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**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION: MTHATHA**

CASE NO: 4437/2024

In the matter between:

ZOLEKA NANCY DUMALISILE

Applicant

And

PHENDULE LANGTON GUSHMAN

Respondent

REASONS FOR JUDGMENT

MHAMBI AJ

INTRODUCTION

1. This matter was brought on urgent basis with a directive to be heard as such on 15 October 2024, consequently it was argued and the court having read the papers filed of record, and having heard the counsel for the parties, it granted

orders as they were prayed in the applicant's notice of motion, the following orders were granted:

- a. This application is heard on urgent basis pursuant to the provisions of Uniform Rule 6(12);
 - b. The respondents be and are hereby directed to, forthwith, restore Erf 5[...], extension 15, Butterworth to the applicant's possession.
 - c. The respondents be and are hereby interdicted and restrained from unlawfully disturbing the applicant's possession of the property
 - d. The respondents pay the costs of this application. The one party paying the others to be absolved.
2. The purpose of this judgment is to give reasons for the appropriate orders granted during the hearing of this matter.

BACKGROUND FACTS

3. The Applicant is ZOLEKA NANCY DUMALISILE, she acted, in instituting these proceedings, in her capacity as the executor of the estate of the late Mr. Kaiser Daliwonga Matanzima, "**the deceased**".
4. The property that is the subject matter of these proceedings was owned by the deceased and is described as erf 5[...], Butterworth, Extension 15 Township, Registration division, Gcuwa and measuring 642 square meters, "**the property**".
5. The first Respondent is Phendule Langton Gushman, an adult male person of No. [...] F[...] Street, Butterworth.

CAUSE OF ACTION

6. It appears *ex facie* the papers that the applicant secured possession of the property by putting one Khululwa Gubevu,” **Khululwa**” who, it is alleged, remained in possession of the property until 05 October 2024.

7. Khululwa deposed to a confirmatory affidavit in support of the application according to her affidavit, she stated that:-

3. “On Saturday, 05 October 2024, the First Respondent, along with police officers from Umsobomvu Police Station, whose names and surnames I do not know, and other unknown parties who appeared to be speaking foreign language came to the property and forced me out of it. I did not agree to this. I also learnt in the process that the applicant was also unaware of this and had not authorized it”.

8. This matter falls within *mandament van Spolie* as the cause of action.

9. *Mandament van spolie* remedy relates to possession. Lawsa defines possession as: -

“The combination of a factual situation and a mental state consisting in the factual control or detention of a thing (*corpus*) coupled with the will to, possess the thing (*animus possidendi*)¹.

10. In **Yeko v Qana**², *Mandament van spolie* is in the first place described as possessory remedy (*remedium possessorium*)

11. In **Nino Bonino v De Lange**³ Innes CJ explained the nature of spoliation: -

¹ 27 LAWSA 2 ed 70

² See 1973 (4) SA 735 A at 739 (E)

“Spoliation is an illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even regard to a legal right.”

12. The remedy is possessory suit based on the *maxim spoliatus ante omnia restituendus est*. In simple terms, this means that possession must be restored to the dispossessed person before enquiring into anything else.

13. In **Painter v Strauss**⁴ the court described spoliation as being designed to be a robust, speedy remedy which served to prevent recourse to self-help. In **Yeko V Qana**⁵ the sole requirements of spoliation were described as that the dispossessed person had a possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted. All that must be proved is the fact of prior possession and that the possessor was deprived of that possession unlawfully. In this context unlawfully means without agreement or recourse to law.

14. 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 the other right to the property in dispute is determined (*iudicium potitorium*).

15. Erasmus, Superior Court Practice⁶ goes further and says on the object of spoliation: -

“Merely to restore the status quo ante the illegal action. It decides no rights of ownership, it secures that if such decision be required, it shall be given by court

3. 1906 TS 120

⁴ 1951 (3) SA 307 (0) at 31 – H4A-B

⁵ See *ibid* foot note 2

⁶ See Erasmus, Superior Court practice [service 21 2023] D7-1, see also authorities referred therein

*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**⁷.*

16. This Court had to deal with this matter on the basis of Courts approach **Blendrite Pty Ltd and another V Moonisami and another (2021) ZASCA 77, 2021 (5) SA 61 (SCA)** the Court held that, a Court hearing a spoliation application does not concern itself with the rights of the parties (whatever they might have been) before the spoliation took place, it merely enquires whether or not there has been a spoliation, and if there has been, it restores the status quo *ante*.

17. I agree with the reasoning by Court in **Wait v Wait**⁸, in spoliation proceedings the Court will, therefore, neither enter into lawfulness of the applicant's possession, nor into question of ownership.

18. Clearly, the remedy of spoliation protects possession.

19. In this case, the applicant had satisfied the court that, until 05 October 2024, she was in peaceful and undisturbed possession of the property. She did not authorize any one to dispossess her of the property.

20. Similarly, the confirmatory affidavit by Kululwa, sufficiently testifies that she was put into possession of the property by the applicant, such a peaceful possession was disturbed by the action of the 1st Respondent when she was forced out of the property without her consent.

⁷ See 2021 (5) SA 61 (SCA at paragraphs [6]-[7])

⁸ See 1929 EDL 342, at 345

21. The 1st Respondent has suggested in the answering affidavit that the property was owned by his late father, in that a will marked annexure “A” was attached in the answering affidavit.

22. This 1st Respondent’s proposition is meritless and void of basis, **Innes CJ** held in **Nino Bonino**⁹:-

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of the property, whether movable or immovable. If he does so the court will summarily restore the status quo ante and will do that as preliminary to any inquiry or investigation into merits of the dispute”.

23. The dispute of ownership which the 1st Respondent sought to suggest in the answering affidavit is irrelevant on the determination of spoliation, possession is what the Court has to consider.

24. **Van Blerk JA** correctly put it in *Yeko v Qana*¹⁰, that 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 robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands.

25. In **Ngqukumba V Minister of Police**¹¹ the Constitutional Court held that the Mandament van Spolie entailed restoration of possession of the vehicle in question before all else and directed that the possession be restored. The question of whether the erstwhile possession had lawful cause to possess was a matter to be dealt with after restoration of possession under the Mandament van Spolie had taken place.

⁹ See ibid footnote 3 at page 122

¹⁰ See ibid footnote 2 739 F-G

¹¹ See 2014 (4) SA 112 (cg at para 21)

26. The 1st Respondent argued and challenged the authority of the applicant, qua her capacity as executor to institute the spoliation proceedings, it was argued, the executor was not at the time in possession, but a concession was made that Ms. Bukelwa Gubevu was in possession of the property, it was further argued, only her had *locus standi* to institute the current proceedings.

27. I disagree with that argument or proposition. The authors, Hofmeyer and Paleker, in the book titled “**The Law of Succession in South Africa 2023**” described the executorship as *sui genesis* office, a “**special office**”. The authors mentioned that the executor derives powers from common law and the Act¹², the executor has fiduciary duty to act in the best interests of the estate and the beneficiaries.

Section 26 (1) of the Act: -

“Immediately after letter of executorship have been granted to him an executor shall take into custody or under his control all the properties, books and documents in the estate, and not in possession of any person who claims to be entitled to it under any contract, right of retention or attachment”.

28. In **Kirsten and Another V Moodley and Another**, unreported KZN Judgement, loaded on SAFLI as 2016 ZAKZDHC 31 (22 July 2016) para 25:-

“As an executor he is required in exercising his fiduciary duty to act in the best interests of the estate and the beneficiaries. He is obliged to take control of the assets, preserve them and administer and wind up the estate as soon as possible”

¹² See 2001 revision of 1001 edition at page 14

29. The point this Court emphasizes is that the executor has powers to exercise control over the assets of the deceased, that exercise of control, is equal to possession required to determine the spoliation proceedings.

30. **LAWSA**¹³ is authoritative in this regard, according to LAWSA, the law recognizes so called quasi-possession or judicial possession (**possessio iuris**) which consists of the exercise of control over an incorporeal coupled with *animus* to exercise control.

31. The executor has quasi- possession over the deceased assets, that exercise of control is sufficient to give the applicant the required *locus standi* for Mandament van Spolie purposes.

32. The 1st respondent in its answering affidavit sought to suggest that it was in peaceful possession of the property and that it cannot be said the applicant was in peaceful possession thereof, it further argued and suggested that the said Kululwa Gubevu never took occupation of the property.

33. In this way the 1st respondent raised a defence of counter-spoliation.

34. The Supreme Court of Appeal in the **City of Cape Town v The Human Rights Commission and Others**¹⁴ per Mocumie JA, refers to Silberberg and Schoeman, “**The Law of Property**”¹⁵, the authors state that:-

“As a general rule, a possessor who has been unlawful dispossessed cannot take the law into [their] hands to recover possession. Instead (they) will have to make use of one of the remedies provided by law, for example the Mandament van spolie. But its recovery is forthwith, (instante) in the sense of being still part of the act of spoliation, then it is regarded as a part of the act of spoliation.... It is

¹³ See 27 Lawsa 2 ed 70

¹⁴ See 2024 ZASCA 110 (10 July 2024)

¹⁵ See 6ed (2019) at 353

thus an established principle that counter-spoliation is not a stand-alone remedy and does not exist independently of a spoliation”.

35. During the hearing of this matter, Mr. Bodlani SC, who appeared for the applicant, submitted that counter- spoliation is permissible where a peaceful and undisturbed possession of the property has not yet been acquired, and where counter-spoliation would not establish fresh breach of peace. He further submitted that the 1st Respondent’s conduct of possessing the property in the manner he did, amounted to breach of the applicant’s peaceful possession, the defence of counter-spoliation does not exist under such circumstances. I find merit in this argument, and I agree with it.

36. The defence of counter-spoliation as suggested was nothing but a continuation of the existing breach of peaceful and undisturbed possession of the property by the applicant through Ms. Gubevu.

37. Consequently, the defence of counter-spoliation stands to fail. The applicant has satisfied this court that she was in peaceful and undisturbed possession of the property until such possession was breached by the 1st respondent.

38. In the result, the application succeeded, and I granted orders appearing in paragraph 1 hereof as I did during the hearing of this matter.

MHAMBI M
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Counsel for the Applicant:

Instructed by:

Mr. Bodlani SC

Z. N. Dumalisile Attorneys Inc.

No. 07 Craister Street

Mthatha

Counsel for the Respondents:

Instructed by:

Mr. Qangule

Qangule & Hlabahlaba Attorneys

Office No. 04 Avalon Court

Butterworth

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15 October 2024.

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31 October 2024