

LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE 20 OCTOBER 2025 SIGNATURE _____

1ST APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

Delivered : 20 October 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand down of the judgment is deemed to be **20 October 2025 at 10:00 am.**

Date heard : 15 October 2025

Coram : Bresler AJ

JUDGMENT

BRESLER AJ:

Introduction:

- [1] The Applicant applies on an urgent basis for an order restoring the possession of the tavern furniture and refrigerators which possession was unlawfully spoliated by the 1st Respondent. The Applicant furthermore applies for interdictory relief restraining the 1st Respondent with interfering with the Applicant's peaceful and undisturbed possession of the tavern furniture and equipment pending the finalization of the challenge to the purported will of the late Mahlangu Thomas and the determination of the validity of the letter of executorship issued to the 1st

Respondent which case is pending in the above Honourable Court under Case number: 2025-152968.

- [2] The application is opposed by the 1st Respondent only.
- [3] The Applicant's case is the following: The Applicant is the sister to the deceased, M Mahlangu Thomas (hereinafter the 'Deceased'). Shortly after his passing and on or about the 13th of June 2025, the 1st Respondent presented the Applicant with a handwritten note commissioned by the Fourth Respondent purporting to be the last Will and Testament of the Deceased. In terms of the said document, the 1st Respondent stood to inherit the tavern of the Deceased as well as all the furniture in the said tavern.
- [4] The Applicant and the family members did not accept the validity of the said Will. On or about the 19th of August 2025 it came to the knowledge of the Applicant that the 3rd Respondent issued a letter of Executorship in favour of the 1st Respondent pertaining to the estate of the Deceased.
- [5] Following the attainment of the said Letter of Executorship, the 1st Respondent started to initiate processes to take ownership of the Deceased's tavern and the movable assets and furniture contained therein.
- [6] On the 1st of September 2025, instructions were provided to the legal representative of the Applicant to institute an urgent application to declare the purported Will invalid

ab initio and to have the Master revoke the Letter of Executorship. The matter was enrolled for the 30th of September 2025 on which date same was struck from the roll due to lack of urgency. This application is still pending.

- [7] On the 2nd of October 2025, the 1st Respondent, accompanied by members of the South African Police Service (the 4th Respondent) came to the house of the Deceased to remove the movable assets of the tavern without the family's permission or a valid court order entitling them to do so.
- [8] The Applicant submitted that the matter is urgent as she was unlawfully deprived of possession of the business equipment and furniture by the 1st Respondent without approaching any court for the necessary relief.
- [9] As stated herein before, the 1st Respondent opposed the proceedings. He confirmed his appointment as the Executor in the estate of the Deceased. The 1st Respondent raised *in LIMINÉ* the lack of urgency of the application. He submits that the application lacks urgency because he is the Executor and, as such, he is storing the refrigerators at his place of residence for safekeeping. They are, in any event, not working.
- [10] Of particulars relevance to these proceedings is the averment by the 1st Respondent that he is entitled to collect the assets of the estate by virtue of his appointment as the Executor. According to the 1st Respondent it is therefore his duty to collect assets belonging to the Deceased estate and any alleged dispossession is thus

lawful and justified. Insofar as the refrigerators were in the control of the Deceased and held at the tavern premises, nobody had the right to simply remove these refrigerators without the knowledge and consent of the Executor. The Applicant did so unlawfully and without his consent and retained the refrigerators at her premises. The 1st Respondent also presented proof that these refrigerators are not part of the assets of the deceased estate. They belong to SAB and proof of the ownership of SAB was annexed to the Answering affidavit. The appears not to be disputed by the Applicant.

- [11] As to the urgency of the matter, the 1st Respondent makes it clear that the Applicant failed to set out sufficient facts that supports the extremely truncated time frames contemplated in the Notice of Motion.

Issues that require determination:

- [12] At the hearing, the Court found that there was sufficient urgency to entitle the hearing of the matter on an expedited basis. What remains to be determined is if the Applicant was spoliated by the 1st Respondent and thus entitled to the relief prayed for in the Notice of Motion.

The Applicable Legal Principles:

[13] Spoliation is defined as the wrongful deprivation of another's right of possession. A person who has been dispossessed of property without due legal procedure may apply to court to have the property returned to him.

[14] The nature of a *mandament van spolie* is described in the seminal case of **Nino Bonino v de Lange**¹, where the Learned Innes CJ at p.22 stated that:

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

[15] In the case of **Yeko v Qana**², it was held that an applicant for spoliation remedy must satisfy the court that –

15.1 he was in possession or had *quasi* possession of the property; and

15.2 that the respondent deprived him of the possession forcibly or wrongfully against his consent.

[16] In **Ngqukumba v Minister of Safety and Security**³ 2014 (5) SA 112 (CC) this sentiment was expressed as follows:

¹ 1906 T. S. 120

² 1973 (4) SA 735 (A)

³ 2014 (5) SA 112 (CC) at 118B

"The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."

- [17] Section 26(1) of the **Administration of Estates Act**, Act 66 of 1965 states the following:

'26(1) Immediately after letters of executorship have been granted to him an executor shall take into his custody or under his control all the property, books and documents in the estate and not in the possession of any person who claims to be entitled to retain it under any contract, right of retention or attachment.'

- [18] This provision is mandatory – it encompasses the *crux* of what the duties of an Executor entails. Executors are, after all, the individuals that oversee the administration of the deceased estate.

- [19] The Applicant is thus incorrect in her submission that the Executor must have some form of Court order or authority before assets can be removed or collected. The authority of the Executor is cemented in the provisions of Section 26. An Executor is not a mere procurator or agent of the heirs but is legally vested with the administration of the estate.⁴

⁴ *Malcomes v Kuhn* 1915 CPD 852

- [20] But section 26 pertinently refers to the 'property, books and documents in the estate'. The 1st Respondent presented evidence that the refrigerators does not belong to the deceased estate. They belong to SAB. It is clear that they are not 'property ... in the estate.'
- [21] Section 11 of the **Administration of Estates Act** provides for this incident. It specifically caters for persons, who immediately after the death of the deceased has possession or custody of any property, book or document which belonged to, or was in the possession or custody of the deceased at the time of his death. Such person must, immediately after the death, report such property to the Master. He / she must also, upon written demand, surrender the property to the Executor unless he / she has some right to remain in retention thereof.
- [22] It is quite evident that the Executor must take possession and control of property forming part of the deceased estate and property that was in possession or under the control of the deceased.
- [23] It is apposite to note that neither party addressed the application and the implication of Section 11 of the **Administration of Estates Act**. The Applicant's contention is that the 1st Respondents appointment as Executor does not entitle him to take the law into his own hands without recourse to the court or the Master. This contention is rebutted by the trite provisions of the **Administration of Estates Act** which, in fact, directs that the Executor must take immediate possession of such property

belonging to the deceased estate or in the possession or under the control of the deceased.

[24] Retaking assets that belonged to the deceased without a directive from the court or the master is lawful and aligns with the trite duty of an executor. Retaking possession of assets that were previously in possession of the deceased, or under his control, is subject to a prior written demand. In this instance, no allegation is made of such demand, nor is the absence of the written demand raised by the 1st Respondent. The Court can only determine if the case as presented by the 1st Respondent is valid. In this instance it does not pass muster since the Executor does not need the intervention of either the Master or the Court before collecting assets that was under the control of the Executor. He is entitled to do so *ex lege*.

[25] Having said the aforesaid, and in so far it may be relevant having found that there is no unlawful dispossession, the issue that remains is who was in possession of the assets at the time that it was dispossessed by the 1st Respondent. In this regard, it is common cause between the parties that the refrigerators were kept at the premises that the deceased utilised for his tavern. Some time after his passing, these refrigerators were removed to the parental home of the Applicant without the knowledge or consent of the 1st Respondent, being the Executor in the Estate.

[26] Can it thus be said that the Applicant was in possession thereof for purposes of a *mandament van spolie*?

[27] A spoliation order is available to any person who is:

27.1 making physical use of property to the extent that he derives a benefit from such use;

27.2 intends by such use to secure that benefit to himself; and

27.3 is deprived of such use and benefit by a third person⁵.

[28] Possession need not be possession in the legal sense. It suffices if the applicant factually held (*detentio*) the thing with the intention (*animus*) of securing some benefit for himself.⁶ Both elements, viz *detentio* and *animus*, must be present.⁷ Two elements are thus essential for the possession which is protected against spoliation namely *detentio* (the physical holding of and control of the thing) and *animus* (the intention of securing some benefit for oneself).

[29] In the matter **Mbuku v Mdinwa**⁸ at 222 F – H the following was stated:

"In any event, I am of the view that an agent who has no interest in the property which he holds for his principal, or who derives no benefit from holding it, is not entitled to claim the relief of a mandament van spolie. One should not

⁵ *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 1 SA 230 (E)

⁶ *Nienaber v Stuckey* 1946 AD 1049 1053; *Yeko v Qana* 1973 (4) SA 735 (A).

⁷ *Meyer v Glendinning* 1939 CPD 84. See also *Engling v Bosiel* 1994 (2) SA 388 (B); *Du Randt v Du Randt* 1995 (1) SA 401 (O)

⁸ 1982 (1) SA 219 (Tk) at 222F

forget that it is a remedy which is available to a possessor; it has never, to my knowledge, been extended, except perhaps inadvertently, to a mere detentor. But the animus possidendi which is required to transform detention into possession is not the intention required of old for so-called civil possession; it is no more than the intention to hold the thing in question for one's own benefit and not for another. And a detentor who does not have that intention is indeed merely a detentor".

[30] In this case, the refrigerators were presumably removed to the house of the Applicant's parents. It was not in her possession or in her control. More importantly, the Applicant specifically testifies that the refrigerators were removed from the tavern to safekeep same for the sake of the deceased estate. She did not testify that she had the requisite *animus* in respect of these items. At most, she was a *detentor*.

[31] As such, the Applicant also fails to meet the requirements for possession. The application can therefore not succeed.

Costs:

[32] There is no reason why the costs should not follow the outcome of the proceedings. Having regard to the nature of the proceedings, the level of complexity thereof and the importance to the respective parties, costs on Scale B is warranted.

Order:

[33] In the result the following order is made:

33.1 The Application is dismissed.

33.2 The Applicant is ordered to pay the costs including the costs to counsel on scale B.



M BRESLER AJ

**ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE**

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