



## IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 199/17

In the matter between:

**JOHN MAKHENE KUNENE**

**APPLICANT**

and

**MENZI MNGCAYI KUNENE**

**RESPONDENT**

Neutral Citation : John Makhene Kunene vs Menzi Mngcayi Kunene  
(199/17) [2017] SZHC 171 (17 AUGUST 2017)

Coram : MABUZA - PJ

Heard : 24 MARCH 2017

Delivered : 17 AUGUST 2017

## SUMMARY

**Civil Procedure - Application for *mandament van spolie* – Interim order granted – Applicant seeks confirmation thereof – Interim order confirmed with costs.**

## **JUDGMENT**

### **MABUZA -PJ**

[1] This matter came by way of urgency seeking an order of an interdict *mandament van spolie* as follows:

1. Dispensing with the Rules of this Honourable Court relating to time limits, forms and service of process and hearing this matter on the basis of urgency.
2. Condoning the Applicant's non-compliance with the rules of this Court regarding motion proceedings.
3. That Defendant restores Respondent's grocery store known as Kuthula to the Applicant.
4. That Defendant remove all chains and locks at the door of the store.
5. Directing the Respondents to pay the costs of this Application on the attorney and own scale.

6. That a *rule nisi* do hereby issue calling upon the Respondent to show cause why Prayers 1,2,3,4 and 5 should not be made final on a date to be determined by the above Honourable

7. Costs.

8. Further and/or alternative relief.

[2] The Applicant obtained a *rule nisi* on the 15/02/2017 in terms of prayers 1, 2, 3, 4 and 6 of the above prayers.

[3] The Applicant now seeks the confirmation of the *rule nisi*.

[4] The Respondent opposes the application and the confirmation of the *rule nisi*.

[5] The facts presented by the Applicant is that he is the owner of a grocery shop at Mayiwane which he built on land allocated to him by his late brother – father of the Respondent. The Applicant says that he has been operating the shop since 1997 having built it around 1995. He states that he has been in peaceful and undisturbed occupation since 1997 until on Monday 3

February 2017 when the Respondent locked it with foreign gadgets and lockers.

[6] The Respondents response is that the shop does not belong to the Applicant. That both the shop and the land on which it is built belongs to his (Respondents) late father. Thandabantu Kunene and that it forms part of the assets of the estate of his late father. That the Applicant was appointed by the Master of the High Court to act as Curator *ad litem* to Thandabantu Kunene's estate.

[7] At paragraph 5.6 of his answering affidavit, the Respondent states:

“However, the Applicant herein took advantage of his appointment as the Curator *ad litem* of my late father's estate and did as he pleased with my father's properties as he disposed of the bus and motor vehicle and thereafter applied for a trading licence in his name hence took my late father's shop as well”.

[8] The Respondent says that during January 2017 he instructed his legal representative to eject the Applicant from the shop. The Respondent's attorney wrote to the Applicant a letter dated 7<sup>th</sup> January 2016 (Annexure “L1”). Pertinent extracts of that letter read as follows:

“8. To that end our instructions are to advise you to cease operating the shop on or before the 15<sup>th</sup> January, 2016 and further remove your name from its trading licence since you are now abusing your powers as the executor of the Estate by claiming to be the owner of the same.

9. Note that should you fail to comply with the above demand we shall proceed to court for an ejectment order against you with costs at punitive scale.”

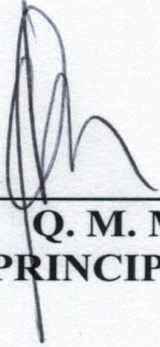
[9] There was no ejectment order obtained against the Applicant and now the Respondent has taken the law into his own hands and locked the shop. He does not deny that he locked the shop without a court order.

[10] It is the action of taking the law into his hands and locking the shop that necessitated the Applicant approaching the Court for a spoliation order, and subsequently having to open the shop per court order.

[11] Because of this the Applicant is entitled to his costs. The Court frowns upon actions such as that of the Respondent and must show its displeasure by awarding costs against him. The Respondent did ultimately open the shop not long after he was served with the interim court order.

[12] There will be no need for a contempt order.

[13] In the circumstances the *Rule nisi* is hereby confirmed. The Respondent is ordered to pay the Applicants costs on the ordinary scale.



Q. M. MABUZA  
PRINCIPAL JUDGE

For the Applicant : Mr. Nhlabatsi

For the Respondent : Mr. Xaba