

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 1923/98

IN THE MATTER BETWEEN

HLOBSILE SYLVIA NDLOVU

APPLICANT

VS

QHAWE MAMBA

RESPONDENT

CORAM

S.B. MAPHALALA - J

FOR APPLICANT

MR JELE

FOR DEFENDANT

MR MDLADLA

JUDGEMENT

(17/08/98)

Before court is an application for a spoliation order brought with a certificate of urgency for an order in the following terms:

1. That the rules of court relating to forms, time limits, notice and service, be dispensed with and the matter be heard as one of urgency.
2. That the respondent be ordered and directed to restore to the possession of the applicant the following items:
 - 2.1 One fiat Uno car, 1997 Model Registration No. SD 385 EH.
 - 2.2 The various items morefully listed in schedule "A" hereto.
3. That the respondent be interdicted and restrained from preventing and/or inhibiting the applicant's access to the company premises and from conducting the ordinary business of the company.
4. That the respondent be ordered to pay costs of this application.
5. Further and/or alternative relief.

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The application is duly supported by the founding affidavit of the applicant. She avers in her papers that she together with one Kevin Richardson are the Directors of the company Mass Media for Africa (PTY) LTD and she is the Controlling Director and have been managing the company since its inception until the 7th August 1998. The respondent is neither a director nor a shareholder of the company. The respondent and applicant are married to each other in accordance with Swazi Law and Custom and have been living together as husband and wife at the matrimonial home at Nkoyoyo from the 7th August, 1998 when the respondent chased her away after a family quarrel.

At all times prior to the 7th August, 1998 applicant in her capacity as Director of Mass Media for Africa (PTY) LTD was in lawful, peaceful and undisturbed possession of the properties mentioned in her prayers. She went further to outline the acts of the respondent in her paragraphs 7, 8, 8.1, 8.2, 9, 10, 1,

12, 12.1, 12.2, 12.3, 12.4, 13, 14, 15, 16, 17, 18, 19 which seek to show how the respondent disposed her of the properties. She further avers at paragraphs 21 and 22 that the matter is urgent.

The matter came before me on the 14th August, 1998 where Mr. Mdladla for the respondent raised two points in limine from the bar stating that his client intends oppose this application and applied that they be granted a postponement to file opposing papers. The first point he raised is that since the parties are married in terms of Swazi Law and Custom the applicant has no locus standi in judicio since in law in order to sue she needs the consent of her husband and further more on the question of locus standi she has filed these papers in her personal capacity yet the property belongs to a company that there is no company resolution entitling her to institute these proceedings. Further on his second prong of his points in limine he argued that the applicant has not shown urgency in terms of Rule 6 5(a) of the High Court Rules and the requirements propounded in the case of Humphrey H. Henwood vs Maloma Colliery Limited and another Civil Case 1623/94 (unreported).

Mr. Jele in turn submitted that in the case in casu the applicant has satisfied the two allegations which an applicant must make and prove to obtain a spoliation order that, firstly the applicant was in peaceful and undisturbed possession of the property and secondly that the respondent deprived her of the possession forcibly or wrongfully against her consent.

I have read the papers before me very carefully and considered the submissions by both counsel. In our law spoliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right (see Nino Bonino vs De Lange 1906 T.S. 120 which was approved in Silo vs Naude 1929 A.D. 21, Nienaber vs Stuckey 1946 A.D. 1049 and numerous other cases) The object of the order is merely to restore the status quo ante the illegal action. It decided no rights of ownership. The reason behind the practice of granting spoliation orders is that no man is allowed to take the law in his own hands, and to

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dispossess another illicitly of possession of property, and if he does, the court will summarily restore the status quo ante as a preliminary to any inquiry into the merits of the dispute (see Voet 41, 2, 16, 43, 17, 7 and Nino Bonino vs De Lange (supra). The maintenance of law and order is of infinitely greater importance than the mere rights of particular individuals to recover possession of their, property, and even though the despoiler is provoked to the uttermost degree by the conduct of the person disposed, to commit the spoliation the maxim spoliators ante omnia restituenous est will be applied (see Greying vs Estate Pretorius 1947 (3) S.A. 514 (w)).

In the present case I am satisfied that the applicant has satisfied the two requirements for a spoliation order. The status quo ante must be summarily be restored. The merits of the dispute will be gone into once the status quo has been restored. It appears to me that the absence of power of attorney and resolution of the company and the fact that applicant is a minor in terms of the law is not to apply at this stage. The facts of the matter is that the applicant is the Controlling Director of the company and she was in possession of the property when the respondent dispoiled her. Authorities on the subject, more particularly the case of Yeko vs Qana 1973 (4) S.A. 735 (AD). The Appellate Division reaffirmed the importance of an applicant's establishing that prior to dispossession he had actual and not necessarily juristic possession of the thing concerned. It would be sufficient if the applicant's holding was with the intention of securing some benefit for himself. The textbook The Law of Property by NTJ Olivier, et al (2nd Ed page 187, the learned author states as follows:

"The mental element of the control required for mandament van spolie is the intention to control the thing for one's own benefit (The "animus ex re commodum acquirendi")

It is clear to me that the applicant satisfies the above and thus is entitled to bring this remedy. On prayer three that of a prohibitory interdict it is my view that the applicant on her papers has satisfied the requirements propounded by Innes J A in the case of Setlogelo vs Setlogelo 1914 A.D. 221. On the question of urgency I am satisfied that the applicant has made a case in terms of the rules of this court.

In the result, I grant the order in terms of prayers 1, 2, 2.1, 2.2, 3 of the notice of motion. The order to have interim effect and to issue forthwith. The rule returnable on the 21st August, 1998 and in the meantime respondent to file opposing papers on or before the 18th August, 1998 and applicant to file her replying affidavit on or before the 20th August, 1998 and the matter placed on the contested roll of the 21st August, 1998.

Costs to be costs on the cause.

S. B. MAPHALALA

JUDGE