



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case 730/15

In the matter between:

COSHIWE MATSENJWA AND SEVEN OTHERS

Applicants

And

**THE REGIONAL ADMINSTRATOR AND SIX
OTHERS**

Respondents

Neutral citation: *Coshiwe Matsenjwa and Seven Others vs The Regional Administrator and Six Others (730/15) [SZHC 08] 19th February 2016)*

Coram: **MAPHALALA PJ**

Heard: **29th May, 2015**

Delivered: **19th February 2016**

For Applicants: **Advocate L. Maziya
instructed by the offices of Malinga and Malinga Inc.**

For Respondents: **Mr V. Kunene
Senior Crown Counsel at the Attorney- General's Chambers**

Summary: Civil Procedure – Application for an order of **mandament van spolie** interdict – Respondent’s contends this court has no jurisdiction to decide the matter – as it falls to be decided in terms of Swazi law and custom - this court finds it has jurisdiction – grants the interdict with costs.

JUDGMENT

The Application

[1] On the 20th May, 2015 the Applicants filed an Urgent Application against the Respondents for an order of an interdict **mandament van spolie** as follows:

1. **Dispensing with the Rules of this Honourable Court relating to time limits, forms and service of process and hearing this matter on the basis of urgency.**
2. **Directing the Respondents to restore possession of the underlisted building material to the 1st Applicant forthwith to wit:**
 - **68 x 1BR corrugated iron sheets**
 - **20 x reinforcements**
 - **20 x large roof timber**
 - **30 x small roof timber**
 - **2x large window frames**
 - **6 x gable imigogodla**
3. **Directing the Respondents to pay the costs of this Application on the attorney and own scale, such costs to include Counsel’s fees duly certified in terms of rule 68 (2) of the Rules of The High Court which costs are to be paid by the said Respondents jointly and severally, the one paying the others to be absolved.**
4. **Further and / or alternative relief.**

- [2] The Application is founded on the affidavit of the 1st Applicant one Coshiwe Matsenjwa who related at great length the sequence of events in the dispute between the parties. The other Applicants filed confirmatory affidavits to the Founding Affidavit of the 1st Applicant.

The Opposition

- [3] The Respondents oppose the Application and have filed the Answering Affidavit of the 1st Respondent one Sylvia Mthethwa who is the Regional Administrator of The Lubombo Region addressing a point of law on jurisdiction. That the court has no jurisdiction and then canvassed a defence on the merits of the Application. A confirmatory affidavit of one Ernest Dlamini who is a Rural Development Officer in the Lubombo Region is filed in support thereto.
- [4] The Applicants then filed a Replying Affidavit of one Solomon Matse who is cited as the 2nd Applicant to the averments in the Answering Affidavit of the Respondents.

The Background

- [5] The facts of the dispute are outlined at paragraph 11 to 12.6 of page 9 of the Founding Affidavit to be the following:

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11.1 A couple of weeks ago I was approached by the 2nd - 8th Applicants in their capacities as members the development committee of our area to allow them to use the yard at my homestead to put certain

building material that was to be used to complete the construction of a community hall which is about 100 meters away. These items consisted of corrugated iron sheets, timbers, window frames, amongst others. Since this was a community project that was going to be of benefit to all the members of the Mhlabubovu area, my family included, I agreed. They made an earnest appeal to me to keep a watchful eye over these items.

11.2 From that time I had always been in peaceful and undisturbed possession of those items. Even the builder would come every morning to ask for any material that he was going to sue that day and would bring back whatever remained during knock-off time.

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12.1 On Friday the 15th May 2015 whilst I was sitting at my homestead there came a lot of motor vehicles including a Police van. The occupants all alighted and came to me. There were about seven Police Officers, five of whom were in uniform, and they were all armed with guns. I got extremely terrified. They told me that they had been sent by the law (*“batfunywe ngumtsetfo”*) to collect all the building material in my yard. I responded by telling them that I had been asked by the 2nd to 8th Applicants to keep a watchful eye on these items and I was therefore not going to allow them to take them away in the absence of the members of the committee.

12.2 They then moved a distance away to caucus amongst themselves. When they came back they told me that they had considered what I had said but they would be failing in their duties if they left the items behind.

12.3 I then asked them to at least show me any document authorizing them to take these items which I could at least show to the committee members when they ask me about the whereabouts of the said items.

12.4 The response that I got was that I should tell the committee members that the items had been collected by “messengers of the law” (“*titfunywa temtsetfo*”).

12.5 The chiefdom’s “*bucopho*” one gobovu amos Mbhamali, who had come with them, tried to reason with these people but to take the items in the absence of the committee members but they did not listen to him. They the loaded all the items in a big truck and left.

12.6 I later established that these people included the 3rd an 4th Respondents whom I was seeing for the first time.

[6] The attorneys of the parties advanced their arguments before this court on 29 May, 2015 and filed Heads of Arguments on both sides. I am grateful to both attorneys. I shall in brief outline the salient features of these arguments in the following paragraphs of this judgment.

[7] I must mention that I shall commence with the arguments of the Respondents on account of the points **in limine** to the effect that the court has no jurisdiction to hear the matter. That only the customary law is applicable in the determination of this matter.

(i) The Respondent's Arguments

[8] The attorney for the Respondent Mr. Kunene advanced arguments and filed Heads of Arguments stating the background of the case as. In the said Heads of Arguments, dealt with a number of topics being Respondents submission on the spoliation in paragraph 2 thereof. In paragraph 3 dealt with the issue of the Land Management Board. In paragraph 4 dealt with the issue of disputes of fact citing decided cases on the subject being the case of **Mbombo Dlamini vs Chief Hynd Dlamini Court Case No. 1773/14 and that of Plascon Evans Ltd vs Van Riebeeck (Pty) Ltd 1984 (3) SA.**

[9] In paragraph 5 thereof dealt with the issue of jurisdiction to the following argument:

“It is Applicants’ submission that they are challenging the appointment of the Chief even though they want to proceed with the construction under his jurisdiction. This is a Chieftaincy dispute couched as spoliation. The Applicants are refusing to be allocated land by the Chief simply because they do not recognize him. If teg Court were to grant the spoliation in this matter, the chief on whose land Umphakatsi the hall is constructed will suffer prejudice in that the Applicants will continue disrespecting the Chief to the prejudice of His Majesty’s appointment. Further the material being utilised which is also government property will go to drain as the hall will be demolished and be allocated land as soon as the Applicants agree to conform to His Majesty’s appointment. The court is referred to the case of Aaron Mkhondvo Dlamini vs The Commissioner of Police Civil Appeal 3/2011.”

[10] The final argument advanced by Mr Kunene is that Applicant should had taken the matter up with the higher traditional authorities to report the stoppage of the

construction this is where all the issues will be ventilated including giving directions on what should happen.

(ii) The Applicants' Arguments

- [11] The attorney for the Applicant filed two sets of Heads of Arguments being the main Head of Arguments filed on the 27th May, 2015 followed by Supplementary Heads of Arguments on urgency and the point on jurisdiction.
- [12] In the main Heads of Arguments Advocate Maziya dealt with the contention that his clients have fulfilled all the requirements for the granting of **mandament van spolie** interdict citing the provisions of the Constitution in section 33 (1), 35, 38 and 141 (2). Further that 1st Respondent did not have the power to order the removal of the items from the 1st Applicant since no such power can be inferred from the enabling legislation ie – The Regional Council Order 1978 and Part 1 (a) of Chapter VII of The Constitution.
- [13] In the Supplementary Heads of Arguments Advocate Maziya dealt with the issue of urgency in paragraph (A) citing a plethora of decided cases
- [14] In paragraph 9 to 10 thereof dealt with the issue of jurisdiction and in paragraph 9 contends the following:

It is submitted that this Honourable Court does have the requisite jurisdiction to deal with this matter since the cause of action is spoliation i.e - the mandament van spolie. This being a Roman Dutch concept it is submitted that there is no entity under Swazi law custom which has the jurisdiction to determine its applicability since the only entity under custom that has power to administer justice i.e. the Swazi Court structure

is enjoined by the enabling legislation i.e The Swazi Court Act No. 1950 to apply Swazi land and custom. Section 11 of that Act provides as follows:

“---subject to the provision of this Act as Swazi Court shall administer –

- a) The Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provision of any law in force in Swaziland.
- b) the provision of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79/50 or any law repealing or replacing the same and in force within the area of jurisdiction of the Court;
- c) The provisions of any law which the Court is by under such law authorised to administer.”

[15] In paragraph 11 to 13 Advocate Maziya then dealt with the issue of costs citing a number of decided cases on the subject. That the court should grants costs at a punitive scale in the present case.

The Court’s analysis and conclusions thereof

[16] Having considered all the papers and the arguments of the attorneys of the parties I shall first deal with the preliminary points raised by the Respondents and if I find against such points to then address the merits of the matter being the Application for **mandament van spolie** by the Applicant. I must mention that at the commencement of the arguments of the attorneys I enquire from them whether I can hear this matter as a single Judge in view of the issue of jurisdiction which touches on the provisions of the Constitution of Swaziland. Both Counsel took the position that this court can decide this matter as it is presently constituted.

The preliminary points

- [17] On the first point raised by the Respondent that of urgency the attorney for the Respondent Mr Kunene during arguments indicated that he was not disputing that the matter was urgent but was taking the point that the Applicants had stated in their founding papers that they could not be afforded substantial redress at a hearing in due course.
- [18] I have considered all the arguments of the parties to and fro and I am persuaded by the arguments of Advocate Maziya at paragraphs 1 to 8.1.2 of the Applicants Supplementary Heads of Arguments. Furthermore in view of the time that elapsed since the attorney advanced arguments I do not think this point of law is now of no consequence. I have considered the Application in the long term.
- [19] Coming to the second point raised by the Respondent that the Land Management Board (LMB) has not been joined as a party in these proceedings. I have considered all the arguments of the attorneys of the parties in this regard it had appeared to me that this point also fails. In this regard I am persuaded by the averments of the 2nd Respondent Solomon Matse in the Replying Affidavit at paragraphs 6 to 6.1 to the following:

Contents of these paragraphs are noted. My committee was never party to any meeting that was convened by the Land Management Board, (LMB). I note that the meeting is said to have been held in 2009 at Chief Loyiwe's Umphakatsi. That meeting could not have stopped the construction of the community halls as that project had long been halted by the shortage of building material in 2006. It is therefore incorrect that the abandoned the project pursuant to advice by the Land Management Board.

6.1 It is surprising how the Land Management Board have attended a meeting of this nature at Chief Loyiwe's Umphakatsi since at that

time (i.e 2009) all legitimate community meeting were held at Bhekizwe where the Late Ngongolwane had established the area's Umphakatsi following Chief Loyiwe's death. It was at Bhekizwe where Ngongolwane introduced Malima's rival, Gume Maziya, to the Maphungwane residents in 2005. Maliwa was only appointed in 2010 thus it is inconceivable that such an important meeting could have been held at Chief Loyiwe's residence, when the well known Umphakatsi was at Bhekizwe.

- [20] On the above I find that the point raised by the Respondent cannot succeed.
- [21] Now I come to the point of law of jurisdiction to the legal proposition that this court cannot hear this matter as it falls to be determined under Swazi law and custom.
- [22] In this regard the Respondents have advanced arguments at paragraph 5 of Mr. V. Kunene's argument reproduced at paragraph [9] of this judgment.
- [23] On the other hand the attorney for the Applicants contends at paragraph 9 of Advocate Maziya's Heads of Arguments that this court does have the requisite jurisdiction to deal with the matter since the cause of action is an interdict i.e. **mandament van spolie**. That being a Roman Dutch concept and there is no entity under Swazi customary law which has the jurisdiction to determine its applicability. In this regard Advocate Maziya stated the following:

It is submitted that this Honourable Court does have the requisite jurisdiction to deal with this matter since the cause of action is spoliation i.e - the mandament van spolie. This being a Roman Dutch concept it is submitted that there is no entity under Swazi law custom which has the

jurisdiction to determine its applicability since the only entity under custom that has power to administer justice i.e. the Swazi Court structure is enjoined by the enabling legislation i.e The Swazi Court Act No. 1950 to apply Swazi land and custom. Section 11 of that Act provides as follows:

“---subject to the provision of this Act as Swazi Court shall administer –

- a) The Swazi law and custom prevailing in Swaziland so far as it is not repugnant to natural justice or morality or inconsistent with the provision of any law in force in Swaziland.
- b) the provision of all rules or orders made by the Ngwenyama or a Chief under the Swazi Administration Act No. 79/50 or any law repealing or replacing the same and in force within the area of jurisdiction of the Court;
- c) The provisions of any law which the Court is by under such law authorised to administer.”

[24] After assessing all the arguments of the parties in this regard I am persuaded by what is submitted by Advocate Maziya at paragraphs 9, 9.1.1 to 9.2 in his Heads of Arguments. The Applicants are alleging an infringement of their rights conferred upon the High Court by sections 14 (2) 33 (1) and 35 (1) and (2) as well as section 151 (2) of the Constitution of Swaziland all these clauses are not excluded by section 181 (8) since that clause specifically confirms itself to 151 (1) section 38 provides the following:

“---Notwithstanding anything in this constitution, there shall be no derogation from for the enjoyment of ----

(b) the right to fair hearing -----

(d) the right to an order in terms of section 35 (1)

[25] I agree with the arguments of Advocate Maziya that the first part of the foregoing section (i.e section 38) means that the enjoyment of these rights and freedom, should not be infringed upon notwithstanding the provisions of section 151(8). Further Advocate Maziya states the following at paragraph 9.2.2.1 :

It is submitted further that in so far as it may be said that these sections (i.e 14(2), 33(1), (2) and 151(2) are in conflict with Section 151 (8) on jurisdiction, it is Section 151 (8) that should give way since the first three sections are in the Bill of Rights. Such clauses always prevail in the event of conflict with a clause that falls outside the Bill of Rights. The Ugandan case of RWANYRARE & OTHERS vs ATTORENY GENERAL (2004) AHRLR 279 (Ug cc 2004) the Uganda Constitution Court had occasion to deal with such conflict and resolved it thus at p.281 of the judgment:

“-----Where human rights provisions conflict with other provisions of the constitution, human rights provisions take precedence and interpretation should favour enjoyment of human rights freedoms.”

[26] In the totality of the arguments advanced by Advocate Maziya on the jurisdictional threshold I have come to the considered view that this court does have jurisdiction to deal with this matter and grant the Applicants relief.

The merits

[27] Having considered all the papers and the arguments of the attorneys of the parties in this Application the Applicants are seeking an order directing the Respondents to restore possession of certain building material that they were deprived without due process on the 15 May 2015. The essence of the Respondents defence is that the Applicants do not pay allegiance to Chief

Maliwa, in that they failed to observe protocol in their endeavours in completing the community hall. That the community hall is under the full control and supervision of Chief Maliwa. That a community development shall be undertaken only after consultation with the consent of the said Chief.

[28] In this regard the Respondent rely on a meeting that was held in 2009 at Chief Loyiwe's Umphakatsi at paragraph 4 to 5 of the Answering Affidavit. However, according to the Applicants that meeting could not have stopped the construction of the committee hall as that activity had long been halted by the shortage of building material in 2006 that it is incorrect that the Applicant abandoned the project pursuant to advise by the Land Management Board according to paragraph 6 of the Applicants' Replying Affidavit.

[29] However, that as it may in law in such applications all that an Applicant must show is that he was in peaceful and undisturbed possession of the property complained of and that he was dispossessed without due process. (See **Silberberg and Schoeman, The Law of Property 2nd Edition at page 138**. It is also trite law that in such applications the respective rights of the parties to the property in issue is not part of what the court is to consider. It also trite law that such interdicts are granted **ante omnia** that is "before any other thing".

[30] The learned authors **Olivier et al** in their legal textbook **Law of Property, 2nd Edition at page 182** state the following on the subject:

"The uniqueness of mandamus van spolie has for its application for its application. Apart from the requirements for the remedy and the acceptability of defence, there are a few applications by which the unique purpose and function of the remedy are emphasized.

- (a) **Since the mandament is aimed at the preservation of existing control relationships, all extra-judicial takings of existing control through self-help are affected by it, even when they are authorized by statute. As a result statutes of this nature are interpreted restrictively.**

- (b) **Since the mandament maintains public order against unlawful self-help, the government is subject to it. The government can of course avail itself of the same defences that at the disposal of any other respondent, among other considerations by which the action concerned is justified, such as urgent and immediate date to the state. The mandament can be excluded by statute, as was done to a large extent by means of the inclusion of section 3B in the Prevention Illegal Squatting Act 52 of 1951. In principle, however the government is also subject to the mandament van spolie, and statutory measures which curtail or suspend its functioning will be interpreted restrictively. It is also expected that the procedures and conditions of the authorizing act be adhered to strictly to prima facie unlawful self-help and spoliation is to condone on the authority of an act.**

- (c) **The courts have repeatedly emphasized that agreements which purport to justify the taking of control by means of self-help are against the public interest and void. This has been applied in the case of lease which grants the lessee of his right to enter the lease premises without legal procedure, a contract which authorizes the seller to repossess the thing without legal procedure and a lease which grants the lessor the right to repossess the lease object without legal procedure.”**

[31] On the papers before court is without question that the Applicants were in peaceful and undisturbed possession of the building materials at the time they were taken away. There was never any court order directing such

dispossession. According to the above legal authority of **Olivier (supra)** at paragraph [30] thereof since the **mandament** maintains public order against unlawful self help, the government is subject to it. The Government can of course avail itself of the same defences that are at the disposal of any other Respondents, among other considerations by which action concerned is justified such as urgent and immediate danger to the Crown.

[32] In the present case no such defences has been canvassed by the Respondent. The Respondents took the law into their own hands in the circumstances of the case.

[33] I wish to comment **en passant** that in this case a very old woman was despoiled of property under her care through the force of Police Officers and other officers in a situation that should not happen in our constitutional dispensation in this country.

[34] In the result, for the foregoing reasons on the merits of the case I am inclined to grant the Application in terms of the Notice of Motion, and it so ordered.

[35] On the question of costs I have considered all the arguments of the parties and in the exercise of my discretion levy costs on the ordinary scale.

STANLEY B. MAPHALALA

PRINCIPAL JUDGE

