

**IN THE HIGH COURT OF ESWATINI  
JUDGMENT**

**HELD AT MBABANE**

**CASE NO: 2849/23**

In the matter between:

**KHOLWAPHI KHETSIWE DLAMINI**

**APPLICANT**

And

**POLYCARP MFANASIBILI DLAMINI**

**FIRST RESPONDENT**

**NKOSINGIPHILE DLAMINI N.O.**

**SECOND RESPONDENT**

**THE COMMISSIONER OF THE  
ROYAL ESWATINI POLICE N.O.**

**THIRD RESPONDENT**

**THE ATTORNEY GENERAL N.O.**

**FOURTH RESPONDENT**

*In re:*

**POLYCARP MFANASIBILI DLAMINI**

**APPLICANT**

And

**KHOLWAPHI KHETSIWE DLAMINI**

**RESPONDENT**

*In re:*

**SWAZILAND BUILDING SOCIETY**

**PLAINTIFF**

And

**KHOLWAPHI KHETSIWE DLAMINI**

**DEFENDANT**

Neutral Citation: *Kholwaphi Khetsiwe Dlamini and Polycarp Mfanasibili Dlamini and 3 Others (2849/23) [2024] SZHC 07 (6 February 2024)*

Coram: LANGWENYA J

Heard: 15, 19 January 2024

Delivered: 06 February 2024

Summary: *Law of property-applicant moving spoliation and declaratory application against owner of property-Spoliation proceedings instituted after applicant was ejected from property following execution of order that is subject of a pending appeal in the Supreme Court.*

## JUDGMENT

### Introduction

- [1] The applicant launched the present proceedings on an urgent basis seeking an order couched in the following terms:
1. That the rules of this court in respect of manner, service form and time limits be dispensed with and that the matter be heard as one of urgency.
  2. Condoning the applicant's non-compliance with the rules of the court.
  3. A rule *nisi* returnable on the date to be appointed by the honourable court for an order in the following terms:



- 3.1 declaration that the Notice of appeal automatically stays the execution of the order granted by her ladyship M. Langwenya on 22 December 2023 in the main matter
- 3.2 That the first and second respondents and or anyone acting under their stead and or holding title through them should restore the status *quo ante* and hand over possession of premises being portion 258 (a portion of portion 53) of farm 50 situate in the district of Hhohho ('the property') back to the applicant.
- 3.3 That the first respondent and or anyone acting under his stead and or holding title through him should remove any and all their property in the aforesaid property.
- 3.4 That the third respondent is to use whatever means in the enforcement of prayer 3.2 and prayer 3.3.
4. That prayer 3.1, 3.2, 3.3 and 3.4 hereof operate forthwith as an interim order from the first date of enrolment of the matter.
5. Costs of suit at attorney and own client scale against the first respondent
6. Further and alternative relief.

[2] The first respondent has moved to reject the application and has filed answering papers.

#### The Parties

- [3] The applicant is Kholwaphi Khetsiwe Dlamini an adult female LiSwati of portion 258 (a portion of portion 53) of farm No: 50 situate in the Hhohho district.
- [4] The first respondent is Polycarp Mfanasibili Dlamini an adult male LiSwati of plot 25 Thembelisha Township, eZulwini in the Hhohho district.
- [5] The second respondent is Nkosingiphile Dlamini, a deputy sheriff of Hhohho district.

- [6] The third respondent is the national commissioner of the Royal eSwatini Police cited in her nominal capacity as the head of the police service an organization that has a responsibility to maintain law and order as well as enforce court orders. Its headquarters is along Mhlambanyatsi road, Mbabane in the Hhohho district.
- [7] The fourth respondent is the Attorney General with its office situate along Mhlambanyatsi road, Ministry of Home Affairs building, fourth floor, Mbabane in the district of Hhohho.

#### Factual background

- [8] I begin with re-stating the version of the first respondent because it sets the scene for the present application which refers to a notice of appeal that was filed after an order that was granted in an application where first respondent was the applicant.
- [9] The first respondent is the registered owner of the property that is the subject matter in this application<sup>1</sup>. By virtue of a writ of attachment dated 7 October 2020 issued by the High Court for the execution of a judgment dated 25 June 2018 in an action wherein Swaziland Building Society was plaintiff and the applicant in the present matter was the defendant<sup>2</sup>, the property that is the subject matter in this application was attached and sold by public auction on 5 May 2023. The property was bought by the first respondent and registered in his name in August 2023.
- [10] By letter of 30 October 2023 from the second respondent, applicant was requested to vacate the property by 7 November 2023<sup>3</sup>. Applicant undertook

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<sup>1</sup> See: Deed of transfer No. 560/2023 at page 98-104 of the Book of Pleadings.

<sup>2</sup> See: Case No. 747/2018

<sup>3</sup> See: page 116-17 of the Book of Pleadings.



to vacate the property on 12 November 2023 at 9am in a letter of 6 November 2023. I restate in full the contents of applicant's letter<sup>4</sup>.

6 November 2023

**The Deputy Sheriff Nkosingiphile Dlamini**

**Plot 135 Extension 3**

**Gule Street**

**Mbabane, 0044**

**Dear Mr Dlamini**

**Re: Swaziland Building Society/Myself**

I refer to your letter dated 30<sup>th</sup> October 2023 notice to vacate the house. I have since received communication from the Building Society this morning and here (*sic*) requests an extension of vacating the house. I need to sell some of my (*sic*) staff and find alternative accommodation.

I request an extension of vacating to the 12<sup>th</sup> of November 2023. I request to hand you the keys on Monday 13<sup>th</sup> November 2023 9,00am.

Yours Sincerely,

**Kholwaphi Dlamini**

- [11] In a letter addressed to applicant the second respondent stated that the purchaser of the property had agreed to grant her the extension until 12 November 2023. The letter states that on 13 November 2023 the second respondent will come to the property to inspect the property and receive the keys<sup>5</sup>. The pleadings reflect that when applicant vacated the property on 13 November 2023, she handed the keys to the second respondent. The second respondent transmitted the keys to the first respondent who took possession of the property. First respondent avers that he then registered the water account of the property in his name which the applicant continues to consume<sup>6</sup>.

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<sup>4</sup> See: page 118 of the Book of Pleadings.

<sup>5</sup> See: page 119 of the Book of Pleadings.

<sup>6</sup> See: paragraph 13.2 of first respondent's answering affidavit at page 62 of the Book of Pleadings.

- [12] It is first respondent's case that the residue of the purchase price of the property was paid into applicant's account and she withdrew some of the money for her benefit. This much of first respondent's case is not denied. Applicant contends that the averments of first respondent in this regard are irrelevant and immaterial to the spoliation proceeding herein<sup>7</sup>.
- [13] Having vacated the property on 13 November 2023 and unbeknown to the first respondent, the applicant was found on the property on 3 December 2023<sup>8</sup>. On 6 December 2023 first respondent moved an urgent application for spoliation against applicant. For technical reasons, the application was removed from the roll. The applicant was not located on the property after 6 December 2023. On 12 December 2023 through a certificate of urgency, first respondent moved an application interdicting and restraining applicant from returning to the property; that first respondent be allowed to access the property for his use and enjoyment. The court was informed that the applicant was no longer on the property thus the application for an interdict and not for spoliation.
- [14] The court granted first respondent interim relief as applied for on 12 December 2023. The court further ordered that in addition to serving the order on the property, it had to be published in one of the local newspapers circulating in the Kingdom. The interim rule was returnable on 22 December 2023.
- [15] On 22 December 2023, there was no appearance on behalf of the applicant and only Mr Maphalala appeared on behalf of the first respondent. Mr Maphalala applied that the interim rule be confirmed. The court granted confirmation of the rule.

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<sup>7</sup> See: Applicant's replying affidavit at paragraph 9 at page 144 of the Book of Pleadings.

<sup>8</sup> See: paragraph 4 at page 54 of the Book of Pleadings.



- [16] Mr Ginindza for the applicant in present matter submitted that a notice to defend the application of 12 December 2023 was filed on 21 December 2023. The notice to defend was not in the court file then nor was it present when submissions were made in the present matter.
- [17] After the court confirmed the rule on 22 December 2023, a notice of appeal was filed on the same day. The notice of appeal was served on the first respondent's attorneys on 5 January 2024. The first respondent submits that the property was kept under constant surveillance and applicant was not present thereon after he was granted interim relief interdicting and restraining applicant from returning to the property. The property was secured with a lock at the gate by respondent. For this reason, it is urged by first respondent that applicant was not in possession of the property.
- [18] On 4 January 2024 applicant was found on the property and was served with the court order of 22 December 2023<sup>9</sup>. At this stage no appeal notice had been served on first respondent's attorneys. It was submitted by first respondent that had he been aware of the notice of appeal, he would have applied for leave to execute the court order. The application for leave to execute was subsequently filed unopposed except for points of law that were raised by Mr Ginindza during submissions.
- [19] The applicant's case is that on 4 January 2024 she was in peaceful and undisturbed possession of the property when she was evicted by the first and second respondents. The ejection of the applicant, it is argued took place even though she showed respondents a copy of the notice of appeal staying the order court order of 22 December 2023. After ejecting applicant from the

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<sup>9</sup> See paragraph 13.3 of first respondent's answering affidavit at page 62 of the Book of Pleadings. The first respondent further state at paragraph 35.2 of the answering affidavit that 'It is denied that...the execution of the court order was carried out lawfully as there was no instrument staying the execution of the said court order at the time of execution.' (page 72 of the Book of Pleadings).



property, it is averred that respondents then put a security guard with two dogs at the gate of the premises to ensure that the applicant could not gain access to the property. The respondents further replaced padlocks of the house. Applicant submits that first respondent instructed the security guard on the property to remove applicant and her attorney from the property and he obliged.

[20] Applicant submits further that the property is currently under guard by a male security guard and two dogs. On the property there is also a truck belonging to the first respondent.

[21] Applicant contends that she has a clear right to possession of the property because she was in peaceful and undisturbed possession of the property when she was arbitrarily and unlawfully removed from it. It is her contention further that she was removed from the property based on an impugned court order which she is appealing.

[22] Applicant argues further that the balance of convenience favours that her possession of the property be restored to her because she was in peaceful and undisturbed possession when she was removed. She submits that she is currently destitute and resides in her car with her children; that her personal effects remain locked inside the property. It is her case that first respondent will not suffer prejudice if possession is restored to applicant because respondent has still not made any improvements on the property. Applicant submits that it is herself and her family that continue to suffer prejudice as they are forced to live in a motor vehicle and her important personal effects remain locked inside the property.



## Spoliation proceedings

[23] An application for a spoliation order must first and foremost establish that she was in peaceful and undisturbed possession of the thing in question at the time she was illicitly deprived of possession of the thing<sup>10</sup>.

[24] In *Mbangi and Others v Dobsonville City Municipality*<sup>11</sup> Flemming J stated as follows:

**'The authorities show a certain consistency in requiring not merely 'possession' as a prerequisite for granting a spoliation order, but 'peaceful and undisturbed' possession.'**

[25] It is also important to note that in spoliation proceeding-

**'Although a spoliation order does not decide what apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status be restored...'<sup>12</sup>**

[26] As to the object of a spoliation order; Maritz JA<sup>13</sup> stated as follows:

**'Even though the *mandament van spolie* is therefore not intended to bring about the ultimate determination of the competing proprietary or possessory claims of the litigants to the things in contention, it nevertheless constitutes a final determination of the litigants' 'immediate right' to possess them for the time being.'**

[27] In sum, it is not the burden of this court in the present proceeding to determine the ownership rights of the parties. They are irrelevant in the instant proceeding. In *Kuiiri* (SC) at para 2 Maritz put it this way:

**'The *mandament*, it was held, may be granted-**

**'if the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of, e.g. ownership, and that the claimant has not title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hand, and that conduct conducive to a breach of the peace should be discouraged.'**

<sup>10</sup> *Kuiiri and another v Kandjoze and others* 2007 (2) NR 749 (HC); *Mbangi and Others v Dobsonville City Municipality* 1991 (2) SA 330 at 335H-I

<sup>11</sup> 1991 (2) SA 330 at 335H-I

<sup>12</sup> *Nienabar v Stuckey* 1946 AD 1049 at 1053

<sup>13</sup> *Kuiiri and another v Kandjoze and Others* 2009 (2) NR 447(SC) para 3.



[28] Thus, in the instant proceeding the burden of the court is to determine whether the applicant was in peaceful and undisturbed possession of the property at the critical time and whether the first respondent illicitly deprived her of such possession. Flemming J put it crisply in *Mbangi and Others v Dobsonville City Council*<sup>14</sup> thus:

**‘When a Court becomes involved with the law, it is rarely otherwise than as a matter of enforcing a right or entitlement of a person. The termination of spoliation forms a contrast. A Court interferes even to assist a party who should not have possession and, furthermore, in all cases (except where lawful authority is relied upon by the respondent) without taking any interest at all in what right do or do not exist. That inverted approach finds its explanation and justification therein that the Court is not protecting a right called ‘possession,’ but that in the interests of protecting society against self-help, the self-service undertaken by a spoliator is stopped as being a justiciable wrong.’**

[29] In sum, the *mandament van spolie* finds its immediate and only object in the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the *status quo ante* is restored.

#### The element of peaceful and undisturbed possession

[30] The respondent denies that applicant was in peaceful and undisturbed possession of the property. The return of applicant to the property in December 2023 was immediately resisted by the first respondent through application to court. The court granted respondent the order prayed for. The order is now a subject of appeal. It is not denied that the applicant agreed to vacate the property on 12 November 2023 and that she indeed vacated the property. When applicant re-occupied the property in December 2023-4 January 2024 it was without the consent of the first respondent. In my considered view, applicant’s re-occupation of the property cannot be said to have been peaceful

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<sup>14</sup> At 336C-E.



and undisturbed because first respondent opposed applicant's re-occupation of the property through due process.

- [31] The applicant has not taken the court into her confidence on how she entered the property when there is evidence that respondent had secured the property through a lock at the gate. In my view, the applicant does not have a protectable right when all she can show is a lawful or unlawful self-help or grab of possession to which there is continued resistance<sup>15</sup>.
- [32] A spoliation application failed in *Kgosana v Otto*<sup>16</sup> where evidence showed that the applicants had occupied property without consent and that respondent had immediately taken steps to resist the invasion of the land, and had continuously taken steps to resist the unlawful conduct of the applicants. The court reasoned that in the circumstances, possession never became peaceful and undisturbed.
- [33] In *Mbangi and Others v Dobsonville City Council* (above) Flemming J summarized the position in the following words<sup>17</sup>:

**'The applicant for spoliation requires possession which has become ensconsed, as was decided in the Ness case<sup>18</sup>. See also Sonnekus 1986 TSAR at 247. It would normally be evidenced (but not necessarily so) by a period of time during which the de facto possession has continued without interference. However, quite apart from evidential considerations, the complainant lacks protectable merit if the best he can prove is a (lawful or unlawful) self-help grab of possession to which there is continued resistance.'**

- [34] The question whether the owner has continuously taken steps to resist deprivation of his property is a question of fact. It was not argued on behalf of the applicant that the first respondent abandoned the legal process thus leaving applicant in peaceful and undisturbed possession of the property. It is clear however from the answering affidavit of first respondent that he never

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<sup>15</sup> *Kgosana v Otto* 1991 (2) SA 330(W) at 338B-D.

<sup>16</sup> 1991 (2) SA 113(W).

<sup>17</sup> 1991 (2) SA 330 (W) at 338B-D.

<sup>18</sup> *Ness and Another v Greef* 1985 (4) SA 641 (C)

rested on his laurels as soon as he discovered that applicant was back on the property in December 2023. He followed legal process to have applicant removed from his property.

- [35] My view of the facts is that the applicant was never in peaceful and undisturbed possession of the property when she returned after leaving on 12 November 2023. First respondent continuously resisted applicant's return to the property and that for this reason the applicant is not entitled to the remedy sought.

The requirement of unlawfulness

- [36] The applicant points out that the dispossession of the property from her by the respondents was arbitrary and unlawful because it was done even though she had produced a notice of appeal against the court order that respondents were executing. Respondents deny that the notice of appeal was produced and shown to them when they executed the court order of 22 December 2023. Mr Ginindza for the applicant submitted that the notice of appeal was only served on first respondent's attorneys on 5 January 2024, a day after the respondents executed the order<sup>19</sup>. First respondent submits that 'the execution of the court order of 22 December 2023 was carried out lawfully as there was no instrument staying the execution of the said order at the time of execution. The said appeal notice was only served upon my attorneys on 5<sup>th</sup> January 2024, a day after the execution of the court order...'<sup>20</sup>
- [38] On the version of the first respondent, supported by applicant I cannot find that respondent's conduct in executing the order was arbitrary and unlawful.

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<sup>19</sup> This submission finds support in first respondent's answering affidavit at paragraph 35.2 at page 72 of the Book of Pleadings.

<sup>20</sup> Paragraph 35.2 of First Respondent's answering affidavit at page 72 of the Book of Pleadings.



Respondents were unaware of the notice of appeal because they had not been served with it when they executed the order on 4 January 2024.

Application for declaratory order

[39] The applicant has further entreated the Court to declare that the notice of appeal automatically stays the order granted by this court on 22 December 2023 in the main matter<sup>21</sup>. From the pleadings, there is no contest between the parties about the position of the law in this regard.

[40] It is trite that a declaration is a discretionary order that ought to be granted with care, caution and judicially, having regard to all the circumstances of the case at hand. Some of the requirements for declaratory relief is that there must be an existing and concrete dispute between the parties; and the rule that a party is not entitled to approach the Court for what amounts to a legal opinion on an abstract or academic matter. Absent a concrete dispute between the parties on the effect of a notice of appeal to an order or judgment granted by a lower court, I decline the invitation to issue a declaratory order on this question.

Application for leave to execute pending appeal

[41] On 16 January 2024 Mr Polycarp Mfanasibili Dlamini, through a notice of motion moved this court to grant him leave to execute the final order of this court granted on 22 December 2023 pending the appeal noted by Ms Kholwaphi Khetsiwe Dlamini. This application was not opposed by Mr Ginindza representing Ms Dlamini. No notice to defend the matter and no answering papers were filed on behalf of Ms Dlamini. Mr Ginindza raised points of law namely: that the applicant was approaching the court with unclean hands; that the applicant was abusing court process and lastly that the

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<sup>21</sup> See prayer 3.1 of the Notice of Motion at page 5 of the Book of Pleadings.



order sought by the applicant is impossible to perform because the order complained of has been executed already.

[42] I agree with Mr Ginindza's submission that the order being sought under the application for leave to execute pending appeal has been overtaken by events. If applicant avers in his pleadings that the order was executed on 4 January 2024 that is the end of the matter. An order that has been executed cannot be re-executed. In any event, the Supreme Court in *Thanda Mngwengwe v Nomfundo Sibandze and Another*<sup>22</sup> stated that there is no need to apply for leave to execute the judgment<sup>23</sup>.

### Costs

[43] The applicant has prayed for an order of costs at a punitive scale. She submits that first respondent's conduct of refusing to recognize the notice of appeal and the condescending manner he addressed Mr Ginindza, her counsel was an insult not only to Mr Ginindza but to the court as well. It is submitted that the first respondent was boastful, arrogant and rude toward the applicant and applicant's attorney on 4 January 2024. To prevent a slippery slope to anarchy, it was argued, the court must order that first respondent pays costs at a punitive scale for his unbecoming conduct.

[44] The first respondent denies that he was boastful, arrogant and rude toward the applicant and her attorney on 4 January 2024. He contends that he was polite but firm when he informed the applicant that her presence on the property was a violation of the court order of 22 December 2023.

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<sup>22</sup> (09/2015 [2015] SZSC 37 page 10, para 11.

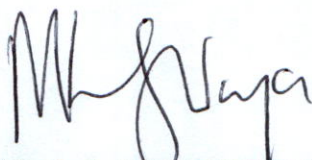
<sup>23</sup> See also Rule 40 of the Supreme Court Rules of procedure which states that: 'An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the High Court or Court of Appeal may order on application.'



- [45] The normal rule is that ordinary costs should follow event and the punitive cost orders are only made when there are special circumstances justifying it. In special circumstances, costs may even be given against a successful application for spoliation order and a harsh and mean-spirited approach in utilizing the *mandament van spolie* has been mentioned in this regard. It is anybody's guess if first respondent was mean-spirited in using spoliation because the allegations levelled against him are denied. The quest to ask in this matter is whether there are unusual circumstances in the case to deviate from the normal costs order. In my view there is none. This I say because even if the first respondent's conduct towards the applicant and her attorney was churlish – and this is denied – this consideration standing alone does not outweigh the other vexed issues in the present matter.
- [46] It behoves me to comment on some ugly spectacle that played itself out in the pleadings as well as during submissions in this matter. Counsel appear to have engaged in some unwarranted verbal sparring, trading jabs with some invective in some places in the process. This is deprecated.
- [47] Counsel should always be courteous towards colleagues, regardless of how hot and enraging the legal battle contours prove to be. Counsel must always avoid acrimony and resentment when representing their client – that is the preserve of the warring protagonists not of officers of the court. Counsel must refuse to become emotionally entangled in a legal matter even though their clients may be caught up in a state of anguish and bitterness towards each other.
- [48] Even in heated legal battles, the courts still expect counsel, as officers of the court to provide a calming and sobering influence in all matters that they handle.

[49] In the result the following order is made:

1. The application is dismissed
2. Costs to follow the event.



M. S. LANGWENYA

**JUDGE OF THE HIGH COURT**

**For the Applicant:            Mr K. Ginindza**

**For the Respondent:        Mr S. V. Mdladla**