



IN THE HIGH COURT OF ESWATINI

CASE NO. 267/2024

HELD AT MBABANE

In the matter between:

GOODNESS SHONGWE

APPLICANT

And

BONGANI ZIKALALA

1ST RESPONDENT

MBALI VINOLIA MABUZA

2ND RESPONDENT

NEUTRAL CITATION:

**GOODNESS SHONGWE VS BONGANI
ZIKALALA A ANOTHER (267/2024) [2024]
SZHC 49 (19/03/2024)**

CORAM:

BW MAGAGULA J

HEARD:

27/02/2024

DELIVERED:

19/03/2024

SUMMARY:

*Civil Law – Urgent Application in terms of the Rule
6 (25) of the Rules of Court – Points in limine taken*

– Lis pendens – Lack of urgency – Failure to meet requirements of a spoliation remedy – The crisp issue in this matter is that does the execution of a order of Court beyond territorial jurisdiction by a messenger of Court constitutes spoliation? And if it does, what is the remedy? Does the Magistrate Court have the requisite jurisdiction to parade a remedy to the parties and regulate the execution of it's orders?

HELD:

Points in limine in respect of lis pendens, lack of urgency; Failure to meet the requirements of a spoliation succeeds and jurisdiction succeeds with costs.

RULING ON THE POINTS IN LIMINE

BW MAGAGULA J

- [1] Serving before court is an application instituted on a certificate of urgency by the Applicant against the Respondents. It is common cause that the 1st Respondent is a messenger of Court for the district of Manzini. Although the Applicant disputes that the messenger in question (Bongani Zikalala) is entitled to execute orders outside the jurisdiction of the Manzini Magistrate Court.

[2] Ostensibly, the Applicant seeks the following prayers;

2.1 *That the above Honourable Court dispense with the normal and usual requirements of the Rules of the above Honourable Court relating to service of process, time limits and notices and that this matter be heard as a matter of urgency.*

2.2 *That a rule nisi operative with immediate and interim effect do hereby issue directing the 1st and 2nd Respondents to forthwith restore possession ante omnia to the Applicant of the motor vehicle despoiled from Applicant, to wit:*

MAKE: AUDI

VEHICLE IDENTIFICATION NO: WAUZZZ8E34A296713

ENGINE NO: AVF 637793

3. *That the 1st and 2nd Respondents be called upon to show cause why;*

3.1 *Prayer 2 should not be confirmed as a final order.*

3.2 *1st and 2nd Respondents should not be ordered to pay costs of this application at attorney-client scale.*

[3] The basis for the prayers sought in terms of the founding affidavit are as follows;

3.1 The Applicant alleges that she got to be in possession of the vehicle in question subsequent to the death of her husband one Mbongeni Ngozo who used to work in South Africa.

3.2 The motor vehicle is always been in her peaceful and undisturbed possession ever since her husband died in April 2023. The possession of the vehicle was sanctioned by the husband's family members subsequent to a meeting that happened after the funeral. She has also stated before court that since she cannot drive, the motor vehicle in question was driven to her place by one of her husband's sons of residence at Lobamba.

- [4] Central to the application is that on Friday 2nd February 2024 Applicant received a call from her landlord, that there were some people at her place who were in a company of members of the Eswatini Royal Police. The landlord paraded to advise her that the said people were towing the motor vehicle in question, which was parked outside her rented house. The motor vehicle is fully described below; *AUDI below registration number; DBM 086 S – Engine Number AVF 63 7793 Chassis No. WAU ZZA 83 34B 296.*
- [5] She could not attend to the scene at the time to see what was happening, as she was at work. When she returned later on, she found that the motor vehicle had been removed. Her neighbor, one Njabulo Dlamini subsequently came to her house. He gave her copies of court processes, being a notice of motion and a order. She was advised that they were left by the people who took the motor vehicle.
- [6] The applicant therefore contends that the motor vehicle was spoliated from her. Since the first respondent, rather, had no power to take the motor vehicle

as his territorial jurisdiction did not extend to the Hhohho region where the motor vehicle was found, as he is a messenger of court for the Manzini region.

[7] The Respondents have elected not to respond to the merits of the matter, but have instead raised certain points of law through a notice dated the 15th of February 2024.

[8] The points of law have been tabulated in the following fashion;

8.1 *lis pendens* has been raised, underpinned by that there is a similar matter involving the motor vehicle which is pending at the Magistrate Court under Case No. 609/2024. It is argued that the Applicant should have anticipated the return day of the *rule nisi* at the Manzini Magistrates Court instead of coming to this Court. It is the Magistrates Court that is competent to hear all the issues under complaint.

8.2 The Respondent further contends that there is no urgency in this matter. The motor vehicle in issue was attached and removed by the 1st Respondent on the 2nd of February 2024. The papers are self-explanatory to that effect. The return was the 12th February 2024. Therefore, as the argument goes, if the Applicant could not file an urgent application to anticipate the return day of Rule *nisi* then she should have appeared on the 12th February 2024 at the Magistrate Court to raise all the issues that she has raised before this court.

8.3 The Respondents further contends that the Applicant has failed to meet all the requirements of a spoliation remedy. More especially since the motor vehicle in issue, is kept by a messenger of Court in pursuant to a Court order. The Court order remains lawful as it has not yet been discharged or rescinded by a court of law.

THE APPLICANT'S ARGUMENTS IN RESPONSE TO THE POINTS IN LIMINE

- [9] In responding to the issue of *lis pendens* the Applicants have argued that the requirements for the plea of *lis pendens* have not been satisfied in the matter at hand because the cause of action is not the same. The Applicant argues that in the matter at hand the proceedings are spoliation proceedings, which are not related to the merits of the matter is the ownership of the motor vehicle. At the Magistrates Court, the 2nd Respondent claim ownership of the motor vehicle, which is a different and separate relief from the prayers sought before this court.
- [10] The applicant also argues that the very purpose of the mandament Van applied is to restore possession ante Omnia to the applicant. Justice demands that such an order be granted, as it should not conflict with whatever outcome that will be in the magistrate's court case. It is also argued by the applicant, that the spoliation order will not in any way confer ownership of the motor vehicle to the applicant, but she will remain a mere possessor of the same

THE LAW

[11] The requirements for the plea of *lis pendens* were stated by Ota J. in the case of **Kareem Ashraf & Another v Gigatech (Proprietary) Limited** Case No. 2199/2010 (HC) referring to the learned authors **Herbstein and Van Winsen** in the text **The Civil Practice of the Supreme Court of South Africa** (4th Edition), 249 – 250 as follows;

“The requisites of a plea of lis pendens are the same with regard to the person, cause of action and subject matter as those of a plea of res judicata, which, in turn, are that the two actions must have been between the same parties, or their successors in title, concerning the same subject matter and founded upon the same cause of complaint. For a plea of res judicata to succeed, however, it is not necessary that the “cause of action” in the narrow sense in which the term is sometimes used as a term of pleading should be the same in the latter case as is in the earlier case. If the earlier case necessarily involved a judicial determination of some question of law or issue of fact in the sense that the decision could not have been legitimately or rationally pronounced without at the same determining that question or issue, then that determination though not declared on the face of the recorded decision, is deemed to constitute an integral part of it, and will be res judicata in any subsequent action between the same parties in respect of the same matter. The same principle will generally apply when the plea is one of lis pendens. ...In order to decide what matter is in issue, one should consult the pleadings, not the evidence led.”

It follows from the foregoing exposition, that three ingredients must be evident in both claims to sustain a successful plea of *lis pendens*, namely:-

- 1) The parties must be the same.
- 2) The subject matter of the claims must be the same
- 3) The cause of action must be the same.

ANALYSIS AND CONCLUSION

[12] What was stated in the matter of **Carim Ashraf & Another vs Giga Tech Proprietor Limited**¹ is paramount and it is worth highlighting. The Court stated as follows;

“For a plea of res judicata to succeed, however, it is not necessary that the “cause of action” in the narrow sense in which the term is sometimes used as a term of pleading, should be the same in the latter case as is in the earlier case.”

[13] The Applicant also insists that the requirements of a spoliation order have been met in the application at hand. The Applicant contends that the Respondents have not denied that the motor vehicle was taken by the first Respondent outside his area of jurisdiction, which is the Manzini district, as clearly the motor vehicle was taken in the Lobamba district. The Applicant

¹ Case No. 2119/2010

has further cited section 6, subsection 2 of the Magistrate Court Act, which provides that every summons, subpoena, warrant, or other process issued out of any Magistrate Court, sheriff, or force throughout the district, and all process when endorsed by a judicial officer of any other district. Every judicial officer is hereby required, on production to him of any such process, to endorse the same. Order 25, Rule 9, subsection 4 of the Magistrate Court Act provides that if the property is situated in some district other than that in which the judgment was given, the messenger of court of the latter district shall forward the warrant to the messenger of court of the district in which the said property is situated, who shall, after obtaining the endorsement of a judicial officer thereon as provided by section 6, subsection 2 of the Act, proceed to assert the property in the manner provided in this Rule. In the absence of any affidavit filed by the first Respondent to dispute this assertion, the Applicant argues that the first Respondent does not enjoy any other protection in terms of the law.

[14] I will dwell more on the basis of the spoliation later, however, what is key now is that it is the same motor vehicle that the Magistrate Court had ordered the messenger of Court to remove from the Applicant, that is the subject of the spoliation proceedings before court. The basis for what is termed a spoliation is that the messenger when executing the court order acted outside his area of jurisdiction. Otherwise, the motor vehicle is the same. Hence, it is my conclusion that the subject of the spoliation is exactly the same vehicle that was the subject of the order at the Magistrate Court under Case No.609/2024.

[15] The observation is made in that recognition that the parties before this court are no longer the same as they were the subordinate court. There is now the 1st Respondent who is the messenger of Court. In my view, the messenger of court does not have a personal interest in the matter pertaining to the subject of the application, so he cannot be said to be a party in the strict sense of the word. He has been cited in his official capacity as a messenger of Court. Whether he attached the motor vehicle correctly or wrongly as he was outside the area of appointment, but the instrument which he was carrying when executing the order, is the valid order that was issued by the Magistrate Court. I will discern later on the legality or otherwise of his action outside the territorially jurisdiction. But for now, as addressing the *lis pendens* issue I am inclined to agree that this matter is exactly the same matter that fell for determination under Case No. 609/2024. The net effect of the spoliation if it is issued would impact on the matter that is pending at the Magistrate Court. In my view it is undesirable to do so.

[16] I say so for the following reasons first, to order the spoliation would defeat the order that was issued by the Magistrate. Secondly, if the Applicant argues that the prayer that he seeks is a spoliation order which is different from the ownership issue that was under contention at the Magistrate Court. In my view to argue so, is technical and it is constitute a splitting of heirs so to speak. The Magistrate Court deemed it fit after considering the papers that it should have issued the order in the manner in which it did. To then grant a spoliation order just because the order was executed outside the jurisdiction of the Court has a negative effect of defeating the nature of the order granted by the Magistrate

Court, which is undesirable that can only be done when the order is appealed against or it is reviewed.

[17] I now turn to address the argument that the messenger of Court executed the order outside his territorial jurisdiction. In my view, it is common cause that Lobamba where the motor vehicle was executed is outside the territorial jurisdiction. Hence, the Court make a finding of fact that indeed the messenger of Court executed the Court order outside the territorial jurisdiction. However, in my view he was authorized to do so, because the order that he was armed with which is annexed in the papers before Court as annexure “A” in 3.1 is termed as follows;

“3.1 An order authorizing the messenger of Court for the District of Manzini to cease and attach the under mentioned motor vehicle. Make AUDI below registration number; DBM O86 S – Engine Number AVF 63 7793 Chassis No. WAU ZZA 83 34B 296 – presently in the possession of the 1ST Respondent wherever and whomsoever it may be found.

3.2 That members of the Royal Eswatini Police at any region or police station where the motor vehicle may be located be and directed to assist the messenger of Court in the execution of this order.

3.3 That the motor vehicle set out above should be kept in the possession of the messenger of Court pending finalization of this application.”

3.3 That the motor vehicle set out above should be kept in the possession of the messenger of Court pending finalization of this application.”

[18] It is worthy of mention that the mere reading of the order especially order 3.1 the last sentence clearly states that the messenger of Court is entitled to attach the motor vehicle wherever and from whomsoever it may be found.

[19] The messenger of Court must have searched the motor vehicle within his territorial jurisdiction and did not find it. As he must have found it outside the district of Manzini and then the order that he was armed with, actually condoned the non-compliance with the Rules of the Court which granted the order. If it is the Rules of that Court that demarcates the jurisdiction, then clearly the Court order condoned such an application pertaining to the matter that the messenger of Court was handling. Over and above that, the Court order specifically authorized the messenger to attach it wherever it could be found. If the messenger of Court found it in Lobamba which is outside his territorial jurisdiction, then he was authorized by the very same Court order to attach it there.

[20] It is therefore the finding of this Court that the attachment does not constitute spoliation, just because it was executed outside the territorial jurisdiction of the messenger. The messenger was armed with a court order which dispensed with. Even if I am not correct in my interpretation, the Applicant's relief does not lie in this court. There is absolutely no reason why the Applicant did not

approach the Magistrate Court for the alleged non-compliance of order XXV of the Magistrates Court Act.

[21] Due to the foregoing reasons the point taken by the Respondent of *res judicator* should succeed. The matter is clearly pending at the Magistrate Court. Whatever relief that the Applicant may feel she is entitled to, she was perfectly entitled to anticipate the rule *nisi* and place all the complaints that she may have, before that Court. There is absolutely no reason why the Applicant should have approached this Court.

[22] This Court deems it unnecessary to consider the other points of law raised. The two legal points raised are sufficient to dispose of the matter. The points of law are upheld. The application is dismissed with costs.

[23] I will discern to address the issue of costs. Usually, it is trite that costs must follow the event. The Applicant has unnecessarily exposed the Respondents to a higher scale of costs. Especially by instituting the current proceedings at the High Court. It is common cause that the tariff of costs at the High Court is higher than the tariff at the Magistrates Court. It follows that the Respondents were made to be out of pocket, in a bid oppose the proceedings at the High Court. There is absolutely no reason why they should not be entitled to the costs. Costs must then follow the event even in this matter.

ORDER

- 1) The points in *limine* of *lis pendens* and jurisdiction succeed.
- 2) The Applicant's application is dismissed.
- 3) The Applicant to pay costs of suit at an ordinary scale.



BW MAGAGULA

JUDGE OF THE HIGH COURT OF ESWATINI

For The Applicant:

T. Mavuso – (Motsa Mavuso Attorneys)

For The Respondents:

M. Dlamini - (Musa Dlamini & Associates)