



REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 2026-178881

In the matter between:

TEMBELA NTLOKO

Applicant

And

FANISWA KEWUTI NKATI

First Respondent

MPHO NKATI

Second Respondent

Neutral citation: *Ntloko v Nkati and Another* (Case no 178881/2025) [2026]
ZAWCHC ... (20 August 2026)

Coram: LEKHULENI J

Heard: 29 July 2026

Delivered: 20 August 2026

Summary: Declaratory order – Respondents removing movable assets from the applicant’s premises – Magistrate’s Court granting a final spoliation order against the respondents – Respondents noting an appeal against the decision of the magistrate – Applicant seeking a declaratory order that the spoliation order is not suspended by the filing of the notice to appeal – Spoliation order granted by the magistrate final in effect - Notice of appeal suspending the spoliation order of the Magistrate – Application dismissed.

JUDGMENT

LEKHULENI J:

Introduction

[1] This is an urgent, opposed application in which the applicant seeks an order declaring that the final spoliation order granted by the Magistrate's Court for the District of Cape Town in case number 3773/2026 on 17 July 2026 ('the spoliation order') is immediately executable and not suspended by the first and second respondents' intended or noted appeal.

Material background facts

[2] The applicant and the first and second respondents' son lived together as partners at Parklands North, Cape Town, Western Cape. They purchased a sectional title unit jointly in August 2025. The applicant's partner (the respondent's son) passed away on 14 May 2026, leaving a will appointing the first respondent as the executrix of his estate. Subsequent thereto, the applicant brought an urgent application in this Court under case number 2026-114724, seeking an order declaring that she was married to the first and second respondents' son by customary union. The applicant's application was dismissed on the grounds that she cited the Kewuti family as the respondent and failed to cite either a natural person or a juristic person as a respondent.

[3] On 4 July 2025, the first and second respondents attended the applicant's premises and, without a court order, removed a number of movable items, including a refrigerator, washing machine, microwave, kettle, toaster, television, television stand, camp chair, iron, 2 beds, and a headboard, alleging that the property belonged to their son. The applicant subsequently filed a criminal case for

housebreaking against the first and second respondents under case number 115/07/2026.

[4] The applicant stated that she was informed that her late partner had a last will and testament that entitled the first respondent to the movable property in the applicant's possession. However, as far as she was aware, no letters of executorship had been issued appointing either the first or the second respondent as an executor, and even if such letters had been issued, the respondents may not take the law into their own hands without due process.

[5] On 7 July 2026, the applicant attended the Cape Town Magistrate's Court seeking a spoliation order. The applicant appeared in person and was assisted by a clerk of the civil court to file an application for a *mandament van spolie*. The application was presented before a magistrate who granted an interim order with a return date of 16 July 2026. The applicant thereafter approached the Sheriff of Kuils River South to execute the order but was unsuccessful. The applicant later instructed her attorneys of record to assist her in enforcing the spoliation order.

[6] After some correspondence between the applicant's and respondent's attorneys, the respondents brought an application before the magistrate's court on 09 July 2026 to suspend the spoliation order. Indeed, the court suspended the operation of the interim order pending the hearing of the main application on 16 July 2026.

[7] On 16 July 2026, following the hearing, the magistrate set aside the suspension order of the rule nisi and made the interim spoliation order final. The applicant's attorney subsequently instructed the Sheriff to enforce the final order. On 20 July 2026, the respondents filed a notice of appeal against the magistrate's decision confirming the interim order. Accordingly, the Sheriff could not execute the order due to the notice of appeal filed against the judgment of the court a quo.

[8] On 22 July 2026, the applicant's attorney sent a letter to the first and second respondents' attorneys of record, advising them that the mere noting of an appeal, or expressing an intention to do so, does not suspend the operation or execution of the

spoliation order. The letter gave the first and second respondents until the close of business on 22 July 2026 to comply with the final order and to immediately restore possession of the applicant's movable property, failing which the applicant would bring an urgent application. The first and second respondents failed to comply with the letter; consequently, the applicant filed this application with this court.

[9] The respondents opposed the applicant's application and contended that it was not urgent. They argued that the alleged urgency pleaded by the applicant was self-serving and self-created. On the merits, they asserted that the deceased was the sole owner of the movable property removed from the house where the applicant was residing with the deceased. The respondents further asserted that the applicant was not legally married to the deceased. They stressed that the applicant attempted to approach the court to establish the validity of the marriage, but that application was dismissed.

[10] The respondents averred that the applicant and the deceased experienced a breakdown in their relationship, prompting them to go their separate ways, each with their own belongings. The respondents submitted that on 30 March 2026, the applicant left the common home where she and the deceased were living. On 2 April 2026, the applicant returned to the common home to collect her clothes and all the property she had purchased with her own money. The respondents stated that the applicant removed all her belongings from the property and left the common home completely. The applicant did not return to the property until after the deceased's burial on 13 May 2026. According to the respondents, the applicant moved back to the property after the first week of June 2026.

[11] On the execution of the spoliation order, the respondents contended that their notice of appeal suspended the magistrate's spoliation order and revived the suspension order granted on 9 July 2026.

Principal submissions by the parties

[12] At the hearing of this appeal, Ms Murote, counsel for the applicant, submitted that the applicant seeks a declaratory order confirming that, under the

common law, the spoliation order granted by the magistrate is not suspended by the respondents' notice of appeal. Counsel submitted that declaratory relief is necessary because the Sheriff cannot execute the order in the face of the respondents' notice of appeal. On the question of urgency, Ms Murote contended that the matter is urgent. Counsel argued that the applicant has been denied access to her movable assets and has been sleeping on the floor after the respondents removed her bed and other essential items. Counsel submitted that the applicant was compelled to leave her home and live with her parents because the respondents removed her bed and other essential furniture. Ms Murote implored the court to grant a declaratory order.

[13] On the other hand, Mr Mbenyane, counsel for the respondents, argued that the matter is not urgent. Mr Mbenyane submitted that the urgency pleaded by the applicant was self-created. Counsel pointed out that the applicant, who was legally represented at all times, ought to have brought the application in a timely manner. According to Mr Mbenyane, on her own version, the applicant became aware of the notice of appeal that triggered the present application on Monday, 20 July 2026, yet delayed for a week before approaching the court. Mr Mbenyane contended that the urgency alleged by the applicant amounts to harassment, a means of frustrating the respondents, and an attempt to use the court as a tool. In his submission, he argued that the urgency is self-created and self-serving.

[14] On the merits of the application, counsel was emphatic that the noting of the appeal suspended the spoliation order issued by the magistrate. Counsel also argued that on 4 June 2026, the respondents removed the movable property ordinarily situated in the house owned by the applicant and the respondents' deceased son. According to counsel, the respondents have a will that gives them the residue of the deceased's estate and authorises them to administer the said property or estate. Counsel urged the court to dismiss the application with costs.

Issues to be decided

[15] From the above discussion, this court is enjoined to determine whether the respondents' notice of appeal suspended the spoliation order granted by the magistrate.

Discussion

[16] The respondent impugned the urgency of this application. In terms Rule 6(12) of the Uniform Rules of Court, an applicant is required to set out the circumstances that justify the hearing of the application on an urgent basis and the basis on which she contends she would not obtain substantial redress at a hearing in due course. Rule 6(12)(b) of the Uniform Rules mandates two requirements of an applicant in an urgent application. *First*, the applicant must explicitly set forth the circumstances she avers render the matter urgent, and, *secondly*, the reasons she claims she would not be afforded substantial redress at a hearing in due course.¹

[17] In this matter, the court granted an order against the respondents. The applicant stated in her affidavit that she has been without a bed, a refrigerator, cooking facilities, and a washing machine since 4 July 2026, after the respondents dispossessed her of these items. As noted by the applicant's counsel, each day the spoliation order remains unenforced, the harm is compounded. The applicant gave the respondents an opportunity to comply voluntarily with the court order by 22 July 2026, before resorting to litigation, but the respondents failed to comply. In my view, the applicant's reconciliatory conduct in giving the respondents time to comply with the order should be encouraged rather than treated as a delay. The respondents' suggestion that the delay was self-created is fundamentally flawed and unsustainable.

[18] Moreover, spoliation applications are, by their very nature, ordinarily treated as urgent, precisely because the remedy loses its purpose if it is not dealt with

¹ *East Rock Trading 7 (Pty) and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) paras 6-7.

promptly. In my view, this matter is urgent and warrants this court's immediate attention.

[19] As to the merits, it is trite that, in terms of the common law rule of practice, the execution of all judgments is suspended upon the noting of an appeal; that is to say, the judgment cannot be carried out, and no effect can be given thereto, whether the judgment be one for money (on which a writ can be issued and levy made) or for any other thing or for any form of relief granted by the Court appealed from. The foundation of the common-law rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable damage from being done to the intending appellant.²

[20] To obtain leave to execute, the party in whose favour the judgment was given must make a special application and satisfy the requirements of s 78 of the Magistrates' Courts Act 32 of 1944 ('the Magistrates' Courts Act') in the Magistrate's Court, and of s 18(1) read with s 18(3) of the Superior Courts Act 10 of 2013 ('the Superior Courts Act') in the High Court.

[21] However, there are exceptions to this rule. In terms of s 18(2) of the Superior Courts Act, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal. In other words, an application for leave to appeal does not suspend the operation of an interlocutory order. Furthermore, in High Court practice, s 16(3) of the Superior Courts Act prohibits appeals against any judgment or order in connection with interim relief in matrimonial matters made under Rule 43 of the Uniform Rules of Court. The question that arises is whether a spoliation order granted by the magistrate falls within this exception. This is the question I turn to consider hereunder.

[22] At the hearing of this matter, Ms Murote, counsel for the applicant, submitted that the spoliation order granted by the magistrate was restorative in nature and was

² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H–545A; *Reid and Another v Godart And Another* 1938 AD 511 at 511.

not suspended by the noting of the application for leave to appeal. Counsel referred the Court to a decision from this division in *Cummings v Lambrick*,³ in which it was held that a spoliation order is inherently restorative and interim in nature and that its purpose is the swift reinstatement of the *status quo ante* and the discouragement of self-help. The court noted that the mere noting of an appeal or the intention to note an appeal does not suspend the operation of a spoliation order. To permit otherwise, the court found, would defeat the very purpose of this remedy.

[23] I agree with the court's views to the extent that an interim spoliation order is not suspended by the subsequent noting of an appeal against it. I must, however, mention that a spoliation order that is final in effect is suspended by the noting of an application for leave to appeal or by the noting of an appeal. This conclusion is fortified by the decision of the Supreme Court of Appeal ('the SCA') in *Gauteng Province Driving School Association v Amaryllis Investments (Pty) Ltd*,⁴ in which the SCA noted that the noting of an appeal in that matter against a spoliation order had the effect of suspending execution of the spoliation order (see *Reid & Another v Godart & Another* 1938 AD 511 at 513).

[24] As I see it, a spoliation application may take one of two forms: it may be final in effect, or interlocutory in effect. The former arises where the application is brought in circumstances where there is no underlying dispute between the parties. This typically occurs where, without any prior history, the spoliator deprives the possessor of his or her possession. In such circumstances, an order directing the restoration of possession before all else is an order with the effect of a final judgment.⁵

[25] Put differently, a spoliation order obtained independently of any underlying action, as in this matter, is final in effect and therefore appealable. An application for leave to appeal, or the noting of an appeal, suspends the operation of that spoliation order. In *Gauteng Province Driving School Association and Others v*

³ [2025] ZAWHC 323 (18 December 2025) para 7.

⁴ [2012] 1 All SA 290 (SCA) para 4.

⁵ *Metchem Steelpoort CC v Eskom Holdings SOC Ltd* 2 219 JDR 1633 (GJ) para 20.

Amaryllis Investments (Pty) Ltd and Others (supra) Ponnann JA, writing for the unanimous Court, stated:

'I pause to record that although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, *it is to that extent a final order and is therefore appealable* (Nienaber v Stuckey 1946 AD 1049 at 1053)'.⁶ (emphasis added)

[26] The second form of a spoliation order, in my view, arises where there is an underlying dispute between the parties, and the order is granted merely as interim, interlocutory, or temporary relief pending the resolution of that dispute. A spoliation order granted in such circumstances is interim in nature. It does not purport to finally determine the merits of the causa between the parties. It is like an interdict which is granted *pendente lite*, which does not have the effect of a final judgment as envisaged in s 83(b) of the Magistrates' Courts Act. Such relief or interdict serves as a step in the proceedings between the parties.

[27] Put plainly, a spoliation order granted pending the determination of the underlying dispute is interlocutory in effect and is ordinarily not appealable. To this end, I share the views expressed by Van der Linde J in *Metchem Steelpoort CC v Eskom Holdings SOC Ltd*,⁷ that where there is in fact an underlying dispute between the parties as to the entitlement to possession of a thing, spoliation relief is by definition only temporary or interim or interlocutory. The learned justice observed that it would be sophistry to suggest that, in such a case, spoliation relief is final, on the basis that at least it decides the issue of entitlement to possession "finally", albeit that actually the court that decides the entitlement to possession down the line will do so finally. In my view, what is critical is the effect of the order on the parties or the issues in the suit.

[28] The principle that a spoliation order may provide interim relief was clearly articulated by the SCA in *Eskom Holdings SOC Ltd v Masinda*,⁸ where the Court noted:

⁶ At para 3.

⁷ 2019 JDR 1633 (GJ) para 26.

⁸ (1225/2018) (2019) ZASCA (18 June 2019).

[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute' as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. *But what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final.* The contrary comment of the full court in *Eskom v Nikelo* is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute." (emphasis added)

[29] The excerpt demonstrates that where there is an underlying dispute between the parties, spoliation relief is merely interim, interlocutory or temporary. This is because the merits of the underlying dispute have yet to be resolved, and spoliation relief, by definition, does not purport to resolve the merits definitively. The transient nature of spoliation relief was alluded to in *Venter and Others v Van Rensburg and Others*,⁹ in these terms:

[33] Practically, as discussed in *Cronshaw & Another v Coin Security Group (Pty) Ltd* [1996] ZASCA 38; 1996 (3) SA 686 (A) 9[1996] 2 All SA 435) at 690DE's case at 1215, an appeal against the grant of a temporary interdict order would often be inconsistent with the very purpose of this remedy which is to protect the right of the complainant party pending an action or application to be brought by him to establish the rights of the respective parties (See also *Davis v Press & Co* [1944 CPD 108] at 119 (Fagan J)). As it is similar with a Spoliation order, basically a speedy remedy, intended to prevent the continuous harm suffered by the Applicant by remedying, at once, the effects of an unlawful action pending the resolution of the merits of their dispute. So the appeal against a spoliation order would defeat the very purpose of the remedy. (emphasis added)

⁹ (2121/2017) [2017] ZAGPPHC 906 (11 April 2017).

[30] Reverting to the facts of the present matter, it is evident that the spoliation order granted by the magistrate is final in effect and therefore appealable. There is no underlying dispute between the parties regarding the applicant's entitlement to possession of the movable assets of which she was despoiled. The applicant approached the court after being dispossessed, and the magistrate restored the *status quo ante* by granting the spoliation order. Once the respondents noted their appeal, the applicant ought, in my view, to have approached the court in terms of s 78 of the Magistrates' Courts Act to bring the suspended order into operation. For completeness, s 78 of the Magistrates' Courts Act provides:

'Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application.'

[31] As foreshadowed above, the order granted by the magistrate court was final in effect and was appealable. As soon as an appeal was noted, the court a quo could, on application, direct that execution shall issue or that there shall be a suspension of execution. Significantly, if neither party to a pending appeal applies for the alternative orders provided for in s 78 and neither of those orders is made, the common law rule that the execution of a judgment is automatically suspended upon the noting of an appeal takes effect, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given to it.

Conclusion

[32] Consequently, I am of the view that the noting of the appeal indeed suspended the magistrate's spoliation order. I am mindful that the purpose of the spoliation remedy is to restore factual possession to a person who has been unlawfully dispossessed of property or subjected to an unlawful interference in rights

that such a person exercises.¹⁰ I am also cognisant that the spoliation remedy enforces the rule-of-law principle in s 1(c) of the Constitution as it serves as a bulwark against self-help.¹¹ However, the magistrate's spoliation order was final in effect and was suspended when the notice of appeal was filed. To execute on the magistrate's order, the applicant had to invoke s 78 of the Magistrates' Courts Act and seek leave from the court a quo.

Costs

[33] The respondents remain in possession of the assets they unlawfully dispossessed the applicant of. The magistrate heard argument from both parties and found that the applicant had been unlawfully deprived of her property. The respondents continue to benefit from their unlawful conduct. Conduct of this nature is fundamentally inconsistent with the principles that undergird our constitutional values. In the circumstances, I am of the view that each party should bear its own costs.

Order

[34] Given all these considerations, the following order is granted:

34.1 The applicant's application is hereby dismissed.

34.2 Each party is ordered to pay its own costs.

LEKHULENI JD
JUDGE OF THE HIGH
COURT

¹⁰ *South Cape Corporation (Pty) Ltd v Engineering Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-546A.

¹¹ *Marima and Another v Makofane and Another* (2025/132162) [2025] ZAGPJHC 1080 (2 October 2025) para 40.

APPEARANCES

For the Applicant: Adv D Murote

Instructed by: Katherine Barnard and Associates

For the Respondent: Adv AA Mbenyane

Instructed by: Lingani and Partners Attorneys Inc