



**IN THE INDUSTRIAL COURT OF ESWATINI**

**CASE NO: 123/2019**

In the matter between:

**JOSEPH NHLANHLA GWEBU**

**APPLICANT**

And

**SINGLETON SIMANGO**

**1<sup>st</sup> RESPONDENT**

**ROYAL SWAZILAND SUGER**

**CORPORATION**

**2<sup>nd</sup> RESPONDENT**

Neutral citation : *Joseph Nhlanhla Gwebu v Royal Swaziland  
Sugar Corporation & Another [123/2019]  
SZIC 46 [03 May 2019]*

**CORAM:**

**BONGANI S. DLAMINI : ACTING JUDGE**

**DAN MMANGO : MEMBER**

**NKHOSINGIPHILE DLAMINI : MEMBER**

DATE HEARD : 24 APRIL 2019

DATE DELIVERED : 03 MAY 2019

*Summary: Application for spoliation by former employee of the Respondent alleging that he was unlawfully and without a court order ejected from the company house- Respondent raising preliminary point of law to the effect that Industrial Court has no jurisdiction to preside over the matter, there being no employer-employee relationship between the parties since employee's services have been terminated.*

*Held; The house from which the Applicant was ejected was allocated to him as a benefit accruing from the employment relationship between the parties. The Industrial Court is seized with jurisdiction to hear and dispose of the matter because the source of the relationship between the parties was one of employer and employee.*

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## JUDGEMENT

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### Introduction

**1.0** Before Court is an application for spoliation in which the Applicant seeks an order in the following terms;

- 1. *Dispensing with the Rules of Court as to time limits and service procedures and dealing with the matter as one of urgency.***
- 2. *Condoning the Applicant's non-compliance with the said Rules of the above Honourable Court.***
- 3. *Directing the Respondents to restore possession of the premises at Mhlume Hambanathi, Extension 2, House No.51 to the Applicant forthwith.***
- 4. *Interdicting and/or restraining the Respondents from unlawfully depriving the Applicant the said property.***
- 5. *Interdicting and/or restraining the 1<sup>st</sup> Respondent from in anyway harassing or threatening or interfering with the***

*Applicant in his possession of the premises situate at Mhlume Suger Mills.*

**6. *Ordering and compelling the Respondents to pay damages in the amount of E 100 000.00 in respect of the Applicant's immovable that was exposed to the rain by the 1<sup>st</sup> Respondent.***

**7. *Costs of this application.***

**8. *Further and/or alternative relief.***

**2.0** In its answering affidavit, the Second Respondent (“Respondent” or “Employer”) raised two preliminary points of law namely that;

2.0.1 The Applicant’s application does not meet the peremptory requirements of Rule 15 of the Rules of the Industrial Court in that his dismissal was effected in August 2017.

2.0.2 The Industrial Court does not have jurisdiction to grant an order of spoliation because the employment relationship between the parties was terminated in August 2017.

- 3.0** After pleadings were exchanged between the parties, the matter was set down for argument on the 24<sup>th</sup> April 2019 and, on this day, the matter was duly argued and judgement was reserved to a later date.
- 4.0** During argument, the Respondent correctly chose not to address the point on urgency and as such this Court will equally not address same, save to mention that the urgency in the matter is said to arise from the Respondent's conduct of ejecting the Applicant from the premises in early April 2019 and not from the dismissal of the Applicant from employment in August 2017. This point is unlikely to have succeeded, but as already indicated, we were not addressed on same and we could have been persuaded otherwise.
- 5.0** It is also worthy of mention at this stage that the Applicant himself chose to abandon the claim in relation to the alleged damages suffered by him as a result of the ejectment effected on him and his family by the Respondent. This, in our view was a correct decision as such a claim cannot be entertained by the Industrial Court.

6.0 During the hearing of the matter, the parties addressed the Court both on the point *in limine* raised on behalf of the Respondent on jurisdiction and also addressed the merits of the matter.

### **Brief Facts**

7.0 The Applicant was employed by the Respondent on the 20<sup>th</sup> June 2001 as a Handyman Builder on a monthly salary of E 5,775.35 (Five Thousand Seven Hundred and Seventy Five Emalangi and Thirty Five Cents.)

8.0 During the month of July 2017, the Applicant was charged with four counts namely-

**5.0.1 Lawful Instruction: You refused to take a Breathalyzer test when ordered to do so by the Security Officer, Services Supervisor, Crop Production Manager and the Estate Manager while at the Security Offices.**

**5.0.2 Assault/Fighting/Intimidation: You made intimidating and threatening statements against the Services Supervisor and the Crop Production Manager when they were ordering you to undergo the Breathalyzer test at the Security Offices.**

**5.0.3 Disrespect, insolence and insubordination: You behaved in a disrespectful and insubordinate manner when you were being ordered to cooperate with the Security Officer in undergoing the breathalyzer testing process.**

**5.0.4 Substance Abuse: You reported for work under the influence of alcohol as you visually appeared very drunk and unfit for work.**

**9.0** At the end of the disciplinary hearing, the Applicant was found guilty on all charges and this fact was communicated to him in a correspondence dated 25 August 2017 signed by one Mr. Norman R. Dlamini who describes himself as the Front End Manager- Mhlume Factory.

**10.0** The Applicant states that he appealed the findings of guilt meted out on him and that his appeal was never processed by the Respondent. However, the Respondent disputes the allegation that it did not entertain the Applicant's appeal. In the answering affidavit, the Respondent has annexed a letter dated 6<sup>th</sup> December 2017 which it alleges was an outcome of the appeal lodged by the Applicant. In this

correspondence, signed by one P. Myeni, the General Manager (Operations), the Applicant's appeal was dismissed for lack of substance.

**11.0** The Applicant proceeded to report a dispute at the Conciliation Mediation and Arbitration Commission and, after conciliation, the dispute was certified as an unresolved dispute. Armed with the certificate of unresolved dispute, the Applicant lodged an application for determination of the unresolved dispute in accordance with the provisions of Section 85 (2) of the Industrial Relations Act 2000 (as amended).

**12.0** The Applicant's cause of action is set out in paragraphs (9) and (10) of the Founding Affidavit where it is alleged by him that;

**“On or about the 2<sup>nd</sup> April 2019 at around 7 pm while at Luve, I was called by my children who informed me that they were being ejected by the 1<sup>st</sup> Respondent from the above mentioned premises without an order from Court. It was raining cats and dogs on that day. My children and Mahlelela were ordered to vacate the premises and the 1<sup>st</sup> Respondent removed the household items outside the premises. I was disturbed by what I was told by the**



**children and promptly go [sic] to Mhlume Police Station to report the incident. The police telephoned the 1<sup>st</sup> Respondent and cautioned him that what he was doing was against the law as it was an abuse of the children.**

**On arrival at the premises I found my children outside in the rain and my household items were also exposed to rain and thereby being damaged. The 1<sup>st</sup> Respondent's unlawful conduct exposed my children to bad weather condition which may cause sickness and they were traumatized by the whole incident."**

**13.0** In response to the above allegations by the Applicant, the answer by the Respondent is as follows;

**"Save to state that during a routine inspection by the second respondent's housing department, it was discovered that there were people in occupancy of the premises including the applicant and were then evicted from the premises since they were in unlawful occupation. The remainder of the allegations are unknown and therefore disputed."**

**14.0** During argument, the Respondent’s Attorney submitted that the Applicant was being ejected from the premises because the employment relationship between the Applicant and the Respondent had ceased to exist by virtue of the dismissal sanction which was imposed on the Applicant after the disciplinary hearing process and which sanction was confirmed on appeal.

### **ANALYSIS OF THE EVIDENCE AND CONCLUSION**

**15.0** It appears to us that the issue of spoliation as contained in the pleadings and submissions from the parties is settled. The ejection of the Applicant and his family was carried out by the Respondent without a Court Order.

**16.0** In the High Court case of **Busisiwe Makhanya v. Absalom Makhanya Civil Case No.1430/2004 (Unreported)**, the court stated the law as follows;

**“It is trite law that in order for the Applicant to succeed in an application for *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).*

**17.0** It being settled that the Respondent's conduct constituted an act of spoliation, an important and crisp point for consideration is; which forum, between the High Court and the Industrial Court, should the Applicant's cause be determined?

**18.0** It was argued on behalf of the Respondent that the employment relationship between the parties has terminated with the result that there is no longer an employer-employee relationship. According to the Respondent's submission, there being no employer-employee relationship, the Applicant's cause should be determined by the High Court and not the Industrial Court since the latter Court is only empowered to deal with disputes between employers and employees during the course of employment.

**19.0** Section 8 (1) of the Industrial Relations Act 2000 (as amended) which confers jurisdiction to the Industrial Court provides;

**“The Court shall, subject to sections 17 and 65, have exclusive jurisdiction to hear, determine and grant any appropriate relief in**

**respect of an application, claim or complaint or infringement of any of the provisions of this Act, the Workmen’s Compensation Act, or any other legislation which extends jurisdiction to the Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment or between an employer or employer’s association and a trade union, or staff association or between an employees’ association, a trade union, a staff association, a federation and a member thereof.” [under-lined for emphasis]**

**20.0** Under Section 8 (3) of the same Act, it is provided that;

**“In the discharge of its functions under this Act, the Court shall have all the powers of the High Court, including the power to grant injunctive relief.”**

**21.0** Spoliation is, no doubt, a common law remedy. In its wisdom, the legislature deemed it fit that the Industrial Court should be given remedial powers which are found under the common law.

**22.0** In the present matter, the subject matter of the spoliation proceedings is a housing facility which had been allocated to the Applicant as one

of the benefits of being an employee of the Respondent. The source of the housing facility extended to the Applicant and his family is no doubt the employment relationship that existed between the parties. It is this employment benefit which the Respondent has sought to illicitly reclaim that forms the basis of the dispute between the parties.

**23.0** In Section 2 of the Industrial Relations Act, 2000 (as amended), the word “**dispute**” is defined as meaning “**a grievance, a grievance over a practice, trade dispute and means any dispute over the-**

**(a) Entitlement of any person or group of persons to any benefit under an agreement, Joint Negotiation Council agreements or Works Council agreements;**

**(b).....**

**(c) Disciplinary action, dismissal, employment, suspension from employment or re-engagement or reinstatement of any person or group of persons.”**

**(d).....**

**(e) Application or the interpretation of any law relating to employment; or**

**(f) terms and conditions of employment of any employee or the physical conditions under which such employee may be required to work.”**

**24.0** The dispute relating to the dispossession of the housing facility extended to the Applicant is therefore one that falls within the definition of dispute as described in the Industrial Relations Act 2000 (as amended). That being the case, a Court with competent jurisdiction to entertain the kind of dispute which is the subject matter of these proceedings is the Industrial Court.

**25.0** The Industrial Court retains jurisdiction even if it were to be accepted that the Applicant is no longer an employee of the Respondent. To hold otherwise would be equivalent to suggesting that once a termination is made and communicated to an employee, the Industrial Court is automatically stripped of its powers to adjudicate even in cases of unfair dismissal. It is accepted and settled that in all cases of unfair dismissal, the employer and employee relationship would, in the majority of cases, have ceased to exist. In these circumstances or cases, the Industrial Court still retains jurisdiction because the source of the dispute is an employer-employee relationship that existed

between the parties. The guiding test is whether the Applicant was an employee to whom Section 35 of the Employment Act, 1980 (as amended) applied.

**26.0** Another reason why we have come to the conclusion that the point *in limine* raised on behalf of the Respondent is not valid is because of the nature of spoliation proceedings. In the case of **Rosenbuch v Rosenbuch and Another 1975 (1) SA (W)** the Court held that;

**“A spoliator cannot justify his conduct, and avoid the consequences of that conduct, by saying that he was the victim of prior spoliation...In the case of Natal case of Meyer v. La Grange and Another, 1952 (2) SA 55 (N), there is a reference at p.58 H to the dictum by VAN DEN HEEVER, J, as he then was, in the unreported case of Van Zyl v Fastenau Bros, decided in the High Court of South-West Africa in the year 1935. The learned Judge is said to have expressed himself in these terms:**

**“It is clear that where one person has arrogated to himself the right to take anything out of the possession of another, he is liable to be subjected to an order directing him to restore, even if ownership may be in question.”**

**27.0** In this case, all that the Applicant is saying is that by agreement, the house was allocated to him by the Respondent by virtue of an employer-employee relationship and that he was despoiled of the house without a court order. The argument advanced on behalf of the Respondent being that the employment relationship between the parties has been terminated is an argument that goes to the merits of the matter as it seeks to justify why the Respondent is entitled to take back possession of the house and, by the same standards, why the Applicant should approach the High Court for the appropriate relief. That is not the nature of spoliation proceedings. The house was allocated to the Applicant as part of the benefits of his employment by the Respondent. Employment benefits and disputes relating thereto are adjudicated by the Industrial Court. It is for these reasons that we have come to the conclusion that the relief of restoring the housing benefit allocated to the Applicant by the Respondent must be adjudicated by the Industrial Court.

**28.0** The Respondent, being one of the most prominent and leading corporate entities in this country acted recklessly and unlawfully by taking the law into its own hands and subjecting the Applicant and his family to humiliating and degrading conditions when the



ejection without a court order was being carried out. The Respondent's conduct must accordingly be visited with an appropriate order of costs.

**29.0 The court accordingly makes the following orders;**

- a) The point *in limine* relating to jurisdiction is dismissed.**
  
- b) An order is hereby granted in terms of prayer (3) of the Applicant's application dated 11<sup>th</sup> April 2019.**
  
- c) The Respondent, namely, Royal Swaziland Sugar Corporation, is directed to pay costs of this application in the ordinary scale.**

**The Members agree.**

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**BONGANI S. DLAMINI  
ACTING JUDGE OF THE INDUSTRIAL COURT**

*For Applicant:*

*Mr. Leo Dlamini (S.A Nkosi Attorneys)*

*For Respondent:*

*Mr. Hasso Magagula (Robinson Bertram  
Attorneys)*