



IN THE HIGH COURT OF ESWATINI

JUDGMENT

Held at Mbabane

Case No. 1218/23

In the matter between:

**MATADAR INVESTMENTS (PTY) LTD**

**1<sup>ST</sup> APPLICANT**

**MARCO PAULO INVESTMENTS (PTY) LTD**

**2<sup>ND</sup> APPLICANT**

**AND**

**MUSA KHATHWANE**

**1<sup>ST</sup> RESPONDENT**

**ZETHU KHATHWANE**

**2<sup>ND</sup> RESPONDENT**

**SICELWINI ROYAL KRAAL**

**3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL**

**4<sup>TH</sup> RESPONDENT**

**Neutral citation:** *Matadar Investments (Pty) Ltd & Another vs Musa Khathwane  
& 3 Others [1218/23] [2023] SZHC 300 (27 October 2023)*

**Coram:** FAKUDZE, J

**Heard:** 06/06/2023; 13/06/2023; 19/06/2023; 22/06/2023; 26/06/2023;  
11/07/2023; 25/07/2023; 26/07/2023

**Delivered:** 27 October, 2023

Summary:

*Spoliation proceedings – 1<sup>st</sup> Applicant claims that it had a lease agreement with 2<sup>nd</sup> Applicant – 1<sup>st</sup> and 2<sup>nd</sup> Respondents ordered shop leased by 2<sup>nd</sup> Applicant to 1<sup>st</sup> Applicant to be closed – in so doing the Respondents were enforcing an Order issued by 3<sup>rd</sup> Respondent in 2019 conferring ownership rights of the property to Elias Khathwane – 2<sup>nd</sup> Applicant asked to be joined and there was no objection to the joinder – 1<sup>st</sup> Applicant alleges that it was not a party to the 2019 dispute – dispute was between 2<sup>nd</sup> Applicant and Elias Khathwane – 1<sup>st</sup> Applicant's relationship with 2<sup>nd</sup> Applicant is based on an existing lease – court's finding that the 1<sup>st</sup> Applicant has satisfied the requirements for spoliation as same was in peaceful possession of the property in dispute and there was no order of court or Royal Kraal Order allowing the locking up of the business premises since the 3<sup>rd</sup> Respondent's Ruling pertained to Elias Khathwane and the 2<sup>nd</sup> Applicant – Rule nisi confirmed with costs.*

**JUDGMENT**

[1] On the 6<sup>th</sup> June, 2023, the Applicant filed a Notice of Motion under a certificate of urgency seeking the following:

- 1.1 *Dispensing with the normal and usual requirements of the above Honourable Court's Rules relating to service, notices and enrolling this matter to be heard on an urgent and ex parte basis;*
- 1.2 *Condoning the Applicant's non-compliance of the above Honourable Court's Rules;*



- 1.3 *Ordering and directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to restore possession ante omnia of the three (3) business premises situate at Lomahasha Shopping Complex at Lomahasha, being a Total Filling Station, Lucky Hardware and Lomahasha Saving Centre immediately upon service to them of this Order;*
- 1.4 *Ordering and directing the Deputy Sheriff of the District of Lubombo to open any locks in the three (3) business premises for the Applicant to have access to the premises;*
- 1.5 *Granting the Applicant costs at the punitive scale of attorney and own client;*
- 1.6 *That a Rule Nisi operating with immediate effect be and is hereby issued returnable on a date to be stipulated by the above Honourable Court why an Order in terms of prayers 3, 4 and 5 should not be made final;*
- 1.7 *If the Respondents are prejudiced by the immediate effect of the Order, granted by the above Honourable Court they may, on twenty four (24) hours' notice to the Applicant anticipate the date of hearing and apply that the above Honourable Court rescind and/or discharge the Rule Nisi;*
- 1.8 *Granting the Applicant and further and or alternative relief.*

[2] The Respondents are opposing the Application. Marco Polo Investments (Pty) Ltd, 2<sup>nd</sup> Applicant applied to be joined as an Applicant in the matter which application was not opposed by the Respondents. On the 6<sup>th</sup> June, 2023, the court granted a Rule Nisi as prayed for by the 1<sup>st</sup> Applicant.

## The parties' case

### Applicant

- [3] The 1<sup>st</sup> Applicant's case is that it was in peaceful and undisturbed possession of the three (3) business premises at Lomahasha Shopping Complex where she operates a filling station, supermarket and a hardware. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents, acting jointly with one Lemmy Matimba and Joseph Matimba, locked the aforementioned businesses thus despoiling the Applicant.
- [4] The Applicant further avers that when it was despoiled of the business premises the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not have a court order to lock the business premises, hence their action was unlawful. In so closing the premises, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents alleged that the properties belong to their family and if the Applicant wants to continue doing business, it should sign a lease agreement with them. Alternatively, since the Respondents are equipped with an Order from Esicelwini Royal Kraal that the property belongs to them, they have a right to order the Applicant to vacate the property or lock it.
- [5] It is the Applicant's contention that it has a valid lease agreement with 2<sup>nd</sup> Applicant who are known to it as the rightful owners of the business premises. The Applicant annexed the lease agreement and same was marked as annexure "B."
- [6] As a result of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' unlawful action the Applicant has suffered loss of over One Hundred Thousand Emalangeni (E100,000.00).



- [7] The 2<sup>nd</sup> Applicant avers that it entered into a lease agreement with the Applicant and this lease agreement is still in existence. The 2<sup>nd</sup> Applicant further avers that the Applicant was not a party to the dispute between Thomas Elias Khathwane and 2<sup>nd</sup> Applicant. Case No. 1994/2019 related to the late Thomas Elias Khathwane and Marco Polo (Pty) Ltd, the 2<sup>nd</sup> Applicant. Furthermore, the 2<sup>nd</sup> Applicant alleges that the purported authority from 3<sup>rd</sup> Respondent is a nullity since same was overturned by the chief as evidenced by Annexures "C" and "D" of the 1<sup>st</sup> Applicant's Replying Affidavit. See also "L2" of the 2<sup>nd</sup> Applicant's Replying Affidavit.
- [8] The final argument by the Applicants is that even if Mr. Masilela the umphakatsi secretary was bribed into writing a letter to the 2<sup>nd</sup> Applicant clarifying that the Chief had not assigned anyone to deal with Elias Khathwane and the 2<sup>nd</sup> Applicant's matter, there is nothing to prove that the secretary's letter was fraudulent. The whole matter was not prosecuted. This is just a hearsay.

### **The Respondents**

- [9] The Respondents argue that the Esicelwini Royal Kraal should have been joined as a party to the proceedings. After all, the authority on which the Respondents carried out the closure of the business premises came from that Royal Kraal. The Respondents further alleged that it is trite law that a party that has a direct and substantial interest in a matter should be joined. Non joinder can be fatal to the party that has failed to join the interested party. The Applicant has also failed to join the two Matimba members who are the Umphakatsi Representatives who went there to evict the Applicant. There

was also the non-joinder of the Attorney General who represents all Chiefdoms in terms of the Constitution.

- [10] On the issue of non-joinder alone, this court should dismiss the Applicants' case. In the event the court does not uphold the point of law on joinder, it is the Respondents' contention that this court has no jurisdiction because the dispute arose in respect of a business that is on Swazi Nation land. The Respondents were acting on the Ruling of the Umphakatsi under Swazi Law and Custom after same had been referred there by the High Court in 2019.
- [11] On the merits, the Respondents argue that the Applicants are not entitled to any order. This is so because when the Respondents were attempting to evict the Applicant, they relied on the Ruling of the Umphakatsi under Swazi Law and Custom. On that basis, alone, this court has no power to interfere with the Traditional Authorities' processes.

### **The Law**

- [12] In the case of **Regional Administrator and Six Others v Coshiwe Matsenjwa and Seven Others (15/2016) [2016] SZSC 13** (30<sup>th</sup> June 2016) His Lordship Chief Justice Maphalala M.C.B. said at paragraph 11:

*"[11] Having come to the conclusion that the cause of action in this matter relates to spoliation proceedings, the court a quo did not misdirect itself in coming to the conclusion that it had jurisdiction to entertain the matter. The court a quo was correct in its finding that the principle of "mandament van spolie" comes from Roman Dutch law and that this principle has no application in Swazi Law and Custom."*



[13] The Learned Chief Justice continued to observe in paragraph 13 as follows:

*“[13] The High Court has unlimited original jurisdiction in civil and criminal matters including revisional jurisdiction over subordinate and specialised courts as well as tribunals exercising a judicial function. In addition the High Court has appellate jurisdiction over the subordinate courts as well as Swazi Courts. The remedy of mandament van spolie originates from the Roman Dutch Law, and it is justiciable before the High Court; such remedy is not excluded from the jurisdiction of the High Court.”*

[14] In Swaziland Commercial **Amadoda Road Transportation and Others v Siteki Town Council, Civil Case No. 254/2012** (HC) at paragraphs 17 and 18 where it was stated as follows:

*“[17] It is trite law that the essence of the “mandament van spolie” is that the person who has been deprived of possession must first be restored to his former position before the merits of the matter can be considered. The main purpose of the remedy is to preserve public order by restraining persons from taking the law into their 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. The Motion Proceedings are ideal and expedient for this remedy since it is urgent in nature with a quest to restore the status quo ante before the equities and merits of the case are considered; any delay would defeat the unique and summary nature of the remedy.”*

*“[18] There are two essential requirements which the applicant must prove: 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 Applicant in this first requirement to show that he had factual control of the thing coupled with the intention to derive some benefit from the thing. Furthermore, he must prove an act of spoliation, that he had been deprived of his possession of the thing without a court order or against his consent.”*

[15] On the issue of joinder, it has been established that a party who has a vested and substantial interest in a matter should be joined. In **Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W)**, Celliers A.J. observed as follows:

*“[11] It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand and joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to misjoinder), on the other hand. In cases of joinder of necessity, the court may, even on appeal, mero motu raise the question of joinder to safeguard the interests of third parties, and decline to hear the matter until such joinder has been effected or the court is satisfied that third parties have consented to be bound by the judgment of the court or have waived their rights to be joined.”*

#### **Court's observation and conclusion**

[16] The 1<sup>st</sup> Applicant contends that it was despoiled of its property based on an Order issued by the Esicelwini Royal Kraal. The 1<sup>st</sup> Applicant's contention



is that much as the Order was issued by the Sicelwini Royal Kraal, it was issued in respect of a 2019 High Court Case No. 1994 wherein the parties were Thomas Elias Khathwane and Marco Polo (Investments) Pty Ltd. The Applicant did not feature. It entered into a lease agreement with Marco Polo (Pty) Ltd which lease is still in existence. The 1<sup>st</sup> Applicant further contends that it has approached this court for it to be restored to the possession of the three businesses that are the subject of the spoliation. The 1<sup>st</sup> Applicant was in peaceful and undisturbed possession of same. The Respondents raised the issue of non-joinder of the Esicelwini Royal Kraal, the Attorney General and the Matimba who were messengers of the Royal Kraal and are the ones who carried out that Order. They argued that the Royal Kraal is the one that issued the Order conferring ownership rights to Thomas Elias Khathwane who is now late. The Applicants argued to the contrary, by stating that there is no dispute on the issuance of the Order by the Royal Kraal. What matters is that the Applicant was despoiled of the properties

[17] On the issue of the non-joinder, it is the court's humble view that there was no need for the Royal Kraal to be joined. Same applies to the Attorney General and the messengers. It is not in dispute that the Royal Kraal did issue the Order in favour of the aforesaid Thomas Elias Khathwane. What is in issue here is whether the Applicant in this Application was despoiled of the leased property or not. I therefore find in favour of the Applicant on this point that the joinder of the Royal Kraal is not necessary. The same applies to Attorney General and the messengers.

[18] The Respondents also raised the issue of jurisdiction. They alleged that the properties that are the subject of the dispute are on Swazi Nation Land. In



2019, the court that directed that the matter be deliberated upon at the Royal Kraal level was aware of the fact that matters of Swazi Law and Custom are not to be adjudicated upon by the common law courts. In response, the Applicants argued that spoliation is a common law remedy. Common Law Courts can adjudicate on these matters. The case of **Regional Administrator v Coshiwe Matsenjwa and Seven Others** addresses this point. In that case, the Supreme Court stated as follows:

*"[13] The High Court has unlimited original jurisdiction in civil and criminal matters including revisional jurisdiction over subordinate and specialised courts as well tribunals exercising a judicial function ... The remedy of mandament van spolie originated from the Roman Dutch Law and it is justiciable before the High Court; such remedy is not excluded from the jurisdiction of the High Court."*

- [19] The court agrees with the Applicants that the Application before it pertains to spoliation. As earlier stated, the 2019 Ruling by the Royal Kraal related to a matter in which the Applicant was not a party. There is also an existing lease agreement between the Applicant and Marco Polo (Pty) Ltd. What worsens the Respondents' case is that there was evidence brought before the court that the Ruling by the Royal Kraal was set aside by the Chief of the area as per the correspondence written by Masilela to Marco Polo (Pty) Ltd clarifying that the Chief had overturned the decision of the Chief's Council. An attempt was made by the Respondents that Masilela was charged with fraud arising from the very same correspondence. Unfortunately the fraud case was never prosecuted so as to establish the criminal liability of Masilela. Reliance cannot be placed on the Respondents' version that Masilela committed fraud by virtue of the correspondence to Marco Polo




(Pty) Ltd. It is this court's view that practically speaking, there was no Ruling by the Royal Kraal at the time of executing the same by the messengers of the Royal Kraal.

[20] In totality, this court has come to the conclusion that the 1<sup>st</sup> Applicant made a case for spoliation. It did establish that it was in peaceful and undisturbed possession of the three business premises when the messengers came to lock them up. Further, the 1<sup>st</sup> Applicants has established that it was unlawfully deprived of such possession. The 1<sup>st</sup> Applicant has successfully established an act of spoliation. The business premises were locked by the messengers without a court order or Royal Order.

[21] In light of the foregoing, I hereby make the following Order:

- (a) The interim order issued by the court on the 6<sup>th</sup> June, 2023 is hereby confirmed;
- (b) The costs of the Application which shall be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall be at an ordinary scale and shall include the certified costs of counsel in terms of Rule 68 in so far as they relate to counsel for the 2<sup>nd</sup> Applicant.

A handwritten signature in black ink, appearing to be 'FAKUDZE J.', written over a horizontal line.

FAKUDZE J.

JUDGE OF THE HIGH COURT

1<sup>st</sup> Applicant: S. Bhembe

2<sup>nd</sup> Applicant: Advocate L.M. Maziya instructed by R.J.S Perry Attorneys

1<sup>st</sup> and 2<sup>nd</sup> Respondents: N.D. Jele

3<sup>rd</sup> and 4<sup>th</sup> Respondents: Attorney General