IN THE COURT OF APPEAL OF SWAZILAND

Civil Case No.23/03

In the matter between:

LUKE MASEKO **Appellant**

And

1 Respondent
2nd Respondent

FONDO THWALA CHIEF MALUNGE DLAMINI

CORAM **: BROWDE J.A.**
STEYN J.A.
BECK J.A.

JUDGMENT

STEYN J.A.

Summary

Application for an order of *mandarnent van spolie* - return of cattle seized by respondent in execution of a "fine" imposed by a Chief for not observing the tenets of a chastity ritual -nature of the remedy discussed - evidential burden on the respondent that deprivation of possession was authorised and lawful - failure to do so - appeal upheld.

[1] This appeal comes before us because of a decision of the High Court (Mcambuie A.J.) to dismiss an application for an order restoring the possession of five (5) head of cattle to the appellant.

[2] It was common cause that the 1st respondent seized five head of cattle belonging to the appellant. Such seizure was *prima facie* unlawful. This is so because the appellant's cattle were seized by 1st Respondent whilst his 11 year old son was taking them to the dipping tank. They were thereafter placed in the possession of the 2nd respondent who held them at all material times.

[3] The court *a quo* held that the appellant had failed *"to set out sufficient allegations in his founding affidavit to satisfy the requirements for a mandament van spoiie".* (There is no record of the court's *ex* tempore judgment, but by agreement between counsel the sentence in italics cited above constitutes its ratio for the decision to dismiss the application).

[4] The 1st Respondent alleges that the seizure of the cattle was lawful in accordance with Swazi Law and Custom. The factual basis for this contention is that a certain chief Ntfonjeni ordered that the Umphakatsi (Chief in Council), through the Bandlancane (Inner Council) should fine him (the appellant) "some cattle". Chief Ntfonjeni is described as the "custodian of the chastity ritual".

[5] It was the contention of the respondents that the fine was [awfully imposed and lawfully executed. The offence allegedly committed by the appellant was that he violated the chastity

ritual of the throwing of the Uracwasho tassels at his homestead, inasmuch as the female

members of his family failed to wear such tasseis.

[6] The appellant alleged that the 1st respondent was not the Chief of his area and had no authority over him. The second respondent was the only person who had such authority and it was common cause that he was not present when the fine was imposed. Appellant also contended that a mere failure to wear the tassels did not constitute a breach of the Umcwasho rite, neither was the failure to do so punishable by the imposition of a fine and seizing cattle an offender from offender for such breach.

[7] The ratio advanced by the judge a *quo* for dismissing the application because the appellant had failed to set out sufficient allegations to support his claim for relief was in supportable. Mr Mabila for the respondents very fairly and correctly conceded as much.

[8] It is well established law that all that a person despoiled has to prove is that he had possession of the kind that warrants protection and that he was illegally ousted from such possession. The statement by Innes C.J. in *Nino Bonino* v. *de Lauge* 1906 T.S. - 120 that: "spoliation is any illicit deprivation of another of the right of possession" has been repeatedly endorsed by Courts in Southern Africa. See e.g. *van Eck, NO and Another v. Etna Stores* 1947 (2) SA 984 (A) at 1000; *Willowvale Estates and A no. v. Bryanmore Estates Ltd* 1990 (3) S.A. 954 (W) at 957; *Burnham v. Neumeyer* 1917 T.P.D. 630 at 633. It is also clear that an application for a spoliation order can be entertained even if it is alleged that the spoliator was purporting to act in terms

of authority conferred by law. An abuse of such power equates to taking the law into its own hands. See van *Ecks* case above, op cit. where the court says the following:

> **"But it was further argued that, even so, a *inandament van spolie* was not the correct** remedy. That remedy has been dealt with in this Court in the recent case of *Nienaber* ***v. Stuckey*** **1946 A.D. 1049 where the statement, adopted by INNES, C.J., in *Nino Bonino v. de Lange* (1906, T.S. 120) from *Leyser,* was approved:**
>
> > **"Spoliation is any illicit deprivation of another of the right of possession."**
>
> **I can see no ground for holding that spoliation proceedings should not be available in a case such as the present. It is objected that this form of proceedings is only given where a man has taken the law into his own hands; but even assuming, though without deciding, that this contention is correct, that, as I have found above, is exactly what the appellants did in the present case - just as surely as if, on Hargovan's refusal or failure to deliver it, they had taken the rice without any pretext that they were acting under the Regulation. For that pretext cannot avail them. The case of *Sillo v. Naude* (1929, A.D. 21) is beside the point. There the respondent was not taking the law into his own hands; not only did he profess to act in terms of the Pound Ordinance, but he was in fact doing so. Here the appellants were taking the law into their own hands and were not acting in terms of any statutory authority**
>
> **For the above reasons I come to the conclusion that not only was the seizure of this rice illegal but that the order of the Court *a quo* was rightly made."**

[9] As indicated above the seizure of the appellants cattle was *prima facie* an illicit deprivation of his possession of his cattle. The respondents were therefore obliged to prove that in seizing the cattle they acted in pursuance of an authority lawfully conferred on them. This they clearly failed to do. Mr Mabila himself identified six issues on which there were material disputes of fact which were unresolved, all challenging the legality of the respondents' conduct. Moreover, no independent or any expert evidence was adduced to support the *ipse dixit* of the respondents that they acted in terms of a recently introduced customary injunction or that they were empowered by law or custom to seize his cattle as a fine. No statutory provision or other enactment which sanctioned such an invasion of the property rights of a citizen was produced in evidence or otherwise.

[1.0J It follows that a clear, indeed unanswerable case had been made out for the Court to grant the relief sought. It follows that the appeal is upheld with costs, these costs are to be paid jointly and severally by the respondents. The order of the Court *a quo* dismissing the application with costs is set aside. In its place the following order is granted: -

wrongfully seized by the 1st Respondent and presently in the possession of the 2nd Respondent, together with such progeny as may have **been bom to them since they were seized on the 12th of February 2003.**

2. **The Respondents are ordered joindy and severally - the one paying the other to be absolved - to pay the costs of the appeal."**

J.H. STEYN J.A.

I agree

J. BROWDE J.A.

I agree

C.E.L. BECK J.A.

Delivered this 11th Day of November 2005