IN THE HIGH COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **CASE NO: 2837/23**

In the matter between:

PETER F. B. BARBOSA **APPLICANT**

And

LUDIS MIRANDA **1ST RESPONDENT**

NATIONAL COMMISSIONER OF POLICE **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

MPHOLONJENI ROYAL KRAAL **4TH RESPONDENT**

Neutral Citation: *Peter F.B. Barbosa vs Ludis Miranda & 3 Others [2837/23] [2024] SZHC 01 (8 January 2024)*

Coram: LANGWENYA J

Heard: 5, 6, 18 December 2023; 8 January 2024.

Delivered: 8 January 2024.

Summary: *Civil Practice-Application and motion proceedings-Doctrine of 'unclean hands' when applicable-doctrine applies as a general*

equitable doctrine-in a fitting case applicant can be prevented from obtaining relief for the protection of his rights under this doctrine.

Present matter is for mandament van spolie-The High court has unlimited jurisdiction to grant mandament van spolie-spoliation remedy is not a matter of Swazi law and custom.

Points in limine-failure to make allegations on jurisdiction in founding affidavit-such allegations must appear in the affidavit and the court must not be left to deduce that it has jurisdiction-averment that applicant has approached this court with 'dirty hands'-applicant was interdicted and restrained by the Magistrate court from locking out the first respondent from the homestead at Mpholonjeni-applicant was subsequently found to be in contempt of court by the Magistrate court-applicant states he filed an application for review of the orders of the Magistrate court-There is, however no application for a stay of the orders of the Magistrate court while the review application is being pursued in the High Court-where a court has authority to decide an issue or to make an order and errs, such an order must be treated as binding and effective unless overturned in the correct process.

Points in limine that applicant failed to make allegation of the court's jurisdiction in founding affidavit; and that applicant has approached this court with dirty hands are upheld and therefore dispositive of the matter. The application is dismissed with costs.

JUDGMENT

Introduction

[1] The applicant launched the present proceedings on an urgent basis seeking an order couched in the following terms:

1. Dispensing with the procedures and manner of service pertaining to form and time limits prescribed by the Rules of the honourable court and directing that the matter be heard as one of urgency.
2. That a rule *nisi* calling upon the first respondent or anyone acting at her behest to appear and show cause at a date and time to be specified by this honourable court why an order in the following terms should not be made final:
   - 2.1 directing the first respondent to forthwith restore to applicant possession, *ante omnia* of the premises described as the Barbosa homestead at Mpholonjeni under chief Petros Dvuba;
   - 2.2 that failing voluntary restoration, the deputy sheriff be empowered to evict, the first respondent and all those holding through and or under her;
   - 2.3 directing the second respondent to assist in the enforcement of the orders referred to in paragraph 2.1 and 2.2 above;
3. That the rule *nisi* referred to in prayer 2 above operates with immediate and interim effect pending finalization of these proceedings.
4. That the first respondent or any party opposing the relief to pay costs at attorney and client's scale.
5. Further and or alternative relief.

[2] I note that the prayers restated above do not include a prayer for the condonation of applicant's non-compliance with the rules of the court for reasons of the matter being launched on an urgent basis.

[3] I note further that in the founding affidavit, there are no allegations on jurisdiction of this court.

Brief background

[4] The matter first appeared before me on 5 December 2023 and the first respondent had not been served with the court process. I directed that the first respondent be served before the matter could be heard. Mr M. Sibandze appeared for the second, third and fourth respondent and stated that he will abide by the decision of the court. The matter was heard on 6 December 2023 the applicant was represented by Advocate Mr Mofokeng while the first respondent was represented by attorney Mr Mabuza.

[5] Mr. Mabuza filed from the bar the first respondent's notice to oppose the matter as well as a notice to raise points of law. Without issuing an order, interim or otherwise, I directed that parties file their pleadings and that the matter be heard on 18 December 2023. The matter was duly argued on 18 December 2023.

[6] On 18 December 2023 Mr Simelane appeared on behalf of the third respondent and filed an answering affidavit on behalf of *Liqoqo* and asked that they be joined as they had a direct and substantial interest in the matter. The application was vehemently opposed by Mr Mofokeng on behalf of the applicant. Mr Mabuza on behalf of the first respondent did not oppose the application by Mr Simelane. I ruled that the third respondent was entitled to represent *Liqoqo* in the matter in as much as the office of the Attorney General

represented the fourth respondent in the matter. The fourth respondent issued a ruling which was taken on appeal before *Liqoqo*. It is because of the ruling of *Liqoqo* that the first respondent argues she has lawfully taken residence in the homestead. Mr Simelane filed his answering affidavit from the bar. Mr Mofokeng did not apply to be granted leave to reply to the answering papers filed by Mr Simelane.

Urgency

[7] It is now settled law that an application for spoliation is urgent by its very nature. It exists to preserve law and order and to stop and reverse self-help in the resolution of disputes between parties[1]. In this matter I am satisfied that the matter was sufficiently urgent at the time that it was brought to justify non-compliance with the rules of court and the court to have heard the matter as an urgent one.

Mandament van spolie

[8] The essence of spoliation relief is the restoration, before all else of the *status quo ante*. Such an order is granted upon an applicant satisfying two simple requirements: that he was in undisturbed possession of the thing (in this case the home) and that he was deprived of that possession without consent. Ownership of the thing despoiled does not enter into it.

[9] The low threshold for success, and the immediacy with which courts are required to deal with such applications, are essential for upholding the rule of law and deploring self-help.

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[1] *Uvhungu-Vhungu Farm Development CC v Minister of Agriculture, Water and Forestry* 2009 (1) NR 89 (HC).

[10] In the present case, the applicant submits that on 2 December 2023 he was in peaceful possession of the Barbosa Home at Mpholonjeni when the first respondent, unlawfully despoiled him of the property and violently entered therein.

[11] The first respondent denies that she unlawfully entered the homestead in question. The first respondent argues that she is back at her marital home at Mpholonjeni by virtue of a ruling handed down by *Liqoqo* which empowers her to return. The applicant does not so much deny the existence of the ruling as much as he contests the manner of its execution by the first applicant.

Issues for determination

[12] The issues to be determined are in my view two-fold: whether the points in *limine* raised by the first respondent are dispositive of the matter and whether the applicant was in peaceful and undisturbed possession of the Barbosa family home in Mpholonjeni, Mbabane until 2 December 2023 when the first respondent re-assumed residence there. If the court finds that the points in *limine* are dispositive of the matter, that is the end of the matter.

Applicant's case

[13] The founding affidavit is deposed to by the applicant who states that he is an adult male LiSwati and a resident of Mpholonjeni, Mbabane. The applicant and the first respondent are formerly husband and wife. Prior to their divorce, the couple lived at the Barbosa home at Mpholonjeni. After they divorced on 18 May 2021, through a notice from the fourth respondent, the first respondent was ordered to vacate the Barbosa home in November 2022. The first respondent left the Barbosa home in November 2022.

[14] The first respondent appealed fourth respondent's ruling and *Liqoqo* overturned fourth respondent's ruling and found in her favour in July 2023. It appears that the outcome of the ruling by *Liqoqo* was communicated to all concerned orally in July 2023 before it was reduced into writing in November 2023.

[15] The ruling from *Liqoqo* says the applicant built the homestead at Mpholonjeni for the first respondent. The applicant avers that the written ruling further states that he and the fourth respondent must 'open' or allow the first respondent to return to her house. According to the applicant, the ruling emphasizes that the fourth respondent must ensure that the first respondent returns to the house she built with the applicant[2]. The applicant avers in his founding affidavit that the oral ruling of *Liqoqo* 'was that the acting chief of Mpholonjeni, babe Petros Dvuba in the company of the police should take the first respondent back to the Barbosa homestead and place her in her *lidladla*. It did not mention the entire Barbosa homestead as the first respondent has done. Nor that she must unlawfully evict people she has found in the homestead[3].'

[16] On 2 December 2023 the applicant avers that he received communication that the first respondent had arrived at the Barbosa homestead with a group of people. It is contended that the first respondent and her companions broke down the entrance gate and another gate closer to the residence. That was not the end, as the first respondent and the group she was with went on to break and enter the main house-so it was argued by the applicant[4]. The group of

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[2] See page 49 of the Book of Pleadings.
[3] Applicant's founding affidavit at paragraph 20, page 16 of the Book of Pleadings.
[4] See paragraph 12 of the founding affidavit at page 14 of the Book of Pleadings.

people further chased the guard out of the guard house, evicted him and threw away the guard's personal belongings.

[17] When the guard returned to his 'work-station' which is the Barbosa homestead with police, the first respondent is said to have informed them that she was authorized to return to the homestead by a ruling of *Liqoqo*. It is applicant's lamentation that the said written ruling of *Liqoqo* had not been served or shared with him or with the fourth respondent. The applicant concedes however that the said ruling was shown to a certain Mr Jomo Dvuba by the first respondent. The said Mr Jomo Dvuba informed the first respondent to wait for the chief to action the matter. The first respondent is said to have told Mr Jomo Dvuba that she will not wait and that she and the group of people she was with will break and enter the homestead. The first respondent is said to have been advised by Mr Jomo Dvuba that she was not authorized by the fourth respondent to break and enter the Barbosa homestead as she suggested she would.

[18] It is applicant's averment that the first respondent has no right to occupation of the homestead in question if she is not brought back by the chief of the fourth respondent in accordance with the ruling of *Liqoqo*. It is for this reason applicant seeks an order from this court to direct the first respondent to restore possession of the premises at Mpholonjeni to the applicant. The court heard that the first respondent presently occupies the Barbosa homestead at Mpholonjeni having forcefully and unlawfully gained entry therein. First respondent's conduct is wrongful, illegal and unauthorized-so the argument goes. Applicant argues that he and his family has been in peaceful and undisturbed possession of the Mpholonjeni homestead since the year 1998 when they were allocated the land. He argues that he was despoiled on 2

December 2023 when the first respondent resorted to self-help when she took occupation of the homestead.

[19] The applicant avers further that he was informed that the chief of Mpholonjeni is currently indisposed thus his inaction of the *Liqoqo* ruling. It is applicant's contention further that the ruling of *Liqoqo* has no specific time line within which to be implemented. The haste therefore with which first respondent handled the matter is, according to applicant wrong and requires that the act of spoliation be quashed and the status *quo ante* restored *ante omnia*.

[20] The applicant is quick to state that he is not contesting the ruling of *Liqoqo* at this stage. The issue of ownership is also not at the heart of this proceeding. Applicant is only seeking a possessory remedy through this proceeding.

[21] The applicant further asserts that the Secretary of *Liqoqo* stated that it was for the chief of Mpholonjeni and not for the first respondent to implement the ruling of *Liqoqo* regarding the matter of the homestead at Mpholonjeni.

[22] In his founding affidavit, the applicant did not disclose that he was restrained and interdicted from removing the first respondent from the home. He also does not disclose in his founding affidavit that he was found to be in contempt of court by the Magistrate court for not complying with the order not to remove the first respondent from the home at Mpholonjeni. The applicant only discloses the information about the Magistrate court matter in his replying affidavit when he responds to first respondent's averments that applicant is approaching this court with unclean hands.

First respondent's case

[23] In her answering affidavit, the first respondent raised the following points of law to wit: that the applicant is approaching this court with unclean hands;

that the applicant has not set out facts or allegations that indicate that this court has jurisdiction to entertain this application in his founding affidavit; and lastly that the applicant has not satisfied spoliation requirements namely that: he was in peaceful and undisturbed possession of the property at the time he was allegedly despoiled and that he was deprived of the property forcibly or wrongfully against his consent.

[24] The crux of first respondent's case is that she is authorized by the decision of *Liqoqo* which was issued orally in July 2023 and later reduced into writing in November 2023 to return to the homestead at Mpholonjeni. It is her contention that she has not been at her homestead since 8 November 2022 after she was unlawfully despoiled of her possession of residence in the said homestead by the applicant. The first respondent argues that she was locked out of her homestead without a legal instrument by the applicant. This averment is denied by the applicant who states that the first respondent was served with a valid notice to vacate the home after the fourth respondent had issued a ruling that she was no longer entitled to live in the said homestead. It is applicant's contention that the right of the first respondent to live in the said home ended when the marital bond between the parties was severed through the divorce order issued by the Magistrate court in May 2021.

[25] The first respondent avers further that after the Magistrate Court had issued an interim order restraining and interdicting the applicant from removing the first respondent from the home at Mpholonjeni, the applicant acted in complete defiance of the court order by locking her out and hiring new security and instructing them not to allow the first respondent back into the home. This, according to Ludis Miranda's confirmatory affidavit happened on 8 November 2023. The first respondent argues that armed with the order from

the Magistrate court, she went to her home in the company of her brother and the police to resume living there. The applicant was called and the police informed him that they were at the home to ensure compliance with order of court and that he should direct the security to open the gate for the first respondent. It is averred that the applicant told the police that he would instruct the security to open the premises but this was not to be so as after hanging up the phone, the first respondent and the police were informed by the security that they had been instructed by applicant not to open the home to the first respondent and that they should not receive any court order from the police and from the first respondent and the people who were accompanying her back to her home[5]. This averment is not denied by the applicant who only states that the version of the first respondent in this regard is not relevant to the spoliation application[6].

[26] On 2 December 2023 the first respondent furnished the Mpholonjeni royal kraal with the written decision of *Liqoqo* on the matter. The written decision was received by Mr Jomo Dvuba and Mr Thomas Mabuza who however declined to dispatch *lincusa* to accompany the first respondent to the home in question. The written decision of *Liqoqo* was crystalizing the oral decision handed down on 3 July 2023 on the matter. It is first respondent's case that in terms of the decision by *Liqoqo* the fourth respondent had to ensure that she was able to gain access to the home in question and not that it had to take and place the first respondent in her *lidladla* as the applicant now contends[7].

[27] The first respondent contends further that the fourth respondent has, since July 2023 been disinclined to effect the decision of *Liqoqo* and that in her view she

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[5] See First Respondent's answering affidavit at page 69 of the Book of Pleadings.
[6] See Applicant's replying affidavit, paragraph 16.10 at page 109 of the Book of Pleadings.
[7] See first respondent's answering affidavit, paragraph 10.3 at page 71 of the Book of Pleadings.

was entitled to give effect to the decision without the help of the fourth respondent. It is her averment further that the decision of *liqoqo* supersedes that of the fourth respondent as it is an appellate body in matters of customary law. For these reasons, first respondent argues that she is not in illegal, wrongful and unauthorized occupation of the homestead.

Third Respondent's case

[28] The Attorney-General's office filed an affidavit of Mr Paul Dlamini- the chairman of *Liqoqo* amplifying the written decision of the body of July/November 2023. Mr Dlamini averred that *Liqoqo* hears appeals against decisions handed down by Chiefs and or their Councils regarding issues of land allocation in chiefdoms. According to Mr Dlamini, the applicant subjected himself to the jurisdiction of *Liqoqo* when it heard the appeal filed by the first respondent concerning the home at Mpholonjeni.

[29] It is Mr Dlamini's contention that the decision of *Liqoqo* was that the home in question was procured for the first respondent and that the fourth respondent and its Council should ensure that the ruling is implemented. The first respondent subsequently approached *Liqoqo* and complained that the ruling was being defied by the Chief and his Council. The applicant was again summoned and he did not appear to have first respondent's complaint addressed.

[30] According to the chairman of *Liqoqo*, its ruling is self-executory and gives the first respondent a right to go in her homestead unassisted in the event there is refusal to comply with the ruling. It is averred that the applicant's right to the homestead was curtailed on 3 July 2023 when *Liqoqo* made a ruling on the matter. For this reason, it was averred, the applicant was not in peaceful and

undisturbed possession since he had been lawfully ordered to hand over the home to first respondent. It is averred further that *Liqoqo* is a lawful and constitutionally appointed *libandla* and that it issues decisions that are binding. It was argued that the High Court has no jurisdiction over decisions on the merits save for when the matter is filed as a review application. A party aggrieved by the decision of *Liqoqo* has a further remedy to appeal to Ingwenyama His Majesty by way of *kwembula ingubo*-so it is argued.

Argument on notion of 'unclean hands.'

[31] Concerning the doctrine of unclean hands, it was submitted on behalf of the applicant that the Magistrate court issued an order which could not be given effect to. On 8 November 2022 the magistrate court granted the first respondent access to the home and this order was returnable on 23 November 2022. Before the return date for the applicant to show cause why the interim order should be made final lapsed, and on the return date of the interim order on 23 November 2022, the magistrate court did not make an order for its operation and or restoration through the interim order issued on 8 November 2022. Put differently, the magistrate court did not on 23 November 2022 specify whether the interim order of 8 November 2022 was extended, discharged nor did the court make any other specific order thereto. Consequently, the order for restoration lapsed on 23 November 2022-so the argument goes. It is submitted that the subsequent orders issued by the magistrate court cannot stand if the interim order on which they are based lapsed on 23 November 2022.

[32] I will not get into the nitty gritty of this submission for the following reasons: first, the record of the Court *a quo* on the matter is not before me and second, the matter before me is for *mandament van spolie* and not an application for

review of the Magistrate Court ruling on the court orders complained of. I will however address the above submission in so far as it relates to the argument that the applicant has approached this court with 'unclean hands.'

[33] It is trite that where a court has authority to decide an issue or to make an order and errs, such an order must be treated as binding and effective unless overturned in the correct process. It is a wholesome legal principle that an order of court, even if perceived to be wrong stands and is valid and binding unless properly set aside either by the court, either on its motion or at the instance of a party affected thereby. It has not been argued nor has it been shown that the said orders have been set aside or that an application for the stay of same has been made.

[34] I am of the view that the argument by the applicant is dangerous and appears to suggest that a party can choose which orders to respect and which ones not to, based on whether in that litigant's view the order exists or does not exist and whether the order is correct or not. Such an approach would, in my view be highly subversive and inimical to the rule of law.

[35] In *Economic Freedom Fighters v Speaker of the National Assembly & Others; Democratic Alliance v Speaker of the National Assembly & Others*[8] it was stated as follows:

> **'The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which will be given heed to. Our foundational value of the rule of law demands of us as law-abiding people, to obey decisions by those clothed with legal authority to make or else approach**

[8] (CC 171/15) ZACC 11 (31 March 2016) at para 75.

the courts of law to set them aside, so we may validly escape their binding force.'

[36] The above quote, though appears at a face value to be referring to constitutional and statutory powers in the initial parts, applies with equal force to court orders. If there should be any doubt, the last sentence places the matter well beyond doubt. I have no doubt in my mind that eSwatini, just like the Republic of South Africa subscribes to the notion of the rule of law. The point of law that the applicant has approached this court with dirty hands is therefore upheld.

That this Court has no jurisdiction over the matter

[37] It was argued on behalf of the first respondent that the applicant's founding affidavit lacks essential averments of jurisdiction and or a set of facts that indicate that this Court has jurisdiction to entertain this application. It was argued by Mr Mabuza that whether or not the court has jurisdiction is a conclusion of law

[38 It is not denied by the applicant that the founding affidavit has not expressly stated that the court has jurisdiction over the matter. It was argued however that in terms of rule 6(1) of the High Court rules, the applicant has set out in his founding affidavit facts that show that the court has jurisdiction over the matter. Mr Mofokeng argued that it is unnecessary to plead conclusions of law but that the court can determine from the facts set out in the founding affidavit and the relief prayed for that it has jurisdiction to entertain the application.

[39] In Herbstein and Van Winsen[9] it is stated that founding affidavits must contain certain averments and that it is necessary to clearly state amongst others that the Court has jurisdiction. On the other hand, Erasmus[10] states as follows:-

> **'The facts must set out simply, clearly and in chronological sequence, and without argumentative matter in the affidavit which are to support the notice of motion. The statement of facts must contain the following information:**
>
> **(i)...**
>
> **(ii) the facts indicating that the court has jurisdiction.'**

[40] The learned author, Harms[11] confirms the position of the law in this regard as stated by Herbstein et al and by Erasmus and states as follows:

> **'In any summons or founding affidavit, the necessary factual allegations relating to jurisdiction must be made. It is not sufficient to state the legal conclusion of jurisdiction.'**

[41] In *Ben Zwane v Deputy Prime Minister & Another*[12]applicant, like in the present matter failed to make allegations of jurisdiction in the founding affidavit. The court held that the allegations must appear in the Founding affidavit and that the court must not be left to deduce that it has jurisdiction. I agree entirely with these sentiments and hold them to be applicable in the present matter. This point of law is accordingly upheld.

That spoliation requirements have not been met by the applicant

[42] The first respondent contends that the applicant was not in peaceful and undisturbed possession of the property when he was allegedly despoiled and that the applicant was not deprived of the property forcibly or wrongfully against his consent.

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[9] 'The Practice of the Supreme Court of South Africa' 4th edition at page 364

[10] "Superior Court Practice' at B-37 to 38

[11] 'Civil Procedure in the Supreme Court' at page 79

[12] High Court Case No: 624/2000-Ruling on Points in Limine delivered on 24 March 2000.

[43] It is first respondent's contention that applicant's possession of the homestead was illicitly secured by him when he unlawfully locked her out of the homestead without a court order and refused to comply with a court order restraining and interdicting him from removing first respondent from the homestead. The applicant does not deny that there is a court order to this effect. What he argues is that the court order is non-existent and for this reason he has noted an application to have the orders reviewed by the High Court. I have already dealt with this argument in the paragraphs dealing with the argument on unclean hands, I need not repeat myself here.

[44] In my view, the return of the first respondent to the home was not unlawful in as much as it was ordered by the ruling of *Liqoqo*-a traditional body that acted as an appellate body when it overturned the fourth respondent's previous ruling on the matter. The deprivation of applicant's possession followed resort to legal process. For this reason, first respondent's return to the home is authorized and therefore not unlawful.

In the result, I make the following orders:-

1. The application is dismissed.
2. Costs to follow the event.

M. S. LANGWENYA

JUDGE OF THE HIGH COURT

For the Applicant: Mr T. Mofokeng

For the first Respondent: Mr M. Mabuza third Respondent: Mr Simelane-Deputy Attorney-General