

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1228/2023

In the matter between:

MIHLAKAYIFANI BHEKI MAGAGULA

APPLICANT

And

NONKULULEKO NZIMA

FIRST RESPONDENT

INDVUNA MAFONDOLOLO

MBHAMALI

SECOND RESPONDENT

THE NATIONAL COMMISSIONER

OF POLICE

THIRD RESPONDENT

ATTORNEY GENERAL

FOURTH RESPONDENT

Neutral citation : *Mihlakayifani B. Magagula v Nonkululeko Nzima & 3 Others (1228/2023) [2024] SZHC 26 (07/03/2024)*

CORAM: B.S DLAMINI J

DATE HEARD: 16 February 2024

DATE DELIVERED 07 March 2024

Summary: Spoliation proceedings- Applicant contending that he was despoiled of home donated to him by deceased. First Respondent arguing that Applicant never resided at the home in question and that she was the one always in occupation of the home in question- Requirements for spoliation proceedings considered.

Held; The Applicant has failed to reasonably demonstrate that he was in occupation of the home in question and that he was unlawfully removed from same by First Respondent. Application dismissed with costs.

JUDGMENT

INTRODUCTION

[1] The Applicant, who describes himself as an adult Liswati male of Mahlabaneni area in Big Bend, moved an application before this Court seeking to be granted orders as follows;

- “1. That the first respondent be directed to restore possession of the land situated at Mahlabaneni-Big Bend area, Lubombo District to the applicant *ante omnia*. That the Deputy Sheriff for the Lubombo District be authorized to effect the restoration of the possession of the land to the applicant.**

- 2. That the Deputy Sheriff for the District of Hhohho with the assistance of the Royal Eswatini Police where necessary be directed to remove all movable properties of the first respondent (Nonkululeko Nzima) from the home of Mhlakayifani Bheki Magagula and deliver such property at a place which the first respondent shall direct.**

- 3. That the Deputy Sheriff for the Hhohho District be directed to demolish any structure be it permanent or temporary that**

would have been built by the first respondent within the boundaries of the homestead of Mhlakayifani Bheki Magagula.

4. That the first respondent be ordered to pay costs of this application.
5. That the Applicant be granted any further and or alternative relief which this Honourable Court may deem just in the circumstances.”

[2] In the Founding Affidavit, Applicant alleges that he was a friend to one Mkoloni Maziya who was a resident of Mahlabaneni area in Big Bend and had built his home in this area. The said Mkoloni Maziya (now deceased), according to Applicant, was involved in an adulterous relationship with the First Respondent and this fact was communicated to him by the deceased whilst he was still alive.

[3] The Applicant states in his Founding Affidavit that the deceased (Mkoloni Maziya) informed him that First Respondent was once

married to a Dlamini male person at Kwaluseni area. Before that, First Respondent was married to a certain Mr. Richard Ndzinisa with whom they had two children and was also in a relationship with one Mr. Million Simelane with whom they had a daughter. According to Applicant, Mkoloni Maziya informed him that the many previous relationships of First Respondent was the cause of the strain in the relationship between the two of them.

[4] Applicant alleges that at the time that First Respondent met with the deceased, she already had her own homestead at Mahlabaneni area in Big Bend where she lived with her children. According to Applicant;

“[4.4] Mkoloni Maziya decided to give me the home that he had built at Mahlabaneni area. He informed the Indvuna of the area Mr Mafondololo Mbhamali and the Inner Council of Mahlabaneni Umphakatsi that he was giving the home to me and that I was going to compensate him for some money [sic] he had spent on some developments.

[4.5] Mkoloni Maziya got sick such that he had to leave Mahlabaneni area. Mkoloni Maziya before leaving

Mahlabaneni area introduced me to his children Pule Sandile Maziya and Sipho Maziya. Mkoloni Maziya informed his children that he was giving the home to me. The children consented.

[4.6] Mkoloni Maziya passed away and his children decided to go and live in the Republic of South Africa at Leandra, Gauteng Province.”

- [5] It is alleged by Applicant that after the death of Mkoloni Maziya, the latter's children and their cousin and uncle took him to the Mahlabaneni Umphakatsi to be formally introduced. At the Umphakatsi, Applicant was introduced to the Inner Council comprising of Indvuna Mafondololo Mbhamali, Secretary to the Inner Council, Zachariah Fakudze, Mabhalane Tsikati, Mrs Tsabedze and Mrs Dlamini.
- [6] Applicant further alleges that due to First Respondent's claim of ownership of the home, the dispute had to be reported to the Umphakatsi and that after deliberations, a ruling was made in his

favour that the home belongs to him as he had completed all processes that have to be followed in accordance with customary law.

[7] In addressing the cause of action, it is Applicant's contention that First Respondent refused to accept the decision by the Mahlabaneni Inner Council, and instead, waited for an opportunity when Applicant would be away to his work station and that is when she (First Respondent) took her children to the homestead and placed them at the disputed home. Applicant alleges that First Respondent invaded his home and is preventing him from accessing the home, which according to Applicant is being trashed by First Respondent's children.

[8] In her Answering Affidavit, First Respondent raised a number of preliminary points of law namely that;

- (a) The High Court has no jurisdiction to preside and make a determination on disputes relating to land situate governed through customary law.

- (b) The matter or dispute between the parties is *res judicata* as same was deliberated and a ruling was issued by the Ngevini Umphakatsi under which the area of Mahlabaneni falls.
- (c) The Applicant has failed to meet the requirements for the grant of *a mandament van spolie*.

[9] First Respondent's contention on the merits of the matter is that it is not true that Applicant was ever in occupation or in control of the property in question. First Respondent alleges that when she was about sixteen years old, she was approached by Mkoloni Maziya ("the deceased") and they began a love relationship. First Respondent moved in with the deceased and they stayed together at Mavalela area in the Lubombo Region. After about five years, the deceased left for South Africa in pursuit of work opportunities.

[10] According to First Respondent, when the deceased left for South Africa, she never heard anything from him for many years until the year 2014 when First Respondent got a call from the said Mkoloni

Maziya. During this time, First Respondent was residing at Mahlabaneni area in the Lubombo Region with her family.

[11] First Respondent states that in the year 2015, they rekindled their love relationship with the deceased and he would often come to sleep at her homestead at Mahlabaneni. Being uneasy with having a man coming to sleep at her family homestead, First Respondent informed the deceased that out of respect for her family, it was not proper that they should be spending nights together at her family homestead. It was for this reason that the deceased took a decision to '*khonta*' or apply for residence for her at Mahlabaneni area.

[12] The deceased, according to First Respondent, informed First Respondent to look for a place at Mahlabaneni area in which the couple could build their home. It is First Respondent's further contention that;

“[11] Fortunately, and coincidentally, in the same year 2015, one Make Simelane who had a home nearby my homestead, decided to relocate and go [to] reside in South Africa, and she approached me to ascertain if I have an interest in her

homestead in order that she can transfer her ownership rights thereof to me to which I responded to the affirmative. To that effect I duly informed Maziya of same and he reiterated that he can assist me in doing all that will be required to put into effect the transfer of such ownership rights aforesaid homestead to me.

[11.1] I state that due to the reason that Maziya was not from the Mahlabaneni area, I took him to one Mfanawabani Mbhamali (Lisekela Lendvuna) and introduced him there as my lover who intended on assisting [me] acquire ownership rights to the aforesaid homestead and he will pay all the dues in accordance with Eswatini Law and Custom associated with such transactions as he was desirous of securing me with a homestead.

[11.2] In response, Mfanawabani Mbhamali told me that we should go to Mafondololo (indvuna) to introduce Mkoloni Maziya. I state that we were accompanied by the said Mfanawabani Mbhamali who introduced us before Umphakatsi, and mentioned that we intended on

undergoing the Swazi Custom of *kukhonta* in the above said land as we were advised that land rights in terms of Eswatini Law can only be transferred through the *kukhonta* process.

[11.3]Consequently, the Royal Kraal approved same and we paid a total amount of E 4,100.00 (Four Thousand One Hundred Emalangeni) being monies equivalent to a cow and/or beast for the custom of *kukhonta*.

[11.4]I hasten to state that at the Royal Kraal, Mkoloni Maziya was expressly asked who he was acquiring the said land for and he reiterated that he was acquiring same for me (LaNzima).”

[13] It is First Respondent’s contention that Mkoloni Maziya (the deceased) once again left for South Africa in 2016. According to First Respondent, once the deceased was in South Africa, he once again became distant and sounded like he was no longer on the same page with the First Respondent on the couple’s future plans. The deceased

attempted to eject the First Respondent from the premises and became violent such that First Respondent had to report the matter to the police. First Respondent alleges that she personally developed the home by constructing other structures which she rented out to tenants.

[14] In the year 2022, the First Respondent received a summons from the Royal Kraal and upon arrival, First Respondent found Applicant who claimed that the home had been given to him by the deceased. On the 11th day of June 2022, the Royal Kraal, based at Ngevini Umphakatsi, deliberated on the matter. On this day, the Applicant was accompanied by Mkoloni Maziya. The Royal Kraal rejected Applicant's and deceased's claim over the home and held that same belonged to the First Respondent. First Respondent proceeded to attach the ruling made by the Royal Kraal in the matter.

[15] It is First Respondent's contention that the deceased never resided or made any improvements on the property in question. The deceased would only visit First Respondent for a few days and then leave for South Africa. According to First Respondent, the children of the

deceased have never set foot on the home in question and do not even know where it is situated.

[16] The First Respondent denies that there was any ruling by traditional authorities in favour of Applicant. On the issue of spoliation, First Respondent contends that;

“...I state that I have been in occupation of the home in question ever since I completed constructing structures. I have been leasing the home to individuals who were working around the area...I further reiterate that I have never used force in anyway; I have been in occupation of the home in question. I state that even the registered name at the Electricity Company for electricity is [in] my name having been assisted by the authorities to open electricity.”

[17] The First Respondent vehemently denies that Applicant was ever in possession or occupation of the said property as alleged in his Founding Affidavit and that he was despoiled of same by her at any point of time.

ANALYSIS OF ISSUES AND FINDINGS

[18] The Applicant's cause of action in this matter is founded on the *mandament van spolie*. The Court is thus required to determine the question of who, between the parties, was in occupation or possession of the home as opposed to who, amongst the feuding parties, has rights of ownership over the same.

[19] In *Makhanya v Makhanya* [2002] SZHC 49 (19 June 2002), the Court had this to say:

“It is trite law that in order for the Applicant to succeed in an application for a *mandament van spolie* he must show that (a) he was in peaceful and undisturbed possession of the things; and (b) he was unlawfully deprived of such possession (See *Van Der Merwe et al, The Law of Things and Servitudes, Butterworths at page 71* and the cases cited thereat).

In the present case, it is abundantly clear from the facts advanced by the Applicant that the requirements outlined above have been satisfied. The case for the Respondent in his answering affidavit is based on the rights he has on the properties taken. This, however is not the purpose of the application before court. The *mandament*

van spolie is used to summarily undo the unlawful taking of existing control by restoring the control without investigation [investigating] its merits (see *Bonino vs De Lange* 1906 TS 120, 125 and *Teko vs Qana* 1973 (4) SA 735 (A) 739 G). This means that the court restores the Applicant's control without investigating the merits of the parties' to the thing, merely because control has been seized unlawfully by self-help."

[20] It is therefore important that the party alleging unlawful deprivation of property must reasonably establish and prove that he or she was in control over the property in question. Proving the element of control, like in all similar matters, requires an objective assessment of the facts placed before Court. In an opposed application like in the present, the facts alleged by Applicant must be placed on an equal scale with the facts alleged by the Respondent. The Court must then determine which of the two conflicting versions, is to be accepted as the correct version on a preponderance of probabilities.

[21] Both Applicant and First Respondent allege that they were in possession of the property in dispute immediately prior to the

launching of the application to this Court. What Applicant has alleged in his Founding Affidavit is that whilst he was away at work, the First Respondent took advantage and placed her children in the home in question and stops him from accessing the home. This averment by Applicant, does not on its own mean that the latter was in physical control of the property in question.

[22] The Court notes that Applicant was required to allege in his Founding Affidavit that he was staying or living on the property in question prior to him leaving for his work station. This averment would have qualified him to be considered as someone in possession or control of the property at some point in time. There is however no such averment in Applicant's papers. In the case of **David Malinga v Bheki Malinga [264/2012] SZHC 72 [2017] (19 April 2017)**, the High Court of Eswatini held as follows as regards the principles applicable to matters of this nature;

“[18] The principles governing spoliation proceedings have been stated in various authorities of this Court. These proceedings are also referred to as *mandament van spolie* actions. In the case of *The Regional Administrator, Lubombo*

Region and 6 Others v Coshiwe Matsenjwa and 7 Others
(15/2014) [2016] SZSC 13 (unreported) M.C.B Maphalala
CJ quoted a High Court judgment that he made and stated
that the essence of spoliation proceedings is that;

“the person who has been deprived of possession must first be restored to his former possession before the merits of the matter can be considered. The main purpose of this remedy is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts. In order for peace to prevail in a community and to be maintained, every person who asserts a claim to a particular thing should not resort to self-help in order to gain possession of the thing.”

[23] When the two versions of the Applicant and the First Respondent are put on a scale, the First Respondent’s version comes up as more probable and reasonable. The First Respondent was able to demonstrate that the dispute between herself and Applicant was reported to the area’s traditional authorities. The written ruling by the *Inner Council*, which First Respondent was able to attach to her Answering Affidavit, clearly points out that the deceased applied for

residence or '*khontaed*' for the First Respondent. The Council stated in their ruling that First Respondent is rightful owner of the home in question.

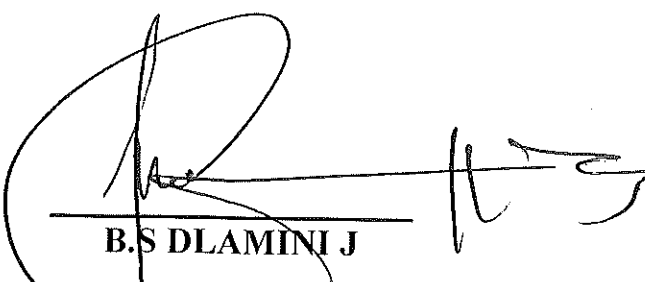
[24] The Applicant on the other hand, even though he alludes to a ruling being made in his favour by the traditional authorities, has not attached such ruling in his papers. The Court notes that the individuals whom Applicant says made up the Inner Council when making a ruling in his favour, are the very same individuals present when a ruling was made in favour of the First Respondent.

[25] Possession or control over immovable property is factual and, like in all cases must reasonably be proved. As submitted by First Respondent's counsel, it was necessary for Applicant to state the date and time of his occupation on the property in question and further state when he moved out to be at his work station. These essential averments are lacking in the Founding Affidavit. In the contrary, First Respondent contends that she is the one who has always been occupation of the home and that at some point, she rented out a section of the home to construction workers.

[26] The Applicant has failed to prove the existence of the two essential requirements for a claim based on *mandament van spolie*, namely control and unlawful deprivation of property. If anything, Applicant seeks an easy way to take occupation of the home upon the realization that it may be a tough call to take occupation based on his alleged right of ownership of the home.

[26] In the final result, the Court hereby issues the following orders;

- (a) **The Applicant's application be and is hereby dismissed.**
- (b) **The Applicant is ordered to pay costs of suit in the ordinary scale.**


B.S DLAMINI J
THE HIGH COURT OF ESWATINI

For Applicant:

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