



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

(Ex tempore judgment on 29 November 2013)

Case No. 1862/2013

In the matter between

**MANZINI MEAT MARKET (PTY) LTD
PIMENTAS KFC LTD t/a KFC**

**1st Applicant
2nd Applicant**

and

**DUPS FUNERAL HOME & UNDERTAKERS
(PTY) LTD
MANZINI CITY COUNCIL**

**1st Respondent
2nd Respondent**

Neutral citation: *Manzini Meat Market (Pty) Ltd and Another v Dups Funeral Home & Undertakers (Pty) & Another* (1862/2013) [2013] SZHC 283 (29 November 2013)

Coram: **MAMBA J**

Heard: **29 November, 2013**

Delivered: **29 November 2013**

- [1] Civil Law – spoliation - when such relief available to an applicant – available only where applicants’ possession of subject matter is sufficiently stable, firm and ensconced.
- [2] Civil Law – mandament van spolie – nature of the right discussed. It is a remedy against self help against some one who has possession that is established, peaceful and undisturbed. This is a right of possession and is not a vindicatory right and thus available to a lessee or possessor whose possession is ensconced or established.

- [3] Civil Law – application for a mandament van spolie. Applicants having had possession or occupation of an access road for a period of 30 years. First Respondent thereafter leasing and fencing off property where access road is situate despite the applicants' objections to the fencing thereof. Fencing of land depriving applicants access to their property. Application for spoliation granted against first respondent.
- [1] The two applicants herein are the occupiers of business premises situate on portion 10 and portion 11 of Erf Number 368 situate in the Manzini City Centre. These properties are owned by one Moses Ncala and he has leased them to the applicants. The first applicant took possession thereof in about 1979 whilst the second applicant came in about a year later and both have been in occupation and carrying on business thereat ever since those respective dates.
- [2] It is common cause that the applicants' loading bays are situated at the back of the premises overlooking plots Number 105 and 106. Plot Number 105 is owned and occupied by the first respondent, since 2011. Lot 106 is owned by Dilys and Thembi Dlamini and is leased to the first respondent.
- [3] The access road to the applicants' loading bay is about six (6) metres wide and comprises about three (3) metres of Lot 106 and also three (3) metres of Lot 107. Both applicants have used this road ever since they took occupation of the premises. They aver further that this road is also recognized by the

second respondent which uses it in order to collect refuse from the premises and neighbouring properties.

- [4] It is significant to note that the applicants state that ‘there is no other loading bay dedicated to use by them except the ones behind the business premises and that the only road to that loading bay is the one referred to herein. Further, it is the applicants’ contention that ‘[15] Plot 106 has always been vacant and from the year 1979 the first applicant has used it without any objection from its owner for big trucks who deliver bulk meat carcasses on its premises every week. Due to the fact that on the right hand side of the access road there are Swaziland Electricity Company power poles and there is a storm water drain just at the entrance the first applicant has been forced to use for over 30 years about 3 metres of the land which encroaches on lot 106. This has been solely to accommodate the 18 and 12 ton-double back axle trucks which deliver bulk meat carcasses twice in a week. Those trucks need a big space to move and turn.’ Applicants aver that the six (6) metre width of the road is the minimum that is required by them to cause their said trucks to move on that access road.

- [5] It is common ground that on 01 November 2013, by letter dated that day, the first respondent informed the applicants that it ‘...will be fencing off Lot 106 ... to clearly set out the boundaries stipulated by the municipality between the neighbouring properties.’ The first respondent further advised and acknowledged that this exercise had ‘the potential to interrupt’ the applicants’ current logistics.’
- [6] In response to the above letter by the first respondent, the applicants informed the first respondent that they ‘...have no objection to your fencing of lot 106 provided that in doing so you shall not adversely affect the use of the delivery lane by the big trucks who come to’ make deliveries to the premises. Later, the applicants informed the first respondent that its proposed fencing would close its only access road to their premises and severely harm their businesses in the process as no trucks would be able to gain access to the premises.
- [7] Despite the above protestations by the applicants, on 20 November 2013, the first respondent erected a fence on the boundary of lot 106 and lot 107, which fencing effectively deprived the applicants of the use of the three (3) metres of lot 106 that is part of the access road. Effectively, this meant that

the trucks used by the applicants could not have access to the loading bay or to the business premises of the applicants. The upshot of this fencing by the first respondent was this application by the applicants who have applied inter alia, for the following orders; namely:

- ‘2. The first respondent is ordered to forthwith restore to the applicants the peaceful and undisturbed possession of right of way on lot 106 in favour of portion 10 and 11 of Erf Number 368 situate in the Manzini Town Centre;
3. The first respondent is ordered to forthwith remove the fence erected along the right of way on lot 106 in favour of portion 10 and 11 of Erf Number 368 situate in the Manzini Town Centre in order to restore to the applicants peaceful and undisturbed possession and use of the right of way over Lot 106 in favour of portion 10 and 11 of Erf Number 368 to a width of not less than 3 metres into Lot 106.’

[8] As can be seen from the allegations and prayers stated above, this is an application for a *mandament van spolie* or spoliation order. The applicants submit that from the facts above, the first respondent has taken the law into its own hands ‘by placing a fence on Lot 106 which has for 33 years been

used by the applicants to receive meat deliveries conveyed in 18, 12 and 8 ton refrigerated trucks capable of conveying bulk frozen carcasses to their business premises.’

[9] The first respondent has filed an opposing affidavit herein. In *limine*, the first respondent submits that the applicants have failed to cite and join the owners of Lot 106 in these proceedings and this is fatal to the application. Secondly, first respondent argues that there is a dispute of fact in this application that cannot be resolved in this application proceedings. The alleged or averred dispute is that the applicants’ and second respondent’s trucks are able to have access to the premises, despite the fencing that has been erected by the first respondent. I shall deal with these two points before examining the first respondent’s response to the merits of this application.

[10] First, the point of non joinder of the owners of Lot 106 is sadly misconstrued or misconceived. The right that the applicants assert is the right of possession. It is not a right to possession or a vindicatory right. Indeed the actions complained of are those of the first respondent who is itself the lessee of Lot 106. The landlords or owners of the properties concerned

herein have only a financial interest in these matters. But more importantly, in *JS Van der Watt Enterprises CC and Another v Vusani Property Investments (Pty) Ltd (2692/2006) [2006] ZAFSHC 100 (31 August 2006)*, cited by the applicants herein, the Court stated as follows:

‘[9] ...I find the following passage in *The Law of South Africa, Vol. 27, First Re issue, P. 183, para 266* persuasive:

‘In cases of indirect possession the question may arise in future whether the direct possessor and the person exercising indirect possession through another should not both be entitled to a mandament van spolie. Where physical control is exercised on behalf of a master or employer by a servant or an employee, the courts have decided that only the master or the employer can institute the *mandament*. What, however, about the case where the direct possessor such as an agent of a lessee who exercises control on behalf of a principal or a Lessor does in fact have the intention of deriving some benefit from the thing? In this case it is submitted that both the direct and the indirect possessor should in principle be entitled to the *mandament*.’

See also *PAINTER v STRAUSS 1951 (3) SA 307 (0) AT 313H-314A* and *MBUKU v MDINWA 1982(1) SA 219 (TSC) at 222*. On the

evidence I am satisfied that the second applicant not only exercised the alleged right of way on behalf of the owner of Erf 140, but also with the intention of deriving at least some benefit for itself.’

See also *MULLER v MULLER 1915 TPD 28*, cited by this Court in *THULANI MATSEBULA v ALFRED BOY BOY MNDZEBELE*, case 211/2006, judgment delivered on 30 January 2006, where the Court at 30-31 per Wessels J stated as follows:

‘Now it is quite clear that, though our spoliation order has its roots in the Roman Law, it is really derived from Canon Law, and the Canon Law did not require the same formality that the Roman Dutch Law required in regard to possessory interdicts. We have to do then with the CANON LAW and with a mandament van spolie as obtained in the old Dutch Courts, where recourse was to a spoliation order – the possessory mandament which lies upon every person who has the actual legal possession of a movable. It does not matter whether a person holds a thing for himself or whether he holds a thing as an agent of another. The object of the law in granting a spoliation order is to restore the parties to the possession in which they were before violence took place, before unlawful taking away of possession took place. The object of the law is to prevent people from taking the law

into their own hands and so causing disturbance of the peace and also to protect a person who has a possessory right; and, therefore, a spoliation order can be obtained as well by an agent as it can by the owner of the property.’

[11] The second point in *limine*, does not, in my judgment constitute a dispute of fact. The applicants’ case is not that their access road has been completely closed or shut. Their case is that specified or particular size or types of trucks are unable to have access to the loading bay. The first respondent’s assertion on this issue does not dispute this inasmuch as the first respondent has failed to state the nature and size of the trucks it alleges have had access since the fencing complained of was erected. This objection by the first respondent is wanting in detail or specifics and thus does not constitute a dispute of fact in the circumstances of this case or the allegations under consideration herein. This point is likewise dismissed or rejected.

[12] In *Thulani Matsebula* (supra) I noted that:

‘[9] By its nature and for the objects for which it was designed and the wrongs or ills it was aimed or designed to curb, an application for a spoliation order is a speedy and summary remedy – it restores the

parties to the **status quo ante** before any adjudication or inquiry into the merits of the dispute between the parties.

[10] Any act or circumstance whereby people take the law into their own hands and become judges in their own cause constitutes a breach of the peace or has the potentiality to lead to such breach. It therefore warrants an urgent or speedy remedy.’

I repeat these remarks herein. Vide also *Nino Bonino v de Lange*, 1906 TS 120 at 125.

[13] On the merits, the first respondent has denied that the applicants were in possession or occupation of the portion of Lot 106 complained of herein. First respondent submits that “...the mere fact that they might have used the property (albeit unlawfully) does not amount to them having been in possession.’ This assertion by the first respondent is clearly legally untenable or unsound. Again, a *mandament van spolie* pertains to the right of possession rather than to the lawfulness or otherwise of that possession. Furthermore, the uncontroverted evidence is that the applicants have used that part of the property in question for a period spanning about 30 years. This use or possession has been peaceful and undisturbed. The first respondent only came to the scene when it signed the lease agreement with

the owners of Lot 106 in about October, 2013. From those facts, the applicants' occupation or possession of the portion of the land in question was firm, established and ensconced. It was stable. This is, in law, sufficient to ground the required possession to found a claim for a spoliation order. (See *Mbangi and Others v Dobsonville City Council 1991 (2) SA 330* and *Luke Maseko v Fundo Thwala and Another, case 23/2003*, judgment delivered on 11 November 2005).

[14] The first respondent in its letter to the applicants advising them of the intended closure or interference with the access road, plainly acknowledged that the intended fencing would adversely affect the applicants in having access to their loading bay. The applicants objected to or protested about this, but the first respondent went ahead nonetheless and erected the fence. This deprived the applicants of the right to use their refrigerated 8, 12 and 14 ton double differential trucks from using that access road. The action by the first respondent was plainly a matter of self help and is hereby declared unlawful.

[15] For the above reasons, the application is granted with costs on the ordinary scale.

MAMBA J

For the Applicants : **Mr. N.D. Jele**

For the first Respondent : **L.R. Mamba Attorneys**