CIV\APN\413\93

IN THE HIGH COURT OF LESOTHO

In the Application of :

MAHOOANA MAHASE	1st Applicant
PHOKA MAHASE	2nd Applicant
MPEOANA KHETHISA	3rd Applicant

v

JAMES MAHASE MAHASE	Respondent

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on the 13th day of December, 1994

The applicants brought an application seeking an order against the respondent to restore to them items listed in the document annexed to their papers marked Annexure "A".

Annexure "A" is a list consisting of items set out from numbers one to seven.

These are : (1) Lounge(new) cream white bed, dressing table, stool, mattress and base
(2) Fridge and Cylinder(48kg) full
(3) Lounge suit, bed Dressing table, stool mattress and base
(4) Hi-Fi set
(5) 37 LP's at M32 = M1,184
(6) 1 Big mat - dark green
(7) Kitchen Unit

The total value of these above items is given as M14 484-00.

The 1st Applicant's affidavit carries the thrust of the three applicants' version in the outline of events constituting these applicants' case.

What seems to be common cause is the fact -

(1) that the property set out in Annexure "A" belonged to the deceased;

(2) that the property in question was at Maputsoe in Leribe where the deceased Bernard Lesole Mahase was residing before his death;

(3) that the three applicants didn't live at Maputsoe but that the first two applicants lived at Ha Hoohlo in Maseru. The 3rd applicant does not say where she lives;

(4) that she did not live at Maputsoe at the deceased's place;

(5) that the three applicants are majors.

According to 1st applicant supported by the two other applicants they are all the children of the deceased.

The 1st applicant avers that the deceased died on 1st February, 1993 and was buried at Seforong, Quthing on 13th February, 1993. Prior to his death the deceased was employed by Wanda Furnishers Maputsoe.

He further avers that the deceased was separated from their mother 'Mampeoane Mahase. He further states that the applicants nonetheless stayed with their mother during school terms and with their father during school holidays. This averment does not say when this took place though.

Although the respondent has not bothered to say anything in relation to contents of the 1st applicant's affidavit in paragraph 5 he however has strongly denied that the applicants are the legitimate children of his late son Bernard Lesole Mahase. He states that his son was never married to the applicants' mother and challenges them to furnish proof of such marriage. He reiterates that his son was neither by Civil nor Sesotho law and custom married to the applicants' mother.

He buttresses his averments by pointing out that the applicants by virtue of their illegitimacy have never worn a mourning cloth in accordance with Sesotho Law and Custom in respect of any death of the relatives in the Mahase family nor have they in any way participated in relation to any death of a member of that family.

In response to the respondent's charges of the applicants' illegitimacy the 1st applicant supported by the other two avers that they are legitimate children of the deceased and their mother who was married to the deceased by customary law. The 1st

applicant is quick to indicate that the question of the applicants' legitimacy is not an issue in this proceeding "since it is a case of spoliation as can be inferred from the Notice of Motion". The 1st applicant buttresses the question of the applicants' legitimacy by stating that he has been advised that the presumption of marriage between the applicants' parents can be made on the basis that the applicants have all along been using their late father's family name.

The applicants associating themselves with the 1st applicant's averments seek to show the Court that the respondent took the items appearing in Annexure "A" from the 1st applicant's possession and loaded them in a truck belonging to Wanda Furnishers.

The 1st applicant's averment as to when the alleged property was taken by the respondent is somewhat confused in relation to the date of the deceased's burial. In paragraph 5 of the Founding Affidavit he says the deceased was buried at Seforong on 13th February 1993, but in paragraph 7 he says "on 12th February 1993 (the) respondent after deceased's funeral came to Maputsoe and.....took the items listed in Annexure "A"......".

From the reading immediately above it would seem the property was taken after the deceased's funeral reckoned by the 1st applicant to have been either some day preceding 12th February 1993 or in fact on that day. But his previous statement indicates that

the funeral was on 13th February, 1993. The respondent agrees with this date as the date of the funeral. Yet consistently with the allegation by the 1st applicant that the property was taken after the funeral whatever date it was, the 3rd applicant on page 10 paragraph 3(c) avers that

> "Immediately after the Deceased's funeral first and second applicants returned to the house occupied by deceased at Maputsoe, and I was there when respondent forcefully loaded the furniture items in a Wanda Furnishers truck".

So emphatic despite the above confusion on which was the actual date of the funeral are the applicants that the 2nd applicant on page 8 paragraph 4.1 avers that

> "I wish to emphasise the fact that the respondent after my deceased (father's) funeral.....followed I(sic) and 1st applicant to Maputsoe and that he did not consult us in any way before loading the furniture which was in our possession".

So it would seem according to the applicants the furniture was taken and loaded after the funeral on the one hand, while on the other hand according to the respondent it was taken on the day when the body was being conveyed from Maputsoe to Seforong i.e. 12th February, 1993 which is the day preceding the day of the funeral i.e. 13th February, 1993.

The inelegance in the use of the English Language indulged in on behalf of the applicants has a double tragedy; first lack of clarity, next the consequent difficulty in discerning the more

important aspects of the case such as points of real dispute.

For instance one is not clear on when exactly is the time sought to be conveyed as the time when any of the applicants mentioned took possession of the deceased's property from the reading of paragraph 6.3 at page 5 saying :

> "Immediately prior to the death of Deceased after he was taken ill to Ficksburg Hospital and immediately after deceased's death I and 2nd Applicant was (sic) in possession of the mentioned items listed in Annexure 'A'".

Surely the phrases immediately prior to and immediately after the deceased's death cannot mean one and the same thing. Yet possession if at all any of deceased's property was taken, could have been taken from either of those two points onwards and not both. Surely if I take possession of deceased's chair before he dies I don't take possession of it after he died unless the prior possession had been interrupted. Likewise the reference to the phrase was taken ill when used in relation to a hospital betrays laziness in the choice of words which could bring clear meaning to surface because being taken ill is a phrase which is in itself complete and does not imply conveyance to any place as such; but lo and behold! In this paragraph it is loaded with an unenviable quality to serve the purpose of conveying two different meanings at once and in the process help obscure the meaning more and more. I may just point out that time and again Courts of law have drawn

a distinction between two forms of evidence, namely oral evidence and evidence on affidavits. The Courts assign greater responsibility to attorneys who help prepare evidence in the form of affidavits. It is thus intolerable to put the Court under the necessity to paraphrase a sentence which could have been quite clear if those who drafted affidavits devoted enough time to achieve the desired end.

MRS KOTELO for the applicants submitted that the applicants seek restoration of goods listed in Annexure "A" appearing at page 12 of the paginated record.

She emphasised that the instant proceedings are spoliation proceedings. She relied on background facts to show how the applicants came into possession of goods of which it is complained that they were despoiled.

She stated that paragraph 5 shows that the 1st applicant came into possession of the goods on the death of the deceased. But my reading of paragraph 5 merely indicates the date when, the deceased died, the place and date where and when he was buried. It also indicates where he was working and residing prior to his death. Apart from that it refers to the question of the deceased's separation from the applicants' mother 'Mampeoane.

Quite truly paragraph 5 shows that apart from the white

bedroom suite allegedly bought as a wedding present in consideration of an impending marriage between the 3rd applicant and one Mosito Khethisa the items reflected in Annexure "A" belonged to the deceased. The wedding is said to have taken place on 8th May, 1993 when the deceased had already died and was thus unable to hand it over to the bride.

She pointed out further that paragraph 6.3 shows that the 1st and 2nd applicants were in possession when the deceased was taken ill and moved to Ficksburg Hospital.

I have since discovered on perusal of the 3rd applicant's affidavit that what the 1st applicant doesn't state with any amount of essential particularity in paragraph 6.3, is given some semblance of meaning at page 10 paragraph 4 as follows :

> "First and Second Applicant (sic) remained in possession of the goods listed in Annexure (sic) when my deceased father was taken ill to Ficksburg.....".

In this connection she dispels any need to resort to inferences concerning the two other applicants' evidence on the issue for she provides direct evidence.

MRS KOTELO drew the Court's attention to the fact that paragraph 7.1 shows that the respondent took items in Annexture "A" from Maputsoe to Quthing; and that the record reveals that the 1st applicant strongly objected to that deed. The Learned Counsel also

pointed out that the respondent refused to return the goods even when asked so to do by the first applicant.

She emphasised that the respondent in his opposing affidavit wants the Court to believe that there hasn't been any spoliation. She stressed that the applicants were in possession but were deprived of their possession by the respondent. She buttressed her contention by reference to page 16 paragraph 6.3 where the respondent is said to have averred

> "I would not dispute that applicants used to visit my late son as their biological father...."

and was quick to make the best of the fact that while the corresponding paragraph 6.3 at page 5 makes reference to the fact that applicants 1 and 2 were in possession of the deceased's property, the respondent contented himself with saying

> "they only knew him to be their biological father about four years before his demise".

Thus has the respondent failed to deny that they were in possession.

MRS KOTELO accordingly submitted that what the Court is seized of in this proceeding is spoliation and contended that illegitimacy is not relevant at all in this instant matter.

She stressed that even though the respondent tries to deny that the applicants were in possession, the allegation he makes at 7.3 on page 16 is a bare denial. In fact the respondent's attitude comes clearly to surface as being that even if the applicants were in possession, which he is quick to indicate that he denies, "they had no right whatsoever to such property".

Applicants' Counsel invited the Court to the view that the reason for the respondent's attitude is not hard to find. It is to be gathered in his own evidence that the applicants are illegitimate. She asked the Court to regard it as a revealing admission of the applicants' possession on the respondent's part that at page 17 he actually said "I needed nobody's consent to take my son's property". This in my view tends to render nugatory the respondent's counsel's submission that it was Wanda Furnishers employees and not the respondent who took the goods.

Another feature advanced on behalf of applicants as an admission of the applicants' possession is to be found in the respondent's explanation at page 17 paragraph 8.2 that he refused to hand over the bed room suit because he wanted to consult with his family on what its fate should be according to Sesotho law and custom.

MRS KOTELO reiterated that it seemed to be the respondent's attitude that he should take this property without regard to the

fact that it was in the applicants' possession because, as his son was unmarried, the applicants were illegitimate hence cannot be heard to seek protection against clear acts of spoliation by the respondent.

The Court was referred to Nienaber vs Stuckey 1946 (AD) 1049 at 1055 that

> "As it is clear that a person who has no rights at all to the property removed from his possession, may still be entitled to the relief, his not having a jus retentionis has no relation to his claim for the relief.....

In Nino Bonino vs de Lange (1906 TS 120) Innes CJ says (at p.122) 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'."

The Court was referred to page 1053 of the above authority where it is stated that

> "Where the applicant asks for a spoliation order he must make out not only a prima facie case, but he must prove the facts necessary to justify a final order - that is, that the things alleged to have been spoliated were in his possession and that they were removed from his possession forcibly or wrongfully or against his consent".

The learned Greenberg JA went on

> "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 the same amount of proof

> is required as for the granting of a final interdict, and not of a temporary interdict; where the proceedings are on affidavit.....".

In answer to the submissions made on behalf of the applicants MR PHEKO for the respondent neatly after setting what is common cause in this proceeding, stated that what remains for the Court to determine is whether these proceedings are spoliation proceedings or vindicatory proceedings based on the doctrine of re vindicata. In this regard the Court feels greatly obliged to learned counsel for giving an important warning signal at the very outset that the Court should be wary of the fact that it might have been induced into labouring under the false impression that it is dealing here with spoliation while in fact it is dealing with re-vindicata masquarading as or indeed clothed in glad rags of spoliation process. May I give an assurance that I am alive to such possibility and its misleading consequences.

Indeed the Court observed that at page 5 paragraph 6.3 the only people reflected as having been in possession are the 1st and 2nd applicants. Thus even on the applicants' own affidavits the 3rd applicant couldn't have been in possession. In any case she failed to take the Court into her confidence in that she does not say where she was staying at the time of the alleged spoliation. Thus because even in the applicants' own affidavits the 3rd respondent couldn't have been in possession, and even assuming this, in her case, is a spoliation proceeding she couldn't be

restored into possession of items she never possessed.

Learned Counsel guided the Court through numerous assertions appearing in the Founding Affidavit tending to suggest and show that what is in issue is not possession but rather right of ownership.

Indeed the 1st applicant at page 5 paragraph 8 uses the phrase that "Respondent has no right to our deceased father's property...".

Learned Counsel used this in illustration of the fact that what the applicants assert is that their grandfather, the respondent, has no right but they do. Thus MR PHEKO submitted that what is in point is that the applicants were not talking of possessory rights but ownership rights.

He referred to page 5 paragraph 6.3 and stated that what has been purveyed before the Court regarding the first two applicants is that they didn't live at Maputsoe and none of the applicants lived with the deceased in any case yet, so he charged, they make a bold statement that "we are in possession of the deceased's property". Learned Counsel pointed out that they didn't say how they got into possession nor that they went to Maputsoe and obtained the key to the house. Thus he submitted that it appears they maintain that by virtue of being the deceased's heirs they

were entitled to possession of the deceased's property. He submitted that it is not clear on papers before Court how they got into possession.

While this may be so I have indicated earlier that the 3rd applicant throws some light on the issue. Moreover in Bennet Pringle(Pty)Ltd vs Adelaide Municipality 1977(1) SA 230 D it is succinctly stated that

> "The question of 'possession' is one of degree. Where what is encompassed by possession requires little in the way of positive physical activity by the possessor, the person who gave him such right and who now invades it cannot justify his conduct on the ground that there was very little positive physical activity by the possessor".

My view is that if the principle espoused herein avails with some force against the person who gave the right to possess it would naturally avail even with greater vigour against a third party who interferes with that right.

There is even greater vindication of the principle referred to above in the summary of Addleson, J that

> "The inquiry must be whether the conduct of the possessor - minimal as it might be - shows that he did exercise rights or carry out activities consistent with the transfer to him of control of the premises; and whether he did so with the intention of securing some benefit to himself".

C above shows that the spoliation order will always avail to prevent persons taking the law into their own hands, such an order

is available at least to any person who (a).... (b).... (c)"is deprived of such use and benefit by a third person".

It was proposed on behalf of the respondent that even if it could be assumed that the applicants were in possession of the property listed in Annexure "A" before or after the deceased's death the respondent denies such possession. In this regard he is supported by three other deponents i.e. the respondent's wife at page 20, the respondent's younger brother at page 22 and the deceased's mother at page 24.

The respondent's counsel made the most of absence in the letter from the applicant's counsel of any reference to property save only insurance policy. This letter was written on 2nd March, 1993 while the deceased had been buried on 13th February, 1993.

Having indicated that the Respondent denies that the first two applicants were ever in possession, learned counsel for the respondent was quick to indicate that there is dispute of fact, and to accordingly rely on the principle enunciated in Bernard Moselane & Ors vs The Manager Bonhomme Commercial High School C of A (CIV) 33 of 1992 (unreported) at p.3 that

> "The application being one for final relief a Court is entitled to assume the correctness of averments by an applicant which are admitted or not challenged by respondent and correctness of the version of the respondent".

See also page 8 regarding the effect had by the dispute of fact

namely that

> "Inasmuch as the appellants were seeking final relief, the version deposed to by the respondents has to be accepted".

Thus it was submitted that as a matter of law the respondent's version should be accepted for there is a dispute on question of possession and the applicants are seeking a final relief.

I would readily agree with this submission if it did not come from the respondent's own affidavit that he required no consent of anybody when he came to take his son's property. This runs counter to the principle laid down in a case referred to earlier that to succeed in obtaining a spoliation order the applicant should show that the property was taken without his consent. The 1st applicant repeatedly indicated this in his founding affidavit. The 3rd applicant thoroughly supplements what scantilly was referred to as possession by the 1st applicant and further indicates that she saw when the 1st and 2nd applicants were despoiled.

I have already dealt with the question relating to the legitimate observation arising from contents of the founding affidavit paragraph 6.3. I can only express my agreement as indeed I even questioned MRS KOTELO during arguments and brought to her attention, not in so many words, that it is not shown exactly when the applicants came into possession. Nor, as MR PHEKO indicated, when the 1st and 2nd applicants assumed joint possession.

Thus the learned Counsel relying on C of A (CIV) No 27 of 1988 Johnny Wa Ka Maseko vs Attorney General and An. (unreported) at 32-33 sought to highlight the perennial tragedies which beset the path where the Court is presented with a conclusion without giving facts to assist the Court how the conclusion was reached.

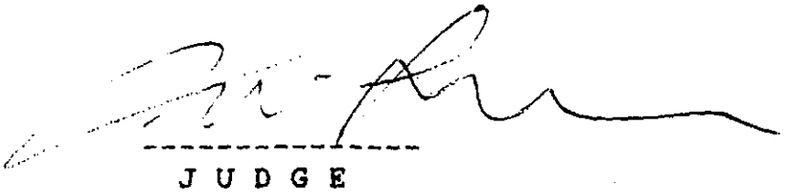
With greatest respect to the above authority, I wish to say that mandamant van spolie is such as strong remedy that the status quo ante has to be restored where it is found that a possessor is found to have been despoiled, before considering proprietory rights or any ancillary rights which may emanate from a proceeding. Once it is shown and accepted as a fact that spoliation exists, all else takes the back seat and mandamant van spolie comes into operation. It availa even between spouses as was the case in Oglodzinski vs Oglodzinski 1976(4) SA 273. See also Jivan vs National Housing Commission 1977(3) SA 890.

Bennet Pringle (supra) indicates that the degree of possession required to necessitate invocation of a spoliation order is minimal. Facts reveal more than minimal possession to have been present. Positive physical activity is borne out by the fact that the 3rd applicant stated that the other applicants remained in the house when the latter went for hospitalisation in Ficksburg where he died after some days. Thus the requirement for the remedy in question was satisfied.

With regard to the 3rd applicant MRS KOTELO hesitated to say if indeed spoliation was proved in her case. She contented herself with saying spoliation was not direct in her case.

I dismiss the 3rd applicant's claim to spoliation, but uphold that of the 1st and 2nd applicants.

A suitable order for costs will be that the applicants i.e. 1st and 2nd applicants taken as a composite whole are entitled to 60% of their costs (which take account of the respondent's substantial success) less 3% representing expression of the Court's displeasure at the slovenly manner that characterises the applicants' papers. The respondent will otherwise bear his own costs.



J U D G E
13th December, 1994

For Applicants: Mrs Kotelo
For Respondent : Mr. Pheko