IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

CIVIL APPEAL NO. 28/07

In the matter between:

THOKO IVY MKHABELA **APPELLANT**

VERSUS

BONGINKOSI MKHABELA **RESPONDENT**

CORAM: PH TEBBUTT, JA
NW ZIETSMAN, JA
JP ANNANDALE, AJA

FOR THE APPELLANT: MR. S.C. DLAMINI (of SC Dlamini & Company)

FOR THE RESPONDENT: MR. NDLOVU (of Masina Mazibuko & Company)

JUDGMENT
22nd MAY 2008

[1] Spoliation proceedings were instituted against the appellant and another by which return of twelve head of cattle were sought.

[2] The applicant approached the High Court on the 27th April 2007 to seek an order to compel the appellant and a deputy sheriff to restore possession of the cattle to him, which he stated to have been forcefully taken from him by the then respondent, assisted by a deputy sheriff, but without any lawful means to do

so. He says that he purchased the cattle at diverse occasions and kept them in his father's kraal. After the death of the latter and in order to keep his own cattle separate from cattle in the disputed estate, he moved them elsewhere. It was a matter of only four days thereafter that he was deprived of his peaceful and undisturbed possession of his own property.

[3] In support of his contentions, he filed affidavits from the people he purchased the livestock from, the man who kept his cattle in his kraal and the veterinary officer who confirmed the cattle to belong to him. He also attached the requisite stock removal permit which authorized him to move his twelve identified cattle to the other kraal.

[4] He thus established a *prima facie* case to entitle him to an order to have the dispossessed cattle returned to him forthwith, along the principle of *spoliatus ante omnia restituendus est* (Voet 43.17.7). The *mandament van spolie* or a spoliation order may be sought from the court by any person deprived of possession by violence, fraud, stealth or some other illicit method, commanding the dispossessor to restore possession to himself, the applicant.

[5] Possession in our law is regarded with such significance that even a thief or a *mala fide* possessor is protected in his possession and physical control of a moveable thing. A possessor

is afforded every possible protection by the law, not only in retaining his physical control but also in regaining it when he has been unlawfully dispossessed.

[6] It is a fundamental principle that no man is entitled to take the law into his own hands. Consequently, if a person without being authorized by a judicial decree disposses another person, the court, without inquiring into the merits of the dispute, will summarily grant an order for restoration of possession to the applicant as soon as he has proved two facts, namely that he was in possession, and that he was despoiled of possession by the respondent. See Voet 41.2.16; Van der Linden 3.5.4; Nino Bonino v De Lange, 1906 TS 122 and Wille's Principles of South African Law, 7th edition by Gibson at page 198 in this regard.

[7] Despite having precisely such a *prima facie* case established against them, the deputy sheriff and the present appellant filed a notice of their intention to oppose the application a few days before the application would have been heard. Instead of the applicant approaching the court *ex parte,* they were given more than two weeks notice of the intended application.

[8] In consequence of the noted intended opposition, the matter was left in abeyance for considerable time. According to the present respondent's attorney, after waiting for some 78 court

days, the applicant re-enrolled the matter to seek the order, which was granted by the learned judge in the court below.

[9] Notably absent was any answering affidavit by either respondent in which the spoliation order was attempted to be resisted. Instead, their attorney of record sought a postponement in order to prepare and file answering affidavits, despite the already inordinately long delay to do so. He also attempted to raise an issue of *lis pendens* as a legal point from the bar, without any notice of such point.

[10] This court is not privy to either a transcript of the proceedings in the High Court or of the reasons by the learned judge for the order he made, but apparently he refused a postponement and would not hear legal argument concerning *lis pendens.* In my view he quite correctly refused to entertain the indulgences sought by the applicants and granted the spoliation order against the appellant and the deputy sheriff, wherein they were directed to forthwith restore possession of the 12 cattle to the applicant.

[11] It is against this order that the appellant noted an appeal which has it that:

"1) The court *a quo* erred in fact and in law by not granting

the appellant leave to file and (sic) answering affidavit out of time.

2) The court *a quo* erred in fact and in law by holding that legal argument by appellant's counsel on *lis alibi pendens* amounted to leading evidence from the bar and would therefore not be considered".

Conspiciously absent is any prayer for an order sought to be made by this court, not even as to costs.

[12] That the prospects of success on appeal are not meritorious at all, especially so when regard is to be had to the facts of the matter and in particular the inordinately long delay in filing answering affidavits, which was then sought to be further extended, is further compounded by a number of aspects.

[13] It seems to me that a particularly cavalier attitude was displayed in both courts. Firstly, to have had 78 court days in which to file an answering affidavit and then to seek an extention of time to do so by a request from the bar could hardly have been expected to be countenanced by the High Court. Seemingly, the argument to advance a point of law from the bar was intended to bear upon an ongoing dispute between the parties in relation to a deceased estate.

[14] This is evidenced by virtually half of the appeal record consisting of papers that have nothing to do with either the spoliation application or the appeal. All such documents refer to different cases. The appellant's attorneys of record cannot claim to have been unaware of the fact that the record prepared for this appeal would be disputed as this was pertinently raised as an issue by the respondent's attorneys in a letter of the 1st April 2008, one and a half months before hearing of the appeal.

[15] This same letter also raises further pertinent issues, in particular that the Rules relating to appeals have not been adhered to. No judgment was filed, nor an explanation as to why it was not done. The respondent did not partake in the preparation of the record. No heads of arguments were filed by the appellant. Factual disputes arise from the filed record. It was suggested that the matter be withdrawn from the appeal roll, but it was not done.

[16] The failure by the appellant to include the judgment by the court *a quo* in which its reasons are set out is a serious omission. Where no written judgment has been handed down, a transcript of the *ex tempore* judgment is to be obtained from the Registrar. The High Court is a court of record and all judicial proceedings are digitally recorded. No explanation was offered for this crucial omission, nor that the learned judge was approached to seek reasons for the order now appealed against but that they could

not be obtained. The *ratio decidendi* for a judicial decision is crucial for purposes of an appeal.

[17] In Johannes Hlatshwayo v Swaziland Development and Savings Bank and 4 others, unreported Civil Appeal Case No. 21/2006, Ramodibedi JA had this to say at paragraph 13 (1):

> "*Furthermore, the judgment forming the subject matter of this appeal has not been annexed to the purported record. It need hardly be stressed that, by making this omission, appellant has in effect denied this court the opportunity to determine the correctness or otherwise of the judgment in question. Such conduct cannot be tolerated by this court*".

[18] Instead, the appellant proceeded in its cavalier fashion, manifested in an application for condonation of the late filing of its heads of argument which was presented to the court only hours before the scheduled hearing. Therein, the appellant's attorney merely stated as his excuse that: "*Due to pressure of work I was not able to file the heads of argument in time*". The heads of argument which were eventually filed consist of no more than one page which merely chronicles the events. No legal or other argument, devoid of any reference to legal precedents or even a prayer for any specific order on appeal is contained in it.

[19] It requires to be noted that the Supreme Court of Swaziland, the apex Court of the land, is ordinarily convened to sit over two sessions during each year. Its appointed Justices of Appeal come from various countries in the region, at great cost to the taxpayer. Swaziland does not have the resources, or the need, to have a full time ongoing session of the Supreme Court. Its members make great personal sacrifices to prepare for the hearing of appeals and to come to this jurisdiction. As the Supreme Court, it deserves due respect by all legal practitioners who appear before it, also that its procedural rules be adhered to.

[20] It has been repeatedly brought to the attention of all legal practitioners that they are enjoined to follow the prescribed Rules of practice. In just one of many such admonitions it was held that:

> "*The Rules of this Court are there not only for the guidance of practitioners but to ensure that the work of this court can be conducted efficiently, for the benefit of litigants and to ensure the proper administration of justice.*
>
> *Failure to comply with them redounds to the detriment of the Court in that it prejudices other*

practitioners, affects the interests of litigants and is disruptive of the working of this court. Further failure to comply with its Rules will therefore be regarded in a serious light by the Court".

(per Tebbutt JA in Andries Stephanus van Wyk and Another v BRL, unreported judgment of the Court of Appeal delivered on 30 November 2001, as referred to in (unreported) Civil Appeal Case No. 9/2007, by Zietsman JA, in the matter between Elina Ngcamphalala and Others v Duma Msibi).

[21] In the present appeal, a litany of errors result in a prime example as to why it is necessary to adhere to the Rules and why non-compliance should not be tolerated.

[22] The submitted record was not prepared in consultation with the opposite party, in flagrant disregard of Rule 30 (5). It resulted in numerous documents being filed which were not before the court *a quo* and which are not relevant to the hearing of the appeal either. Neither a record of the proceedings in the High Court nor the reasons for the Order against which the appeal lies were filed. Save for a single copy, the records were not certified as correct by the Registrar. The appellant's heads of arguments were not timeously filed, as per the peremptory

requirements of Rule 31. The belated application for condonation of late filing is wholly inadequate for its intended purpose.

[23] To crown it all, the appellant's attorney did not appear at the time of the hearing of the appeal and he had to be called to court by the respondent's attorney, causing the Court to wait for him, for over an hour. He explained his absence by saying that he thought it had been enrolled for the following day but it flies in the face of both the initial and subsequent amended published rolls for the current session. Furthermore, the court rolls clearly inform practitioners that it is a running roll which in turn requires litigants to be *au fait* with the days on which their matters are to be heard.

[24] In my view, the cumulative consequence of the appellant's disdainful and cavalier altitude could well have resulted in a costs order *de bonis propriis,* had it not been for a more demonstrable lackadaisical attitude. I do not think that the appellant's attorney deliberately derailed his client's appeal in the manner by which it was manifested. However, I also do not think that under the prevailing circumstances costs on the ordinary scale would be appropriate, in that it would thereby demonstrate acquiescence and platitude by this court.

[25] In De Witt's Auto Body Repairs (Pry) Ltd v Fedgen Insurance

Co. Ltd 1994 (4) SA 705 ECD at 713 (F-G), Jones J held:

> "*There is a limit beyond which a litigant can not escape the results of his Attorneys*' *lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Considerations* ad misericordiam *should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which failure to comply with Rules of the Court was due to neglect on the part of the Attorney. The Attorney, after all, is the representative whom the litigant has chosen for himself and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such relationship, no matter what the circumstances of the failure are*".

Inextricably, the present appellant, being the client who instructed her attorney to prosecute the appeal, is bound by the actions of her attorney in giving effect to those instructions. Should this court now fail to make an appropriate costs order against the appellant, it would have the inevitable consequence of straddling the respondent to bear an unnecessary burden of costs which was necessitated by having to instruct his own attorney to oppose the appeal.

[26] It is therefore ordered that the appeal against the Order of Mamba J in Civil Case number 1195 / 2007, dated the 10th August 2007 is dismissed, with costs on the scale of attorney and client.

Jacobus P. Annandale

Acting Judge of Appeal

I agree

P.H. TEBBUTT

Judge of Appeal

I agree

N.W. ZIETSMAN

Judge of Appeal

Handed down in open court at Mbabane on this the 22nd day of May 2008.