

IN THE HIGH COURT OF SWAZILAND

WILSON JARAWANI

Applicant

And

EUNICE DLAMINI

1st Respondent

NDUMISO DLAMINI

2nd Respondent

Civil Case No. 3944/2004

Coram: S.B. MAPHALALA - J

For the Applicant: MRS L. KHUMALO-MATSE

For the Respondent: NO APPEARANCE

JUDGMENT

(1st December 2006)

[1] This matter was set-down for hearing at 9.00am on the 15 November 2006. On the said day the Applicant was represented and there was no appearance for the Respondent or their legal representatives and in view of this fact the court allowed that the matter be postponed to the following day being the 16th November 2006 to allow the Respondents to attend. On the said date being the 16th November 2006, there was again no attendance for the Respondents despite being alerted by Counsel for the Applicant that the matter will proceed in the "8.30am roll". It is on the basis of this that I allowed Counsel for the Applicant to address me on the merits of the case.

[2] This case is that of an application *mandamus van spolie* where the Applicant had filed a Notice of application for release of motor vehicle being a Mazda 626 Registration No. NU 38162SM, Engine No. FE 586538 and Chassis No. JMZ60 143201162823. In prayer 2 thereof that the Sheriff or his Deputy for the district of Manzini be directed and authorized to search, seize and attach and hand over the said vehicle to the Applicant or his attorneys whenever it may be found and costs of the application.

[3] The said application is founded on the affidavit of the Applicant with annexures. The Respondents oppose the granting of this application to this end has filed an opposing affidavit of the 1st Respondent who has alleged *in limine* therein that she is a married woman and have no *standi* to be sued unassisted by her husband. The Applicant then filed a replying affidavit where *inter alia* he avers on the point *in limine* that 1st Respondent is a widow, therefore she can be sued unassisted.

[4] This application is founded on the maxim *spoilatus ante omnia restituendus est* to the effect that before any dispute on the merits will be adjudicated upon possession must be restored to the *spoilatus*.

[5] *Mandament van spolie* is a remedy available in cases of actual disturbance of possession. The remedy is available when;

- a) A person has been deprived unlawfully of the whole or part of his possession of movables or immovables;

- b) A person has been deprived unlawfully of his quasi possession of a movable or an immovable.

[6] In order to obtain a *mandament van spoile* the Applicant must show that:

- a) He was in peaceful and undisturbed possession of the thing and;
- b) He was unlawfully deprived of such possession (see the *South African case of Kramer vs Trustees Christian Coloured Vigilance Council, Grassy Park 1948 (1) S.A. 748 (C) 753 (per Herbstein J)*).

[7] According to the legal authors *Olivier et al, Law of Property: Student's Handbook, 2nd edition* at page 183 the uniqueness of the *mandament van spoile* has implication for its application. Apart from the requirements for the remedy and the acceptability of defences, there are a few applications by which his unique purpose and function of the remedy are emphasized:

- a) Since the *mandament* is aimed at the presentation of existing control relationships, all extra-judicial takings of existing control through self-help are affected by it, even when they are authorized by statute. As a result statutes of this nature are interpreted restrictively.
- b) Since the *mandament* maintains public order against unlawful self-help the government is subject to it. The government can of course avail itself of the same defences that are at the disposal of any other Respondent, among others considerations by which the action concerned is justified, such as urgent and immediate danger to the state. The *mandament* can be excluded by statute, as was done to a large extent by means of the inclusion of Section 3B in the *Prevention of Illegal Squatting Act 52 of 1951*. In principle, however, the government is also subject to the *mandament van spoile*, and statutory measures which curtail or suspend its functioning will be interpreted restrictively. It is also expected that the procedures and conditions of the authorizing act be adhered to strictly *prima facie* unlawful self-help and spoliation is to be condoned on the authority of an act. (see (a) above).
- c) The courts have repeatedly emphasized that agreements which purport to justify the taking of control by means of self-help are against the public interest and void, (see also 14.4.5.2 (j) below). This has been applied in the case of a lease which grants the lessor the right to deprive the lessee of his right to enter the lease premises without legal procedure, a contract which authorizes the seller to repossess the thing without legal procedure and a lease which grants the lessor the right to repossess the lease object without legal procedures.

[8] The Respondents on the other hand has advanced *per contra* averments to the Applicant's claims. Firstly, that in particular it is disputed that the said motor

vehicle was taken unlawfully, and it is alleged that the Applicant surrendered another vehicle to the Respondents as security for monies owed to him by the Applicant Secondly, that it is denied that the kombi was sold without the Applicant's knowledge. The Applicant colluded with one Aaron Vilane to sell his kombi and both of them have certain payments to him in respect of the proceeds from the sale of his kombi. Thirdly, that Applicant voluntarily and intentionally gave the motor vehicle to him and requested him to drop him at Manzini and raised no objections along the way to Manzini. Further defences are outlined in paragraphs 13 to 17 of the Respondents opposing affidavit.

[9] It appears to me after assessing the above mentioned defences in paragraph [8] *supra* that the Respondents is calling for this court to determine the merits of the dispute between the parties. This, in my view is contrary to the principle on such matters that at this stage of the proceedings the court is only concerned with the restoration of possession to the Applicant. The justice or injustice of the Applicant's possession is irrelevant. According to the maxim *spoilatus ante omnia restituendus est* before any dispute on the merits will be adjudicated upon possession must be restored to the *spoilatus*. (See *Jourbert, Lawsa Vol 27* at page 136 - 7).

[10] In the result, for the afore-going reasons the application is granted in terms of prayers 1, 2 and 3 of the Notice of application.

S.B. MAPHALALA

JUDGE