IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 678/21 .

In the matter between:

SICELO ZWANE	1st Applicant
THABSILE ZWANE- MATSEBULA	2nd Applicant
MATHOKOZA ZWANE	3rd Applicant
MDUDUZI ZWANE	4th Applicant
THEMBISILE MAZIBUKO	5th Applicant
NOMCEBO ZWANE	6th Applicant
SIVIWE SKHOSANA	Applicant
	ih Applicant

and

MBHEKENI ZWANE	1st Respondent
KHABONINA ZWANE	2nd Respondent
NKOSITHINI ZWANE	3rd Respondent
OKAYZWANE	4th Respondent
LUNGILE ZWANE	5th Respondent
RUTHZWANE	6th Responent
THEMBA ZWANE	7th Respondent
AFRICA ZWANE	8th Respondent
MONDIZWNE	9th Respondent
MFANAWENDLELA ZWANE	10th Respondent
SANELE ZWANE	11th Respondent

NTOMBILENI ZWANE	**12'h Respondent**
LOMASONTFO HLETA	**13 th Respondent**
NTOMBI DLAMINI	**14 th Respondent**
NONDUMISO MTSETFWA	**15 th Responent**
TIGEZILE ZWANE	**16 th**
Respondent THE NATIONAL COMMISSIONER OF POLICE	**1ih Respondent**
THE ATTORNEY GENERAL	**18 th Respondent**
THE MASTER OF THE HIGH COURT	**19 th Respondent**

Neutral Citation : Sice/o Zwane and Others v Mbhekeni Zwane (678/2021)[2021JSZHC 82 [2021] (25th May 2021).

Coram: MAPHANGA J

HEARD: 16/04/21;28/04/21 and 06/05/21. DELIVERED :25/05/2021

Summary: *Summary: Civil Law-Application for the remedy of Mandament van Spolie; Applicants seeking restoration or possession of a homestead situate on Swazi Nation Land- communal lands; Court clothed with inherent jurisdiction to grant spoliation remedy regardsless of the property being on communal national lands*

Spoliation Proceedings- requirements and principles revisited; Applicant must show that he was in peaceful and undisturbed possession of a thing prior to the deprivation;

Spoliation remedy - possessor need not prove exclusive possession as he needs not to have been dispossessed of the whole thing to access the remedy; the mandamentalso lies to the aid ofa person who holds jointly with others.

Disputes of fact- notinsummountable- existence of material disputes of fact not a barrier to adjudication of causes on application - spoliation application ideally suited for extraordinary interim remedies like spoliation- Plascon Evans Rule especially applicable.

JUDGMENT

MAPHANGA J

[1] This is an application for injunctive relief involving what appears to be a bitter simmering family dispute to do with proprietary rights of use and occupation of a homestead situated on Swazi Nation Land. It has pitted one faction of a large family against another.

[2] The applicants save for the seventh describe themselves as the children of the late Robert Lobi Zwane (the deceased) with one Angelinah Dlamini one of the deceased's surviving wives. I shall refer further in this judgment to the said Angelinah and how she features in these proceedings. The seventh respondent's status has not been made clear in the papers save that she together with the second to sixth applicants, make common cause with the first applicant who has deposed to the founding affidavit and have also filed confirmatory affidavits aligning themselves with foundational facts pertaining to the matter.

[3] The principal complaint giving rise to this application as alleged in the founding affidavit sworn to by Sicelo Zwane is that prior to the onset of events on Saturday 10th April 2021, he together with the second to seventh applicants were in peaceful and undisturbed occupation of the Zwane homestead situated in an area known as Mbadlane in the greater Malindza area when they were allegedly invaded and attacked by the respondents. It is further alleged in their marauding action the respondents broke into the homestead vandlising and breaking door handles of the buildings at the homestead, forcibly taking occupation of 'some if not all' the houses.

[4] The applicants have launched this application on grounds of urgency on the basis whereof they invoke Rule 6 (25) of the Rules of The High Court - a rule regulating such motions; seeking waiver from the rigor of the rule as pertains conduct of ordinary motion proceedings. They initially approached

the Court *ex parte.* Substantively they sought the following relief in the

form of orders *nisi* for respondents to be ordered to show cause on a date to be appointed by the Court why the following orders should not be entered as final orders:

4.1 That the first to fifteenth respondent and or anyone acting for and on behalf of the said respondents, be and are hereby interdicted from harrassing, threatening, intimidating or assaulting, in any manner whatsoever, any of the applicants (and their mother) in this matter;

4.2 That the first to fifteenth respondents be and are hereby ordered to vacate the homestead belonging to the late Robert Zwane, until such time as the matter is heard and deliberated upon either through the Zwabe Lusendvo or throught the traditional structures in terms of Swazi Laws and Customs;

4.3 That the said Respondents are hereby ordered to hand over any keys in their possession and/or any items they may have removed from the said homestead from the period commencing Saturday the 10th April, 2021 until such time as the interim and final court orders have been issued by this court;

4.4 the the first to fifth Respondents be and hereby be held to be in contempt of Court as they have breached the terms of lhte High Court Order issued on the 14th day of September 2012;

4.5 That the First to Fifth Respondents be committed to gaol for a period not less than twenty - one (21) days or such further period as the Court may determine for their contemt of the Order of Court;

4.6 **That the First to Fifteenth Respondents, ought not to pay for costs of this application at an attorney and client scale"**

I shall in due course comment on the applicant's cause in light of these prayers in the context of setting out the legal basis of the application based on the relevant facts. Suffice to say that upon the hearing of arguments, Counsel for the Applicants elected to abandon the relief premised on Contempt of Court as set out in prayers 4 and 5 (4.4 and 4.5 in the above numbering) The matter for all intents and purposes proceeded in regard to the interdictory relief.

[5] At the onset of the matter when the matter was enrolled before me on the 16th April 2021, I declined to grant an interim order, partly on account of the fact that none was sought on the prayers but also because I found no rational basis as to why despite the professed urgency, the matter had to proceed in the form of a rule nisi. I also, ex sua *motu,* directed that the application be served on th·e Master of the High Court given the apparent involvement of estate administration of the deceased estate; in whatever form that estate may be defined. Mr Hlophe who appeared for the 17th to 19th Respondent indicated his instructions was not to enter the fray and to abide by the courts final decision in the application.

[6] The application is being opposed by the first to 16th Respondents and they filed voluminous papers in the form of their answering affidavits and annexures; I must say the bulk of the papers comprise largely of the various supporting and confirmatory affidavits filed by the respondents in support of the thirteenth respondent (Lomasontfo Zwane - *nee* Hleta) who has filed the Answering affidavit. I propose to give brief background of the essential facts particulary those that are admitted common cause facts.

Background

[7] The deceased whose family is at the centre of this dispute led a polygamous life. It is common cause that during his lifetime he married the aforesaid Angelinah Dlamini (the mother of the applicants *sans* the ylh applicant), one Busisiwe Dlamini, the Thirteenth Respondent and the 14th Respondent ;Ntombi Dlamini (the order being of no moment at this time) all by customary rites under Swazi Law. For the ease of reference where I do not refer to her by name, I shall throughout refer to the said Angelinah as the mother of the applicants.

[8] .During the 1980's the deceased developed and built a communal marital home at Zakhele Township in the Manzini urban area. From the papers it may be conclued that it comprised of a family compound with a number of building units. On it he settled the said Ms Angelinah Dlamini (the applicant's mother) the Thirteenth Respondent and Ms Ntombi Dlamini as separate households and lived with them and his children on the lot.

[9] It is further common cause that in 1995 the deceased by means of the *khonta* system came to acquire and got allocated a parcel of land in Mbadlane under the Malindza chiefdom where he built the homestead which the subject of this application. This homestead when fully developed comprised of several buildings including a number of large houses and what has been described as flats. It emerges as an admitted fact that the deceased had designed and configured to accommodate the entire family households with the several wives in order to relocate them from Zakhele to the more idyllic Malindza.

[1O] There is an area of divergence in the respective versions by the applicants and the respondents as to the ensuing developments regarding the settlement of the family at the new great homestead at Mbadlane. What is not in dispute however is that by the time of his death the deceased was residing at the Mbadlane homestead and so was his wife Angelinah and that the latter her husbands passing has been residing at the homestead which she regarded her matrimonial home. The point of dispute lies as to

the respondents claim that they have also been in residence and the applicants assertion that they were not. This is but one of the issues that arise given the nature of the application to which I shall turn shortly. It brings me to a peculiar feature of the manner in which the application has been brought in so far as the legal standing and interests of the applicants. It is writ large.

[11] By all accounts the applicants' mother is poorly; it being common cause that about 2007 she suffered a debilitating stroke from which she was severly incapacitated. According to the founding affidavit of Sicelo Zwane the extent of the disabilities is such that she lost her speech ability and was also paralysed in such a way that she is now wheelchair-bound. It has been alleged that she is of sound mind and in her full mental faculties and the first applicant professes to have been informed by her doctors that her cognitive capacity to hear everything, although being unable to speak, is intact. An objection raised by the respondents to this one assertion is that the first applicant has not attached any medical evidence in regard to this advice or opinion by a professional to support it. On the other hand if she, as Sicelo Zwane alleges, has full mental capacity, they attach no power of attorney or otherwise by which she has granted them authority to litigate on her behalf.

[12] That said, it is on account of her inability to give instructions and to move the application herself that the applicants claim they deemed it necessary to bring the proceedings on her behalf as well as in their own personal interests. It is in so far as this application relates to the applicants mother that it seems they make light of a matter of serious legal import.

[13] It is trite that the capacity to enter into legal transactions or to institute legal proceedings and litigate in ones own right, is closely related to a person's mental condition. In general a major person, unless certified or proven otherwise, is presumed to be legally competent to manage their own affairs unless declared to be incapable to manage his or her own affairs. It is also trite that no person may institute proceedings on behalf of

another person

unless clothed with the requisite authority to do so. Generally the requirement to attach a power of attorney instrument to prove authority to move an application or show the basis of authority for another is no longer being strictly enforced in this jurisdiction. However in a matter as this one wheren the question as to a would-be-litigant's capacity is raised by the deponent own disclosure, brings the issue to the fore.

[14) Where a person is said to be incapacited to act or manage his or her own affairs, there are established common law procedures for the appointment of another to litigate on behalf of the infirm or incapacitated person[1]. One of well established procedure adhers to the common law process of appointment of a *curator ad /item* to the person in terms of Rule 57 of The High Court Rules. A *curator bonis* to the general management of mentally incapacited person's affairs may also be appointed under the common law.

[15) Curiously neither of these process have been invoked by the Applicants. It begs the question as to whence the 1st Applicant claims to derive the authority to act on behalf of his mother. As matters stand, Ms Angelinah Zwane has neither been cited nor does the said Sicelo Zwane indicate his nominal capacity to act for her on the papers.

[16] It is plain to see that the deceased's wife Ms Angelinah Zwane for whom the applicants purport to act is not before me and is therefore not a party in these proceedings. That is one glaring defect to the present application. I therefore intend to consider this application on the basis of the motion being purely that of the named applicants whose affidavits have been filed. I now turn to the object and averred facts in the application.

This Application

[1] *The procedure for this application includes an application to court on behalf of persons, who owing to physical infirmity cannot manage their own affairs. See Boberg's Law of Persons and the Family 132-133* ***and the cases cited.***

[17] From the prayers set out in the notice of motion supported as they are by the material averments in the founding affidavit of Sicelo Zwane, the object of the application presents in the form of two core remedies. Firstly the Applicants seek a prohibitory interdict to restrain the various respondents from harassing, threatening and carrying out acts of intimidation and threats of violence against the applicants. Secondly an interim mandatory interdict formulated as a spoliation restorative remedy ordering the respondents to vacate the homestead and hand over keys and or any other articles of movable property that they may have removed from the homestead. Both these remedies are sought as interim orders pending the referral of the underlying dispute over occupational rights over the homestead to either the Zwane family counsel or *Lusendvo* or any other appropriate traditional authority in terms of Swazi Law and Custom.

[18] I pay no regard to the contempt proceedings that have been grafted into this application on account of the fact as I mentioned that this procedure was abandoned by the Applicants as indicated by their Counsel Mr Mntungwa. In this regard I commend the learned Counsel for his professional candour in the conduct of the application. The Applicants also seek an order of costs on a scale as between attorney and client; this scale of costs was not pursued or motivated during the hearing of the matter.

[19] The critical averments on which the applicants rely are set out in the facts as stated by the First Applicant, Sicelo Zwane. He describes the various respondents as children of the deceased's other wives; namely the 13th and 14th Respondents; and also two allegedly born out of wedlock.

[20] The nub of the matter according to Sicelo Zwane is that at all material times and significantly on or around the time of the circumstances or incident giving rise to these proceedings, the applicants have since 2007 been in 'peaceful and undisturbed occupation or possession of the entire homestead - it being further alleged that their mother under whom they lay and assert claim to their rights of possession and or occupation, had been

dispossesed by the respondents recent actions and invation. At paragraphs 4 and 5 of his affidavit he alleges the following facts:

> *"4. The present application has been necessitated by the unconsciounable conduct of the First to Fifteenth Respondents. Whilst all these years we were in peaceful occupation at home in Mbadlane which is in the Ma/indza area, the said Respondents on Saturday the 10th April, 2021 decided to break into the homestead, vandalise the property by breaking* some *of the door handles* a *the said homestead, and have occupied* some, *if not all, of the houses in the homestead.*
>
> *5. Noteworthy* is *that even during the lifetime of our father Robert Zwane ('the deceased'), the said Respondents have never resided or stayed at the homestead because our father had indicated that he does not want them there and he allocated them their own homes which they have never accepted. Instead, most of the Respondents, such* as *athe First Respondent, moved to their maternal homesteads and elected to stay there'*

[21] Of further relevance to these allegation is what is stated in paragraphs 6, 7 and 8 where he states:

> '6. *Now that our father has met his untimely death, the Respondents have started to harass, intimidate, threaten and even assault* some *of us. They claim that it is because of us that our father never accepted them and they have forced their way into the homestead in Mbhadlane where our father had built the homestead in question.*

7. ***The conduct of the Respondents amounts to taking the law into their own hands. Even if the Respondents may allege that they are also entitled to the said homestead .....certain due process measures had to be followed .....***

8. ***Instead the said Respondents, on their own accord, forced their way into the homestead, broke and entered into the houses and we had to urgently vacate our disabled mother because we feared for her life and ours as well. The situation was just chaotic as they had brought grinders and were busty opening locked doors"***

(my omission marks)

[22] For the sake of completeness these allegation must be read with paragraphs 40 - 42. These averments augment the quoted statements by the first applicant above. In the latter paragraphs Sicelo elaborates that the highly-charged acrimonous atmosphere at the Zwane homestead developed in the immediate aftermath of the deceased demise particularly around the time of his burial and the subsequent mourning interlude and cleansing ceremonies. He states that the family feud had been referred to the Regional Administrators Offices for mediation to no avail. He further

tells that matters came to a head on the sai.d 10th April 2021 when according to Sicelo, the respondents masquerading under the guise of a family meeting, mobilised and invaded the homestead. That in so doing they arrived *en* masse at the homestead and started to vandalise the property. He repeats that these acts entailed the grinding down of door handles, the seizure and occupation of various houses at the homestead in an act of installing themselves and moving in to take occupation of the place. It is suggested that the respondents acted with agreession and became abusive and uncompromising when the applicants attempted to engage and reason with them. It is further alleged that owing to the

threatening and violent conduct of the respondents, the applicants were forced to flee the homestead with their mother, *Make* Angelinah.

[23] The recurring theme in the allegations by the first applicant is that prior to the unlawful entry and invasion, the respondents had never resided in the homestead whilst the deceased was still alive; that the Angelinah was the only one of the deceased's wives that resided at the homestead, occupying the 'main house' of the homestead. Indeed at the heart of the relevant foundational facts is Sicelo's essential averment that his mother resided with the deceased and after the latter's demise the homestead was left to her by the deceased. I note that a great deal of the matter deposed in the founding affidavit is devoted to seeking to demostrate the acquisiton of the applicants' rights of possession albeit through their mother. Incidentally, equally so is the content of the respondents' response - the respondents papers are likewise largely dedicated to contesting this claim and seeking to focus on their relative substantive rights over access and occupation of the homestead; as opposed to the question of to who retained undisputed possession of the homestead at the material time and the question as to whether the respondent's invaded the property as alleged.

[24] From Sicelo's averments it is notable that other than the glib claim to homestead being the applicants' own and in the same preath their right to occupation thereof, the facts pertaining to the actual residence or occupation of the premises by the applicants in person apart from their mother, are cast in very general and scanty terms. They are unsatisfactory and unconvincing and short on relevant detail in their evidende. Paragraph

54 presents the high watermark of the ambiguity of their material averments as to their claims. I find it necessary to highlight this aspect especially in the following passages at paragraphs 54.1., 54.2., and 54.3. Ostensibly asserting their (the applicants') *prima facie* right to the homestead the first Respondent concludes:

"54.1 As already adequately stated above, our mother, at the very least, has a right to reside peacefully in

the said homestead. She has been residing there

in peace since 2007. It is unethical now that our father has passed away, the Respondents come *to dispossess her of her home through their violent conduct and take over the homestead from her. Her medicine which she constantly needs is at home and she needs to have* access *to her belongings and her home without any fear whatsoever.*

54.2 *In addition to that, this is also our homestead. Inasmuch as* some *of us do not fully reside there, but we are constantly at home to visit our mother and to bring her medication for her illness. We also have a right to visit and* come *home at any time without fear of being attacked in any manner whatsoever. In fact we have custody of all the keys to the houses at home which were given by the deceased during his lifetime.*

54.3 *On the other hand, the Respondents do not have any right in law, to march into the premises with tools and weapons, lock* some *fo the doors to the houses with their our padlocks and keys and effectively kick-us all out of the home. ·This is unheard of and such conduct amounts to self-help which the Courts have, over the years , frowned upon such conduct by individuals as it ahs the ramifications of effectively returning us to arnachy and barbarism."*

[25] It bec0mes plain from the above averments that the applicants largely rely on their mother's rights of occupation for the application and her status as pertains to the alleged possession of the homestead. It is unclear as to what part of the homestead the applicants allege to have

been in

occupation of at the material time and whether in light of the admission in para 54.2 that 'some of us do not reside there' as to who amongst the applicants resides in the homestead. That said further difficulties arise in so far as the Applicants in their own Replying affidavit and by their Counsel's submissions during argument admit further that the 9th to the 12th Respondent also reside in the same homestead; this coming in the face of very general broad sweeping oft repeated allegation in the founding affidavit that 'none of the respondents' resided at the homestead prior to the incidents complained of.

The Respondents Case

[26] For the respondents part shorn of the digression I have pointed out in the affidavits as pertains to the parties contesting claims to their respective rights to possession of the homestead, their position can be summarised to the following contentions. Firstly they contend that the applicants cannot claim a better right to the possession of the homestead than the respondents; that the 13th Respondent as one of the wives of the deceased has along with some of the respondents have always resided at the Malindza homestead; that the deceased configurated and developed the homestead to accommodate all his wives and his children; In a word it is asserted that not only are the respondents entitled to access and reside at the homestead but have actually resided there and have at all times material to the matter been and remained in occupation of some of the housing units on the homestead premises.

[27] It is further alleged that the deceased allocated a house to each of his three wives in the homestead in contention and that at some point they all lived there together during episodes of the deceased lifetime. The respondent refute the notion that the homestead at Malindza was built exclusively for the applicants and their mother. To butress these contentions they have annexed an Trust Deed instrument as evidence of the deceaseds wishes that all of his wives take up residence on the homestead at Mbadlane (Malindza).

[28] The Respondents deny that they ousted the applicants from the Malindza residence alleging that they left it voluntarily and even then, only temporarily. They also deny that there has been any act of disposession. That in a nutshell is the Respondents' case.

POINTS IN LIMINE

[29] At the commencement of the hearing the Respondents sought to advance submissions on significantly two points in limine against the hearing and granting of the relief sought by the applicants. The first point being a jurisdictional point and the second, being that the existence of serious disputes of fact preclude the adjudication of this matter on motion hence if the first point of law fails, this court was urged to dismiss the application at the onset on the second point.

[30] Upon due consideration of arguments by counsel for both the respondents and applicants, I determined and dismissed the preliminary points *ex tempore* with reasons to follow and incorporated in this judgement. I do so now.

Jurisdiction

[31] The Respondents have taken the preliminary point that this court has no jurisdiction to hear this matter on account of the fact that the homestead which is the subject matter of this matter is situated on Swazi Nation Land and that the deceased and his various wives in contention were married in terms of Swazi Law and Custom.

[32] The question of the jurisdiction of this Court in spoliation proceedings notwithstanding the substantive issues falling within the juridictional province of traditional authorities has arised often before this court and is one that has been resoundingly laid to rest. It is settled law that the High Court retains a wide and unlimited jurisdiction to determine any

application

intended to preserve the *status quo ante* pending the determination of any dispute or substantive cause falling under the jurisdiction of traditional authorities or institutions in accordance with Swazi Law and Custom. (See ***Elgin Maguduza Makhubu v Donald Mandlakayise Ndlovu and 7 Others*** **(82412013) [2014] SZHC 220 in that Case the Court applying** ***John Boy Matsebula and 3 Others v Chief Madzanga Ndwandwe and Ano.*** **Civ Appeal No. 1512003 at page 24; See also** ***David Themba Dlamini v Sylvian Logendo Okonda and 7 Others*** **Civ Case No. 1995** ***/2008).***

[33] This very point arose in ***Ntombi Mary Smith v Sipho Mkhabela*** & ***3 Others*** **(50812018) [2018] SZHC** 95 and also in ***Swaziland Commercial Amadoda Road Transporlation*** **&** ***Others v*** **Siteki** ***Town Council*** **Civl Case No 25412012.** In the latter case MCB Maphalala J as he then the Court reaffirmed the legal principles and the extra-ordinary nature of the spoliation being part of the courts inherent jurisdiction to in appropriate grant injunctive relief as both a common law preservation and restitutory writ for the restoration and maintenance of the status quo pending the formal adjudication of the merits and sustantive rights of the parties. There is thus ample authority for the recognition of this Courts jurisdiction.

[34] Mr Hlatshwayo who rose on these preliminary point on behalf of the ***Muzi Shongwe v Isabella Katamzi and Another*** **Case No. 4612013 [2014] SZSC 22** as authoritative support for the proposition and point of the Respondents on jurisdiction. A close analysis of the context of the dictum cited in the Courts unanimous judgment in that case is that the matter related to proceedings for a final interdict as opposed to an interlocutory or interim relief in the unique form of the mandament van spolie and thus is distinguishable to the matter at hand. These judicial pronouncements provide a welter of authority on the power of this Court to hear and determine applications for interim interdicts and the spoliation relief. I now turn to the second preliminary point.

Disputes of Fact

[35] The Courts function is to resolve disputes and in that function necessarily entails the resolution of facts. That is so even in motion proceedings. In the latter instance the Courts are aided by a robust common sense approach coupled with a set of evolved principles aimed at evaluating conflicting evidence on affidavit. It cannot be that the mere emergence of disparities in the evidence and apparent disputes of fact in the papers cannot be determined on motion or that invariably where factual disputes arise applications must be dismissed. The starting point has to be an assesment whether the alleged disputes of fact are material, genuine or bona fide, relative to the issues in the matter

[36] Even where genuine factual disputes arise form the affidavits the approach our courts have adopted dwells in the now well-worn so-called ***P/ascon Evans Rule*** [3] . Put simply it states that a court faced with conflicting versions of evidence on the material facts in the parties affidavits, must take the respondents version together with the admitted facts to determine whether to grant the relief sought by the Applicant. If these facts do not favour the applicant, it must simply dismiss the application. The statement quoted by the Respondents in their submissions that is attributed to His Lordship **Tebbut JA** in the *VIF* case is, with respect, an affirmation of the

above rule

[37] Further the Court has a discretion to take a hybrid approach to dealing with any irresoluble factual disputes in the application and in so doing may take one of two paths; it may exercise its discretion to either refer a limited issue in a narrow field of disputed facts to oral evidence as envisaged in Rule 6 (18) of the High Court Rules on conduct of civil proceedings or it may also refer the matter to trial with appropriate directions.

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2 *See Room Hire Co (Ply) Ltd v Jeppe Street* Mansions *(Ply) LTD 1949 (3) SA 1155 (T) per Murrray AJP at p1165.*

3 *The rule* was *arliculated by a South African Appeals Courl in the case Plascon-Evans (Tvl) Ltd v Van Riebeck Paints (Ply) Ltd 1984 (4) All SA* 366 *(A).*

4 *VIF Limited v Moses Mathunjwa and 10 Others Ct of Appeal Case No. 31/2000.*

[38] Coming to the facts of this matter, as indicated earlier, the view I take is that much of the material gleaned from the affidavits may very well contain factual disputes in the evidence by the opposing parties but in my considered view these are irrelevant and inconsequential to the application in so far as they turn on the parties respective legal claims or contentions as to their perceived rights to the property in question. They have no direct bearing on the two crucial issues to be determined on the spoliation and interdict; namely -

a) Whether the applicants were in possession of the entire homestead at the time of the alleged incidents; and in that regard;

b) Whether there has been an act of unlawful dispossesion carried out by the respondents as well as the alleged acts of harasment, intimidation and threats of violence.

These are the only decisive considerations.

[39] There is another reason I am. disinclined to accept the Respondents' second point in limine, that any disputes of fact that may exist herein are irrisolvable on the papers in this instance. It is that, apart from the fact that the field of genuine disputed facts is narrow on the papers, by its very extra-ordinary and robust nature the relief claimed and the spoliation remedy can only be realised by way of urgent motion. I am fortified in this approach in the dictum I have quoted elsewhere bo the Court in the Swaziland Commercial Amadoda case. [2].

[4].

[5] That statement reflects the correct position on the doctrine of mandament van spolie.

[40] The point of law, like the one on jurisdiction must therefore fail. II is dismissed.

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5 ***Swaziland Commercial Amadoda Road Transportation and Others v Siteki Town Council Civ* Case. *No:***
254/2012 (HG).

THE MERITS

Spoliation

[41] The spoliation remedy is intendedd to protect possession of a person from illicit deprivation of such possession through force, fraud, stealth or other means by another. Its primary purpose is to restore possession and preserve the peace by ordering the reversion to the status quo ante. The expression by the original maxim *spoliatus ante omnia restituendos est* - that 'let the despoiled person be restored to possession before all else hearkens back to the other aspect of the remedy - that whilst it is extraordinary, it is of interim effect pending the determination of the respective parties claims or their rights to the thing in question.

[42] One of the essential requirements for the spoliation is that the applicant must show that he or she had peaceful and undisturbed possession of the thing prior to the deprivation complained of. It has been said that a possessor need not have been dispossessed of the whole thing before he or she is entitled to a spoliation order - nor need he have had exclusive possesion of the property in question before the act of spoliation because the mandament also lies to s the aid of a person who holds jointly with others.

[43] On the facts it is not disputed that the applicants were in joint possession of a section of the premises or the homestead with their mother. Two other factors emerge fromt the common cause facts. Firstly it is not disputed nor is it denied by the respondents that the applicants were in residence at the homestead - albeit with their mother, the said Angelinah Zwane on the 10th April 2021. It is also not in dispute that at the very least they had access to the homestead generally and were also in occupation of what has been described as the main house in the cluster or complex comprising the homestead. It is clear fromt this that by its very nature the possession to the general homestead was communal or jointly held.

[44] The only aspect where I have not been persuaded, disputed by the respondent urging that the applicants version is not true in that respect, is the assertion by the Applicants were in exclusive control or possesssion of the entire homestead. I say this in the light of the critical admissions on affidavit by the applicants that some of the respondents also resided on the premises. This application may only focus on the possession of the main house the possession or occupation where of by the applicants is common cause. The only issue is whether they have proven the act of dispossession of their general access enjoyment and occupation of the homestead and the main house in particular.

[45] The crux of the applicants' case is that by the respondents' acts of aggression, the use of actual or threats of force, intimidation and abuse, they and their mother were displaced by virtue of the fact that out of fear of life and limb or their personal safety and security they were forced to evacuate the homestead. Based on the above analysis of the facts that can only mean they have been denied access to the homestead commons and also deprived of possession of the main house *(/nd/u yakabo).*

[46] The respondents response has been to simply deny this ever happened and that the detailed allegations of the respondents conduct are not true. However, I find their averments in their answering papers evasive, vague and altogether unsatisfactory.

[47] It is trite that a respondent facing a spoliation application may generally raise one or both of the following defences; either:

a) that the applicant was not in peaceful and undisturbed possession of the thing at the time of alleged deprivation; and or

b) the respondent has not committed and act of spoliation.

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6 *Silberberg and Schoeman The Law of Property BUTTERWORTHS 2''' Ed. 1983,,*

[48] In so doing the respondent has to set out, with sufficient particularity the basis for their defence. In motion proceedings terse, bare denials will not suffice. The respondent must engage with the facts or allegation against him in a robust way. They must respond to the material matters raised in the applicant's founding affidavit in relation to the events or circumstances so alleged.

[49] In the instant case much of the substance of the respondents' answering affidavit material seeks to dwell or focus singularly on their claims to the homestead, the seniority or otherwise of the deceased's wives or their marital status or heirarchy under Swazi Law and Custom. I find these incidental and or irrelevant to the question whether the respondents effectively evicted the applicants from the Zwane homestead by dint of aggression. Their affidavits are evasive and much of their responses to the alleged dispossession constitute bare denials when it comes to the basic facts of what really happened on the 10[6]th April 2021. This becomes more evident when regard is had to their response to the damning allegations at paragraphs 40 to 45 of the applicants' founding affidavit. In those paragraphs the applicants specifically allege that the the respondents collectively invaded the homestead under the guise of seeking a family meeting and there after effectively forcibly displaced the applicants out of the Mbadlane homestead.[7] The respondents' response is to be found in paragraphs 31 and 32 of the Answering Affidavit where they say:

> ***"31. AD PARAGRAPH 40-43***
>
> ***I admit that* a *meeting* was *called at the instance of the respondents but deny that the respondents took over the premises and the homestead in the process.***
>
> ***32. AD PARAGRAPHS 44 & 45***

7 *Page 27 of the Book of Pleadings.*

The contents of these paragraphs are denied. I reiterate the contents of my ealier depositions in this regard more specifically that I and some of the respondents have always resided at the homestead. I and the 14th Respondent have always regarded the homestead at Malindza as our matrimonial home"

[50] To place these denials in sharp relief they must be read with the similarly vague averments the respondents make in response to the applicants similarly specific allegations as to the alleged invation that appear in the opening statements of the application. To these the Respondents response may be seen at page 73 of the Book, which reads as follows:

"8. AD PARAGRAPH 8

The contents of this paragraph are denied. I would reiterate the contents of paragraph 5.2 of this affidavit in this regard. The Applicants voluntarily but temporarily vacated with their mother without any undue pressure from the respondent. Their mother's house remains available for their occupation to this day"

[51] In like manner, in apparent rebuttal to paragraph 10 of the Applicants' affidavit to the effect that following the latters eviction from the homestead they have approached the courts as their last refuge, having failed to get the assistance of the Police, the respondents' response to this is:

"10. AD PARAGRAPH 10

The contents of this paragraph are denied. The applicants can only seek restoration if there has been dispossession. I reiterate the contents of paragraph 5.2 of this affidavit in this

regard. **To** ***date, applicants are staying in the homestead at***

Malindza and have continually stayed there even during the lifetime of the deceased"

[52] The respondents recurring reference to paragraph 5.2 of their answering affidavit is perplexing indeeed as no such paragraph appears in the said affidavit. It simply does not exist because one could scour the affidavit to not end as I have not being able to find the alleged paragraph 5.2. That confounds their averment. But I also think the content of their denials is wholly bare, bald and unexplained in light of the highlighted aspects.

[53] The Courts take a robust approach in dealing with bare denials in motion proceedings. In this regard the following dicta in the case of ***Soffiantini v Mould*** **1956 (4) SA 150 F-H** is most instructive:

"If ***by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such device. It is necessary to make a robust, commonsense approach to a dispute on motion as otherwise the effective functioning of the Court can be humstrung by the most simple stratagem"***

[54] These remarks echo words to similar effect in another South African case before the Soffiantini case above where in ***Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** **1949 (3) SA 1155 (T)** a leading case on the subject, Murray AJP in the seminal remarks adverted to by His Lordship Tebbutt JA in the VIF case to which I refer in para 36 above makes plain that:

'A bare denial .....cannot be regarded as sufficient to defeat applicants right to secure relief by motion proceedings .... Enough must be stated by respondent to enable the Court to conduct a preliminary examination of the position to ascertain whether the denials are not fictitious"

[55] That is the correct statement of the law even in this jurisdiction as affirmed by the reference and adoption of these dicta by the Court of Appeal of Swaziland (as it was then in the words of Tebbutt JA writing for the court in its judgment in the *VIF* case.

[56] I reject the Respondents' version in the one breath that the Applicants 'voluntarily and temporarily vacated' the homestead of their own accord or in the next that the applicants left the homestead 'without pressure from the respondents' as disingenious. So is their equally unpersuasive and contradictory statement that all the respondents have always been in occupation and have remained in occupation of their mothers house since the death of the deceased in the context of these denials. It rings hollow and lack candour. As I have indicated the most probable and common cause fact is that its only some of the respondents that have remained in residence.

[57] In the totality of the evidence is more likely than not that due to the Respondents actions, the ensuing bitter acrimony and antipathy that has been generated between the applicants' section of the family on the one part and the respondents' faction on the other, the applicants have been forced out and have had to flee the homestead; that by the respondents stance they are presently being denied peaceable access to the homestead or the resumption of their occupation of the main house where their mother has resided at all material times. It is critical that this untenable situation be put right and possession restored. In so fay as the matter of occupation or possession of the main house and their illicit deprivation thereof through the actions of the respondents I am satisfied that the Applicants have made out a case for the mandament relief.

Interdict

[58] On the facts I am also satisfied that the Applicants have also established that they have a clear and established right to remain in undisturbed

possession of their mothers house in the homestead; sufficient legal conditions to merit the grant of the prohibitory interdict they seek calling upon the respondents to desist from their unlawful interference with that right.

[59] That said I must however also stress that I am not persuaded that the Applicants' case for the other interdictory relief precluding the respondents from the rest of the homestead premises and other housing units in the estate has merit at all; I am equally disinclined to order them to return any keys as proposed by the respondents other than keys (to the main house I refer to above) that they may have acquired since the Zwane troubles began.

In the result I make the following Orders:

1. **Pending the referral and deliberation upon the matter pertaining to claims to the homestead by the Zwane Family Council (Lusendvo) or any other appropriate authority or forum:**

    1.1 That the First to Fifteenth Respondents and anyone acting for or on their behalf, are hereby interdicted from harassing, threatening intimidating or assaulting any of the Applicants in any manner whatsoever in this matter;

    1.2 That the First to Fifteenth Respondents be and are hereby ordered to vacate the main house occupied by the applicants and their mother prior to their eviction; to restore possession thereof to the applicants and to hand over any keys and or any other articles or contents of the main house; to disist from hindering the Applicants access to the homestead and possession of the said main house;

1.3 That the Sixteenth Respondent is directed to procure and deploy adequate resources necessary for the security and the enforcement of the orders as well as restoration and maintenance of peace at the Zwane Premises; to do all necessary to ensure the due compliance and execution of the orders by the respondents;

2. The First to Fifteenth Respondents are hereby ordered to pay the Applicants costs of this application.

MAPHANGA J

JUDGE OF THE HIGH COURT

Appearances:

For the Applicants:	Mr. M. Mntungwa Robinson Bertram lngcongwane Building Gwamile Street
For the Respondents (1st to 16th)	Mr. AC. Hlatshwayo Sibusiso B. Shongwe and Associates No. 5 Lot 1579, Lituba Avenue Eveni MBABANE.
For the 1t h -19th Respondents	Mr. S. Hlophe The Attorney General Chambers Justice Building Usutu Link Road MBABANE.