



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 1123/2014

In the matter between

MATSAPHA CENTRAL GARAGE (PTY) LTD

Applicant

And

PHIWA KUNENE

First Respondent

**THE NATIONAL COMMISSIONER
OF POLICE**

Second Respondent

ATTORNEY GENERAL

Third Respondent

Neutral Citation: *Matsapha Central Garage v Phiwa Kunene and Others*
(1123/2014) [2014] SZSC 394 (6th November 2014)

Coram: **Dlamini J**

Heard: **17th October 2014**

Delivered: **6th November 2014**

Mandament van spolie order – applicant to establish a clear right by reason that such order is not interlocutory but final – in casu upon applicant giving notice to first respondent to vacate premises, the right to possession ended – not in issue that merx registered in the name of applicant and at all material times merx was kept at the premises of applicant – such circumstances warrant order in favour of applicant

Summary: *A mandament van spolie* application has been moved on behalf of applicant in respect two trucks said to be despoiled by first respondent. A *rule nisi* was granted on 15th August 2014 for two trucks to be kept under the custody of second respondent pending final determination of the present application.

Parties' contentions

Applicant

[1] The applicant has averred that it operates a business at Matsapha Industrial Site Lots Nos. 609 and 610 and has a number of movables including the two trucks under issue. The business (applicant) and its assets were purchased from the estate late Raphael Sabelo "Skye" Kunene in 2013. Under Lot 609 also registered in the name of applicant, Raphael Sabelo Kunene ran an unregistered block yard business during his lifetime. He would use the trucks in the operation of the block yard business. When applicant was purchased, the purchasers took possession of all assets registered in the name of applicant. All assets not registered in the name of applicant were taken over by first respondent by virtue of his right to inheritance. However, first respondent decided to continue using the trucks registered in the name of applicant to run its business in Lot 609. The applicant's directors reacted by advising first respondent to take all his inheritance and vacate its premises. They also took the keys for the said trucks from first respondent.

[2] On 13th August 2014 first respondent in the company of five men, forcefully opened the gate of applicant's premises and through other

mechanical means, removed the two trucks. For this reason, applicant seeks for an order of *mandament van spolie*.

First Respondents

[3] The first respondent disputes that the *merx* under issue belong to applicant. First respondent contends that he acquired the said trucks together with the block yard assets. The block yard business used the trucks to run its business which was not part of applicant. He was operating the block yard for the month of June 2014 until applicant ordered him to vacate the premises. However, before then, applicant had taken the keys of the trucks on the basis that his (first respondent) employees were abusing the trucks. Upon applicant's order that he should vacate the premises (Lot 609) the executor of his father's estate requested applicant to hand over the keys to first respondent. However, first respondent refused. For this reason, first respondent contends that it is applicant who has despoiled him and is therefore not entitled to the orders sought.

[4] The first respondent also raised a number of points *in limine viz.*, that the applicants have failed to disclose the material facts; there are disputes of facts; and non-joinder of the executor Mr. Manzini. This point on non-joinder was withdrawn during hearing.

[5] Motivating the point *in limine* for non-disclosure of material facts, the first respondent averred:

“(a) *The applicant did not disclose to the honourable court that it was never in possession of the trucks for which it is seeking a spoliation order at the time I took them but were on the block yard where they were used for the block yard business.*

- (b) *Applicant has not disclosed to the honourable court that in fact it is the one that took the keys to the trucks without my permission nor the executor and they did not have a court order authorising its shareholder, Ntombifuthi Mabuza to do so.*
- (c) *Applicant did not disclose to the honourable court that Mr. Manzini, the executor of the estate did tell Ntombifuthi Mabuza and Mr. Gumbi that he (Manzini) is the one who authorised me to take the trucks as they are part of the block yard business he sold to me.*
- (d) *Applicant did not disclose to the honourable court that they had several meetings with Mr. Manzini whereat they had complained to Manzini that I remove all the assets and business of the block yard from the premises owned by the applicant pursuant to which Mr. Manzini told them that he had told me to remove the assets including the trucks.”*

Adjudication

Points of law

Non disclosure of material facts:

[6] The applicant deposed in its founding affidavit:

“12. *On Lot 609, which is registered in the name of the applicant, the late Raphael Sabelo “Skye” Kunene was running an unregistered block yard business and he was also using the trucks which are registered in the name of the applicant for this business.”*

From this paragraph, it is clear that the applicant did inform the court that the trucks were used to run the block yard business. It is not clear then as to why first respondent decided to depose that applicant failed to inform the court that the said trucks “*were on the block yard where they were used for block yard business*” in the light of applicant’s averment.

[7] The applicant further averred:

“14. On the 13 of July, 2014 we then realised that the first respondent was using the applicant’s trucks and we then took its keys.

[8] On the face of such deposition, there is no basis for first respondent’s contention that applicant failed to disclose that it took the keys from the respondent.

[9] Respondent also raised that the applicant failed to disclose the content of the various conversation between the applicant and Mr. Manzini. His **Lordship Tebbutt JA in Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors 23/2006** at page 16 eloquently wrote:

“It is well established that when a factual issue which appears in the founding affidavit is challenged or denied by the respondent in the answering affidavit, the courts will allow the applicant to clarify or rectify the issue in replying affidavit. (Baeck & Co. (SA)(Pty) Ltd v Van Zimmeren and Another 1982 SA 112(W)”

Turning to the applicant’s replying affidavit as per **Shell Oil Swaziland (Pty) Ltd supra**, the applicant denies any conversation or meetings with Mr. Manzini in regard to the *merx* in the manner so deposed by the respondent. It is therefore inconceivable that applicant would have asserted allegations which are not within its knowledge. For these reasons respondent’s objection stands to fail.

Dispute of facts:

[10] The question for determination under this point of law is whether in the total reading of the parties’ pleading there are any material dispute of facts

which cannot be dealt with on motion. His Lordship Innes CJ in **Frank v Ohlsson's Cape Breweries Ltd 1924 AD 289** at 294 stated:

“The first question which arises is whether the application is one which should have been granted on motion. Now it is a general rule of South Africa practice that when the facts relied upon are disputed an order of ...will not be made on motion: the parties will be ordered to go to trial. The reason is clear; it is undesirable in such cases to endeavour to settle the dispute. It is more satisfactory that evidence should be led and that the Court should have an opportunity of seeing and hearing the witness before coming to a conclusion. But where the facts are not really in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage of dealing with the matter by the speedier and less expensive method of motion.”

The above expounded position of our procedure is often determined by the question; will referring the matter to trial disturb the equilibrium? If the answer is in the negative, the matter ought to be decided on motion. It goes without saying that should the response be in the affirmative, *viva voce* evidence should be allowed. This calls for me to refer to the pleadings by the parties as a whole in order to ascertain whether the probabilities stand to be shifted or not.

Ad merits

[11] In making a determination of the question of dispute of fact, one must also resort to the nature of the order sought. The applicant has sought for a *mandament van spolie* order. **Kramer v Trustees Christian Coloured**

Vigilance Council, Grassy Park 1948 (1) SA 748 at 753 Herbstein J stated of the requisite for an order of spoliation:

“It is trite law that in order to obtain a spoliation order two allegations must be made and proved, namely,

(a) that applicant was in peaceful and undisturbed possession of the property, and

(b) that respondent deprived him of the possession forcibly or wrongfully against his consent.

[12] His Lordship Ebrahim JA in **Gibson Ndlovu v Sibusiso Dlamini and Another Civil Case No. 30/2001** with reference to **Blue Ranges Estates (Pty) Ltd v Muduviri & Another 2009 (1) ZLR 368** wisely stated at paragraph 3:

“However, because a spoliation order is not interlocutory in its effect, but final, it is not enough to show a prima facie right. A clear right to be restored to the possession of the property must be established.

[13] Has the applicant established a clear right or should I ask in the light of the allegation by respondent that there is a dispute of fact, is there a dispute as to the clear right over the property in issue?

[14] The applicant deposed:

“12. On Lot 609, which is registered in the name of the applicant, the late Raphael Sabelo “Skye” Kunene was running an unregistered block yard business and he was also using the trucks which are registered in the name of the applicant for this business.”

13. *When the applicant was bought in 2013 it took possession of the property, the movables registered in the name of the applicant being trucks and motor vehicles, the tools and machinery in the garage. All other items that were in the personal name of the late Raphael Sabelo “Skye” Kunene were taken by the executor and given to the first respondent. This includes trucks and other front loaders which were used by the deceased in his block yard business.*
14. *The first respondent is not happy with his inheritance and also wants items that are registered in the name of the applicant which we as directors cannot allow. The first respondent has been threatening, intimidating us, the applicant’s employees, and our service providers with his group about the applicant’s assets. On the 13 of July, 2014 we then realised that the first respondent was using the applicant’s trucks and we then took its keys. Ever since that day the first respondent did not use the trucks and they were parked in the applicant’s premises.*
15. *On the 13 of August, 2014 at around 0900 hours the first respondent came to the applicant’s premises with about five other unknown men who threatened with violence the applicant’s security guard Mr. Nhlanhla Mamba to open the gate for them. In fear of his life Mr. Mamba opened the gate and the first respondent with his men fiddled with the applicant’s trucks and managed to start them without keys and drove them away to a business plot owned by Women United in Matsapha Industrial Site. This has now led to the current proceedings.”*

The first respondent answered:

- “4.5 *It is noteworthy that the trucks in issue in these proceedings, despite being registered in the name of these companies (the applicant in particular) were not part of the assets sold to applicant.*
- 4.7 *It is noteworthy that the trucks in issue herein, despite being registered in the name of applicant, were sold as part of the block yard business to the first respondent by Mr. Manzini.*
- 4.11 *On or about the 13th July 2014, one Ntombifuthi Mabuza , who is one of the directors of the applicant took the keys of the truck in issue herein from the employees of the block yard who were using the trucks allegedly because the said employees were abusing the trucks.*
- 4.12 *After taking the keys of the trucks, albeit without any court order and authority from the executor of the estate and /or myself, applicant’s shareholder Mabuza Ntombifuthi wrote a letter to Mr. Manzini whereat she documented her basis for taking the keys.*

4.16 *Accordingly, at the hearing of the matter it would be contended that applicant is the one who spoiled me by taking the keys and that when I went to take the trucks, I was acting on authority from the executor of the estate Mr. Manzini.*

It would also be contended that applicant did not have authority to take the keys in the first place when Make Mabuza took the keys, she defied the authority of the executor to return the keys and that applicant was not in possession of the trucks when I took them but they were only on its yard which was used as the block yard.

12.5 *The honourable court is implored to take notice that what is in possession of the applicant albeit without my permission nor that of the executor, are the keys of the trucks not the trucks themselves. To date, applicant continues to be in an unlawful possession of the keys of the trucks.”*

[15] From the preceding pleadings by both parties, the following are not in issue:

1. That the trucks were registered in the name of the applicant.
2. That at all material times, the trucks under issue were in the premises of applicant.
3. That the applicant ordered first respondent to vacate its premises and first respondent duly complied. That he removed all assets in the name personal of estate late Raphael.
4. That the trucks were left behind because the keys were in the physical possession of applicant.
5. That first respondent removed the trucks without the use of their keys as they were still in possession of applicant.

[16] One may pause here to juxtapose the present case with the one dealt with by his **Lordship Herbstein** in **Krammer** *supra*. The appellant, by agreement of the respondent used its premises to run some cinematographic exhibition business. The duration of the contract was perpetual. The respondent then gave notice to the appellant to vacate the premises within six months. The appellant did not oblige when the time came. The respondent locked the premises. The appellant rushed to court for an order of spoliation on the basis that it had been in peaceful and undisturbed possession. The court dismissed the application for want of a clear right. It held that upon notice to vacate, appellant had no right over the property.

[18] It appears to me that it is insufficient to establish peaceful and undisturbed possession in orders for spoliation. There must be proof of a clear right. The rationale for this was eloquently outlined by the honourable Justice **Ebrahim JA** in **Gibson Ndlovu** *supra*, namely, “...because a spoliation order is not interlocutory in its effect, but final...”

[19] Similarly *in casu*, upon notice to first respondent to vacate the premises, his right to possession of the trucks ended. Applicant, in other words, became in peaceful and undisturbed possession over the *merx*. Applicant was therefore despoiled when first respondent removed the two trucks from applicant’s premises. What exacerbates this case is that for all intent and purposes, the applicant has a better titled over the two trucks by reason that they are registered in its name, a fact admitted by the first respondent himself.

[20] The applicant laments first respondent removal of the trucks through the use of unorthodox means. First respondent sent five men to remove the trucks without the use of their keys and this averment is admitted by first

respondent who attested that the executor, Mr. Manzini advised him “*to employ whatever means*” in order to secure possession of the trucks. This on its own goes to establish that at the time of the removal of the trucks, applicant was enjoying peaceful and undisturbed possession. I appreciate that first respondent asserted that he did so because applicant first despoiled him by taking the keys from his employees. However, no application or counter application was filed by first respondent to this court in support of his allegation that the applicant first despoiled him. That as it may, this assertion by first respondent cannot sustain in view of the clear right in favour of applicant of the *merx*.

[21] In the totality of the above, it is my considered view that there is no dispute of facts warranting the matter to be referred to trial and the applicant has established a clear right in order to sustain the order for spoliation.

[22] In the premises, I enter the following orders:

1. The rule nisi granted on 15th August 2014 is hereby confirmed;
2. First respondent is ordered to pay cost.

M. DLAMINI
JUDGE

For Applicant : D. Jele of Robinson Bertram
For Respondents : S. Madzinane of Madzinane Attorneys