



**JUDGMENT**  
**21 MARCH 2014**

[1] This is an application for spoliation brought on a certificate of urgency. The applicant seeks an order that the first respondent be directed and ordered to restore the undisturbed possession and control of the matrimonial home situated in plot No. 2593 Thembelihle Township in Mbabane with immediate effect. He further seeks an order directing the first respondent to forthwith handover the keys to all external doors and the remote control of the main gate of the matrimonial home situated in plot No. 2593, Thembelihle Township in Mbabane to the applicant. He also seeks an order that in the event the first respondent refuses to restore possession, the deputy sheriff be directed to engage the assistance of the police to ensure that the restoration of possession of the matrimonial home is done in a peaceful manner, and, in the process maintaining peace between the parties. The applicant prays for an order for costs.

[2] It is common cause that the applicant and first respondent are married to each other by civil rites in community of property. The marriage was solemnised on the 2<sup>nd</sup> August 1990. Two children were born of the marriage, namely, Sandy Manser, a major who has already established his residence at Ezulwini; and, Imaine Manser, an adult, who still resides in the

matrimonial home. The parties have been living together in the matrimonial home for the past twenty-six years.

- [3] It is not in dispute that on the 7<sup>th</sup> March 2014, the first respondent, in the absence of the applicant, packed his clothes into seven suitcases and placed them outside the house, that she interfered with the locks to the house and the guest cottage as well as the remote control for the sliding gate. According to the applicant, the set of keys which he had couldn't open the house and guest cottage and, the sliding gate could not respond to the remote control. The first respondent on the other hand denied changing the locks and contended that all she did was to take precautions and fitted gadgets on the keyholes. Notwithstanding these varying contentions, it is clear from the evidence that the first respondent made alterations to the remote control of the main gate, the keyholes of the main house as well as the guest house; these alterations made it impossible for the applicant to gain access to the premises. Furthermore, it is not disputed that after packing the suitcases, she called the police and informed them what she had done; she further asked the police to phone the applicant and advise him to come and collect the suitcases otherwise she would burn them. It is further not in dispute that after packing the clothes into the suitcases and calling the police, she switched off her cellphone and left the house. The conduct of the first respondent on the 7<sup>th</sup> March 2014 is inconsistent with the

contention by the first respondent that the applicant had consented to moving out of the house; and, it is certainly not supported by the evidence.

[4] It is apparent from the evidence that the applicant had been living in the matrimonial home for the past twenty six years until he was unlawfully evicted by the first respondent without a Court Order. She certainly took the law into her own hands. A lot that is said by the first respondent in the opposing affidavit is irrelevant for purposes of spoliation proceedings. The first respondent spent a lot of time in the opposing affidavit trying to show that their cohabitation was intolerable, unbearable and abusive to the extreme. These factors are only relevant in divorce proceedings or in an action for judicial separation. It was open to the first respondent to institute legal proceedings against the applicant for judicial separation pending the finalization of the divorce action if she felt that continued cohabitation with the applicant was risky, abusive or intolerable. However, the first respondent has the opportunity to deal with these issues during the pending divorce action.

[5] It is not in dispute that the applicant instituted divorce proceedings against the first respondent on the 23<sup>rd</sup> October 2013 on the basis of adultery and that a month later the first respondent locked out the applicant from their bedroom. It is also not disputed that after the lock-out, the applicant had

been living on the guest cottage until such time that he was unlawfully evicted by the first respondent. The first respondent has not bothered to deny the allegation by the applicant that she had threatened to burn the suitcases if he did not collect them; this allegation contradicts the contention by the first respondent that the applicant moved out of the house by consent.

[6] The principles governing spoliation proceedings are well-settled in our law. 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 restate these principles as follows:

**“17. It is trite law that the essence of the “*mandament van spolie*” 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 by restraining persons from taking the law into their own hands and by 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 asserts a claim to 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 this 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....”**

[7] The applicant has proved spoliation on a balance of probabilities, and, that he is entitled to the order sought. The status *quo ante* is intended to restore possession of the premises to the applicant. This entails that the parties reside together on the premises until the dissolution of their marriage wherein the court would give a direction on the proprietary consequences of the marriage. This order is not intended to deprive the first respondent of possession of the premises as alleged by the first respondent.

[8] Accordingly, the following orders are made:

- The first respondent is directed to restore undisturbed possession and control of the matrimonial home situated on plot No. 2593, Thembelihle Township in Mbabane to the applicant with immediate effect.

- The First respondent is directed to forthwith hand over the keys of all external doors and the remote control of the main gate of the matrimonial home situated on plot No. 2593, Thembelihle Township in Mbabane to the applicant.
- It is further ordered that in the event the first respondent refuses to restore possession of the matrimonial home, the second respondent is directed to assist the deputy sheriff to enforce the restoration of the premises to the applicant in a peaceful manner and in the process maintain peace between the parties.
- No order as to costs.

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

For Applicant

Attorney Bongsi Magagula

For First Respondent

Attorney Sipho Nkosi

For Second and Third Respondents

Crown Counsel Dolly Shongwe