IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 294/2018

In the matter between:

Hlatshwayo Rosemarry Nomsa **Applicant**

And

Sikhatsi Dlamini **Respondent**

Neutral citation: *Hlatshwayo Rosemarry Nomsa vs Sikhatsi Dlamini* (294/2018) [2019] *SZHC 25* (*20 February 2019)*

Coram : T. L. Dlamini J

For Applicant : Mr S. S. Hlophe

For Respondent : In Person

Heard : 11 April 2018

Delivered : 20 February 2019

Civil procedure – Spoliation remedy – Principles thereof considered

Summary: *The respondent caused to be destroyed a drive way protection wall belonging to the applicant – The protection wall had been constructed adjacent to the respondent's property – The applicant now seeks a spoliation order directing the respondent to forthwith re-erect and restore the drive way protection wall which the respondent and/or his agents unlawfully demolished.*

Held*:* *That a spoliation order cannot be relied on when the property that was spoliated is destroyed or demolished. Application dismissed with costs.*

JUDGMENT

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[1] The applicant and the respondent are neighbours at Nkoyoyo in the Hhohho Region. According to the founding affidavit, both are under the jurisdiction of Chief Zembe Dvuba and each was allocated a piece of land on what is known as Swazi Nation Land. They were allocated the land next to each other.

[2] The founding affidavit states that the applicant constructed a drive way protection wall on her piece of land next to the respondent's property. The respondent owns an incomplete structure adjacent to the applicant's homestead.

[3] On the 20th February 2018 at about 10:00 hrs, according to the founding affidavit, the applicant noticed a group of five (5) men destroying her drive way protection wall. The five men used five-pound hammers and were also carrying spades that they used to remove the debris.

[4] The applicant then approached a senior member of the community who is a brother to the Chief, one Mr Vusani Dvuba, and reported to him that certain men were demolishing her drive way protection wall. Mr Vusani Dvuba advised her not to confront the men. Mr Dvuba then called another senior member of the community, Mr Gabriel Shiba, and instructed him to talk to the five men who carried out the destruction of the applicant's drive way protection wall. Mr Shiba was informed by these five men that they were acting on the orders and instruction of the respondent.

[5] The applicant thereafter filed before this court an application, under a certificate of urgency, wherein she *inter alia* sought the following orders:

(i) That the respondent be and is hereby ordered and directed to forthwith re-erect and restore the applicant's drive way protection wall that was unlawfully demolished by the respondent and/or his agents at the applicant's homestead situated at Nkoyoyo in the Hhohho District.

(ii) That the respondent pays the costs of this application at an attorney and own client scale.

[6] Mr Gabriel Shiba filed a confirmatory affidavit in which he confirms that on the 20th February 2018, he approached and confronted five men who were in the process of demolishing a drive way protection wall fence at the homestead of the applicant. He states in the confirmatory affidavit that he confronted these men at the instruction of one Vusani Dvuba who is a senior member of the community.

[7] Mr Shiba further states in the confirmatory affidavit that he was informed by these five men that they were demolishing the protection wall on the instruction and orders of the respondent.

[8] The applicant states in her founding affidavit that the men were asked to produce a court order that authorized them to carry out the demolition, but the men failed and only stated that they were acting on the instructions and orders of the respondent.

[9] Having finished with the demolition of the drive way protection wall, the men proceeded to remove the debris and threw them into a nearby sewer.

[10] The applicant contended that at all material times she was in peaceful and undisturbed possession of the protection wall. She further contended that the destruction of the protection wall was done against her will and that she

never consented to it. For the above reasons, the applicant seeks an order directing the respondent to forthwith restore the status *quo ante* and re-erect the drive way protection wall.

[11] In answering the allegations made in the founding affidavit, the respondent raised points of law and answered on the merits as well. The points of law raised are the following:

(a) That the application lacks urgency and does not meet the requirements of urgency as stipulated in Rule 6 (25) of the Rules of the High Court;

(b) That this court lacks jurisdiction in terms of section 151 (3) (b) of the Constitution of the Kingdom of Eswatini because the land in dispute falls under Swazi Nation Land;

(c) Non-joinder of an interested party, *viz.*, the *umphakatsi* (chiefdom) of the area where the land is situated;

(d) That the applicant failed to plead the requirements of an interdict, and that these requirements have not been met either; and

(e) That the matter has material disputes of facts concerning the question of who owns the property between the applicant and respondent, and also concerning the boundary that separates the applicant's property from that of the respondent.

[12] On the merits, the respondent denies that the drive way protection wall was constructed on the applicant's piece of land. Instead, the respondent contends that the wall was built on his piece of land. He states in the answering affidavit that he had been away for about two months. When he returned, he found the protection wall having been constructed right inside his yard. The wall blocked his access to his house.

[13] The respondent also stated that he did not immediately react but reported to one of the area's authorities by the name of Mangwana Zulu. Although he did not know who constructed the protection wall, he suspected that it was the applicant. When he enquired, no one knew who constructed the wall. He informed Mr Zulu that he suspected that the wall was constructed by the applicant. Mr Zulu then summoned the applicant twice but she never responded to the summons. It was then that he decided to demolish the wall because he did not know who constructed it, contended the respondent.

[14] The respondent further contended that the applicant had already lost the battle over the area where the wall was constructed. The matter was decided in favour of the respondent by the *umphakatsi* in 2010. It was the respondent's submission that the applicant was therefore before this court with dirty hands as she disobeyed the order that was issued against her by the *umphakatsi.* That is why she has now opted to bring her case before another forum (this court), pleaded the respondent.

[15] In paragraph [11] I mentioned points of law that the respondent raised. I must mention that the respondent also contended, as a point of law, that the applicant prayed for an order for costs to be granted in her favour at the punitive scale yet that has not been pleaded and motivated on the papers before court. I agree with the respondent on this point. These are application proceedings and the applicant must make his or her case in the founding affidavit where the evidence to be relied on is stated. There is now a plethora of judgments on the principle that in application proceedings, a party stands and fall on his or her papers. The prayer for punitive costs is not motivated, and is not substantiated either on the papers filed. I am therefore not inclined to award costs at the scale that the applicant prayed for. Below I deal with the points of law mentioned in paragraph [11] above.

[16] **Lack of urgency**

The respondent submitted that the application does not meet the urgency requirements stipulated by Rule 6 (25). He argued that no reason is stated why the matter is urgent and that no reasons have been given why the applicant claims that she cannot be afforded substantial relief at a hearing in due course. The respondent also submitted that the applicant had to show on the papers why her matter should not join the long queue of normal applications before this court. He further submitted that she also had to state *ex facie* the papers why she claims that she cannot be afforded substantial redress at a hearing in due course.

[17] In motivating why the matter should be heard as an urgent one, the applicant stated in her founding affidavit what I quote below:

> *"I submit that this matter is urgent for the reasons that by their very nature spoliation proceedings are urgent as they relate to the protection of possession by an individual and is engrafted so as to preserve peace in the community and restore the status quo ante."* (paragraph 21 of founding affidavit).

[18] In urgent matters, the applicant is required by Rule 6(25), firstly, to state the circumstances which he avers render the matter urgent. Secondly, he must also state the reasons why he claims that he cannot be afforded substantial relief at a hearing in due course. **See: Humphrey H. Henwood v Maloma Colliery and Another (1623/94) [1994] SZHC 68 (30 September 1994)** and **Megalith Holdings v R.M.S. Tibiyo (Pty) Ltd and Another, High Court Case No. 199/2000 (unreported).**

[19] In my view, the respondent is correct that the application does not meet the urgency requirements contemplated in terms of Rule 6(25). I was not referred to any authority declaring that spoliation proceedings must always be regarded and heard as urgent matters. There is also no circumstance or reason stated to show that the applicant cannot be afforded relief at a hearing in due course. I accordingly uphold the point of law on urgency.

[20] Notwithstanding the above finding on urgency, I decided to deal with the merits instead of ordering the matter to follow the normal course of

application proceedings. For that reason, I disregarded that the matter was brought to court under a certificate of urgency.

[21] For the parties to appreciate my findings on the issues I am about to determine, I propose to first deal with the law applicable. Before this court is a spoliation application. The applicant seeks an order directing the respondent to forthwith re-erect and restore the applicant's drive way protection wall which was demolished by agents of the respondent who were acting on his instructions.

The law applicable

[22] In the case of **Nino Bonino v De Lange 1906 TS 120 at 122**, the court described a spoliation order in the following terms:

> *"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."*

[23] The kind of remedy envisaged by the court in the above quoted case of **Nino Bonino** is a spoliation order (also known as a *mandament van spolie*), per the authors Stephen Pete *et al*, ***"Civil Procedure: A Practical Guide"*, 3rd ed, Oxford University Press, 2016, at page 476.**

[24] In the case of **The Regional Administrator, Lubombo Region and 6 Others v Coshiwe Matsenjwa and 7 Others (15/2014) [2016] SZSC 13 (30 June 2016) M.C.B. Maphalala CJ** 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."*

[25] In the above cited case, the Honourable Chief Justice went on to state that in a spoliation application the applicant must prove two essential elements. 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.

[26] According to authors Stephen Pete *et al*, ***"Civil Procedure: A Practical Guide"*** **(supra),** a person's ownership of the property has nothing to do with spoliation proceedings as this is a possessory remedy brought to restore possession to a party who has been unlawfully deprived of it. The court does not examine the rights of ownership. The remedy merely restores the *status quo aute* (the situation that existed before). **See also Gibson Ndlovu v Siboniso Dlamini and Another (30/2011) [2011] SZSC 36.**

[27] In the case of **Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others 2007 (6) SA 511 (SCA) at paragraph [21]**, the Supreme Court of Appeal explained the remedy's effect in the following words:

> "Under it, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor – a fraud, a thief or a robber – is entitled to the mandament's protection. The principle is that illicit deprivation must be remedied before the Courts will decide competing claims to the object or property." (own emphasis)

[28] I now proceed to determine the issues as contended by the parties. These issues consist of the other points of law and the merits.

Lack of jurisdiction

[29] The respondent submitted that this court lacks jurisdiction to determine this matter because the piece of land that is in dispute is on Swazi Nation Land. This court therefore lacks jurisdiction, he submitted, since this is a matter that must first be heard by the responsible *umphakatsi*, and thereafter by the Swazi Courts in terms of section 151(3) (b) of the Constitution of the Kingdom of Eswatini *("the Constitution").*

[30] Section 151(3)(b) of the Constitution provides as quoted below:

> "Notwithstanding the provisions of subsection (1), the High Court –
>
> (a) …

(b) has no original but has review and appellate jurisdiction in matters in which a Swazi Court or Court Martial has jurisdiction under any law for the time being in force."

[31] I wish to state at the outset, as already pointed out in the authorities cited above, that spoliation proceedings do not consider or deal with the merits. No enquiry is made about the merits of the case. The spoliation remedy simply restores the status *quo ante*. It is after the *status quo ante* has been restored that the matter becomes ripe to be heard and determined by the appropriate authority who has the requisite jurisdiction.

[32] In the present proceedings, it is my considered view that the remedy being sought falls under the remedies which this court has unlimited original jurisdiction to grant. This jurisdiction is vested in this court in terms of section 151(1)(a) of the Constitution. The section provides as quoted below:

"151. (1) The High Court has –

(a) unlimited original jurisdiction in civil and criminal matters as the High Court possesses at the date of commencement of this Constitution;" (own emphasis)

[33] Swazi Courts are empowered to administer Swazi Law and Customs prevailing in the Kingdom of Eswatini. **See: The Swazi Courts Act, 1950**. A spoliation remedy is not a matter of Swazi Law and Custom. It is a foreign concept as evidenced by the case of **Nino Bonino v De Lange (supra)** which was decided in another jurisdiction in 1906.

[34] The point of law on jurisdiction therefore fails and is accordingly dismissed.

Non-joinder of *umphakatsi*, failure to plead requirements for an interdict, and existence of disputes of facts

[35] The respondent submitted that the applicant failed to join a necessary party that has a substantial interest in the matter. He argued that the area's *umphakatsi* ought to have been joined because the land in dispute is situated on Swazi Nation Land which is under the authority of a chief.

[36] The respondent also submitted that the proceedings are centered on a mandatory interdict in that the applicant seeks an order compelling the respondent to do something. He therefore argued that the application must meet the requisites of an interdict. He submitted that the applicant ought to have demonstrated that she has a clear right, an injury actually committed or reasonably apprehended, and the absence of a similar protection by any other remedy. It was the respondent's submission and argument that the application does not satisfy the interdict requisites.

[37] The respondent further submitted that the application is fraught with material disputes of facts. The disputed facts concern the question of who as a matter of fact owns the piece of land in dispute between him and the applicant. They also concern the boundary that demarcates the applicant's piece of land from that of the respondent. The respondent accordingly asked the court to dismiss the application on the above stated points of law.

[38] Again I must point out that the above pleaded points of law suffer the same fate as the point of law on jurisdiction. The remedy being sought is for restoration of the drive way protection wall under the spoliation remedy. Under this remedy, restoration of the despoiled property is preliminary before any determination of the competing claims. All the above raised points of law require the court to first determine the merits and then make a ruling. The factual issues raised by the points of law are not the ones to be proved in spoliation proceedings. In my view, the above points of law ought to be dismissed and it is so ordered.

[39] The remedy of spoliation is aimed at restoration of possession. In the case of **Rikhotso v Northcliff Ceramics (Pty) Ltd and Others 1997 (1) SA 526 at 535**, the court held that a spoliation order my not be granted if the property in issue has ceased to exist and that spoliation is a remedy for the restoration of possession, not for the making of reparation.

[40] The legal position as stated in the **Rikhotso case (supra)** was confirmed by the Supreme Court of appeal in the case of **Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others (supra)**. In paragraph 24 the Supreme Court of Appeal states as quoted below:

> *"The doctrinal analysis in **Rikhotso** is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property - not its reconstituted equivalent."* (own emphasis).

[41] In the **Tswelopele (supra)** case, the Supreme Court dealt with a situation where about 100 people were removed from their homes on a piece of land in a suburb of Pretoria called Garsfontein. They approached the High Court for a spoliation order. In the process of their removal, the material used in the construction of their dwellings was destroyed. Following the **Rikhotso (supra)** case, the Supreme Court of Appeal held that because of the destruction, it could not order restoration under the spoliation proceedings.

[42] In *casu*, the applicant stated in her founding affidavit that her drive way protection wall was destroyed by the five men using five-pound harmers. After demolition of the protection wall, the men proceeded to take the debris thereof and threw them into a nearby sewer.

[43] On the basis of the **Rikhotso and Tswelopele (supra**) decisions, this court cannot order restoration under the spoliation remedy because the protection wall was destroyed and the debris thereof were thrown into a sewer.

[44] The application is accordingly dismissed with costs.

T.L. DLAMINI J

JUDGE OF THE HIGH COURT