C OF A (CIV) NO.6/05

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:-

MATHABELO MBANGAMTHI APPELLANT

and

PULENG SESING-MBANGAMTHI RESPONDENT

CORAM:

STEYN, P
MELUNSKY, JA
LEHOHLA, CJ

SUMMARY

*Spoliation order - Rule nisi issued but matter argued 9 months later – Courts should refuse to grant postponements, without good cause. Chief Justice's practice directive adopted by the Court of Appeal. Rule neither confirmed nor discharged on return day by court **a quo** – rule cannot be left in air. In spoliation proceedings generally not competent for respondent to challenge applicant's legal right to possession by way of defence or counter-application. Landlord entitled to apply for spoliation order when tenant in possession of property. Spoliation order granted where respondent interferes with use of part of property. Not competent for court **a quo** to grant different relief from that claimed. Rule confirmed. Points of law raised for first time on appeal without notice to the Court or the other side deprecated – ambushing of opponent unacceptable practice and an abuse of process.*

JUDGMENT

10 and 20 October 2005

MELUNSKY, JA

[1] This is an appeal against an order made by **Mofolo J** in the High Court. Before dealing with the issues it is regrettably necessary to draw attention to certain unsatisfactory features in the record. The first includes the duplication of the appellant's counter-application, including all annexures to the founding affidavit. The second relates to the failure by both parties to furnish English translations of many of the documents, notwithstanding averments in the affidavits that this had been done. There was also the omission to include a copy of the notice of appeal in at least one of the appeal records despite the assurance of the appellant's attorney that the record "comprises seven identical copies". A further unfortunate factor in this matter is the absence of a judgment by the learned judge *a quo*. This is a matter of considerable concern, particularly because the order made was not sought by either party and is somewhat ambiguous. It would have been helpful to us had we been furnished with the reasons which motivated the Court in making the order which is appealed against. Finally it is to be observed that proceedings in the High Court commenced by means of a *rule nisi* issued on 17 March and returnable on 29 March 2004. Although the matter was *prima facie* one of some urgency, the rule was thereafter extended and the matter postponed on at least ten occasions, frequently without any reasons appearing on the record therefore. It was only on 29 December that the matter was argued before the court *a quo*. There appears to be an increasing tendency for postponements to be applied for and to be granted without good cause. The learned Chief Justice, whose

assistance in this appeal we greatly appreciate, joins us in deploring this practice. He specially draws attention to his Practice Directive, no.1 of 2005 in this regard.

[2] The litigation relates to the possession and occupational rights of the parties to Plot No.13284-279 ("the property") situated at Motimposo in the Maseru urban area. The property was leased to Ashton Mbangamthi ("Ashton") in terms of section 49 of the Land Act 1979 for a period of sixty years commencing on 1 March 1992. Ashton, who has since died, was married by customary law to the appellant. In terms of a handwritten document dated 25 August 1992, Ashton granted permission to Thabelo Edwin Mbangamthi ("Thabelo"), to whom he referred as his son, to use the property "for any length of time he wishes". On 7 November 1995, and after Ashton's death, the Land Allocation Committee, apparently acting in terms of the Land Regulations 1980, ruled that the property

> "be passed to Thabelo Mbangamthi".

[3] The respondent married Thabelo on 7 August 1996 and after his death was appointed as executor dative in his estate. According to the respondent she has, since her appointment as executor in January 2003, enjoyed "the use and rights" of the property without disturbance or interference from the appellant or two other persons who were cited as the second and third respondents in the proceedings in the court *a quo*.

[4] The litigation commenced by means of an urgent application brought *ex parte* by the respondent in the High Court. She raised two separate issues. The first was that the appellant and the second respondent had locked the premises on the property on 5 March 2004, thus denying her the right to use, occupy and enjoy the property. The second was that the appellant and the second and third respondents had applied for transfer of the property into the appellant's name and the respondent was anxious to prevent this from taking place. She sought appropriate relief in respect of both of these issues. The matter came before **Peete J** who, on 17 March 2004 issued a rule nisi calling upon the respondents in the court *a quo* to show cause on 29 March why they

> "shall not be directed to desist from interfering with the peaceful use of the property on lease No.13284 279 situated at Motimposo, which is registered in applicant's late husband's names Thabelo Mbangamthi".

The rule did not operate as an interim interdict. It is important to note that the order granted no more than spoliatory relief to the respondent and that no order was granted in respect of the second issue.

[5] In her response, the appellant made certain qualified admissions and some denials relating to the alleged spoliation. The nature and extent of her opposition to the rule with be dealt with later. The appellant also maintained that the transfer of the property into Thabelo's name was fraudulent and that she had applied for it to be set aside.

Furthermore, and after the filing of the respondent's replying affidavits, she launched a counter-application in which she sought the following relief:

> "(1) Leave to consolidate this application together with the main application …..
>
> (2) Cancelling and expunging the endorsement on lease no.13284-279 in favour of late Thabelo Mbangamthi by [the Commissioner of Lands]
>
> (3) Allowing and facilitating the succession procedures of Lease no.13284 on the death of the original owner, late Ashton Mbangamthi.
>
> (4) Costs of suit in the event of opposition.
>
> (5) Further and alternative relief."

[6] The counter-application was opposed but **Mofolo J** granted the following order on 29 December:

> "1. For the natural time of life of [Appellant] the property remains hers and be enjoyed by her in the same way her late husband enjoyed its use.

2. That the status quo be kept in tact.

3. With regard to (1) above, for the purpose of maintaining tranquility and good family relationship the [Appellant] is to from time to time to consult with the [Respondent] in the administration of the estate. Under no circumstances the [Appellant] to in any way lease or part with the property of her late husband, save enjoying its fruits.

4. This being a family matter, no order as to costs."

The appellant appealed against the order on the grounds that the learned judge *a quo* restricted her right to use the property and imposed a duty on her to consult with the respondent "in the administration of the estate". She sought an order that the appeal be upheld. Counsel for the respondent conceded in his heads of argument that the appeal should be upheld but contended that the matter be remitted to be heard by another judge. There was no cross-appeal.

[7] This is an appropriate stage to refer to certain aspects of the order. In our view there are four respects in which the order was incorrect. The first is that the learned judge *a quo* did not deal with the order issued by **Peete J**. When a court is called upon to consider finally a matter in which a rule had previously been issued, it cannot leave the rule in the air. The rule should either be confirmed or discharged and the omission of the learned judge to do either resulted in no order being

made in respect of the alleged spoliation which, in fact, should have been the only matter for the Court's consideration. Counsel for the appellant submitted, however, that the terms of the order were inconsistent with the confirmation of the rule and that therefore it had been discharged, as it were, by implication. This submission is clearly untenable. Quite apart from the fact that an order of court should be explicit, it is not possible to divine an intention on the part of the judge *a quo* to make any order in respect of the spoliation aspect.

[8] The second problem with the order concerns the learned judge's failure to apply the basic principles of spoliatory relief. It is well-established that all that the person despoiled has to prove is that he had possession of the kind which warrants protection and that he was unlawfully ousted. Whether his possession was lawful or illegal is irrelevant (see **Yeko v Qana** 1973 (4) 735 (A) at 739 D-G). It is therefore not open to a respondent to contend, whether by way of defence or counterclaim, that an applicant has no right to possession of the property. The reason for this is due to the fundamental principles of spoliatory relief, that no-one is allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should not be tolerated. The rights of the party despoiled are encapsulated in the maxim *spoliatus ante omnia restituendus est.* The effect is that before any dispute concerning the legality of the right to the property is resolved, or even considered, possession must be restored to the *spoliatus*. And it is by virtue of the very nature of a spoliation application, that a counter-application should not be countenanced (see **Willowvale Estates CC and Another v**

Bryanmore Estates Ltd 1990 (3) SA 954 (W) 961 H; **Minister of Agriculture and Agricultural Development and Others v Segopolo and Others** 1992 (3) SA 976 (T) at 970 F). What the learned judge appears to have done is to have granted some qualified relief to the appellant in terms of the counter-application and to have overlooked the policy of the law relating to spoliatory relief.

[9] The third aspect for concern is the fact that the learned judge took it upon himself to make an order which was not sought in the notice of motion or covered by the evidence or, so we were informed, canvassed in argument at the hearing. There is no doubt that this was unfair both procedurally and materially (**Vice Chancellor of the National University of Lesotho and Another v Putsoa,** C of A (Civ) No.28/2002, paras [9], [10] and [11]). This indeed is why both counsel were agreed that the appeal should be upheld. Nor is it permissible in this matter to rely upon the catch-all prayer for further and alternative relief, as here the relief actually granted was substantially different from that sought (see **The Liquidator Lesotho Bank v Mahlomola Khabo**, C of A (Civ) No.22/03).

[10] Finally it may be noted that the order is ambiguous to the extent that it is unclear what is meant by paragraph 2 thereof. The order is also uncertain insofar as the duties imposed on the appellant in paragraph 3 are concerned. But as neither party supported there paragraphs it is not necessary to elaborate any further thereon and I turn to consider the remaining issues in this appeal.

[11] For us to have simply allowed the appeal, as suggested by counsel, would not have resolved the issue of the spoliation: we would have been obliged to refer the matter back to the High Court for a consideration of the rule. Therefore, and in order to bring the matter to finality without further costs being incurred, counsel were invited to consider whether they would be agreeable to argue the question of spoliation before us. They are to be commended for consenting to this procedure and the appeal stood down to enable them to prepare argument on this issue only.

[12] On the appellant's behalf it was submitted that the question of spoliation did not arise. The argument was based on the premise that the rule had lapsed, as there was nothing to indicate that it had either been confirmed, discharged or extended on 29 March. Without deciding whether a rule may lapse, which is a proposition of doubtful validity, it is apparent from the Court file that the rule was in fact extended on 29 March and from time to time thereafter. I will assume that the appellant's counsel was unaware of the extensions of the rule as his firm was appointed to represent the appellant at a late stage in the proceedings. In all events the argument advanced in this respect has no merit.

[13] The way is now open to consider the merits of the spoliation application. The main structure on the property was a building used partly as a workshop and partly as the appellant's residence. On a proper reading of the affidavits it seems to be clear that the appellant locked the workshop section, thereby excluding the respondent from

that part of the building. According to the respondent. This occurred on 5 March 2004. In response to this allegation the appellant, save for making a general denial of the respondent's averments, does not deal with what happened on 5 March. She says:

> "Applicant (i.e. respondent on appeal) had control only over portion of the workshop. However she did not have possession of the said premises as she had hired them out to a male person who was unknown to me. In January 2004 the applicant's tenant was arrested and spent time in the Maseru Central after he was charged with theft. During his absence I locked up the place as I was visiting the second respondent at Vereeniging in the Republic of South Africa. Thus I have not unlawfully dispossessed applicant as she was not in possession."

In reply the respondent avers that the person who was arrested in January 2004 was named Moeketsi Malete; that he was released from prison during the same month; that he was not the respondent's tenant but her partner; that the respondent was locked out on 5th March and not during January; and that she was dispossessed of her right of access, entry and peaceful enjoyment of the property.

[14] On those allegation it was submitted on the appellant's behalf that there was a dispute of fact which could not be resolved on the affidavits. In my view, however, the only possible dispute is whether Malete was a tenant or a partner of the respondent. The appellant does

not say when Malete was released from prison and she does not refer at all to the events of 5 March. I have no difficulty in concluding, therefore, that the appellant locked up the workshop on 5 March at the time when Malete was no longer under arrest. On the evidence before me the appellant's conduct was unlawful.

[15] It was also argued by the appellant's counsel that the respondent, being the lessor of the premises was not in possession at the time as she had given the use and occupation to her tenant. The appellant's contention that Malete was a tenant is open to serious doubt. She does not disclose how she acquired information about the legal relationship between the respondent and Malete or on what she based her conclusion. There is more justification for relying on the respondent's version as she had direct knowledge of her contractual dealings with Malete. However that may be, I am not aware of any authority which precludes a landlord from instituting spoliation proceedings in respect of leased premises even if he is not in physical occupation thereof. In my view, and to use the expression employed in **Yeko v Qana** (supra), a landlord has "possession of the kind that warrants protection." He may not have possession in the juridical sense but he holds the property with the intention of securing a benefit for himself, which is sufficient to enable him to claim spoliatory relief in respect of the property. **Addleson J** explained the position as follows in **Bennett Pringle (Pty) Ltd v Adelaide Municipality** 1977 (1) SA 230 (E) at 233 G – in fin:

> "In terms of all the authorities cited, the "possession", in order

> to be protected by a spoliatory remedy, must still consist of the *animus* – the "intention of securing some benefit to" the possessor; and of *detentio*, namely the "holding" itself. From a consideration of the cases referred to above, it seems to me to be clear that both these elements, and especially the *detentio*, will be held to exist despite the fact that the claimant may not possess the whole property or may not possess it continuously. If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is (a) making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure that benefit to himself; and (c) is deprived of such use and benefit by a third person. Such a definition may obviously be incomplete but it seems to me to comprise the essentials derived from the authorities referred to, which are necessary to a decision in this case and which were relied on by *Mr Howie*, for the applicant."

[16] On the application of the aforesaid principles there seems to be no reason why a lessor should not be regarded as a possessor for the purposes of enabling him to bring a mandament van spolie if access to the leased property is interfered with. It should be noted, moreover, that a landlord retains a considerable degree of control and various rights in respect of the leased premises, including the right of entry under certain circumstances. For these reasons the respondent was entitled to bring the application and the submissions put forward by

the appellant's counsel cannot be upheld.

[17] There was also a submission that as the respondent was not in possession of the whole property, the rule *nisi* would have to be discharged. The answer to this argument is simply that the respondent did not allege that the appellant had interfered with her possession of the entire property. More significantly the rule does not refer to the respondent's use or possession of the whole property. It protects her peaceful use of the property to the extent that she is in possession of any part.

[18] It follows that the rule should be confirmed but only insofar as the appellant is concerned. The other respondents in the court *a quo* are not before us and we cannot make any order which may affect them adversely. Consequently the operation of the rule against them should be discharged.

[19] Although the respondent succeeds in this court and in the court *a quo*, this is not a case in which an award of costs should be made in her favour in either Court. The parties were agreed that there should be no costs order in the appeal. As there was no appeal by the respondent against the order made by **Mofolo J**. she is not entitled to costs in the High Court.

[20] Finally, and in order to prevent any confusion, it is necessary for us to set aside the order of the Court *a quo* and to dismiss the counter-

application. This should not prevent the appellant from instituting proceedings *de novo* if she is so advised. I draw attention to the apparent factual disputes in the affidavits which *prima facie* will require oral evidence for resolution.

[21] The following order is made:

1. The order of **Mofolo J** is set aside and is replaced with the following:

"(a) The rule *nisi* granted by **Peete J** on 17 March 2004 is hereby confirmed insofar as it relates to the first respondent;

(b) The rule is discharged against the second and third respondents;

(c) The first respondent is directed to desist from interfering with the applicant's peaceful use of the property referred to in lease no 13284 279 situated at Motimposo in the Maseru urban area;

(d) The counter-application is dismissed;

(e) No order is made in respect of the costs of the application or counter-application."

2. No order is made in respect of the costs of appeal.

[22] I should add that I have read the judgment of the President of the Court of Appeal and that I also agree with it.

_____

L.S. MELUNSKY, JA

STEYN, P.

I agree with the reasons for judgment and the orders granted by my brother Melunsky and concurred in by the learned Chief Justice. I wish however to add a few comments of my own concerning two procedural matters as well as with the implications flowing from them. In the first place, as is reflected in the main judgment, the Rule nisi which operated as a temporary interdict was either extended or the matter postponed on no less than 15 occasions and the Rule which was granted as a matter of urgency, remained operative for 9 months. The practice of granting postponements without good cause shown by way of evidence under oath, either *viva voce* or on affidavit is, in terms of the directive of the Chief Justice no longer acceptable. Whilst this is only now the operative rule of practice, the manner in which the various legal practitioners in this matter served their clients' interests is manifestly unacceptable. It is deplorable that lawyers who are paid for their services should have allowed this allegedly urgent matter to be repeatedly postponed without giving reasons on all but two occasions for the delay in bringing the matter to finality. Secondly, - as recorded in the principal judgment - we enquired from Counsel whether they

would be agreeable to argue the issue of spoliation before us so that finality could be achieved and that they agreed to do so. It was therefore a surprise when after an adjournment for Counsel to prepare themselves, Mr. Mosae sought to argue what he called "points in limine". This was clearly not in accordance with the agreement upon which we proceeded to hear the appeal.

Thirdly, neither of the two issues raised had been adverted to in the court below, nor had they been raised in the papers during the 9 months period whilst the matter had served before the High Court. Counsel submitted that he was entitled to do so "because a point of law could be raised at any time, even for the first time on appeal". There are circumstances in which such an indulgence will be granted, however, only in circumstances where it would be fair and proper to do so. See Malebo v Attorney-General – C of A (CIV) No. 5 of 2003 (unreported). Moreover, it is not only prejudice to the other side that has to be considered. A Court of Appeal hears matters after it has had the benefit of heads of argument and has had the opportunity to have regard to precedents which could guide its decisions. Full and helpful arguments and fair adjudication can be severely hampered – indeed negated - when only ill-prepared and poorly considered arguments have been submitted. This would almost always be the case if the points of law are raised for the first time at the appellate hearing and without notice to the other side or to the Court. See The Teaching Service Commission and Others v St. Patrick's High School and Another – C of A (CIV) No. 26 of 2004 (unreported). Indeed in that matter the Court held that to seek to raise new points on appeal was "both irregular and without merit". The same applies to the arguments sought to be advanced without notice to the respondent or to the Court in this appeal. It amounted to an attempt to

"ambush" the other side and the Court will, as master of its processes not tolerate such an abuse. See in this regard also the decision in T.A.M. Industries (Pty) Ltd v ALFA Plant Hire (Pty) Ltd. C of A (CIV) No. 19/20004. We accordingly ruled that Mr. Mosae could not raise his points in limine on appeal for the first time without any notice to the respondent or to us and that he would have to confine himself – as indeed he had agreed - to debate the spoliation issue. I have added these comments because this Court has for many years and on many occasions urged practitioners to observe its rules and to abide by rules of practice laid down by our judgments and those of the High Court. The conduct of the counsel for the appellant is but one further indication of the failure of a practitioner to abide by the rules of good and acceptable practice. I would add one of these is to curb the abuse of the recourse to postponements and to record that this Court has also adopted the Chief Justice's directive of June 2005 in this regard. The Registrar has been directed to ensure that it is communicated to all judicial officers, the Law Society and all practitioners.

_____

J.H. STEYN
PRESIDENT OF THE COURT OF APPEAL

I agree both with the principal judgment as well as with the judgment of the President of the Court of Appeal.

_____

M.L. LEHOHLA,
CHIEF JUSTICE

For Appellant : **Mr M. Mosae**

For Respondent : **Mr T. Khauoe**