



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

13 November 2024

DATE

SIGNATURE

CASE NO: 5558 / 2024

In the matter between:

**JOHN MANDLA LUBISI
T/A NGCESHE FARMING**

APPLICANT

And

ZWELAKHE XOLANI NKOSI

FIRST RESPONDENT

TITANDI TWALA

SECOND RESPONDENT

**UNKNOWN ILLEGAL INVADERS
OF STAND NO. 6743-B, KANYAMAZANE
1214**

THIRD RESPONDENT

**STATION COMMANDER
KANYAMAZANE POLICE STATION**

FOURTH RESPONDENT

**PROVINCIAL POLICE COMMISSIONER
MPUMALANGA**

FIFTH RESPONDENT

THE CITY OF MBOMBELA

SIXTH RESPONDENT

J U D G M E N T

RATSHIBVUMO ADJP:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be on 13 November 2024 at 08H00.

[1] Introduction

This is an urgent application whereby the Applicant seeks an order dispensing with the forms and service provided for in the Uniform Rules, and disposing of this matter in such a manner and in accordance with the procedure in terms of Rule 6(12) of the Uniform Rules. The Applicant further seeks an order to the effect that pending the final determination of the application on the return date, the First, Second and Third Respondents,

- 1.1 “The First Second and Third Respondents are interdicted and restrained from attending to the property known as Kanyamazane, 1214, Mpumalanga Province (the property).
- 1.2 The First Second and Third Respondents forthwith return and/or restore full possession of the property to the Applicant.
- 1.3 That the First Second and Third Respondents (personally and/or through any other person) are interdicted and restraint from:
 - 1.3.1 Preventing, restricting and obstructing in any way the Applicant, his family members and/or employees, contractors or visitors and/or any other person who may have legal cause to work at, or to enter, or leave the property.
 - 1.3.2 Invading and/or causing to invade and/or occupying and/or causing to occupy and/or demarcating land situated at the property.
 - 1.3.3 Building, constructing or delivering any building material to the property.
 - 1.3.4 Removing any form of hindrance, which obstructs persons referred to in paragraph 1.3.1 above, to work at or enter or leave the property (sic).
 - 1.3.5 Interfering with the activities of any of the persons as referred to in paragraph 1.3.1 above, and the farming and tourism operations of the Applicant in general.
 - 1.3.6 Threatening intimidating and assaulting the persons referred to in paragraph 1.3.1 above in any way whatsoever.
 - 1.3.7 Barricading any of the national, provincial or local access roads to the property.
 - 1.3.8 Gathering within 100 meters any entrance to the property.
- 1.4 That the order contained in paragraph 1.3 shall operate as rule nisi returnable on the date to be arranged with the Registrar.
- 1.5 All interested parties are called upon to show cause on the return date as to why the orders in paragraph 1.3 above should not be made final.
- 1.6 The Respondents are to pay the costs of this application, jointly and severally, the one paying, the other to be absolved.”

[2] Further orders sought as *per* Notice of Motion related to how the *rule nisi* shall be served by the Sheriff on the Respondents. These, together with the relief

relating to how the orders shall operate (*rule nisi*) became irrelevant as the application was opposed by the Respondents on the first day of the hearing.

[3] Background.

In 2011, the Applicant approached the Mpakeni Traditional Council for purposes of obtaining permission to occupy the land, for purposes of farming and tourism. A land measuring 24.3 hectars was later identified by the Mpakeni Traditional Council, at Mgwenya Trust of which permission was granted to the Applicant for use as business site. Permission was granted on 29 January 2014.¹ The land in question is adjacent to N4 Road, between Mbombela and Malelane – the property. The Applicant had been in occupation of the property, trading as Ngceshe Farming, from the date the permission was granted until 11 October 2024. For these reasons, the Applicant avers that he has been in lawful and undisturbed occupation of the property for over 10 years.

[4] The incident that caused the Applicant to approach this court, commenced on 09 October 2024 when unknown person entered the property and flattened a piece of land in the property, using a grader. Again, on 11 October 2024, a group of about six men came and removed the access gate to the property and chased away the Applicant's employees and/or family members, telling them not to come back to the property. The Applicant attended to the property wherein he found the First, Second and Third Respondents in the process of demarcating and selling the stands to members of the public, right in the property. According to the Applicant, the First, Second and Third Respondents informed him that they had permission to invade the property from Chief Tikhontele Samson Dlamini of Lomshiya Traditional Council, in order to protect their land. The Applicant therefore seeks a *mandament van spolie* order against the First,

¹ See p. 41 of the paginated bundle, a letter by the Mpakeni Traditional Council dated 14 January 2014, with date stamp of 29 January 2014.

Second and Third Respondents, to restore him to *status quo ante* in respect of the property.

- [5] In opposing the application, the First and the Second Respondents do not deny the allegations averred by the Applicants regarding the incidents of 11 October 2024. They admit their identities in the photographs taken by the Applicant when he confronted them at the property, although they question the date they were taken. The First Respondent admits his interest in the land occupied by the Applicant and goes on to allege that he has had disputes with the Applicant over that land since 2022. In so alleging, he relies on the allegations made by the Applicant of the disputes he had with a certain ward councillor, in 2022, which I did not include in the background above for reason that I find them to be irrelevant for purpose of this application. The First Respondent, who is not that ward councillor, goes no further than just make a one-line allegation that he had a dispute with the Applicant over the property. The allegation about the 2022 dispute takes this application nowhere.
- [6] Whereas the First and Second Respondents do not dispute the Applicant's allegations of the October 2024 incident, their identities and that they were in the property when confronted by the Applicant, or that they furnished the Applicant with their contact details, they surprisingly aver that the allegations made in paragraphs 11 and 12 of the Applicant's founding affidavit must be referring to other persons than them. Paragraph 11 of the founding affidavit refers to the dispute and an order that the Applicant secured against a ward councillor in 2022. Paragraph 12 however refers to the incident that took place on 11 October 2024, the encounter the Applicant had with the First and Second Respondents, including the taking of photographs which the two Respondents admit that it is them reflecting in the photos.

[7] In their answering affidavit, the First and Second Respondents question the lawfulness of the Applicant's occupation of the property. They are of a view that the property falls under the traditional leadership of Lomshiya Traditional Council, and not Mpakeni Traditional Council. In support of this averment, the First and Second Respondents attached a letter from Lomshiyo Traditional Council which letter confirms that the Lomshiyo Traditional Council made a submission to Mbombela Municipality, pleading for the return of Farm Sigambule 216 and Makawusi 215 back to their tribal authority.² According to the Lomshiyo Council, the ownership of these farms was taken from their traditional authority when the democratic government was installed in South Africa. On the face value, this letter suggests that the ownership of these farms falls under Mbombela Municipality. What remains uncertain is whether these farms could be located within the property or whether the property is located within them. The Applicant however denies that the location of the farms is the same as the property he occupies.

[8] While the occupation of the property by the Applicant is not disputed by the First and Second Respondents, they question how he came to be in its possession, suggesting that he was in illegal occupation of the land. They raise a point *in limine* on why the Mpakeni Traditional Council was not joined as a party to the proceedings saying, it is an interested party in the outcome of the application. They also question why the City of Mbombela was joined as a respondent while it has no interest in the outcome of the application. For those reasons, the First and Second Respondents submit that the application should be dismissed with costs.

[9] The law.

Mandament van spolie is often described as a possessory remedy.

² See p. 90 of the paginated bundle,

“The *mandament van spolie* is a possessory remedy (*remedium possessorium*). The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is protected (*iudicium possessorium*), is kept strictly separate from the process whereby a party’s right to ownership or other right to the property in dispute, is determined (*iudicium petitorium*). The object of the order is:

‘[M]erely to restore the *status quo ante* the illegal action. It decides no rights of ownership; it secures only that if such decision be required, it shall be given by a court of law, and not affected by violence. If before the spoliation either party needed a legal decision to establish his rights, he requires it just as much after, as before, the order. He is in no better, and not worse, position than he was before the spoliation. There is consequently nothing inherent in a *mandament van spolie* which demands that it should be conditioned as being granted *pendente lite*’

The reason behind the practice of granting spoliation orders is that no man is allowed to take the law into his own hands, and to dispossess another illicitly of possession of property. This applies equally whether the despoiler is an individual or a government entity or functionary. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. The rule is *spoliatus ante omnia restituendus est*..”³

[10] A court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place; it merely inquires whether there has been a spoliation, and if there has been, it restores the *status quo ante*. In spoliation proceedings the court will, therefore, neither enter into the lawfulness of the applicant’s possession, nor into the question of ownership of the property. The court will not even consider any claim in reconvention, such as a claim for a declaratory order on the respondent’s rights to the property.⁴

³ See Erasmus: Superior Court Practice/Volume 2: Uniform Rules and Appendices: D7. See also *Microsure (Pty) Ltd v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N) 63H–I; *Jigger Properties CC v Maynard NO* 2017 (4) SA 569 (KZP) at 574E–H.

⁴ Erasmus: Superior Court Practice *supra* and *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) at 117D, *Schubart Park Residents’ Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at 331A, and *Lottering v Palm* 2008 (2) SA 553 (D) at 555H–I.

[11] In order to obtain a spoliation order two allegations must be made and proved to wit, the applicant was in possession of the property; and that the respondent deprived him of the possession forcibly or wrongfully against his consent. The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. In spoliation proceedings the court is not concerned with the lawfulness of the applicant's possession. In other words, the applicant must show not that he was entitled to be in possession, but that he was in *de facto* possession at the time of being despoiled.⁵

[12] It is therefore trite that in spoliation proceedings the legal entitlement to the property is irrelevant. The Applicant merely needs to prove undisturbed possession thereof even when he/she is not an owner or legally entitled to such possession. Thus, in *Yeko v Qana*⁶ Van Blerk JA remarked that even a thief can in some circumstances successfully obtain a spoliation order in respect of the stolen property. That matter was a spoliation application involving a landlord who locked out the tenant from trading in a shop that he rented. The court of appeal confirmed the spoliation order despite the fact that the tenant was operating the shop without the trading license. The court of appeal had this to say,

“[T]he very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established. As has so often been said by our Courts the possession which must be proved is not possession in the juridical sense; it may be enough if the holding by the applicant was with the intention of securing some benefit for himself. In order to obtain a spoliation order the *onus* is on the applicant to prove the required possession, and that he was unlawfully deprived of such possession. As the appellant admits that he locked the building it was only the possession that respondent was required to establish. If the respondent was in

⁵ See *Le Riche v PSP Properties CC* 2005 (3) SA 189 (C) at 193G).

⁶ 1973 (4) SA 735 (A) at p. 739G

possession the appellant's conduct amounted to self-help. He was admittedly in occupation of the building with the intention of selling his stock for his own benefit. Whether this occupation was acquired secretly, as appellant alleged, or even fraudulently is not the enquiry. For, as Voet, 41.2.16, says, the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the *spoliatus* has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.”⁷

[13] Discussion.

The court does not have to concern itself with the question on whether the Applicant’s acquisition of the property was legal or not. If the lawfulness of his occupation of the property is in doubt, the Mpakeni Traditional Council is within its rights to challenge it, provided the property is within its area of authority. This is however not that application. If the ownership of the property lies with the sixth Respondent, it is also within the rights of City of Mbombela to evict the Applicant, if it so wishes; provided it is the owner. Lomshiyo Traditional Council does not claim to be the owner of the property; but has made submissions to Mbombela Municipality with the hope that ownership thereof (of Farm Sigambule 216 and Makawusi 215) shall one day revert to it like it once did in the past. The Applicant however believes that the area being claimed by Lomshiyo Traditional Council from the municipality is different to the area incorporating the property.

[14] It is therefore clear that for the spoliation application to be successful, an applicant merely has to show undisturbed possession of a property and that he/she was unlawfully dispossessed of its possession. The identity of the dispossessor or his/her rights over the property is immaterial as the order can

⁷ *Yeko v Qana supra* at 739D-G.

also be made against the property owner who takes the law into his/her own hands. Thus, even if the dispossession was done by Lomshiyo Traditional Council itself, and presuming that it is the owner of the property, considering the ownership rights would be irrelevant for determining whether to grant the spoliation order.

[15] I do not find any merit to the point raised *in limine* to the effect that the Applicant's failure to join Mpakeni Traditional Council as a party is a non-joinder. The substantial test for non-joinder is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.⁸ It is not Mpakeni Traditional Council who dispossessed the Applicant of his possession of the property and no order is sought against it. In fact, from the annexures attached to the founding affidavit, it would appear, the Mpakeni Traditional Council supports the Applicant's application as it is the ones who gave him the right to occupy the property. The granting or refusal of the spoliation application does not confer any more rights to Mpakeni Traditional Council, than it already has, over the property or the surrounding land. The prejudice it stands to suffer as a result of the alleged non-joinder has not been fully demonstrated.

[16] Equally, there is no merit in the argument that the joinder of the Sixth Respondent is a misjoinder. After the application papers were served on it, the Sixth Respondent took no issues with being joined in this motion. Moreover, the Applicant made it clear in the founding affidavit that the Sixth Respondent was cited for the reason that it is its responsibility to stop the mushrooming of illegal townships. If there was any doubt about the interests of the Sixth Respondent, it is laid to rest by the fact that Lomshiyo Traditional Council, on

⁸ See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) para 64–66.

whose mandate the First, Second and Third Respondent claim to operate, alleges that the ownership of the disputed piece of land lies with the Sixth Respondent.⁹

[17] The Applicant's undisturbed possession of the property for over a decade has not been disputed as much as the dispossession thereof was not seriously contended. Issues raised by the First and Second Respondent are no legal defences to the spoliation claim. The application to restore the Applicant to the *status quo ante* must therefore be allowed. Equally, there is no reason advanced why costs should not follow cause.

[18] The order:

For the aforesaid reasons, I make the following order:

18.1 The Respondents are interdicted and restrained from attending to the property known as Kanyamazane, 1214, Mpumalanga Province (the property).

18.2 The First, Second and Third Respondents forthwith return and/or restore full possession of the property to the Applicant.

18.3 That the First, Second and Third Respondents (personally and/or through any other person) are interdicted and restraint from:

18.3.1 Preventing, restricting and obstructing in any way the Applicant, his family members and/or employees, contractors or visitors and/or any other person who may have legal cause to work at, or to enter, or leave the property.

18.3.2 Invading and/or causing to invade and/or occupying and/or causing to occupy and/or demarcating land situated at the property.

18.3.3 Building, constructing or delivering any building material to the property.

⁹ See p. 90 of the paginated bundle,

18.3.4 Hindering or obstructing persons referred to in paragraph 18.3.1 above, to work at or enter or leave the property.

18.3.5 Interfering with the activities of any of the persons as referred to in paragraph 18.3.1 above, and the farming and tourism operations of the Applicant in general.

18.3.6 Threatening intimidating and assaulting the persons referred to in paragraph 18.3.1 above in any way whatsoever.

18.3.7 Barricading any of the national, provincial or local access roads to the property.

18.3.8 Gathering within 100 meters any entrance to the property.

18.4 The Sheriff of the court or his appointed Deputy is authorized to do or cause to be done anything that may be necessary to give effect to this order, including but not limited to appointing contractors and/or obtaining the assistance of the South African Police Services (the Fourth and Fifth Respondents) to enforce this order and to remove any form of hindrance, which obstructs the Applicant and the persons referred to in paragraph 18.3.1 above from accessing, exciting the property or performing their duties therein.

18.5 The Sheriff of the court or his appointed Deputy is further authorized to prevent any construction of structures and/or shacks from taking place at the property and prevent any building materials from being delivered to the property.

18.6 The First, Second and Third Respondents are ordered to pay the costs of this application, jointly and severally, the one paying, the other to be absolved, on scale A.


TV RATSHIBVUMO
ACTING DEPUTY JUDGE PRESIDENT
MPUMALANGA**FOR THE APPLICANT:****ADV. KW VAN HEERDEN****INSTRUCTED BY:****COMBRINK GREYLING ATT INC**
MBOMBELA**FOR THE 1ST, 2ND & 3RD****RESPONDENTS****ADV. R SEGAGE****INSTRUCTED BY:****MP MASEKO ATTORNEYS**
MBOMBELA**DATE HEARD:****05 NOVEMBER 2024****JUDGMENT DELIVERED:****13 NOVEMBER 2024**