IN THE SUPREME COURT OF ESWATINI

Case No. 07/2022

HELD AT MBABANE

In the matter between:

ALEX AND SONS INVESTMENTS (Pty) Ltd **Appellant**

And

METER MIXED CONCRETE (Pty) Ltd **1ST Respondent**

DUMSANI DLAMINI **2ND Respondent**

FIRST NATIONAL BANK t/a WESBANK **3RD Respondent**

Neutral Citation: *Alex And Sons Investments V Meter Mixed Concrete and two Others (07/2020) [2022] SZSC 59(1st December2022).*

Coram: **J.P. ANNANDALE JA, A.M. LUKHELE AJA AND S.M MASUKU AJA .**

Date Heard: **22nd SEPTEMBER 2022.**

Date Handed Down: **1st DECEMBER 2022.**

Summary *: Civil Appeal – spoliation proceedings – Appellant deprived of its peaceful and undisturbed possession of a truck that had been taken in for repairs. The truck was taken from the panel beaters' premises by the 1st and 2nd Respondents without the appellant's consent or an order of the Court. Held that the 1st and 2nd Respondents committed an act of spoliation. Appeal upheld with costs on the ordinary scale, ordered in favour of the appellant. The Court considered further without deciding that the property rights under section 19(2)(c) of the Constitution Act 1 of 2005 ought to be interpreted to cover the unlawful deprivation of property as protected by the Roman Dutch Law remedy of mandament van spolie.*

JUDGMENT

S.M. MASUKU - AJA.

[1] A Judgment of the Court *a quo* discharged a rule *nisi* that had been issued earlier (on the 1st December 2021), as well as costs. The effect of the judgment was that the Appellant in this appeal lost possession of a truck described as an Argosy Freightliner, registration no. ISD 862 BH, to the 1st and 2nd Respondents (hereinafter for convenience called the respondents).

[2] The Appellant being dissatisfied with the judgment as a whole noted an Appeal on grounds that I will set out later in this judgment.

[3] The facts of the matter as presented by the Appellant in the Court *a quo* are that during December 2019 it was approached by the 1st Respondent, duly represented by the 2nd Respondent, who offered to sell to it a truck as described above which at the time was held by a certain garage in South Africa called Interbit Truck Repairs (Interbit).

[4] To facilitate the taking of possession of the truck, the Appellant alleged that the parties entered into a verbal agreement that it would: -

(i) Pay the 1st and 2nd Respondents E100 000.00 (One Hundred Thousand Emalangeni) in cash to take over the truck and to continue servicing the finance loan in monthly installments of E27 000.00 (Twenty Seven Thousand Emalangeni) with the 3rd Respondent;

(ii) To pay the monthly instalments for the truck directly into the 2nd Respondent's account who would in turn transmit the payments to the 3rd Respondent that had financed the truck;

(iii) After finishing the payments due to the 3rd respondent the truck's ownership was to be transferred to the Appellant.

[5] The Appellant had to collect the truck for its own usage, possession and ownership from Interbit. The Appellant alleged that it accordingly paid the amount of E100 000.00 (One Hundred Thousand Emalangeni) and thereafter facilitated the release of the truck with Interbit. The truck was released to him on the 12th

December 2019. The 2nd Respondent handed over to him the truck's registration papers (also known as the Blue Book).

[6] The Appellant says that while all these processes were effected, the Respondents had not disclosed that they were in arrears with payments of the truck to the 3rd Respondent. The latter had already instituted legal proceedings to repossess the truck. Having collected the truck, it was immediately repossessed by the 3rd Respondent on its return to Eswatini. The Appellant had to pay an unbudgeted amount of E300 000.00 (Three Hundred Thousand Emalangeni) to regain possession of the truck. The 3rd Respondent released the truck back to the 2nd Respondent who immediately released it to the Appellant's possession, as per their agreement.

[7] The Appellant alleged that after the handover of the truck to him by the 2nd Respondent following the payment of E300 000.00 (Three Hundred Thousand Emalangeni), he had been in the peaceful and undisturbed possession of the truck. He continued to service the loan with the 3rd Respondent through the 2nd Respondent and contracted the truck to Anchor - T (Pty) Ltd and again later on in May 2021 with Usuthu Forest Products Company to transport woodchips. The Appellant alleged that he ultimately paid a total of about E881

352.04 (Eight Hundred Eighty-One Thousand Three Hundred and Fifty-Two Emalangeni Four Cents) for the truck and only a balance of E114 000.00 (One Hundred and Fourteen Thousand Emalangeni) remained outstanding. He was ready to settle it within two months from date when he instituted the spoliation proceedings.

[8] On or about the 21st July 2021, the truck was involved in a road crash accident whilst being driven by its driver, Sifiso Henry Gamedze. It was still in his possession when the accident occurred. He alleged that the Respondents had to facilitate a claim for its repairs from its insurers because ownership had not yet been passed to him. The insurance policy was still under the name of the Respondents. The Appellant agreed to surrender the truck to the insurers and to Mbabane Panel Beaters. The truck was fetched from the Appellant's premises at Phumlamcashi and taken to Mbabane. The Appellant alleged that the insurance company was responsible for towing the truck from the premises to the panel beaters and it also paid the towing costs as it was covered by the insurance policy and not paid for by the Respondents.

[9] Keen to have the truck back to its business, the Appellant alleged that he had checked the progress of repairs with the panel beaters on a weekly basis. He also communicated with the 2nd Respondent on

the insurance issues including the required voluntary excess that was payable etc. He did not suspect that the 2nd Respondent "had an eye" on the truck.

[10] The Appellant alleged further that as he waited for the panel beaters to complete the repairs, he was surprised to learn that the truck had been released to and removed by the 2nd Respondent from the panel beaters on the 1st November 2021. This he said was done without an Order of Court, or with his consent or any communication regarding cancellation of the agreement he had with the Respondents. The Respondents had gone behind his back to remove the truck from the panel beaters for their own use or benefit.

[11] The Appellant brought spoliation proceedings on the 11th December 2021, twelve days from the 18th November 2021 when he first heard that the truck was removed from the panel beaters.

[12] The 2nd Respondent filed an answering affidavit for and on behalf of the first two Respondents. He admitted that he took the truck from the Appellant's possession on the 25th July 2021 but says it was with the Appellant's consent after the truck had been involved

in an accident. The 2nd Respondent says he had leased the truck to the Appellant and had cancelled the lease on the 7th October 2021 through a short message service (SMS) and by that time the Appellant was no longer in peaceful and undisturbed possession. He alleged that the Appellant lost possession on the 25th July 2021 such that when he (the 2nd Respondent) took the truck to the panel beaters on the 11th November 2021 the Appellant had long lost possession of the truck.

[13] The 2nd Respondent contended further in his affidavit that he cancelled the lease agreement with the Appellant in a lawful manner. There was no need for the Respondents to obtain any Court Order as the truck was in the Respondents' possession, it had been surrendered by the Appellant. The appellant had not paid rentals consistently resulting in the cancellation of the lease agreement with him, so the contention goes.

[14] Both parties had a lot of allegations and counter allegations that they submitted to the Court *a quo*. Not all of the evidence in the affidavits is relevant to spoliation proceedings.

[15] The Court does not presently concern itself with the merits of the dispute between the parties. If the applicant succeeds in proving peaceful and undisturbed possession at the time of deprivation and that the respondents committed an act of spoliation, the Court will summarily restore the *status quo ante*, and will do that as a precursor to any inquiry or investigation into the respective rights of the parties prior to the act of spoliation. The justice or injustice of an applicant's possession is therefore irrelevant. See Nino Bonino V De lange 1906 TS 120 at 122,125. The maxim is *spoliatus ante omnia restituendus est,* i.e. before any dispute on the merits will be adjudicated upon possession must first be restored to the *spoliatus*. See Silberberg and Schoeman, The Law of Property, 2nd ed at page 139.

[16] It follows therefore that it would be futile to capture in this judgment all the allegations that pertains to whether or not the parties had an agreement of sale or a lease, whether or not they had a written or oral sale agreement, the legal ownership of the truck: whether or not it was for the 3rd respondent or registered in the name of Hen – Stan Logistics (Pty) Ltd, the issue as to why the Appellant had the "Blue Book" and other important documents for the truck and so on. All of these cannot be entertained because no defence on the merits of the dispute is

considered in spoliation proceedings. See Silberberg and Schoeman (*supra*) at page 139.

[17] The possessor of a thing is entitled to not be deprived of his possession. Even a thief who has possession of an item which was stolen from its lawful owner may invoke the *mandament van spolie* when the real and lawful owner removes the item from his possession without his consent or without a lawful order. Because possession is such a fundamental right, it is protected by law against all others. Ownership or other legal entitlement plays second fiddle. First of all possession must be restored and only thereafter will the Court entertain any claim to the item or other despoiled right.

[18] It is on these facts that the Appellant filed an urgent application *inter alia* seeking an order calling upon the Respondents to show cause why the Deputy Sheriff should not be authorized to seize and attach the truck in their possession and hand it over to the 3rd Respondent or to hand it over to the Appellant. The Court *a quo* heard the matter on the 1st December 2021 and issued a *rule nisi* in the Appellant's favour on the same date. This is the same Rule that it discharged on the 2nd February 2022, thereby effectively

confirming the Respondents' possession of the truck. This Judgment is now being appealed against before this Court.

[19] The Court *a quo* held that the Appellant had proven that it was in control of the truck, but it further held that it had failed to prove that the truck was taken from it unlawfully. The Appellant is said to have consented to the taking of the truck to Mbabane Panel Beaters. The Court *a quo* also found that there was an inordinate delay in filing the spoliation application. The *ratio decidendi* of the judgment is gleaned from paragraph 19 at page 9 of the judgment.

[20] The rest of the reasons that followed in the judgment have been overtaken by events after the matter proceeded by way of urgency. The issues pertaining whether or not to the short massage of 7th October 2021 terminated the lease or whether the agreement was of sale or lease are irrelevant in spoliation proceedings.

[21] The grounds of appeal are that;

"1. The court a quo erred in law and in fact in finding that the appellant had failed to prove that it was deprived possession of the truck unlawfully as it consented to the truck being taken to Mbabane Panel Beaters, despite having found that the appellant was in control of the truck whilst at Mbabane panel beaters.

2. The court a quo also erred in law and in fact in finding that there was an inordinate delay in filing the application and or that the urgency of the application amounts to an abuse of court process, without giving reason;

3. The court a quo erred in law and in fact in finding that there was non-disclosure of material facts relating to the short massage of the 7th October 2021;

4. The Court a quo in law and in fact in finding that there was disputes of facts and or considering the question of facts in an application for spoliation order"

[22] In support of the first ground of appeal, Appellant's counsel argued that the Court *a quo* correctly found that the Appellant had satisfied the first requirement of possession, that is to say it was in possession

of the truck but failed to also prove that it was taken from him unlawfully. Counsel contended that the issue of possession by the Appellant was formally established by the Court *a quo* and the first enquiry should have ended there and then, with no further enquiry because there is no cross appeal on the Court *a quo's* finding.

[23] The Appellant's counsel submitted further that the Court *a quo* erred in law and in fact to have found that it had failed to satisfy the second requirement of whether it had been deprived of possession lawfully (with its consent or by means of an Order of Court). The error committed by the Court, as it was argued, was in respect of the finding that the Appellant had consented to the truck being taken to Mbabane Panel Beaters from the Appellant's premises at Phumlamcashi, where the truck was kept after the accident. That this finding is contradictory and erroneous. Counsel for the Appellant contended that the Court *a quo* having correctly found that the appellant was still in law in possession of the truck whilst it was at Mbabane Panel Beaters the, Court ought not to have considered the consent of the appellant of the truck being taken from Phumlamcashi to Mbabane Panel Beaters. Instead the Court *a quo* ought to have found or determined whether or not the deprivation of possession of the truck at Mbabane Panel Beaters was with the consent of the Appellant or was authorized

by a Court Order. Alternatively, that the Court *a quo* ought to have found that the Appellant never consented to the loss of possession of the truck at Mbabane Panel Beaters and that there never was any consent to loose possession of the truck at Mbabane Panel Beaters. There was no Court Order that authorized the deprivation of possession of the truck at Mbabane Panel Beaters.

[24] The Appellant's argument, in a nutshell, is that emphasis should be placed on its loss of possession at Mbabane Panel Beaters and not at Phumlamcashi. The Respondents alleged that the Appellant consented to the truck being towed by them or by the insurers from Phumlamcashi on the 25th July 20221 and that this was when it lost its peaceful and undisturbed possession. So much so that by the 11th November 2021 when the 2nd Respondent took the truck without Appellant's knowledge and without an Order of Court, it had long lost possession of the truck. This also applies to the argument that the 2nd Respondent had cancelled the lease on the 7th October 2021 through a phone massage.

[25] The Court *a quo* did not give reasons for its decision on how the Appellant's control or peaceful possession was lost, having found that the Appellant had established control. The Court also did not

give reasons on how it arrived at the conclusion that possession was lost when the truck was taken to the panel beaters rather than when it was taken from the panel beaters after its repairs. I now turn to consider the spoliation remedy in its modern form before applying it to the facts of the appeal.

Mandament Van Spolie

[26] The South African Constitutional Court considered the spoliation remedy in the context of the South African Constitutional era in a unanimous decision of the Justices, handed down on the 15th May 2014, in the case of Ngqukumba V Minister of Safety and Security 2014 (5) SA 112 (CC)[1] .

[27] The judgment was based on an appeal from the Supreme Court of Appeal in Nqgukumba V Minister of Safety and Security 2013 2 SACR 381 (SCA) and a prior decision of the Eastern Cape High Court (Ngqukumba V Minister of safety and security [2011] ZAECM HC 10). The gist of the matter was focused on Sections 68 (6) (b) and 89 (i) of the SA National Traffic Act which

[1] See the treatise by DG Kleyn & B Bekink, The Mandament Van Spolie, The restitution of unlawful possession and the impact of the constitution,1996 University of Pretoria, 206 (79) THRHR.

prohibited possession "without lawful cause" of a motor vehicle of which the engine or chassis number has been falsified or mutilated. The matter related to the question whether these sections in the Traffic Act obliged the police to return a vehicle which they seized unlawfully, or to retain their possession under protection of law, as an entitlement. In essence, the matter concerned an application for a *mandament van spolie* in a case where the applicant asked for restitution of possession of his motor vehicle which was seized by the police.

[28] The South African Constitutional Court integrated the common law concept of *mandament van spolie* within the new constitutional dispensation which I discuss later in this judgment. The Constitutional Court held the view that the property clause in that Constitution was to ensure that the South African common law was infused with constitutional values. Such normative influence had to be extended throughout the common law and as such, the obligation placed on the courts by Section 39 (2) of their Constitution were extensive.

[29] The Constitutional Court's approach confirmed an earlier legal position in Pharmaceutical Manufactures of South Africa: Ex parte President of the RSA, 2000 SA 672 (CC) where the Court

stated that both the South African common law and the Constitution are part of one and the same system of law. All law derives its force and legitimacy from the Constitution as the Constitution is the Supreme Law of the State. (*See paragraph 44*).

[30] I venture to explore the postulation above by reading our own Section 2 (1) of the Eswatini Constitution Act No. 1 of 2005 which states:

> *"This Constitution is the law of Swaziland (eSwatini) and if any other law is inconsistent with this Constitution that other law shall to the extent of the inconsistency, be void."*

[31] **Section 252 (1)** of our Constitution states further that the rules of the Roman Dutch Common Law as applicable since 1907 are confirmed and shall be applied and enforced as common law of Eswatini except where and to the extent that those principles or rules are inconsistent with the Constitution or a statute.

[32] I consider that it should at least be possible to amalgamate our common law principle such as the *mandament van spolie* as one

element of law within the Constitutional legal framework. Our courts are tasked by the Constitution itself to be the ultimate interpreters of the Constitution (See the preamble to the Constitution). We should be well informed about the extent and reach of the common law – its legal principles and its support in the new Constitutional dispensation.

[33] I now return to the concept of the *mandament van spolie*, the essence of which is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else) (Nqgukumba para 10 (*supra*).

[34] As DG Kleyn and B Bekink (*supra*[2]) citing the Roman - Canon Law of procedure say, there is a separation between the possessory suit (*Indicium possessorium*) and the suit on the merits (*Indicium petitorium*). In the possessory suit where the applicant applies for a *mandament* (to be reinstated in his possession), he only has to prove that he was in peaceful and undisturbed possession and that there was spoliation (unlawful deprivation of possession, that is

[2] supra

deprivation without his consent). If the applicant succeeds, possession must be restored *ante omnia*. The Court does not consider the merits of the case. For example, whether the spoliator is the owner and the possessor a thief. This means that the title is never considered during the possessory suit and this approach is supported by the majority of the Roman Dutch authorities (see Kleyn: Die Mandament van Spolie in die Suid - Afrikaanse reg (LLD thesis UP 1986) 258-259.

[35] A spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Silberberg and Schoeman (*supra* at page 135) says "In the final analysis the protection of the peace in a community, which could not be maintained if every person who asserts that he has a right to a particular thing which is in another person's possession, would be entitled to resolve to self-help. Therefore a possessor who has been deprived or "despoiled" of his possession by unlawful means (whether it be by force, fraud, stealth or other means) may apply to the Court for the *mandament van spolie*, an order directing the spoliator to return the thing to them immediately....".

[36] All that the applicant must prove is that:

(a) he was in peaceful and undisturbed possession at the time of the alleged spoliation, and

(b) That he was illicitly ousted from such possession on a balance of probabilities (see Silberberg page 135 supra).

(See also Regional Administrator, Lubombo Region and Others v Matsenjwa and others (15 of 2014) [2016] SZSC 13 (30th June 2016) paragraph 9 and 10).

[37] With regard to the first requirement, a Respondent may in an appropriate case prove that the Applicant did not exercise the measure of physical control which was necessary to acquire or retain possession, or that the intent to derive a benefit from holding the thing was absent. Regarding the second requirement, a Respondent may for instance prove that his act of dispossessing the applicant was in fact not unlawful in that it amounted to counter – spoliation or that it took place with the consent of the Applicant. A defence that the respondent is the owner of the spoliated thing is not acceptable. (Silberberg and Schoeman (*supra)* page 138).

[38] *In casu*, the Court *a quo* held that the Appellant had proved that he was in possession of the truck but had failed to prove that the truck was taken away unlawfully because it had consented to the truck being taken to Mbabane Panel Beaters.

[39] The Appellant, according to the Court *a quo*, failed on the second requirement because of the consent it gave to have the truck towed from the premises at Phumlamcashi, thus relinquishing his peaceful and undisturbed possession.

[40] Do the facts and law support the Court *a quo's* finding? Did the Appellant lose its possession when it allowed the truck to be towed to Mbabane Panel Beaters or when it was taken away from there after its repairs by the respondents without the knowledge and consent of the appellant?

[41] I find the South African judgment in the matter between G and D Refrigeration CC and JPB Mulder (Limpopo Division, Polokwane case No. HCA 05/2016 instructive and perhaps on all fours with what the Court *a quo* was faced with in this case.

[42] The factual matrix of that case can be summarized briefly as follows:-

42.1 The applicant was employed by the respondent to manage its affairs. By mutual agreement between the parties which was verbal, it was arranged that because of the respondent's financial constraints, the applicant be offered and was placed in possession of a motor vehicle for his use and enjoyment as compensation for the service he rendered. It appeared that the motor vehicle ("a Nissan Navara") was still a subject of an instalment sale agreement with a finance holder, MFC, which impliedly retained ownership thereof until the price had been fully settled. The Navara thereafter was to be transferred into the applicant's name. The relevant insurance company that covered the risks associated with the use by the applicant was accordingly advised of this private arrangement.

42.2 It was common cause that the applicant had acquired the Navara and was in peaceful and undisturbed possession of the vehicle as from the 1st September 2014.

42.3 It was also common cause that the applicant was involved in a road traffic accident in October 2015 when it collided with

another vehicle, causing damage to the Navara that he was driving. The Navara was subsequently taken to Thomson Panel Beaters in Polokwane for repairs.

42.4 In January 2016 the applicant was telephonically contacted by a certain Mrs Hartman who was a manager of the respondent. She informed the applicant that she had uplifted the Navara from Thamson Panel Beaters and that the Navara will not be returned to him, citing breach of the parties' verbal agreement as reason.

42.5 It was submitted by the applicant in that case that the conduct of the respondent amounted to an act of spoliation as he felt despoiled when she uplifted the Navara from the panel beaters.

42.6 The respondent conversely denied having spoliated the vehicle contending that the applicant lost possession of the Navara when it was taken in for repairs.

42.7 It is these conflicting submissions around the question of possession and the manner or circumstances as to how the applicant's possession of the Navara was lost that called for an

enquiry – similar to the case before the Court *a quo* and now this Court.

42.8 The legal issues in that case were whether the applicant was in "peaceful and undisturbed possession" at the time when he placed the Navara which he had possession of in the hands of the panel beater for repairs. Differently put, whether by removing the said vehicle, did the respondent's conduct constitute unlawful deprivation of Applicant's possession?

[43] The Court in that case explored approaches by Roman Law writers on the subject matter. It said the right of possession is often referred to as the *ius possessionis* and that it must be distinguished from *ius possidendi*, this is the *possessary* entitlement to demand control or custody over a thing. A good example of the latter is the owner of a motor vehicle who keeps it in his or her garage and drives it daily. He has ius *possidendi* as owner and *ius possessionis* as possessor.

[44] However, where the true owner of a vehicle enters into a contract in terms of which he or she leases the car on hire to a third party for a certain duration of time, on delivery the person who hires it acquires *ius possessio* in terms of that contract.

[45] There are divergent views as to whether possession is a fact (factual possession) or a real right. Wille, in Willes Principles of South African law 9th edition suggests that it should not be seen as a real right, but as an adjunct to the law of things. However, he intimated that the key solution to this paradox lies in maintaining a clear distinction between the fact of possession and the right flowing from possession (*ius possessionis*), whilst Silberberg's view (*supra*) is that physical control is no longer sufficient *per se* to constitute possession.

[46] The court concluded that the context of **physical** control of a thing should for purpose of modern jurisdictional development of common law be widely interpreted as opposed to the narrow interpretation in its historical context preferring the adoption of factual or legal possession. In the Court's view (in that matter) factual or legal possession should be adopted thereby abrogating by disuse the outdated, strict, narrow and conservative requirement of actual physical control. The intention to possess should be sufficient to complement the factual possession for which an intention to possess a thing would be paramount.

[47] In applying this proposition to the facts, the Court in G and D Refrigeration took the view that when the respondent took the Nissan Navara to the panel beaters, he had not intended to relinquish possession thereof, nor did he lose control over it. He was placed in possession thereof by an agreement with the respondent. The applicant, no doubt, still enjoyed factual possession with the intention to acquire the right of entitlement thereto coupled with the right of use thereof.

[48] The Court continued to hold that the submission by the respondent that by handing over the vehicle to the panel beaters, the applicant thereby deprived himself of physical possession of the vehicle, is untenable. The Applicant by his conduct did not evince an intention to relinquish possession of the said vehicle.

[49] The fact that the respondent, without knowledge or consent of the applicant " uplifted" the Nissan Navara from the panel beaters with no intention to restore possession, clearly amounted to an act of spoliation and therefore self – help. Spoliation is mischief precisely charged to obviate self – help. The applicant was restored in his possession of the Nissan Navara *ante omnia* .

[50] *Per contra* the Respondent cited a Northern Cape Division, Kimberly High Court Case of Jan Ntshoeu v Okame E. Smith, Case No. CA & R 107/16 to demonstrate that where the applicant had volunteered his motor vehicle for repairs he by so doing lost his undisturbed and peaceful possession of the vehicle to the workshop owner and therefore not entitled to spoliatiatory relief.

[51] In Ntshoeu, (*supra*) Mr Smith the respondent was involved in an accident whilst driving his 4 x 4 Renault Koleos which was still under hire purchase. He approached Mr Ntshoeu, a panel beater and owner of J's Panel Beater. By agreement, Mr Smith placed the motor vehicle in Mr Ntshoeu's possession by handing over the keys and the car for repairs. It took Mr Ntshoeu ten months to fix the vehicle and it is common cause that Mr Smith failed to pay the costs for the repairs as they could not reach an agreement regarding the amount.

[53] Later, after the car had been fixed, Mr Smith learned that Mr Ntshoeu was driving it around without his knowledge and consent. He went after his vehicle but Mr Ntshoeu refused to release it to him unless he paid him R57 000.00 (Fifty Seven Thousand Emalangeni) for storage, excluding labour. Mr Smith thought that it was an unreasonable and exorbitant amount. Mr Ntshoeu claimed to have acquired a lien over the vehicle for the repairs that he had effected.

[54] Mr Smith accordingly approached the Magistrate's Court, seeking the *mandament van spolie*, claiming that he was in peaceful and undisturbed possession of the vehicle. The Magistrate's Court granted the order against Mr Ntshoeu to restore to Mr Smith possession *ante omnia*.

[55] Mr Ntshoeu appealed that decision. The High Court upheld his appeal on the basis that Mr Smith had failed to prove unlawful deprivation of possession. The Court reasoned that Mr Smith had handed over his vehicle to Mr Ntshoeu for repairs. The vehicle remained with Mr Ntsheou for more than ten months. He had not been paid for either the repairs or storage costs. Mr Smith could therefore not claim that he was unlawfully deprived of his vehicle without his consent or without due legal process.

[56] *In casu* the Respondent argued that we should treat the appeal before us as similar to the Jan Ntshoeu case because they are almost similar. The point being made is that because Mr Smith handed over his vehicle and its keys to Mr Ntshoeu for repairs, and that it was found that he lost his possession at that time, a similar analogy should be extended as authority to support the contention that the

Appellant by allowing the truck to be taken to Mbabane Panel Beaters lost his possession at that time.

[57] I am not persuaded that we should take a similar or mechanical approach *in casu*. By allowing the truck to be taken for repairs at Mbabane Panel Beaters from Phumlamcashi, the Appellant did not intend to relinquish possession thereof, nor did he lose control over it. He wanted the truck to be repaired so that it can be returned to its transport routes. He continued to check the progress of the panel beaters on the repairs of the truck until he one day found that it had been taken away by the Respondents without its knowledge or consent. I have no doubt that as the truck was being repaired at Mbabane Panel Beaters, the Appellant still enjoyed factual possession with the intent to acquire a benefit thereon. It still retained the right of use and enjoyment.

[58] In the case of Ntshoeu, Mr Smith had voluntarily handed over the vehicle for repairs and it had been retained by Ntshoeu's panel beaters for a period of 10 months since he had failed to pay for the repairs. Mr Ntshoeu had kept it as his lien for the work that he had carried out. Mr Smith refused to pay and contested the charges. Mr Smith had relinquished his factual possession and control over the vehicle although he still wanted to benefit from it. Mr Ntshoeu had

not displayed an intention not to restore Smith's possession, unlike the Respondents *in casu*, who took the truck from Appellant's possession with no intention to return it. After all, the 2nd Respondent says that he had a lease that he had cancelled and he had taken the truck and given it to a 3rd party. The two cases are distinguishable in my view and Ntshoeu's case does not advance the Respondents case *in casu*.

[59] The Respondent's argument that we should look at the Appellant's loss of peaceful and undisturbed possession at the time when he gave consent for the truck to be taken from his premises is untenable. Firstly, the cancellation of the lease communicated through a short message service (SMS) seeks to deal with the ownership which is irrelevant in spoliation proceedings. Secondly, the removal of the truck from the panel beaters' premises after it had been repaired and presumably after it's payment, was carried out without the knowledge and consent of the Appellant. It was also done without an order of court. It constituted an act of spoliation.

[60] As alluded to by Silberberg (*supra* at page 138), a defence that (he the respondent) is the owner of the thing is not permissible. Furthermore, as already indicated above, no other defence on the

merits of the dispute will be considered. A defence that the respondent was entitled to repossess rented premises by means of self- help in terms of a clause in the contract of lease which authorized him to do so in the event the lessee commits a breach of contract was rejected in Blomson V Boshoff 1905 TS 429 at 431 - 432 and in Nino Bonino v de Lange (*supra*).

[61] The Respondent's assertion *in casu* that when cancelling the "lease agreement" there was no need for it to obtain any order of the Court as the truck was already in its possession, having been surrendered when it left the Appellant's premises, must therefore be rejected.

[62] Earlier on in this judgment I made reference to the incorporation of fundamental rights in the Constitution and the application of Roman Dutch Law within the Constitutional context (section 252 (1) of the Constitution Act 1 of 2005). Under Chapter III of the Constitution, a comprehensive Bill of Rights is incorporated. The fundamental rights enshrined in the Constitution are enforceable by the Courts per section 14 (2) of the Constitution.

[63] Under Section 14 (1), the right to property is enshrined, declared and guaranteed by chapter III of the Constitution. Section 19(2)(c) states that:-

> *"A person shall not be compulsory deprived of property or any interest in or right over property of any description except where the following conditions are satisfied - (c) the taking of possession or the acquisition is made under a court order."*

[64] The South African Constitution has a similar provision under their Section 25 with a proviso that no one may be deprived of property in terms of law. Further that no law permits the arbitrary deprivation of property (S25 (1)). The Constitutional Court (Ngqukumba para 18) observed that possession is closely associated with and often is an incident of ownership. The confiscation of property such as the vehicle in that case must comply with the requirements of the Constitution.

[65] In my view, there is no reason why we should not as legal scholars, lawyers and Judges extend our own interpretation of section 19(2) (c) to cover the unlawful deprivation of property as protected by the Romans Dutch Law remedy of the *mandament van spolie* . As stated above, there is but one system of law under the Constitution. Be that

as it may, this discourse has not come under the spotlight *in casu* to be explored and decided upon.

[66] The second ground of appeal raised by Appellant is that the Court erred in law and in fact by finding that there was an inordinate delay in filing the application and that the alleged urgency of the application amounted to an abuse of the court process. The Court *a quo* was criticized by the Appellant for not giving reasons for these findings.

[67] The Appellant submitted in his founding affidavit that the matter was of sufficient urgency to be enrolled as such in that it only learnt on or about the 18th November 2021 that the truck had been released by Mbabane Panel Beaters to the Respondents. After making enquires and checking the tracking devices, it was evident that it was on the road being utilized under circumstances that were unknown to him.

[68] The Appellant filed an Urgent Application with the Court *a quo* on the 1st December 2021. This is just under two weeks from the 18th November 2021. Silberberg (*supra*) at page 144 states that as a general rule a possessor who alleges that he has been despoiled

should act within a reasonable time. In Jivan V National Housing Commission 1977 2 SA 890 (W), Steyn J suggested that little or no assistance can be derived from our common law writers as to the period within which the application for spoliation order has to be brought. The bar which in our common law was imposed after one year in the case of *mandament van complainte* should be a guide to modern practice as regards to the *mandament van spolie*.This period (of one year) can serve as a guide only and the ultimate decision will depend on what is reasonable in the circumstances of each case.

[69] Silberberg (*supra*) at page 144 continues to state that even where an application is brought within one year after dispossession, relief may be refused *inter alia* on the following grounds;

(a)If the delay of the Applicant displays a state of mind which indicates that he acquiesced in the alleged dispossession; or,

(b) If , on account of the delay , no relief of any practical value can be granted at the time of the hearing of the application; or,

(c) If he delayed in bringing the application until after he became aware of the advent of a new possessor in good faith.

[70] The Respondents submitted in argument that the Appellant knew by the 18th November 2021 that the truck has been taken away from the panel beaters but he simply did nothing for two weeks. I accept that it took the Appellant two weeks to approach the Court *a quo* after he discovered that the truck had been taken away from the panel beaters. The period is common cause between the parties. In my respectful view two weeks is a reasonable time under the circumstances. It must be recalled that the appellant first had to establish the whereabouts of the truck. He also had to consult with and instruct his attorneys. The second ground should also fail. The matter was still urgent and was correctly enrolled as such. No prejudice was suffered by the Respondents as result of the delay. There is no indication of dilatory conduct.

[71] The last two grounds of a appeal relate to the alleged non-disclosure of material facts relating to the short message (SMS) of the 7th October 2021 which was about cancellation of the "lease" and the existence of a dispute of facts as to whether there was an agreement of sale or lease between the parties. These are all disputes on the merits and are irrelevant. Before any dispute on the

merits will be adjudicated upon, possession must first be restored to the *spoliatus*. Both these last grounds of appeal should therefore fail.

[72] In these circumstances, the appeal is upheld. The Order of the Court *a quo* which discharged the Rule Nisi of the 1st December 2021 is set aside and replaced with the following orders:

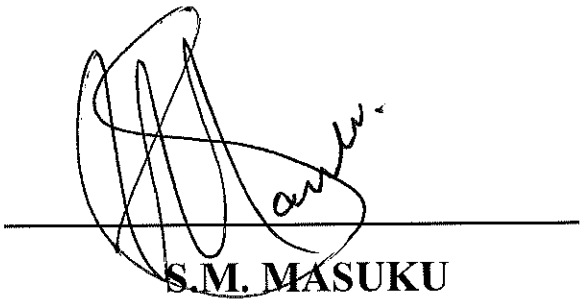
1. The *Rule Nisi* issued by the High Court on the 1st December 2021 is herewith confirmed.

2. The Deputy Sheriff for the district of Manzini is authorized to seize and attach the truck described as;

2.1 Model : Argosy Freightliner
Chassis No. : 1FUJAWCKIELFT4255
Engine No. : 06R1059853
Registration : ISD 862 BH

from the 1st and/or 2nd Respondent or wherever or with whomsoever it be found and to forthwith return it to the Appellant.

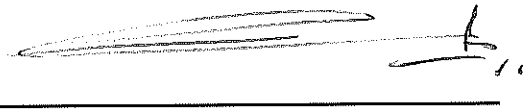
3. Costs on the ordinary scale are ordered in favour of the Appellant.



S.M. MASUKU

ACTING JUSTICE OF APPEAL

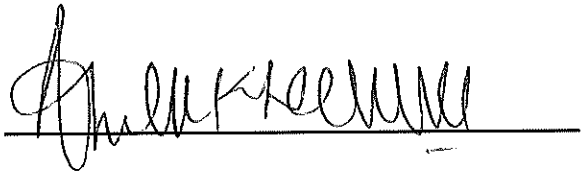
I Agree



J.P. ANNANDALE

JUSTICE OF APPEAL

I Agree



A.M. LUKHELE

ACTING JUSTICE OF APPEAL

For the Appellant: **Mr K. Simelane of M. K. Simelane Attorneys**

For the 1st and 2nd Respondent: **Mr N.D. Jele of Robinson Bertram Attorneys**