

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 446/2025**

In the matter between:

**THANDIWE HELEN MDLULI (nee Mokoena)**

**APPLICANT**

**AND**

**MANDLA MDLULI**

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

**THE STATION COMMANDER SIGODVWENI**

**POLICE STATION**

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

**THE NATIONAL COMMISSIONER OF THE**

**ROYAL ESWATINI POLICE SERVICE**

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

**THE ATTORNEY GENERAL**

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

**REASONS FOR EX-TEMPORE JUDGMENT**

**Neutral citation:**

*Thandiwe Helen Mdluli (nee Mokoena) v Mandla Mdluli & 3 others (446/2025) SZHC 72 (11<sup>th</sup> April 2025).*

**Coram:**

*S.M. MASUKU J*

**Date heard:** 31<sup>st</sup> March 2025

**Date of ex-tempore Judgement:** 31<sup>st</sup> March 2025

**Date for reasons of Judgement:** 11th April 2025

**Summary:** Civil Law- spoliation proceedings- The right of possession (*ius possessionis*) is available to a person actually in possession of a thing and exists either in addition to, or independently from *ius possidendi* which is a right that enables a person to demand that he be given possession of a thing. Therefore, a possessor who has been deprived or despoiled of his possession by unlawful means, may apply to the court by *mandament van spolie* for the return of the thing to him immediately. But when an applicant asks for the return of the thing or its value, he no longer claims *mandement van spolie* but relies on a vindicatory action.

**Held:** In its judgement ex-tempore that the rule nisi ought to be discharged. The Applicant's right to pursue her possessory right over the vehicle relinquished when she handed over the vehicle to the Respondent by consent. She however did not lose her right which justified her claim to have the vehicle returned to her

*possession. Consequently, that places her in a space where she is to pursue a vindicatory action and not mandament van spolie.*

- [1] The Applicant is a lawfully wedded wife of the 1<sup>st</sup> Respondent (“the Respondent”). They married each other on the 27<sup>th</sup> May 2013 in terms of Eswatini Law and Custom and their marriage still subsisted at the time of this application. The parties established their matrimonial home at Nkambeni in the Hhohho region.
- [2] In 2013 the Applicant had and drove a VW polo/golf and the Respondent a Volvo S40 (all sedans). The Volvo S40 developed mechanical problems after being involved in a road accident in the year 2013. It could not be fixed and it was sold. A decision was made to purchase another Volvo S40 from a certain Mr Ngwenya at Timbutini. The Volvo was registered in the Applicant’s name. The Applicant used the Volvo to start a hawkers’ business on the side.
- [3] The parties sold the Volvo S40 to their colleague in the police service a certain Mr Silenge. The sale occurred early in the year 2022. The reason for the sale was that in 2016 they bought a Ford Ranger (the subject matter of this application). There are different versions of who exactly bought or paid for the vehicle, an issue that touches on ownership emanating from consequences of their marriage. This aspect of the debate as will be shown later in this judgement is irrelevant in spoliation proceedings.
- [4] The Applicant claims to have been given the exclusive use of the Ford vehicle since 2016 for her business, she also kept its registration book. The Respondent confirmed that she allowed her to use the vehicle before he retired

in 2023 because as a Senior Police Officer he had access to a Government vehicle. The Respondent disputes that the Applicant had exclusive use of the Ford vehicle, and averred that he would also from time to time use it before they purchased another vehicle a Toyota GD6 in the year 2023.

- [5] It is common cause that the Respondent was to a greater extent responsible for the service and maintenance of the Ford vehicle.
- [6] The parties also have what they considered their home at Selection Park, a house provided by their employer. The Applicant averred that early in December 2024 whilst at the house at Selection Park the Respondent came to the house and took the original keys for the Ford vehicle. On the 6<sup>th</sup> January 2025 the Respondent came to their matrimonial home at Nkambeni and demanded the spare keys because he said he wanted to take the Ford vehicle for service. She gave the Respondent the keys and effectively gave the Respondent the Ford to be serviced.
- [7] The Applicant averred that days and weeks passed and when she enquired about the status or progress of the service of the vehicle the response given by the Respondent was that there was a spare part of the car that had been ordered from Johannesburg which they had to wait for its delivery.
- [8] Early March 2025 she 'got wind' from someone that the Ford was being sold and she should check facebook to confirm. She checked and confirmed that indeed the vehicle was being sold at Puma Matsapha Industrial site for E300 000-00 (Three hundred thousand emalangen). She said she was shocked to the core because the Respondent had not informed her about the intended sale. She then approached the Magistrate Court in Mbabane on the issue of the motor vehicle. There is also a dispute on the kind of proceedings before that court but it is also irrelevant for the relief sought here.

- [9] On the 6<sup>th</sup> March 2025 she filed the present application. Its purpose she stated is to seek an order for spoliation against the Respondent 'for he had disdainfully taken the motor vehicle from her by deceit without an order of court and her consent to sell it.'
- [10] She is also seeking an interdict against the sale of the motor vehicle because she said she has a clear right on the vehicle as the joint owner.
- [11] The Respondent however, said he has always been the one responsible for the maintenance and service of the Ford vehicle and same was due for service when he took it. He said he had informed the Applicant that he wanted the car for service and she gave him the keys.
- [12] He said when he took the car in for service the technicians at Carson Motors found a mechanical fault with the car that required spare parts from Johannesburg. He realized that the vehicle was actually nine years old and could develop serious mechanical issues from the present ones in future that would require a lot of money to fix. Money which they do not have as he had retired. So, he thought the best option was to sell it whilst it was still in a better condition. He would then purchase a smaller vehicle for the Applicant. The Applicant had non of it, she was clear that she was not interested in a small car she wanted a van when they discussed the issue. The Applicant disputed any conversation about the intended sale of the Ford vehicle.
- [13] She brought the urgent application for the following orders;
- 13.1 Interdicting and restraining the Respondent from selling the motor vehicle namely a Ford Ranger LDV registered USD 878 CM..*
- 13.2 That the Respondent returns the motor vehicle, namely, a Ford Ranger LDV... to the Applicant forthwith failing which the Deputy Sherriff of the Honorable Court must attach and remove same wherever it may be found and deliver same to the Applicant.*

13.3 That the order above operate with immediate and interim affect pending the determination of this application...

[14] At the debut of the matter, the court by consent of the parties issued a *rule nisi* with a return date for the Respondent to show cause why the orders should not be made final.

[15] The matter was argued on the 31<sup>st</sup> March 2025 and the court issued an *ex-tempore* judgment discharging the rule with no order as to costs. These are the reasons for the judgement.

### **The relief sought**

[16] It is clear from the notice of motion that the applicant's approach is double-barreled when it seeks to achieve a single answer which is that of *mandament van spolie*.

The first part being a prayer for a final interdict to prevent the 1<sup>st</sup> Respondent from selling the vehicle, which requires the applicant to prove that she has a clear right over the motor vehicle. The second part being a spoliation relief which has a different set of requirements for the court to compel the return of the vehicle on the basis that she was in peaceful and undisturbed possession when the vehicle was taken from her and that she was illicitly dispossessed of the vehicle.

[17] When the matter was argued, the Applicant's attorney was asked by the court if there were any facts that supported the Applicant's clear right to the motor vehicle to sustain a final interdict against the sale of the vehicle by the Respondent. The Applicant rightfully conceded in my view that there was non. This is so because the parties are married under Eswatini law and custom and that regime does not recognize community of property. The Applicant would thus have to prove that she had a clear right over the vehicle on the basis of other grounds recognized by law other than on the basis of their

marriage. The challenge she had is that her main application being spoliation does not require the court to enquire or investigate into the respective rights of the parties. See Nino Benino v De Lauge 1906 TS 125.122.

***Ius Possessionis and Ius Possidendi***

- [18] The work of DG Kleyn & B.Bekink, The mandament van Spolie, The restitution of unlawful possession and The Impact of the constitution, 1996 University of Pretoria, 206 (79) THRHR citing the Roman-Canon law of procedure say, 'there is a separation between a possessory suit (*indicium possessorium*), and the suit on the merits (*Indicium petitorium*). In the possessory suit where the applicant applies for *mandament* (to be reinstated in his possession), he only has to prove that he was in peaceful and undisturbed possession and that there was spoliation (unlawful deprivation of possession, that is deprivation without his consent). If the applicant succeeds, possession must be restored *ante omnia*. The court does not consider the merits of the case.
- [19] The court in the Supreme Court Case Alex and Sons Investments (pty) Ltd and Meter Mixed Concrete and Two Others (07/2020) [2020] SZSC 59 (1<sup>ST</sup> December 2022) the court explored approaches by Roman Law writers on the subject matter and cited the works of Silberberg and Schoeman 2<sup>nd</sup> ed page 117, that, 'the right of possession often referred to as *Ius possessionis* must be distinguished from the so called *ius possidendi*, the right to the possession of the thing'. In *casu* we speak in the forma as the Applicant's right of possession of the motor vehicle and in the latter context, the Applicant' right to the possession of motor vehicle. Whereas the Applicant's first prayer for a final interdict and restraining order to prevent the Respondent from selling the motor vehicle speaks to Applicant's right to the possession of the car, the

second prayer for the return of the motor vehicle 'forthwith' speaks to the right of possession of the motor vehicle.

- [20] 'The right of possession (*ius possessionis*) is available to a person actually in possession of a thing and exists either in addition to, or independently from *ius possidendi* which is a right that enables a person to demand that he be given possession of a thing, i.e a right which justified a person's claim to have a thing in his possession. Thus a person may have a *ius possidendi* without actually being in possession and, conversely, he may have a *ius possessionis* without having a *ius possidendi* i.e a right to the possession of a thing' (see Silberberg and Schoeman (Ibid 117)).
- [21] Therefore, a possessor who has been deprived or 'despoiled, of his possession by unlawfully means (whether it be by force, fraud or stealth or other means, may apply to the court by *mandament van spolie* for an order directing the spoliator to return the thing to him immediately'. See Silberburg and Schoeman page 135 (*supra*) caution has to be exercised regard being had to the facts of each case because Rumpff J. in Zinman v Miller 1956 3 S8 (T) held that when an applicant asks for the return of an article or its value, he no longer claims a *mandament van spolie* but relies on a vindicatory action.
- [22] Returning to his first prayer as said earlier, she prayed for a final interdict and restraining order to prevent the sale of the Ford vehicle by the Respondent in a spoliation application without the necessary supporting facts to showing her clear right of the vehicle.
- [23] In spoliation proceedings as said the court does not concern itself with the merits of the dispute between the parties. The court will refuse to enquire or investigate the respective rights of the parties prior to the act of spoliation. The justice or injustice of applicant's possession is irrelevant. The maxim is *spoliatus ante omnia restituendus est*, i.e before any dispute on the merits will



be adjudicated upon possession must first be restored to the *spoliatus*. See Silberberg and Schoeman (*supra* at 139).

- [24] The interdict relief in 1<sup>st</sup> prayer of the notice of motion is concerned with the merits of the respective rights of the parties to the possession of the Ford vehicle, the so called *isu possidendi* for which the court should not concern itself in spoliation proceedings.

### **Mandament van spolie**


- [25] As stated by D.G Kleyn and B Bekink (*supra*) that in the possessory suit where the Applicant applies for a *mandament* (to be reinstated in his possession) he only has to prove on a balance of probabilities that;
- (a) *he was in peaceful and undisturbed possession at the time of the alleged spoliation, and*
  - (b) *that he was illicitly ousted from such possession. See also Regional Administrator, Lubombo Region and Others v Matsenjwa and Others (15 of 2014) [2016] SZHC 13 (30 June 2016 paragraph 9 and 10).*
- [26] With regards to the first requirements, a respondent may in an appropriate case prove that the applicant did not exercise the measure of physical control which was necessary to acquire or retain possession, or that the intent to derive a benefit from holding the thing was absent. In effect he would be saying the applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation.
- [27] Regarding the second requirement, a respondent may for instance prove that his act of dispossessing the applicant was not unlawful in that it amounted to counter spoliation or that it took place with the consent of the applicant. In essence saying, he has not committed spoliation.

- [28] Did the Applicant retain possession of the motor vehicle with intent to derive a benefit from it. It is not disputed by the Respondent that the Applicant was in possession of the motor vehicle since 2016. Her possession has not been disputed. Even at the time when the vehicle was taken by the Respondent the vehicle was in her possession and under her use. As regards to the first requirement it is abundantly clear that she was in possession of the motor vehicle.
- [29] On the second requirement, the Applicant submitted that the deprivation by the Respondent of the motor vehicle was wrongful. She argued that it was taken from her under the pretext that it was being taken for service when in actual fact it was for purposes of selling it without her consent and involvement. She argued further that the deprivation was wrongfully because it took place without due court process or without any legally special right to oust the possessor.
- [30] The Respondent on the other hand argued that he did not deprive the Applicant possession of the motor vehicle forcefully or wrongfully because she handed over the vehicle to him by consent. He said like in the past he was responsible to service the vehicle. He informed the Applicant that he was taking the car for service, if he wanted to forcefully deprive her of the vehicle he would have done so by using the spare key he had.
- [31] He said it was only when the mechanics informed him that the vehicle needed much more serious attention and there was a spare part that was required to be ordered from South Africa. He said this was when he informed the Applicant that they could not afford the service of the car in future as it was old (9) years and he had retired. They needed to sell the vehicle and purchase the Applicant a smaller vehicle. The Applicant denies the latter conversation about the sale of the car.

- [32] The Applicant argued that she did not consent to the sale of the vehicle and that the Respondent's action of advertising it for sale at the Puma Motors amounted to an act of spoliation or self help by the Respondent hence it should be returned to her.
- [33] The court held in its judgement *ex tempore* that the rule ought to be discharged. The Applicant's right to pursue her possessory right over the vehicle relinquished when she handed over the vehicle to the Respondent by consent. Her right of actual possession (*ius possessionis*) was lost when she agreed to handover the vehicle to the Respondent. She did not however lose her right which justifies her claim to have the vehicle returned to her possession. In other words she never lost her right to the possession of the vehicle (*ius possidendi*).
- [34] Silberberg and Schoeman at page 132 (*supra*) state that 'although a claim to the possession of a thing will, more often than not, be connected with a *ius possidendi* i.e appear as an element of some other right, in so far as the right of possession is the consequence of possession, a possessor's *ius possessionis* exists independently of any *ius possidendi*.'
- [35] In *casu* the Applicant let go of her right of possession when she consented to let to release the vehicle to the Respondent. She did not however relinquish her right to lay a claim to the possession if she can establish that she has a better *ius possidendi* than the Respondent who is in fact in possession of for the time being. The onus of proving a better title always lies on the person who seeks to dislodge the possessor. This may as well be a suit on the merits.
- [36] The Applicant's prayer for interdicting the sale of the vehicle and its return places a burden on the Applicant of proving her better right over the vehicle because the Respondent's possession of the car creates a presumption a better right in his favour. That is why she must prove a clear right over the vehicle.

Consequently it places her in a space where she is to pursue a vindicatory action and not *mandament van spolie*.

- [37] The court concluded that the requirements for the relief of *mandament van spolie* have not been met by the Applicant. In that although she has proved that she was in peaceful and undisturbed possession at the time of the alleged spoliation, she had not proved that the vehicle was illicitly taken away from her as she consented and had handed over the vehicle to the Respondent.
- [38] On the second aspect of the application that deals with a final interdict and the 1<sup>st</sup> Respondents selling of the vehicle without her consent. Applicant has not demonstrated her clear and better right over the vehicle from that of the Respondent. In any event in spoliation proceedings the court does not concern itself with the merits of the dispute between the parties.
- [39] In the circumstances the *rule nisi* issued on the 6<sup>th</sup> March 2025 with interim effect was discharged. No order as to costs made as parties are a family.

A handwritten signature in black ink, consisting of several large, overlapping loops and a trailing flourish, positioned above a horizontal line.

S.M. MASUKU

**JUDGE - OF THE HIGH COURT**

**For the Applicant: Mr W.Maseko of Maseko Tsambokhulu Attorneys.**

**For the 1<sup>st</sup> Respondent: N.Ndlangamandla – Mabila Attorneys.**