

**IN THE HIGH COURT OF ESWATINI JUDGMENT**

**CASE NO: 798/2022**

**HELD IN MBABANE**

**IN THE MATTER BETWEEN**

**ZODWA SHONGWE (NEE VILAKATI)**

**Applicant**

**AND**

**GERMAN SHONGWE**

**First Respondent**

**TIKHALI SHONGWE**

**Second Respondent**

**THE COMMISSIONER OF ROYAL ESWATINI**

**POLICE**

**Third Respondent**

**THE ATTORNEY GENERAL**

**Forth Respondent**

**NEUTRAL CITATION:**

***ZODWA SHONGWE (NEE VILAKATI) VS  
GERMAN SHONGWE & 3 OTHERS (798/2022)  
SZHC – 100 [02/06/2022]***

**B W MAGAGULA J**

**CORAM:**

**HEARD:**

**30<sup>TH</sup> MAY 2022**

**DELIVERED:**

**7<sup>TH</sup> JUNE 2022**

## **SUMMARY**

*Mandament van spolie – Ownership and proof thereof not a requirement. Peaceful and undisturbed possession is all what is required. Rule 18 (4) considered. Deprivation of property left in the hands of widows is frowned upon. It does not only constitute harassment but it violates the constitution. The application succeeds. No order as to costs.*

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## **JUDGEMENT**

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### **Background Facts**

- [1] The Applicant is before court on an urgent spoliation proceedings, against two of her in laws. The allegations are that the Respondents have in their possession a motor vehicle which was purchased by Applicant's biological sister and placed in her possession to use. In her founding affidavit, she does acknowledge that at some point, she allowed her husband to use the vehicle during his lifetime.
- [2] The first Respondent resides at Othandweni area in Siphofaneni. The First Respondent is an uncle to the Second Respondent. According to the Applicant's founding affidavit, she resides at KaMadlenya area in Siphofaneni. The places of residence of the First and Second Respondent are not an issue.

[3] According to the founding affidavit of the Applicant, the following are the salient facts of the matter before court;

3.1 She is a widow by virtue of being married to her late husband, Sabelo Shongwe. They got married in 2018 and the husband died four years later, on the 19<sup>th</sup> February 2022.

3.2 The Applicant avers that at some point she was employed as a Teacher at Lanjane Primary School. She used to commute to work from her home, marital home. She gives an impression that it is long distance between the two destinations being Lanjane and Kamkhokhi in Siphofaneni. Although the court was not placed in clear picture of the exact distance, but an impression was made that it is a considerable distance between the two places. Hence, the need for her to acquire a motor vehicle.

3.3 According to the Applicant, she was assisted by her biological sister Delisile Vilakati to acquire the motor vehicle which is the subject of the dispute. Since she did not have funds at the time. Her sister made a deposit of E25, 000.00 to the seller of the vehicle, Ziya Investments.

[4] The Applicant has annexed annexure "PM1" in her founding affidavit as proof that her sister paid E25, 000.00 to Ziya Investments, as a deposit for the purchase of the motor vehicle.

[5] I have had an occasion to peruse annexure "PM1". It appears that it is a copy of an undescribed document. It has no title and it is not clear who issued it. What is contained on this document is the following;

5.1 It is numbered (11) and was issued on the 25<sup>th</sup> of February 2019. There is a name inscribed on it, being Vilakati Delisile Simongo Princess. Her cell number is reflected as 7623883. There is a figure of E25, 000.00 Emalangenani inscribed on it. There is a vehicle described there, which is stated as Mazda Demio. There are also figures and it is not clear what those figures are for, but there is a registration number at the bottom, which is FSD 697DM. The document itself does not state what this E25.000.00 is for because, as it does not state ex facie the document that it is for the purchase price or a deposit thereof.

[6] The Applicant has also averred that the motor vehicle was delivered to her sister, who in turn placed it in her possession for her sole use and enjoyment. The Applicant has also stated that after she had been placed in possession of the motor vehicle, her sister paid the balance that was owing to the purchaser in installments, until the full payment was made. The ownership of the vehicle was then transferred to her sister by Ziya Investments. She also stated that it was a condition imposed by her sister, that she will only transfer ownership to her once she has re - imbursed her in full, the purchase price of the motor vehicle.

[7] The Applicant has also annexed documentary evidence being "PM1- PM6", which she said are receipts reflecting payments made to Ziya Motors. When

consideration is made to annexure PM2 – PM6, they indicate varying amounts received from Vilakati Delisile Simongo Princess.

The identity of the vehicle is reflected to be a Mazda Demio FSD 1697. Except for “PM2”, all the documents show that the amounts were received by Ziya Investments. The other key important averment that has been made by the Applicant, is how the motor vehicle was purchased. How it came into her possession. She deals with this in paragraphs 12, 13, 14 and 15. In those paragraphs, in a nutshell, she says her sister entered into a purchase agreement with Ziya Investments. Pursuant to which a down payment of E25, 000.00. was made. After that, she took the motor vehicle and gave it to her sister (Applicant).

- [8] I now turn to consider how the Respondents deal with such pointed averments. Through the affidavit of the First Respondent, he simply says the contents of those paragraphs are denied and the Applicant is put to strict proof. He goes on to traverse on averments that were not made in paragraph 12 and 13. In those two paragraphs, there is no reference to Lucky. Yet he avers Lucky is his late elder brother's child, and he had always confided in him as his surviving father on his personal issues. He then goes on to state that, when his brother bought the motor vehicle in question, he came to show him and even left him a copy of the proof of purchase. That is all he says in answer. He does not deny that this motor vehicle was in the possession of the Applicant. This is a vital averment that the Applicant had made in her founding affidavit which was deserving of a response.

The ownership element is irrelevant. What is key, is possession and that the Respondents deprived her of possession unlawfully. It appears that the Respondent did not controvert those.

### **THE LAW**

[9] Rule 18 (4) state as follows;

*Every pleading shall contain clear and concise statement of the material facts upon which the pleader relies for his claim or answer to any pleading, as the case maybe with sufficient particularity to enable the opposite party to reply and thereto.*

[10] I have taken time to read the entire First Respondent's answering affidavit. In my view, it definitely does not comply with rule 18 (4) in the manner in which he answers to the founding affidavit. He does not state in a clear and concise manner, the material facts upon which he relies on for his defence. I will now over and above what I have mentioned above, consider how the Respondents deal with the pertinent averments made by the Applicant. In the Applicant's founding affidavit in paragraph 14, she states in clear and unequivocal terms that, it is her sister who paid the balance owing in installments until the payment of the last installment was made and then ownership was transferred by Ziya Investments. Her sister is alleged to have stated that, she will transfer the title to Applicant once she re-imburses her the purchase price.

[11] When one now considers the First Respondents response, which is contained in paragraph 7, this is what he states;

*“Contents here are denied an Applicant is put to still proof. The proof attached herein contradicts the dates stated on the receipts. There are annexures that have got dates”.*

- [12] It is not clear from the First Respondent’s answer in what way do the proofs of payment contradict the dates. First Respondent simply makes a bare denial. He just contends himself with a denial, without laying down the concise statement or the material facts upon which he relies on the denial. This then clearly makes it a bare denial. There is no basis laid for it.
- [13] Her Ladyship, M. Dlamini J has had an occasion to deal with a failure by a Respondent to state material facts upon which a denial is made. This was in the case of **Lungile Mngometulu and another vs The Attorney General. High Court Case No. 335/2013**, where she held that, where a litigant simply denies an allegation without advancing his side of the story, the other party is entitled in our law to consider that no issues have been raised and that his version has not been denied.
- [14] Spoliation is a remedy that seeks to restore possession forthwith<sup>1</sup>, without going into enquiry on the merits of the matter<sup>2</sup>.

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<sup>1</sup> See Willes’s Principles of South African law 8<sup>th</sup> edition page 267

<sup>2</sup> Silberberg and Schoeman’s: The law of property, 4<sup>th</sup> edition page 269

## **Respondents Defence**

[15] I have already touched on the Respondent's approach to the application in this judgment. The essence of their defence is the following:

- 15.1 The motor vehicle came to be in the possession of Lucky Shongwe through the decision of the deceased.
- 15.2 Lucky or the deceased's brother confided to the First Respondent on personal issues.
- 15.3 When the Applicant's husband was still alive he came to show the First Respondent the motor vehicle in question and even left a copy of the proof of purchase.
- 15.4 In paragraph 14, the First Respondents estate as part of his answer that the motor vehicle was left in his custody by the owner.
- 15.5 The deceased's estate has been reported to the Master of the High Court, and the Applicant has already been appraised of the Respondent's visit to the Master's office. The parties should go through that process for the best interest of the minor children.

## **ANALYSIS AND CONCLUSION**

[16] The First Respondent denies that the Applicant placed the motor vehicle in the possession of Lucky Shongwe<sup>3</sup>. What the First Respondent does not volunteer though in his answering affidavit, how then is the motor vehicle came to be in

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<sup>3</sup> See paragraph 9 of the first Respondents answering affidavit.



his possession or that of the Second Respondent. He also does not deny that he is in possession of the motor vehicle. The Applicant in her founding affidavit, unambiguously avers that she instructed Lucky Shongwe to park the motor vehicle at the First Respondent's house for safe keeping. She further states that, she went further to call the First Respondent and alerted him to expect the arrival of the vehicle with Lucky and he must take possession of the vehicle keys for safe keeping, until her return from hospital.

[17] In his response to these direct and pointed averments or allegations. The First Respondent directs his response to two other paragraphs, other than the averments made in paragraph 20. This is how the first Respondent responds to all three paragraphs.

#### **9. AD Paragraph 19, 20 and 21**

*Contents herein are denied and Applicant is put to shut proof. I aver that Lucky got the motor vehicle from the deceased.*

*(Attached herewith is a confirmatory affidavit of Lucky Shongwe marked "2")*

[18] The following concerns emanate from the above response by First Respondent.

18.1 The first Respondent has elected to make a bare and blanket denial to specific averments that have been made by the Applicant, without substantiating the basis of his denial.

18.2 In as much as he alludes to the fact that Lucky got the motor vehicle from the deceased, but he then contradicts himself in paragraph 14 of his answering affidavit when he states that the motor vehicle was left in his custody by the owner.

[19] What then should happen to the averments made by the Applicant which have been met with a bare denial by the Respondents? In **Lungile Mngometulu and another vs The Attorney General**<sup>4</sup>, it was held that a bare denial is as good as no plea at all. There is no reason why the same reasoning should not apply in motion proceedings, where a bare denial has been made in an answering affidavit<sup>5</sup>.

[20] This then leads me to conclude that the averments in respect of which a bare denial has been made must be taken as if they have not attracted any denial from the Respondents. If the Respondents wanted to controvert that Lucky Shongwe was specifically sent to park the vehicle at the home of first Respondent up until Applicant returns from hospital. First Respondent should have in a clear and concise manner controverted that and stated clearly whether the motor vehicle was placed in his possession or not. This then makes it justifiable for one to conclude that indeed the first Respondent was placed in possession of the motor vehicle by Lucky Shongwe after being directed to do so by the Applicant. Lucky Shongwe's confirmatory affidavit

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<sup>4</sup> High Court Case No. 335/2013

<sup>5</sup> Rule 18 (4) requires that a pleader must state clearly and concisely the material facts that he relies on.

does not assist the First Respondents case, because he also makes bare denials without substantiating his position.

[21] The Applicant has further averred that, whilst she was in mourning, the Second Respondent, who had not been placed in possession of the car, approached her seeking for permission that he must be the one that should keep the vehicle. Again, a bare denial of this allegation is made by both the First Respondent and the Second Respondents<sup>6</sup>. I will also take this bare denial as constituting no denial at all. It actually gives credence to the Applicants case that the two are in possession of the vehicle and unlawfully so. It has also not been denied that after the demise of her husband, she was in peaceful and undisturbed possession of the motor vehicle. The temporal handing over of the vehicle to Lucky cannot be said to constitute permanently relinquishing of the vehicle.

[22] I will now turn to the issue of whether the Applicant has been able to make a case for spoliation. In paragraph 27, the Applicant states that during the Easter Holidays, she again made an effort to reach out to the Respondents to return the motor vehicle. Instead of the motor vehicle being returned, they decided to approach the Master of the High Court. It is not explained on the Respondents papers, on what basis did the Respondents apportion themselves the responsibility of reporting the estate to the Master. The Applicant was married to the deceased, at least that part is not being disputed. She is an adult

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<sup>6</sup> This is done in paragraph 10 of the first Respondents answering affidavit. The second Respondent did not file an independent answering affidavit of his own. He simply confirmed all that was said by the first Respondent through a confirmatory affidavit.

not a child, why was she bypassed when the estate of her husband was being reported to the Master of the High Court? In as much as it is common course that there are certain degrees of consanguinity between the Respondents and the deceased. Be that as it may, the deceased was a husband to the Applicant. The Respondents being blood relatives to the deceased, should not have undermined the Applicant who is the wife of the deceased.

[23] I must express my disquiet with the entitlement attitude displayed by the Respondents as in laws of the Applicant. It is now not uncommon in our jurisdiction for in laws to undermine a widow once her husband has passed on. This is apparently justified under the guise of Swazi Law and Custom. Such conduct undermines the provisions of our constitution<sup>7</sup>. It cannot be countenanced by this court.

[24] In the Respondent's heads of argument the Respondents have raised a host of new issues. Some are the following;

24.1 The Applicant has failed to inform the necessary parties being the office of the Master of the High Court the garage in whose name the motor vehicle is registered.

24.2 The Applicant is also alleged to have failed to inform (my own underlining) Delisile Vilakati as the supposed new owner. The court notes the choice of words used in the heads, being "inform" The Respondents alleged that the Applicant failed to inform I assume they

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<sup>7</sup> Section 28(1) and (3) and also Section 19 (2)

intended to mean Applicant failed to cite or join the above named parties. The Respondents also argued that the Applicant has failed to meet the necessary requirements for spoliation.

[25] It was argued that the Applicant was never in possession of the motor vehicle, as it has always been with the deceased.

[26] In their heads of argument, the Respondents also cited the case of **The Manzini Meat Market and Another Vs Dups Funeral Home Undertakers and Another Case No. 862/13** where it was stated that the legal possession must be sufficiently stable, firm and enconsed.

[27] In as much as the principle as set out in the Manzini Meat Market case is correct, but its application to the facts at hand by the Respondent is ill-conceived and misplaced. The Applicant was in possession of the motor vehicle and her possession was stable, firm and enconsed. In her founding affidavit, she clearly states that she did not intend to lose the possession permanently, when she asked Lucky Shongwe to drive the vehicle to the First Respondent's place for parking. She states specifically that this was to be so, until her return from hospital. I therefore fail to appreciate the basis of the argument that her possession of the vehicle was not firm. It is the Respondents that are now holding onto the motor vehicle unlawfully, by refusing or failing to release it to her despite that she has returned from hospital.

[28] In respect of the argument of non-joinder, it has not been raised in the Respondent's answering affidavit. It is therefore a new issue that comes in the

heads of argument. The Respondent's defence should have been raised in their answering affidavit, not in their heads of argument.

[29] It is my considered view that due to the foregoing reasons, the Applicant has clearly made a case for spoliation. She was in peaceful and undisturbed possession of the vehicle. She temporarily relinquished possession and gave it to one Lucky Shongwe with specific instructions that it must be parked at the First Respondent's home for safe keeping. As to how the motor vehicle got to the possession of the Second Respondent, is unexplained and does not justify the deprivation of possession.

[30] I am therefore satisfied that the First and Second Respondents, must restore possession of the motor vehicle immediately to the Applicant. The Applicant's Attorney, Mr Hlanze, during the arguments, abandoned the prayer in respect of costs. If this prayer was not abandoned, I would have ordered that the costs should follow the event. In fact I was inclined to issue costs at a punitive scale, in light of the high handedness and inconsiderate manner in which the Applicant has been treated. The Applicant is a widow of the Respondent's own relative, they should have been more sensitive. I would have done so to mark my disapproval and also to send a strong message to other members of the public who may adopt such an abusive and marginalizing attitude towards widows<sup>8</sup>. In the circumstances, the Applicant's application succeeds. Each party to pay its own costs as per the submissions of Mr T. Hlanze.

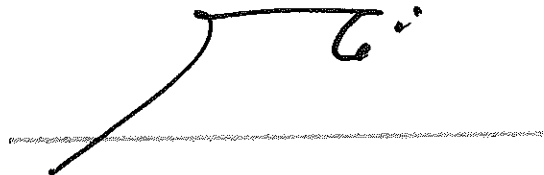
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<sup>8</sup> The United Nations General Secretary in an article published on the 2<sup>nd</sup> June 2019 ([www.un.org](http://www.un.org)) urged the world to consider the economic hardship and increased vulnerability that bereaved women can face.

## **ORDER**

1. That the forms of service and time limits prescribed in the Rules of Court be dispensed with and this matter be dealt with as an urgent application.
2. That the Sheriff or his Deputy in the Lubombo District and/or members of the Royal Swaziland Police from the Siphofaneni Police Station be authorized to seize from the Second Respondent or any other person in possession thereof a certain motor vehicle, to wit; Mazda Sedan 2007 model with the following particulars:

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|----------------------|-------------|
| Registration Number- | FSD 697DM   |
| Engine Number -      | ZJ537333    |
| Chassis Number-      | DE3FS110005 |
3. No order as to costs.



**BW MAGAGULA J**

**JUDGE OF THE HIGH COURT OF ESWATINI**

For the Applicant: Mr T. Hlanze (TV Hlanze Attorneys)

For the Respondents: Mr M. Nkambule (Nkambule Attorneys)