceedings are ideal and expedient for this remedy since it is urgent in nature with a quest to restore the status *quo ante* before the equities and merits of the case are considered; any delay would defeat the unique and summary nature of the remedy.**

**[18] There are two essential requirements which the applicants must prove; firstly, that he was in peaceful and undisturbed possession of the thing; and secondly, that he was unlawfully deprived of such possession. It suffices for the applicant in the first requirement to show that he had factual control of the thing coupled with the intention to derive some benefit from the thing. Furthermore, he must prove an act of spoliation that he had been deprived of his possession of the thing without a court order or against his consent ....”**

[23] I accept the evidence of the respondents that the applicants reside on the main homestead belonging to the late Moses Dlamini and that the respondents reside in the houses constructed by the late Phinda Dlamini; I further accept the evidence of the respondents that Phinda and his wife with whom they had a double marriage in terms of the Common law and then Swazi law and custom had seven outbuildings which are leased to tenants; the dispute between the parties centres around the estates of Phinda and his wife and not the main homestead of the late Moses Dlamini or his estate. It is common cause that there was a wall separating the main homestead from the home of Phinda Dlamini which was demolished by the applicants without due process of the law.

[24] Accordingly, the application is dismissed as follows:

- (a) The applicants are directed to forthwith restore possession of the homestead of Phinda Dlamini, the motor vehicles, the furniture and

household effects to the respondents pending the winding up of the estates of Phinda Dlamini and Lucy Dlamini.

- (b) The respondents are interdicted and restrained from disposing the assets of the estates of Phinda Dlamini and Lucy Dlamini in their possession pending the winding-up of the said estates.
- (c) The fourth respondent is directed to convene a meeting of the next of kin of Phinda Dlamini and Lucy Dlamini within fourteen days hereof to appoint a neutral Executrix dative other than the parties herein.
- (d) The first respondent is directed and authorised to collect rentals to the leased houses of Phinda Dlamini and account to the fourth respondent pending the appointment of the Executrix dative.
- (e) The applicants are directed to pay costs of suit on an attorney and client scale.

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**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**