



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Case No. 264/2012

In the matter between:

DAVID MALINGA

Applicant

And

BHEKI MALINGA

Respondent

Neutral citation: *David Malinga v Bheki Malinga* [264/2012] SZHC 72 [2017]
(19 April 2017)

Coram : **T. L. Dlamini J**

Date heard : 26 July 2016

Date of delivery : 19 April 2017

Summary: *Civil Procedure – Spoliation proceedings – Principles governing spoliation proceedings considered – Respondent took cattle from possession of the Applicant – The cattle were taken from the Shiselweni region and moved to the Manzini region – The Applicant reported the Respondent to the police for stock theft – Police could not cause the Respondent to be prosecuted because they believed that they would have a weak case – Applicant then approached this court for a spoliation remedy – A rule nisi was issued calling upon the Respondent to show cause why a final order should not be issued directing him to restore possession of the cattle to the Applicant.*

Held: *Applicant was despoiled of the cattle – Possession should first be restored to him – Rule nisi confirmed and Respondent ordered to also hand over to the Applicant the progeny of the cattle forming the subject matter of the proceedings.*

JUDGMENT

The Application

- [1] In February 2012 the Applicant filed an application under a certificate of urgency and sought, amongst others, the following prayers:
2. *That a rule nisi with immediate effect do issue calling upon the Respondent to show cause on Friday the 17th of February 2012 at 9.30 a.m. why an order in the following terms should not be made final;*

- 2.1 *That he restores ante omnia the cattle he took from Applicant's kraal at A1, Lavumisa in SHISELWENI on or about the 20th of December 2011 as listed in annexure "A" hereto.*
 - 2.2 *That the Sheriff be ordered to instruct members of the Royal Swaziland Police to give effect to this order.*
3. *That MENZI DLAMINI be appointed Deputy Sheriff to fetch the cows wherever they may be situate.*
4. *Costs of suit.*

[2] The facts as set out by Applicant in the founding affidavit are that he was in peaceful and undisturbed possession of 13 female cows which are described in an attached annexure marked "A". The attached annexure lists 3 black cows, 2 red and white cows, 1 brown black bullock, 2 red female calves, 2 black bullocks and 3 black and white female cows.

[3] The Applicant deposed that he was despoiled of the cattle by the Respondent on or about 20th December 2011 whilst the cattle were kept in his kraal at A1, Lavumisa in the Shiselweni District. The Respondent simply loaded them into a truck and moved them to Ngculwini.

[4] Applicant submitted that he never authorized a stock removal permit to be procured as the cattle were registered in his name and he did not procure one

either. As the person in whose name the cattle were registered, Applicant contended that he was to sign the stock removal permit.

[5] As background information, the Applicant stated that he was asked by the Respondent to keep two of his cows, a male and a female. Around 2008 the Respondent brought another cow with a calf. The cattle eventually multiplied to eight (8) in number.

[6] The Applicant further stated that he concluded an oral agreement with the Respondent to the effect that the Respondent was to pay Eight Hundred Emalangeni (E800) per month notwithstanding the number to which the cattle would have multiplied. It was agreed, according to the Applicant, that the Respondent was to pay for vaccine, food for labourers and grazing levies.

[7] The Applicant further stated that the Respondent did not pay even a cent of the agreed amount. On or about 30th November 2011, the Respondent requested the cattle and Applicant reminded him about the agreement and thereafter sent to him a fee note of E60 722.00. The Applicant stated that the Respondent requested to be given a few days to raise part of the money.

[8] It was submitted by the Applicant that whilst he was at work on the 20th December 2011, and without having had any further communication with the Respondent, the Respondent took away the cattle. He reported him to the

police for theft and the police advised the Respondent to return the cattle to the possession of the Applicant. The Respondent did not however, take heed of the police advise. The police then informed the Applicant that they will have a weak case in prosecuting the Respondent for stock theft. The Applicant therefore decided to institute the present proceedings.

[9] The Respondent gives a different version of the facts in his answering affidavit. As background information, the Respondent stated that they are members of the same family with the Applicant. The Applicant is an uncle to the Respondent. He therefore stated that keeping his cattle with the Applicant was not a strange arrangement.

[10] In summary, the Respondent deposed in the answering affidavit that he bought cattle from different farmers in the Lubombo Region and kept them at Applicant's farm. In total he bought 9 cattle and 5 calves were born whilst 2 of the cattle died. He further stated that the Applicant sold a total of 5 cattle without the Respondent's consent and knowledge. In a nutshell, the Respondent submitted that the Applicant utilized the progeny and some of the Respondent's cattle for his own benefit.

[11] The Respondent further stated that each time the Applicant took and used the Respondent's cattle, he would show to the herdboys replacement ones and also inform the Respondent as well. He also stated that in May 2010, with the assistance of his grandmother and aunt who are senior members of their

family, the Applicant was requested to give back to the Respondent the cattle. The Applicant agreed and the Respondent then furnished the Applicant with stock removal permits in order to expedite the process. The Applicant did not however, give back the cattle to the Respondent.

[12] The Respondent stated that following several meetings, he was then called by his uncle Sandla Malinga who informed him that the Applicant has authorized him to facilitate the removal of the cattle from the Applicant's kraal to the Respondent's custody. Acting on this information the Respondent then procured stock removal permits from Hlatsi and handed them to uncle Sandla Malinga to take to the veterinary officer of the local dipping tank for completion. After dipping day he received a call from Sandla who informed him that the cattle have been cleared to his name and that he must come to collect them. On the basis of this information he then proceeded to collect the cattle and left one behind as a token of appreciation.

[13] The Applicant denies that he granted authority to Sandla Malinga to facilitate the return of the cattle to the Respondent.

[14] For reasons unknown to me, the matter was not prosecuted until it was given a hearing date in November 2015. On the 18th February 2016 the court granted a *rule nisi* in favour of the Applicant. The Respondent was ordered to show cause on the 10th March 2016 why the following orders should not be made final:

- 2.1 That he restores *ante omnia* the cattle he took from Applicant's kraal at A1, Lavumisa in SHISELWENI on or about the 20th of December 2011 as listed in annexure "A" hereto.**
- 2.2 That the Sheriff be ordered to instruct members of the Royal Swaziland Police to give effect to this order.**
- 3. That WISEMAN DLAMINI be appointed Deputy Sheriff to fetch the cattle wherever they may be situate.**
- 4. Costs of suit.**

[15] On the return date for the rule, counsel for the Respondent submitted from the bar that the cattle died from drought. The court then ordered the parties to file supplementary affidavits regarding the submission made from the bar.

[16] Following two court appearances, the matter was postponed for hearing of arguments to the 21st April 2016. On this date an application for a postponement was made by attorney D.M. Dlamini who stood in for counsel Madzinane who appears for the Respondent. The application was opposed and counsel for the Applicant applied for a confirmation of the rule and that the Respondent be ordered to also hand over, under further relief, the progeny of the cattle to the Applicant. The court declined to confirm the rule on the basis that the Applicant had not served upon the Respondent a notice of set down. The matter was then postponed to the 28th April 2016 and the Respondent was ordered to pay wasted costs of that day.

[17] Following the postponement, a notice of set down was filed on behalf of the Applicant for an order that the *rule nisi* be confirmed with costs, and that under further relief the Respondent be ordered to hand over to the Applicant the progeny of the cattle in question.

The applicable law

[18] The principles governing spoliation proceedings have been stated in various authorities of this court. These proceedings are also referred to as *mandament van spolie* actions. In the case of **The Regional Administrator, Lubombo Region and 6 Others v Coshiwe Matsenjwa and 7 Others (15/2014)[2016]SZSC 13** (unreported) M.C.B. Maphalala CJ quoted a High Court judgment that he made and stated that the essence of spoliation proceedings is that:

“the person who has been deprived of possession must first be restored to his former possession 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.”

[19] The Honourable Chief Justice went on to state that in a spoliation application the Applicant must prove two essential requirements. 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 latter requirement to prove that he was deprived of his possession of the thing without a court order or against his consent.

[20] In a majority judgment of the Supreme Court his Lordship Ebrahim JA stated that for the second requirement, the respondent must allege and prove that he was deprived of possession forcibly or wrongfully against his consent.

Gibson Ndlovu v Siboniso Dlamini and Another (30/11) [2011] SZSC 36, para 2 (unreported)

[21] Hlophe J expressed the principle of a spoliation order in the following terms:

“The essence of a spoliation order is to ensure that no one is allowed to take the law into his own hands or put differently no one is allowed to resort to self-help. Furthermore, it is the essence of this relief that the merits are not as yet considered as the only issue to consider is whether from the facts the law was followed so as to ensure peace prevails.”

Shifa Investments (Pty) Ltd v Mormond Electrical Contractors (Pty) Ltd (1753/2013) [2014] SZHC 114, para 18 (unreported)

[22] The authors Stephen Pete *et al* in their book titled “**Civil Procedure: A Practical Guide**”, 3rd ed, Oxford University Press, 2016, state the following about the remedy:

“ A person’s ownership of property has nothing to do with a *mandament van spolie* as this is purely a possessory remedy brought to restore possession to a party who has been unlawfully deprived of it ... Even a thief in certain circumstances may obtain spoliation from an owner (if the possession was peaceful and undisturbed). The court does not examine the rights of ownership: the remedy merely restores the *status quo ante* (the situation that existed before).” (at page 477)

Applicant’s contention

[23] The Applicant contends that he was in peaceful and undisturbed possession of the cattle. On or about the 20th December 2011 he was despoiled of the cattle by the Respondent who simply loaded them into a truck and moved them to Ngculwini. He further contended that he never authorized the procurement of a stock removal permit as the cattle were registered in his name. He submitted that he needed to first clear them before they could be moved to another place or dipping tank. That process was however not followed.

Respondent’s contention

[24] The Respondent contends that the Applicant authorized and consented to the removal of the cattle from his possession. He submitted that the Applicant

first informed the Respondent that he is willing and ready to return the cattle and thereafter mandated Sandla Malinga to facilitate their return to the Respondent. The Respondent further contends that the Applicant also showed to the herdboys the cattle that were to be taken by the Respondent.

- [25] The Respondent submitted that he then went to collect the cattle from the Applicant's farm on the 4th January 2012 and that the herdboys are the ones who showed to him the cattle that the Applicant instructed them to give to the Respondent.

Issues for determination

- [26] The Respondent raised the issue of existence of dispute of facts as a point *in limine*. He submitted that the dispute of facts concerns the question of how the Respondent acquired possession of the cattle. According to the Respondent the cattle were cleared to the Respondent's name by the Applicant through his brother Sandla Malinga whom he authorized, and that the cattle were also shown to the herdboys by the Applicant.

- [27] A second dispute of facts relates to the time when exactly the alleged dispossession occurred. According to the Applicant it occurred on or about the 20th December 2011 yet the Respondent submitted that he collected the cattle on the 4th January 2012.

[28] A third dispute of facts relates to the question of whether or not the Respondent had agreed to the alleged payment of fees for keeping the cattle. This is an allegation which the Applicant makes but is denied by the Respondent.

[29] I am, however, of the view that the second and third dispute of facts interrogate the merits of the matter. The authorities referred to above are very clear that in spoliation proceedings the court restores possession before the merits of the matter are considered and determined. For this reason I will not labour myself by making any determination about these two dispute of facts. The only issue that is relevant and requires determination is the question of whether or not the Applicant authorized Sandla Malinga to facilitate the return of the cattle to the Respondent. This allegation is made by the Respondent but is denied by the Applicant. For purposes of this application, this is the contested issue that requires determination by this court. The question of ownership and title to the cattle are not relevant in these proceedings.

[30] It is settled that where a dispute of facts arises in application proceedings the matter may either be referred to trial or oral evidence on a specific point or that it may be dismissed if the dispute of fact was foreseeable at the time when the proceedings were instituted.

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1162 and 1168.

Herbstein and Van Winsen, “The Civil Practice of the Supreme Court of South Africa, 4th ed, Juta and Company Ltd, p. 383

Rule 6 (17) and (18) of High Court Rules

- [31] Counsel for the Respondent argued and persuaded the court to act in accordance with the latter option and dismiss the application with costs.
- [32] It is also settled that not every matter where there is a dispute of fact may not be resolved on the papers filed in court. According to the Plascon Evans rule as expressed in the case of **Plascon – Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 at 634**, it is not every dispute of fact that would necessitate a resort to oral evidence in order to resolve as there are instances where a matter would be decided on the papers irrespective of the dispute of fact.
- [33] The starting point for me is to determine whether or not this dispute of fact can be resolved on the papers before court or it requires to be referred to trial or oral evidence. I will do so by first setting out events that took place concerning this matter, and thereafter by examining evidence gathered from official records that relate to the movement of cattle from one dipping tank to another.

[34] This matter was brought to court in February 2012 but ended up gathering dust after pleadings were closed in May 2012. The Judges' entries on the file reflect that on the 10th February 2012 the matter was postponed by consent of the parties to 17th February 2012. On the 17th February 2012 the matter was removed from the roll for non-appearance of the parties. On the 2nd March 2012 it was then referred to the Registrar for allocation of a hearing date. Eventually it was allocated the 11th of November 2015 as the hearing date. It however did not proceed on this date as counsel for the Respondent was held up before the Supreme Court. Consequently, it was postponed to the first session of 2016.

[35] The next hearing date was 18th February 2016 wherein a *rule nisi* was issued by this court. A dispute of fact then arose concerning the issue of whether or not the cattle died or were transferred from the Respondent's Dipping Tank called Mhlamati Dipping Tank No.502 located in Ngculwini and moved to Luve, Mabuti Dipping Tank No. 407.

[36] On account of the dispute referred to above, the veterinary officers of the two aforementioned dipping tanks were ordered to file affidavits detailing all information concerning the existence or non-existence of the cattle, and their removal and movement from one dipping tank to another. They complied with the order and filed detailed affidavits, including copies of permit register books, dipping cattle register and stock removal permits that were procured and issued in respect of the removal and movement of the cattle from one dipping tank to another.

- [37] The veterinary officer for Mhlamati Dipping Tank No. 502 in Ngculwini where the Respondent's kraal is located stated on affidavit that on the 20th December 2012 a herd of 13 cattle is recorded to have been moved from Sitilo in the Shiselweni region from the kraal of David Malinga who is the Applicant herein to the kraal of Bheki Malinga who is the Respondent herein. On the basis of this information, it is the court's finding that the cattle were taken from the kraal of the Applicant and moved to the kraal of the Respondent.
- [38] A copy of a permit register book was attached by the veterinary officer and marked as annexure "AG1". This permit register book reflects the following information; Date, Permit Number, Name of Applicant, Name of origin, Tank Area of Origin. Tank Area Number, Region, Owner of Destination, Tank Area of Destination, Tank Area Number of Destination and Region of Destination.
- [39] The permit register book reflects that on 20/12/2012 permit number 293497 which was applied for by Bheki M.T. Malinga (therein stated as the applicant) was used to receive cattle whose place of origin is the kraal of David Malinga (the Applicant herein) from tank area Sitilo number 710 in the Shiselweni region. It also reflects that the owner of the kraal of destination is the applicant who is recorded as Bheki M.T. Malinga. The tank area of destination is Mhlamati dipping tank area number 502 under Manzini region.

[40] From the information stated above, it is clear that the stock removal permit that was used to move the cattle from the Applicant's kraal was applied for and procured by the Respondent. The aforementioned Sandla Malinga does not appear to have played any role in the removal and movement of the cattle from the Applicant's kraal to that of the Respondent. The name of Sandla Malinga does not feature anywhere in the records to indicate that he is the person who was authorized (by the Applicant) to facilitate the removal of the cattle. I accordingly do not find it to be true that Sandla Malinga cleared the cattle to the name of the Respondent.

[41] In addition to the above, the founding affidavit deposed to by the Applicant states that the Applicant never authorized a stock removal permit to be procured and that he did not procure it either. He emphasized that he had to sign the stock removal permit because the cattle were registered in his name. In answer to this averment the Respondent stated in the answering affidavit that the stock removal permit is completed by the veterinary officer and the person who represents the other person (registered owner). He answered in the following words:

“8.3 Furthermore, it is denied that applicant had to sign the stock removal permit. It is completed by the veterinary officer and the person who represented the other and/or came to register it, only (sic) registers his identity not that there is provision for signature.”

[42] If the above quoted answer by the Respondent is correct, then the finding that I made and stated in paragraph 40 above is confirmed. Sandla Malinga does not appear in the official records submitted by the veterinary officer as the person who facilitated the removal of the cattle. The version given by the Respondent is therefore proved to be incorrect and untruthful in my view and finding.

[43] If for some reason my finding as stated in the above paragraphs is incorrect, I rely on the other evidence placed before court because it brings about the same result. The Applicant states in his founding affidavit that when the Respondent took the cattle he reported him to the police for stock theft. Below I quote him verbatim:

“

15.

To my surprise whilst I was at work on the 20th December 2011 he came to take the cows and I duly reported him to the police for theft who charged him for taking the cows without authority.

16.

He was asked to return the cows to my possession before the end of January 2012. He has not done so to date and the police are saying they will have a weak case in prosecuting him for stock theft hence the present application.”

[44] In response to the above allegation the Respondent stated in his answering affidavit the following:

“11. AD PARAGRAPH 15-16

Contents herein are denied and the applicant is put to strict proof thereof.

I submit that after the report by the applicant to the Sidvokodvo Police about the purported theft, the police convened a family meeting whereat it transpired that I did not steal the cattle and police directed that we go home and discuss the issue. It was at the police station whereat the applicant told the police in my presence that he was going to get a court order and I would pay and also lose my cattle.

Accordingly, it is denied that I was at any stage asked by the police to return the cattle.”

[45] From the above depositions it appears clearly that the cattle were taken from the Applicant without his consent and against his will. The fact that he went to the extent to reporting to the police the removal of the cattle from his possession is proof that the cattle were forcibly taken from his possession.

[46] The point of law that there is a dispute of facts on how the Respondent acquired possession of the cattle does not justify a dismissal of the application because the dispute is resolvable on the papers before court. The evidence

clearly shows that the cattle were forcibly taken from the Applicant's possession and without his consent.

[47] From the authorities referred to earlier on, the principle behind a spoliation proceedings is that possession of the thing must first be restored. The question of who is the rightful owner with a lawful title is determined after possession has been restored. The essence of the principle is that people must be induced to act in a lawful manner than to take the law into their own hands. In the circumstances, the Applicant is entitled to the relief he seeks. The merits of the case are not yet to be determined.

[48] The Applicant also made an application and prayed that under further relief the Respondent be ordered to hand over the progeny of the cattle to the Applicant. The affidavit of Lungile J. Mabiliso who is the veterinary officer for Mhlamati dipping tank where the cattle were taken to by the Respondent states that 10 calves were born from these cattle. On the other hand 9 cattle died and 2 were slaughtered.

[49] In my opinion the prayer is consistent with the case made and with the relief that is being sought. In this kind of proceedings the ownership and title to the cattle is not an issue for consideration. In my considered view, and I so find, the Applicant is entitled to the progeny of the cattle that were unlawfully taken from him.

[50] For the foregoing reasons, I make the following orders:

1. The *rule nisi* issued on the 18th February 2016 is hereby confirmed with costs.
2. Under further relief, the Respondent is ordered and directed to also hand over to the Applicant the progeny of the cattle which forms the subject matter of these proceedings.

T. L. DLAMINI
JUDGE OF THE HIGH COURT

For Applicant : M. E. Simelane

For Respondent : S. L. Madzinane