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IN THE SUPREME COURT OF ESWATINI

HELD AT MBABANE **CASE NO.22/2020**

In the matter between:

FAMILY OF GOD CHURCH **Appellant**

And

NHLANHLA VICTOR MACINGWANE **Respondent**

Neutral Citation: *Family of God Church vs Nhlanhla Victor Macingwane (22/2020)* (2021] SZSC1 (27th May 2021)

Coram: **R.J. CLOETE JA, S.B. MAPHALALA JA AND N.J. HLOPHE JA.**

Date Heard: 16 March 2021

Date Handed Down: 27th May 2021

Summary

Civil Procedure - Interpretation or Variation of Judgments or Orders - When a Judgment qualifies to be interpreted or varied - Appellant instituted proceedings before the court a quo seeking an order of court interpreting or varying a judgment it contended had issued two conflicting orders - Court a quo neither considering nor deciding the issue contended to have necessitated the interpretation or variation of the judgment complained of when matter was finally heard - Court a quo considering and deciding a different issue to the one brought to it for decision by the parties as can be seen from the pleadings - Resultant judgment of the Court a quo appealed against to this Court - Whether Court a quo entitled to deal with the matter in that manner - Irregular for the Court a quo to deal with the matter in the manner it did and to eventually decide it on an issue it had not been asked to decide - Appeal succeeds with no order as to costs.

JUDGEMENT

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[1] On the 30th July 2018, the court a quo per her Ladyship Justice M. Dlamini issued an order, annexure A to the application, in terms of which it directed as follows: -

"J. Applicant's application succeeds in the following manner,"

1.1 The First Respondent under case no. 733/2018 is ordered to: -

[a} Restore possession of the land situate on Swazi Nation Land at Hhababa area, Matsapha near Lusushwana Water Services Depot and adjacent to the Manzini - Mbabane High Way, to the Applicant,

[bJ Demolish all structures built on the said piece of land.

[c} Should)Sf Respondent be inclined to insist on the said piece of land, JSf Respondent is ordered to compensate the Applicant for the structures therein at a fair market value upon which order No.2 hereunder shall not apply.

[d} Kwaluseni (Mbikwakhe) Royal Kraal is ordered to apportion another piece of land of similar use [trade] to the first Respondent within a reasonable time from date of this judgment.

[e] Each party to bear its own costs.

(2] There is an apparent inconsistency in the order captured above. Whereas the said order refers to order no.2 at paragraph (C), there is no order no.2 ex-facie the order in question. The same thing cannot however be said of the order set out in the written judgment which, as shall be seen herein

below, was prepared as a follow up to the said order, particularly to give reasons how and why the order in question was arrived at. In the order set out in the judgment concerned, there is indeed order no. 2 which is similar to order (D) in the Court Order, Annexure A. Further still, whilst the text of the order set out in annexure A says nothing about order C being in the **alternative,** order 1.2 in the judgment, which is a synonym of order (C), makes it clear that it (order 1.2) is in the alternative.

[3] As shown in the foregoing paragraph, the individual orders contained in Annexure A, at least in terms of the wording used and although not in terms of the numbering of the individual orders or paragraphs of the Court Order, is contained in the written Judgment of the court *a quo* which suggests, on its face, that it was handed down on the 28th September 2018 following the hearing of the matter on the 30th July 2018. It shall however be noted that the latter date is similar to that appearing ex facie the court order referred to in paragraph 1 above, where that same date is referred to as the one on which that order was issued by the court a quo.

[4] I can only assume that the court order referred to in paragraph 1 above was issued *extempore* and was subsequently followed by the reasons set

out in the written Judgment referred to in paragraph 2 above where the same order was incorporated. I clarify however that from the circumstances of the matter, it seems immaterial whether the order was delivered *ex tempore* and extracted soon thereafter, or whether it was only extracted and recorded in the form of an order from the Judgment handed down on the 28th September 2018, as long as one is alive to the inconsistencies that exist in the order.

[5] Whereas the order embodied in annexure A lists the individual orders alphabetically in the following manner, 1.1 (a), (b), (c), (d) and (e); that set out in the judgment lists such orders numerically as 1.l(a),(b) alternatively 1.2, 2 and 3. They are all worded similarly however. Orders 1.2 and 2 on the Judgment, are what appears as orders (c) and (d) on the Court Order, annexure A. In the Judgment, it is clear that order 1.2 (order (C) in annexure A), is alternative to orders l.l(a) and (b) and I should add, it is inconsistent with them in its effect.

[6) According to a summary of the facts *ex facie* the Judgment, three related matters under case numbers 325/2018, 732/2018 and 733/2018 were consolidated and dealt with as one given that they related to the same

piece of land. The piece of land in question is part of Swazi Nation Land described as situated at Hhababa area, Matsapha near Lusushwana Water Services Deport, adjacent to the Manzini-Mbabane Highway.

[7] It is common cause from the Judgment in question that case no. 325/2018 was an application brought by both the Indvuna of Zombodze Royal Kraal and the Acting Indvuna of Kwaluseni Royal Kraal, who approached the court a quo jointly seeking an Order to confirm a decision allegedly reached by the Zombodze Royal Kraal, clarifying that the piece of land described above had been allocated to the appellant herein, even though it was at the time allegedly claimed by the Respondent herein.

[8] Case No.732/2018 on the other hand was about an application instituted by the acting Indvuna of Kwaluseni Royal Kraal against the Manzini Regional Administrator and a body identified as the Kwaluseni Kings Council. The Order sought was that the latter body be declared to be unconstitutional whilst the Reginal Administrator was to be ordered to liaise or deal with the appellant only on matters of Kwaluseni area, particularly those concerning the allocation of land in the said area. The land forming the subject of these proceedings was one such piece of land

which the acting Induna of the Kwaluseni Royal Kraal sought to have dealt with through him instead of the Kwaluseni Kings Council which he alleged had purported to allocate it to the current Respondent notwithstanding that the Kwaluseni Royal Kraal and the Zombodze Royal Kraal, were the only appropriate authorities in relation thereto and had in exercise of their said authority allocated the land in question to the appellant church.

(9] Case no.733/2018, which is the matter that forms the gravamen of this appeal and the judgment of the court a quo being currently appealed against in these proceedings, was about an application instituted by the Appellant, the Family Of God Church, seeking an order compelling the Respondent, one Nhlanhla Macingwana, to restore to its possession, the piece of land referred to above. It alleged that the piece of land in question was unlawfully appropriated from its possession by the Respondent, Nhlanhla Macingwane, without an order of court. It had sought another order of court directing the said Respondent to forthwith demolish all the structures built on that piece of land by him. A further order sought was to interdict the Respondent from constructing further structures on the said piece of land.

[IO] In its judgment to the said application, the court a quo, per Justice Dlamini found as follows, which has never been successfully challenged, at paragraphs 20-23;-

"20 It was not disputed that the Family of God Church was apportioned the piece of land in 2005. It is also not in issue that the same piece of land was identified on behalf of Nhlanhla Macingwane in 2006. The question that baffles the mind is, how could the same entity in the name of Kwaluseni (Mbikwakhe) Royal Kraal earmark the same piece of land for different Applicants? The answer is glaring from the pleadings. There is also a serious contention for power within the inner Council of Kwaluseni (Mbikwakhe) Royal Kraal itself.

21 It is this persistent fight in the inner Council of Kwaluseni (Mbikwakhe) Royal Kraal that has led to some members paying allegiance to the Zombodze Royal Kraal while others to the Kwaluseni Kings Council. The English axiom is apposite "when two elephants fight, the grass suffers. " It is clear from the pleadin gs that both the Famih o f God Church and Nhlanhla lvfacinglVa ne are innocent victims o[the in fighting among the Kwaluseni (Mbikwakhe) ROl al Kraal , the Kwaluseni Kings Council and the Zombodze Raval Kraal.

22 My duty is not to pronounce on the two differing contentions on who ought to exercise power over Kwaluseni area but to safeguard the interest of the innocent victims. In so doing I was guided bv the evidence that the Family o f God Church was apportioned the land

first in 2005. Nhlanhla Macing.wane was as per the headman one Musa Dlamini. a pportioned the land in 2006.

23. *During submissions, it was revealed that the Family of God (Church) has constructed a massive structure over the piece of land while Nhlanhla Macingwane just a shack. Further. Nhlanhla Macing.wane constructed the shack a(ter the Famil v o f God Church had alread1 commenced its construction. He ought to have come [or a spoliation order or interdict rather than commence construction as it was obvious that someone else was alread v in possession o f the said piece o[land".* (Underlining has been added)

[11] The order issued by the court a quo following its foregoing findings, whose full text is captured in paragraph 1 above, is said to have been appealed by the current Respondent to this court. The said appeal did not get to be heard and determined because the Appellant failed to comply with certain provisions of the Appeal Court Rules which necessitated that the appeal be deemed abandoned by this Court which went on to so order. In a nutshell the order concerned had directed that the applicant's (current appellant's) application had succeeded with the first Respondent having been ordered to restore possession of the land in question to the applicant (current appellant) as well as to demolish all structures built on the said piece of land. It had gone on under order (c) (order 1.2 in the judgment) to direct that should the First Respondent be inclined to insist on the piece

of land in question, he was being ordered to compensate the Applicant for the structures thereon at a fair market value. In that event it ordered that the order it had issued under order 2 to the effect that the Kwaluseni Royal Kraal was to allocate another piece of land to the Respondent was not going to apply. It was this order "C" in annexure A and order 1.2 in. the judgment, which as shall be seen herein below, was considered to be problematic or inconsistent with its main order and findings and therefore necessitated an interpretation, hence the application whose judgment or order gave rise to this appeal as shall be noted herein below.

[12] Soon after the order by the Supreme Court deeming the appeal by the current respondent abandoned, the latter wrote a letter to the Appellant's Attorneys which was dated the 2nd December 2011, which reads as follows on the material paragraphs, being paragraphs 2 and 3:-

> *"2 Your client has vigorously defended the integrity of the aforesaid order which is in the alternative. You will no doubt appreciate that the alternative order is primarily for our client's benefit to the extent that he is given the latitude to make an election between two scenarios;*

12.1 *To demolish all structures developed by him on the disputed land and restore possession thereof to your client (or)*

12.2 *Compensate your client for the structures developed by it at a fair market value.*

3. We hereby formally communicate our client's election to insist on retaining the disputed land in which case he will compensate your client accordingly. "

[13] Although the current Respondent had construed the order of the court a quo referred to above to be giving him a latitude to choose over the two scenarios referred to above, the Appellant had not seen it that way when considering its response per the letter dated the 10th December 2019. In that letter the Appellant had said the following on what I consider to be the material paragraphs:-

" 2. it appears that there is confusion regarding Judge M Dlamini'sjudgment of the court a quo.

3. *Our client's interpretation which we submit makes sense, is that our client should be the one compensating yours for the structures, based on the fact that our client had not constructed any structures on the disputed piece of land.*

4. *The main order clearly states that our client was successful under case no.733/2018. It would therefore defeat logic for*

the Court to rule in favour of our client and in the same judgment change tune.

5. *We believe that our client is the one who should be compensating yours.*

6. *In the event the parties are not in agreement, may the parties approach the Learned Judge for clarification of the said Judgment.* "

[14] It would seem that these two letters had clearly stated how each one of the parties construed the judgment of the court a quo. The conflicting views by the parties bear out the apparent inconsistency in the order and by extension, the ambiguity therein. Otherwise, the subsequent correspondence did not change the position of each one of the parties except to crystalize it. These subsequent letters were exchanged until about mid-February 2020, where after, the current appellant, the Family of God Church, instituted application proceedings seeking an order effectively interpreting the judgment or varying it as a result of the apparent ambiguity. In terms of the Notice of Motion, appellant sought the Following Orders:-

1. *Finding that there is an ambiguity and/or patent error in its judgment under Order 1.2 of the judgment of the 28th September 2018.*

2. *Varying the same judgment by deletion of Order 1.2 thereof and/or substitution thereof by an Order entitling the*

Respondent to compensation in respect of any structures erected by the Respondent on the land that the Respondent unlawfully appropriated.

3. *Further and/or alternative relief*

4. *Costs of suit.*

[15] Although prayer 1 of the application for clarifying or interpreting the judgement is not elegantly drawn in its current form, it is very clear what is intended by it. That intention is borne out in the version on which the argument before Court was based, which is simply that the court a quo was being urged to find that there was an ambiguity to the entire order brought about by order 1.2 or that the said prayer was a patent error.

[16] As a basis for the order sought in the interpretation of the judgment concerned, the Appellant said the following at paragraphs 15.1 to 15.4 which I am of the view warrants being captured in the exact words herein: -

"15.1 This Honourable Court clearly granted the Applicant the order sought in the Notice of Motion by ordering Respondent to restore possession of the land in dispute and demolishing all structures built by the Respondent on that land. This was the primary order of this Honourable Court.

15.2 *This Honourable Court clearly found that the Applicant's application had succeeded, and any subsequent order would need to be consistent with that finding.*

15.3 *The introduction of the alternative order was clearly in error given the reading of the order of court as a whole, for this Honourable Court could not have meant to grant restoration and vacant possession with one hand and to take it away with the other in return for money.*

15.4 *The land on which any structures stand was rightfully allocated by the Chief to the Applicant and no compensation for the structure would grant the Respondent the right of occupation of the land on which it stands. Clearh the order for compensation was in error in the circumstance (sic) o f the case. because the Applicant church is the right ful possessor o f the land. It would accordin g!)' be im pos sible to execute the alternative order. and the Honourable Court could not have meant to give such an order.* (underlining has been added).

[17] At paragraphs 17.8 and 18 of the founding affidavit by the Appellant's founder, Mr David Mathse, the following is stated contending the existence of an ambiguity in the court order concerned: -

"17.8 The ambiguity of the order is further manifest in that it could not have been the intention of the court to award the Respondent the land which he is found by the Court to have illegally appropriated and in respect of which he violated an

order by the traditional authorities of both the Zombodze and Mbikwakhe imiphakatsi (Royal Kraals), to vacate and which he obtained through force".

18. What requires the court's interpretation and variation is whether it is the court's intention that the Applicant, who was the successful party in litigation should effectively forfeit the disputed portion of the "piece of land" at no cost, at the instance of the unsuccessful party and also forfeit the potion that it built its church on after being compensated, which compensation (is) for only the structures therein (and) it has never sought" .

[18] In its response to the contentions contained in paragraphs 15.1-15.4 and 17.8 -18 of the founding affidavit; which in my observation formed the gravamen of what the ambiguity or obscurity in the judgment complained of was alleged to be, the Respondent did not say anything that suggested that there was no dispute on those paragraphs or one that showed that there was no reason for complaint on the court prder in question. To record what he said verbatim in response thereto in his answering affidavit, the Respondent contended as follows with regards the concerned paragraphs: -

"23. Ad paragraph 15.1

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If one ignores the alternative order issued by this Honourable Court, the allegations in this para.graph are admitted.

24. *Ad paragra ph 15.2*

The allegations in this paragraph are denied and the Respondent is put to strict proof

25. *Ad pa ragra ph 15.3*

The allegations in this paragraph are denied and the Deponent is put to proof thereof

26. *Ad paragraph 15.4*.

The Allegations in this paragraph are denied and the Deponent is put to proof thereof

29 *Ad paragra phs 17.6.17.7 and 17.8*.

The Allegations in these paragraphs are denied and the deponent is put to proof thereof

30 *Ad paragra phs 18, 19, 20, 21, and 22*

30.1. *The allegations in these paragraphs are denied and the deponent is put to proof thereof*

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30.2 I maintain that there is no ambiguity in the order of this Honourable Court, a fact which has always been pointed out to the deponent who was however stubborn notwithstanding the notice he was given that an order for costs at attorney - client scale would be sought if proceedings were instituted to clarify what is otherwise a clear order".

[19] I have had to go into this length reciting the paragraphs contending there was an ambiguity including its nature against those responding thereto, to show that from the papers themselves, nothing tangible had been said to realistically contradict the allegations on the existence of ambiguity in the order or judgment concerned. In fact, what had been said in response to the contentions of ambiguity in the order or judgment was mainly in the realm of bare denials. This is what in reality the court a quo had to grapple with in determining whether or not there was any ambiguity or obscurity in the order or judgment in question so as to decide whether or not to grant the reliefs sought.

[20] After the application for interpretation of the order of the court a quo and /or its variation was heard, the court a quo per the Honorable Justice M. Dlamini, prepared a judgment in too summarized a form. Before spelling

out what it said, I mention in passing that the Respondent had raised certain points in limine. These points in limine are not shown to have been dealt with in any detail or form in the order comprising the summarized version. It suffices that all parties appeared content with the way those were treated given that none of the parties made an issue over it.

[21] Otherwise the order by Justice Dlamini after hearing the matter was written by hand on the file cover before it was transcribed. It was expressed in true summary form and read as follows:-

> *"1. By the latter part of the alternative order "upon which Order No.2 herein under shall not apply", it is clear that the court intended the Respondent under case No.733/2018 to compensate the Applicant. It also arose during the argument(s) that Respondent has dismally failed to comply with the alternative order in as much as it communicated to Applicant that it opted for same. An Appeal was deemed by the Supreme Court as abandoned. This in the Court's eyes was a delaying tactic at the expense of Applicant. This deserves censure. Further the point raised by the Respondent which is his main point of law on how the parties appear must fail for the reason that the Applicant could not rearrange the parties after the matter was consolidated and judgment sought to be varied cited the*

parties in that particular manner. For these reasons altogether, Applicant's application stands to be dismissed. costs order (sic) are declined in favour of the Respondent.

2. *To ensure compliance with the order issued two [2] years ago, in line with the principle of our law that Justice delayed is justice denied, Respondent is ordered to submit within fourteen [14] days the fair value document prepared by listed Professional if applicant accepts same and communicate to the Respondent within three [3] days. Respondent is to find a neutral person to prepare the necessary valuation report and Respondent is ordered to pay after three [3] days from receipt of such acceptance failing which the Deputy Sherriff Mr Mciniseli Zwane is to find a neutral person to prepare the necessary valuation report and Respondent is ordered to pay after three [3[<jays from receipt of the documents by Zwane.*

3. *Matter postponed to the 4th May 2020 for the parties to report."*

[22] As indicated above the Appellant noted an Appeal against this summarized judgment or order of the court a quo. As further indicated, this (current) judgment is an offshoot of the said appeal. The grounds of the appeal concerned were stated as follows in the notice of appeal: -

"J. Order 1.2 which the Appellant sought the Court to vary in its variation application is inconsistent with the findings of fact

and law made by the court a quo in that the result is that the unsuccessful litigant who illegally occupied the Appellant's property is awarded the opportunity to purchase the property which appellant has no desire to alienate.

2. *The Order 1.2, in light of the fact that the Respondent was the unsuccessful litigant has no basis in law in that no such relief was sought by either the Appellant or Respondent. The order has the effect of granting the unsuccessful litigant the opportunity to purchase not only the disputed portion of the land but also the portion upon which the Appellant's church is built, which was never the subject matter of the dispute before the court a quo.*

3. *The order manifestly fails to do justice between the parties in light of the fact that the Appellant was the successful litigant and leads to a miscarriage of justice where the Respondent who has acted unlawfully is in effect the successful party.* "

[23] The Respondent who in his answermg affidavit had insisted on the payment of punitive costs, noted a cross appeal in terms of which he contended that the court a quo had erred in not awarding him the costs of the proceedings although he had been the successful party. According to the cross-appellant the court a quo had refused him costs on the grounds that it had allegedly found that he had deliberately failed to put in motion the compensation of the appellant for the piece of land yet there was no proper evidence to enable the court to so conclude.

[24] He further cross appealed against the court's failure to award him costs at attorney client scale when it dismissed the Respondents application. It was contended further that the court a quo had refused cross-appellant an opportunity to make submissions in support of his prayer in that regard (that is, for costs at attorney - client scale).

[25] Lastly the cross appellant contended that the court a quo had erred in ordering that he be the one to procure the valuation of the disputed property and the ancillary orders on the logistics for the compensation. It was further argued that in so doing the court a quo had erred because it had pronounced on an extraneous issue which had not been solicited by either party.

[26] It cannot be disputed that considering the allegations in the founding affidavit on what the issues that necessitated the interpretation or variation of the Judgment were, the court's written reasons (abridged as they are) say nothing about the court a quo having addressed the real cause of complaint which had prompted the application for the interpretation and / or variation of the judgement or order in question.

[27] Simply put the issue that warranted the interpretation of the order or its variation had *inter alia* been the fact that the court a quo had in its very first judgment between the parties failed to appreciate that it having declared that appellant was a successful party, particularly in the sense that whereas he had in reality brought spoliation proceedings, the court a quo had notwithstanding it having effectively found that the Appellant (the Church) had been despoiled and had already ordered the restoration of the despoiled property or portion of land to the Appellant, it had in the same vein purported, by orderl .2 of the same judgment or order, by order C of the Court Order (annexure A to the application) purported, to authorize the person who had been found by it to have despoiled the successful party, to be allowed to keep the property he had illegally helped himself to, which was contrary to the law governing the reliefs to be granted a despoiled party . Other than the Respondent being granted a relief foreign in spoliation proceedings the Court's conduct amounted to the said party being made to benefit from his own wrong which the law does not allow. See **S v Mamabolo (CCT44/00) (2001] ZACC 17; 2001 SA 409.**

[28] It compounded it that the order for the keeping of the same property by the party who had acquired it through self-help had not been prayed for by any of the parties and is against the tenets of law governing the protection of possession. The same thing applies if that party is being ordered to compensate the one found to have been despoiled of the land concerned. The relief cognizable in law in favour of a despoiled party is the restoration of possession which often, should happen without qualification. This proposition was expressed as follows in **Ludik v Keeve & Another (Appeal - 2015/316) [2016) NAHCMD 4 (20 January 2016:**

> *"The remedy of mandamant van spolie is aimed at every unlawful and involuntary loss of possession by any possessor and its object is no more than the restoration of the status quo ante as a preliminary to any inquiry or investigation into the merits of the respective claims of the parties to the thing in question.* "

[29] The upshbt of the court order in question was the court approbating and reprobating and thus blowing hot and cold at the same time in so far as it purported to grant an order that restored appellant to the possession of the land in question with one hand whilst taking away the same possession with the other hand and giving it to the unsuccessful party, which the law

does not countenance. The conduct of anyone to blow hot and cold at the same time is also known as the doctrine of peremption.

[30] The position of our law with regards to the doctrine of peremption was expressed as follows in **Hlatshwayo v Mare & Deas 1912 AD 242.**

> *"This doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed, to blow hot and cold, to approbate and reprobate.* "

Although I have not found a case where this doctrine applied against conflicting orders having been issued in the same judgment by a judicial officer, I do not see why same cannot apply in a case where an order purporting to grant conflicting orders in the same matter had been issued by the judicial officer.

[31] It appears that instead of considering and determining the issue brought before it, which informed the alleged ambiguity in the initial order of the court a quo, it considered and decided a different matter to that brought as an issue for determination. In fact, the Court considered and decided the relationship between orders 1.2 and 2 of the judgment which was not the issue before it for determination.

[32] I agree that in doing so the court aquo misdirected itself on the real issue for determination before it. It cannot be denied that the court a quo had been asked to clarify the ambiguity brought about by the inconsistency or conflict between orders 1.1(a) and (b) on the one hand and order 1.2 of the judgment (order (C) of annexure A), on the other hand. As indicated, it considered the relationship between orders 1.2 and 2 which is not what the ambiguity brought to Court for clarity was. The real issue was that whilst it had found in terms of orders 1.1 (a) and (b), that the appellant had been successful in its application as a result of which it had ordered that the possession of the land the latter had been despoiled by the respondent, be restored to it and that the structures the respondent had erected on the said piece of land be demolished; it had also issued an inconsistent order 1.2 of the judgment in terms of which it purported to give the unsuccessful party a choice not to comply with the order it had issued, but instead to compensate appellant by paying him the monetary value of the said piece of land. The problem with the compensation is not only that it had not been sought by any of the parties but also the fact that it is fundamentally inconsistent with the nature of the relief sought and granted by the court a quo which is in the form of the mandamant van spolie, commonly known as spoliation proceedings.

[33] The position of our law seems trite that an order which is a product of a misdirection by a court deserves to be set aside or to be varied and substituted with an appropriated one See: **Mkhulisi v Rex (13/10) [2011] SZSC55 (30 November 2011).**

[34] Although the normal consequence at that stage would be a referral of the matter to the court a quo, and perhaps in a situation like the present to a different judicial officer, it is also trite that there are exceptions to that general rule. Although dealing with the consequences of a review which in the circumstances of this matter would be analogous to those, **Hebstein** and **Van Winsen's The Civil Practice of the Supreme Court of South Africa, 4th Edition, Juta and Company, at page 959,** expressed the position as follows;-

> *"Although the court will in the case of a successful review generally refer the matter back to the particular body entrusted by the Legislature with certain or special powers rather than make the decision itself, it will not do so when the end result is a foregone conclusion and or reference back will merely waste time, when the reference back would be an exercise in futility or where there are cogent reasons why the Court should exercise its*

discretion in favour of the Applicant and substitute its decision for that of the Respondent". (Underlining has been added).

[35] Given that the initial application by the Applicant was in reality spoliation proceedings as confirmed by the court a quo in its initial judgment, the only appropriate order would be the restoration of possession of the land concerned to the party who had been despoiled and nothing more. I am therefore of the firm view that it would not be necessary to refer the matter back to the court a quo as the result in the matter should be a foregone conclusion. The order granting the party found to have despoiled the other an alternative to retain the despoiled property and pay compensation is not a competent spoliation relief. In that sense it would be proper for this Court to substitute its decision for that which the court a quo should have made during the interpretation or variation of the impugned order it was asked to do.

[36] There is an even more plausible ground on which this court should substitute its decision for that which the court a quo should have made. In terms of Rule 33(3) of the Court of Appeal Rules this Court, whilst presiding over an appeal in terms of which the notice of appeal contains a ground seeking to have part of a judgment varied, has the power to

make any order that should have been made by the court a quo, after hearing the matter.

[37] Before pronouncing what I consider to be an appropriate order, it is important for me to comment on one other aspect of the matter with regards the order complained of as bringing about ambiguity to the Court Order. This is order 1.2 of the initial judgment whose full text has been referred to above.

[38] The reality is that this order had not been requested by any of the parties. The Appellant who had brought proceedings in the form of spoliation had not asked to be compensated as an alternative to his possession of the piece of land in question being restored. The Respondent himself had not asked to be allowed to compensate Applicant for same. The significance of such a request by each one of the parties is that it would have enabled them to address the Court on the issue of compensation prior to the judgment or order concerned being made or issued.

[39] As things stand, the court a quo appears to have granted the order it did *mero mutu*. The record does not show that the parties were at any stage

during the hearing of the matter called upon to address the Court on such an issue, which compounds the problem in that it renders the order to be one that was granted without the interested parties having been heard on that aspect of the matter nor having asked for it. The judgment of the predecessor of this Court, in the Swaziland Court of Appeal, found that a judgment or order issued without a party having been heard or having been refused a hearing in circumstances where he should have been heard, has the tendency to render such a judgment or order nugatory and of no force or effect. This was in **The Swaziland Federation of Trade Unions VS President of The Industrial Court of Swaziland and Another {11/97) !19981 SZSC 8 {OP tJ anaur y 1998)** at paragraph 17, where that proposition was expressed in the following words:-

> *"A clear violation of natural justice will, in every instance, vitiate an order and no room for judicial discretion as to whether to set it aside can, in such instances exist.* "

[40] The same views were expressed in the following words in the English case of **General Medical Council v Spackman 119431 AC 627 at 644 to 645** as cited in Baxter's book, **Administrative Law** at page 540;-

> *"If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the*

essential principles of justice. The decision must be declared to be no decision". See also **Meshack Makhubu and Another v Regional Officer and Another (25/19) (2619) SZHC 39 (1st March 2019).**

[41] Otherwise, the position of our law is trite that a party may not be granted an order he has not sought or prayed for. See in this regard **Bernard Nxumalo vs The Attorney General. Civil Appeal No. 50/2013 and The Commissioner of Correctional Services V Nontsikelelo Hlatshwayo, Civil Case No. 67/2009.** I can only add that even though there could be an instance where in the interests of justice it would be important to issue an order it considers fair and just in instances where same had not been prayed for, it seems to me that the major consideration is whether the parties have been heard on the issue that necessitated the grant of the judgment or order complained of prior to its being issued. There was no dispute during the hearing of the matter that the issues surrounding the order in question were never deliberated upon by the parties prior to the judgement or order concerned. The Respondent's notice of cross appeal says as much about the court a quo having granted a relief that had not been prayed for.

[42] For his own part the Respondent filed .a cross appeal to the judgment or order of the court a quo complained of. That is the order dismissing the application seeking an interpretation, clarification or variation of the initial judgment or order of the court a quo.

[43] In his said notice of cross - appeal the Respondent in the main appeal had, contended in summary, that the court a quo had erred in not granting the cross - appellant the costs of the application notwithstanding that he was the successful party. According to the cross - appellant, the court a quo had not granted it such costs because it had taken into account inadmissible evidence to come to the conclusion it did.

[44] The cross-appellant complained further that the court a quo erred in not awarding it costs at attorney-and-own-client scale when it dismissed the Appellant's application. The third ground in the cross-appeal was that the court a quo had erred in ordering the cross appellant to procure a valuation of the disputed property including the ancillary orders to that particular order. The attack on this latter order was based on the court a quo having allegedly pronounced on an extraneous issue neither solicited

by the parties and one in which the parties were not given a meaningful opportunity to address the court.

[45] In line with the view of the matter I have taken with regards the appeal (as distinguished from the cross-appeal), it is unnecessary for me to address the cross-appeal, which I would have been required to do if I was not upholding the appeal. This is not the case herein.

[46] I will not end this judgement without having mentioned for the record, that a Court has power in law to clarify or interpret its judgment if on a proper interpretation of it, its meaning remains obscure or ambiguous. This is as long as that does not alter the sense and substance of the judgment or order. That is done by the court if it is in the interests of justice to do so. If what is done is just and equitable, it would be taken to be in the interests of justice to interfere with that judgment by way of interpretation. See in this regard **Herbstein and Van Winsen's The Civil Practice of The Supreme Court of South Africa,** 4th Edition, Juta and Company at Page 926-927. It is in line with this principle that I have concluded that order 1.2 of the judgment a quo of the 18th September

2018 be interpreted with the ambiguity entailed in it being removed. I am convinced that it is equitable and in the interests of justice to do so.

[47] In light of the foregoing considerations I have come to the conclusion that the Appellant's Appeal succeeds which means that the cross-appeal falls away.

[48) Consequently I make the following order: -

1. The Appellant's Appeal succeeds with the result that the cross-appeal falls away.

2. In view of the fact that the initial application was in the form of spoliation proceedings which can only lead to one answer in the event of success by an applicant as well as in consideration of Rule 33(3) of the Appeal Court Rules, this Court will not revert the matter of the clarification or variation of the initial order to the court a quo but will substitute its order for that of the said Court. Accordingly, it is ordered that: -

    2.1 The inclusion of order 1.2 in the judgment of the court a quo dated the 28th September 2018 (also cited as order (C) of Annexure A to the initial application),

renders the judgement or order of the court a quo, ambiguous and is a result of an error by that Court.

2.2 Order 1.2 of the Judgment a quo (order (c) of Annexure A) is thus set aside and is declared a nullity which is of no force or effect.

2.3 In line with prayer 2 of the application a quo, and to ameliorate the harshness of a pure spoliation order in an instance where the parties themselves see it as appropriate to make, the appellant is to compensate the Respondent for any structure erected by him on the land in question.

3. In the interests of justice as brought about by the diminished blameworthiness on the parties for the situation they found themselves in, each party shall bear its costs.

I Agree

R.J. CLOETE
JUSTICE OF APPEAL

I also Agree

/ S.B. MAPHALALA

JUSTICE OF APPEAL

For the Appellant	Mr M.S. Sibandze.
For the Respondent	Mr S.K. Dlamini.