

**IN THE SUPREME COURT OF SWAZILAND**

**CIVIL APPEAL NO.30/2011**

**HELD AT MBABANE**

**In the matter between:**

**GIBSON NDLOVU : APPELLANT**

**AND**

**SIBUSISO DLAMINI : 1<sup>ST</sup> RESPONDENT**

**MDUDUZI DLAMINI : 2<sup>ND</sup> RESPONDENT**

**CORAM : RAMODIBEDI, CJ**

**: EBRAHIM, JA**

**: S.A. MOORE, JA**

**FOR THE APPELLANT : MR. N. MANZINI**

**FOR 1<sup>ST</sup> RESPONDENT : MR. S. BHEMBE**

**FOR 2<sup>ND</sup> RESPONDENT : NO APPEARANCE**

**HEARD : 23 NOVEMBER 2011**

**DELIVERED : 30 NOVEMBER 2011**

SUMMARY

*Civil procedure - spoliation proceedings - requisites - disputes of facts - appeal dismissed.*

**JUDGMENT**

**EBRAHIM J.A.**

[1] This is an appeal against a refusal by MCB Maphalala J to grant a spoliation order to the appellant.

[2] The requirements for the issue of a spoliation order have been stated and restated numerous times. In *BOTHA V BARRETT 1996 (2) ZLR 73 (S)* and 79, *Gubbay CJ* said:

**“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:**

1. **that the applicant was in peaceful and undisturbed possession of the property; and**
2. **that the respondent deprived him of the possession forcibly or wrongfully against his consent.**

**See: *Nino Bonino v de Lange 1906 TS 120 at 122;***

***Krammer v Trustees Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748 (C) at 753;***

***Davis v Davis 1990 (2) ZLR 136 (H) at 141C.”***

[3] There is no requirement for the applicant to show some reasonable or plausible claim to the property despoiled: *SHIRIYEKUTANGA BUS SERVICES (PVT) LTD V TOTAL ZIMBABWE 2008 (2) ZLR 37 (H)* at 41, per *Makarau JP* (as she then was). However, because a spoliation order is not interlocutory in its effect, but final, it is not enough to show a *prima facie* right. A clear right to be restored to the possession of the property must be established: *BLUE RANGES ESTATES (PVT) LTD V MUDUVIRI & ANOR 2009 (1) ZLR 368 (S)*, per *Malaba DCJ*, citing *NIENABER V STUCKEY 1946 AD 1049 at 1053-4*, where *Greenberg*

*JA* said that the same amount of proof is required as for the granting of a final interdict.

[4] This is where the appellant has a problem. His founding affidavit stated that, apart from the names of the respondents, their full and further particulars were not known to him. He also claimed to be the owner of the cattle that were allegedly despoiled. He said they were under his peaceful and undisturbed possession "while under the care of my herd man Linda Mamba." Linda Mamba's affidavit, which is very terse, said that the cattle were under his care for and on behalf of the appellant, when they were taken away by the respondents.

[5] The respondents give quite a different story. They say that the cattle were owned by their late father; the appellant was not the owner. The cattle, after the respondent's father's death, then formed part of his estate. The cattle had been in the first respondent's possession, but were at Linda Mamba's kraal because they had been "sisaed" ("loaned" or "lent") to him by the first respondent's father. The cattle were registered in the deceased's name.

[6] The appellant admits that the cattle were indeed registered in the deceased's name but claimed that nonetheless they belonged to him. He does not explain how this came about.

[7] It is clear that the record does not tell the full story. The appellant claims not to have any particulars about the respondents, but he certainly had a great deal to do with the settling of the estate of their father. He inserted notices regarding the estate into the press, a task that is usually that of the executor of an estate. He does not explain why he did such a thing. Following the finalization of the liquidation and distribution account, the Master purported to grant authority to transfer 25 head of cattle from the name of the deceased into the appellant's name. It is not made clear why the Master did this.

[8] All in all, one is left wondering what exactly happened in this case. Certainly, there is doubt as to who possessed the cattle and on whose behalf. It is apparent that there is a litany of disputes between the parties. Consequently, I would agree with the learned Judge *a quo* and would dismiss the appeal, with costs.

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**A.M. EBRAHIM**

**JUSTICE OF APPEAL**

**I agree** :

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**M.M. RAMODIBEDI**

**CHIEF JUSTICE**

**I agree** :

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**S.A. MOORE**

**JUSTICE OF APPEAL**