IN THE COURT OF APPEAL OF LESOTHO

Held at Maseru

C of A (CIV) 72/2018

CIV/APN/475/2017

In the matter between:

MAHLALELE KHABO **1ST APPELLANT**

HLALELE KHABO **2ND APPELLANT**

and

'MATAU KHABO **1ST RESPONDENT**

MAIPATO KHABO **2ND RESPONDENT**

CORAM : DAMASEB AJA.

MUSONDA AJA

CHINHENGO A.J.A.

HEARD : 22 OCTOBER 2019

DELIVERED: 1 NOVEMBER 2019

SUMMARY

First appellant alleging she was married customarily to deceased and that after he was buried respondents and extended family members forcibly removed her from the erstwhile matrimonial home;

Appellants filing for spoliation order – Respondents, mother and sister of deceased, denying 1st appellant was married and averring she left the so-called matrimonial home some four years before deceased's death;

Judge determining as fact that dispute of fact arises on affidavits as to whether or not 1st appellant was in possession at material time and calling for oral evidence on that issue but restricting witnesses to 1st appellant and 1st respondent only; Judge applying Plascon-Evans rule and dismissing application;

Law relating to spoliation and disputes of fact discussed – approach of judge to matter confirmed and appeal dismissed with costs

JUDGMENT

CHINHENGO AJA:-

Introduction

[1] The appellants herein are aggrieved by the decision of the High Court dismissing their application for a spoliation order. They and the respondents are related although the extent of that relationship is to some extent disputed, especially bwtween the 1st appellant and the 1st and 2nd respondents.

[2] At the center of this appeal is the right to possession of assets in the estate of the late Francis Joseph Khabo ("Francis"). Francis was gunned down by an unknown assassin outside his home on 21 April 2017 and was buried on 10 June 2017. His home was at Mats'aneng and consists of a double storey dwelling house and a three roomed house, together with household property and other personal property. He also owned a Toyota Corolla motor vehicle and two undeveloped sites at Mat'saneng and Matholeng. These undeveloped sites are not subject of the spoliation proceedings with which we are concerned in this appeal. I will refer to the property under disputation collectively as "the property"

[3] The 1st appellant avers that she married Francis by customary rites in 1991 and lived with him until his death. In her founding affidavit she stated that they were blessed with two sons, the 2nd appellant and another, Motseki. The 1st appellant admitted at paragraph 5.2 of her affidavit that she does not know the whereabouts of Motseki. She was challenged by the 1st respondent as to the patenity of the 2nd appellant and she belatedly admitted, in the replying affidavit, that the 2nd appellant was a step-son of Francis but Francis and the whole Khabo family had accepted him as his son.

[4] The 1st respondent was Francis's mother. Francis was her only son. Her husband passed on in 2005. The 2nd respondent was Francis's sister and is a daughter of the 1st respondent.

Alleged spoliation

[5] The 1st appellant averred that when Francis was killed the 1st and 2nd respondents and members of their extended family accused her of complicity in the death of Francis and forced her to leave Francis's home on 11 June 2017, the day after Francis was buried. She said that she left all her movables such as clothing, bank cards, lease documents, academic certificates, her passport and that of her late husband and the husband's mine clock card and blue card. They also forced her to leave the Toyota Corolla motor vehicle behind. She said that she literally left her erstwhile home with the clothes that she was wearing on that day.

[6] The 1st appellant averred that she was in peaceful and undisturbed possession of the property at the time that she was despoiled of it. Accordingly she applied to the court for restoration of possession of the property. In the alternative she prayed for a declaration that she is the owner of the property and the 2nd appellant is the owner of the Toyota Corolla motor vehicle; that the respondents be ejected from the immovable

property, restore the motor vehicle and pay to her "M900 000.00 for violation of [her] privacy and impairment of dignity".

[7] At the hearing of the application in the court *a quo* the appellants did not pursue the alternative claim and prayed only for a spoliation order. The 1st appellant's founding affidavit, at paragraph 3.2, also made this abundantly clear:

> "This matter does not involve dispute over title to land, derogations from title and rights which override title. On the contrary it is a purely *mandament van spolie* application. This matter is thus far beyond the jurisdiction of the Subordinate Court."

Denial by respondents

[8] The respondents opposed the application. They stated that although the deceased and the 1st appellant had lived together "in concubinage" from 1991, they ceased to do so in 2013 after the applicant left the property. They vehemently disputed that the deceased and the 1st appellant were ever married hence they alleged that "their relationship was one of concubinage." At paragraph 6.2.1 of the answering affidavit, the 1st respondent stated (and this is not disputed in the replying affidavit):

> "For the edification of this Honourable Court, a few months after the [1st appellant] had separated with my late son in 2013, the latter delivered all her remaining personal effects to her parents' home at Ts'ahkolo Ha-Keketsi."

[9] At the same paragraph 6.2.1 the respondents state that the 1st appellant "suddenly emerged and showed up at my son's place two days preceding the funeral…did not even sleep there on her date of arrival…only slept at that place on… 10th June 2017… and following day she left carrying her travel bag."

[10] The respondents contended that there were seriously disputed facts in the application, which the appellants should have foreseen and which compelled proceedings by way of action. They accordingly prayed for the dismissal of the application "with costs on a punitive scale."

Family hostility

[11] The papers before us show that a lot of mutual dislike and even hostility developed between the appellants and the respondents. This is understandable because of the circumstances in which the deceased met his death. The deceased's natal and extended family and the police suspected

that the appellants were somehow involved in the death. They actually accused the appellants of having connived with a hired assassin to kill the deceased. In consequence thereof the 2nd appellant and his wife were arrested on suspicion that they were complicit in the killing. They are now on bail awaiting trial.

[12] Against such a background it is quite possible that the respondents would do everything in their power to ensure that the appellants do not come anywhere near the deceased's estate or benefit from it. It is equally possible that the 1st appellant may now exaggerate her relationship with the deceased and, as alleged by the respondents, build up a false case that she was married to the deceased and lived with him right up to his death. Fortunately in this case, the only important issue for determination is whether, as at the time of the deceased's death, the 1st appellant was living with him or not, that is to say whether she was in any joint possession of the property with the deceased or not. If she was, she would be regarded as having been in possession of the property, regardless of whether she was a concubine or a lawfully married wife at customary law.

Legal principles on spoliation

[13] It is perhaps necessary to restate the law on spoliation orders. A spoliation order is an order against the unlawful

dispossession of property from a person who was in peaceful and undisturbed possession of the property. It relates solely to possession and not ownership. Innes CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 states that:

> "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 property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute…."

[14] Millin J in *De Jager & Ors v Farah & Nestadt* 1947 (4) SA 28 (W) at 35, explained the principles of law regarding spoliation in a case where demolition of premises was undertaken without legal process by stating that -

> "What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is so interfered with, the

> court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondents' conduct that the occupation by the applicants carries with it penal consequences."

[15] In that case the court held that by their conduct in proceeding to demolish certain premises without legal process, which were dilapidated, verminous and generally unsanitary, in order to secure the ejectment of the occupiers, the respondents had committed acts of spoliation and they were therefore interdicted from further demolishing those premises.

[16] The *mandament van spolie* is therefore a possessory remedy and "possessory" in this context merely means the protection of possession separate from the right of ownership. The remedy restores the status *quo ante*. It decides no rights of ownership. It is not concerned with the rights of the parties. The court does not even enter into the lawfulness of the possession or into the question of ownership. A spoliation order is a final determination of the immediate right to possession. Because it

is a final order, it is not enough to make out a *prima facie* case. The entitlement to the order must be proved on a balance of probabilities. No consideration of convenience enters the question hence the requisites of the spoliation order are simply that-

(a) there must be an allegation that applicant was in peaceful and undisturbed possession.This was confirmed by Addleson J in *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233G-H as follows-

> "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 that the claimant may not possess the whole property or may not hold 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 the benefit to himself; and (c) is deprived of such use and benefit by a third person.

[17] Deprivation must be actual and physical. Possession must be established, *not entitlement to possession*. Here we are concerned with *de facto* possession which need not be exclusive but can be joint. Any wrongful deprivation suffices, including force and stealth or even by a trick. Wrongful means against consent and without resort to legal process. The forcible taking even by the owner is spoliation in these circumstances. It is not sufficient to prove a *prima facie case* – the applicant must prove facts which justify a final order. Therefore, proof is on a balance of probabilities even if the application is on affidavit.

[18] Where the denial is based on an assertion that applicant was not in possession, it is a denial that the applicant did not have the necessary physical control. The respondent has the onus to prove this defence or any other defence he may put up. It is not for the applicant to disprove the defences: the respondent must provide adequate information to sustain his defence and failure to do that would be fatal to his case. However, if the respondent can proffer a valid defence, the applicant will not succeed with his application even if he has satisfied all the other requirements of the *mandament van spolie.*

Dispute of fact emerging: approach thereto

[19] During the course of the hearing in the High Court, the learned judge correctly formed the opinion that the issue whether or not the appellants were in possession of the property was a disputed fact and that it could not be decided on the affidavits. Acting in terms of Rule 8(14) of the High Court Rules 1980 he referred the matter to oral evidence in these words-

> "In terms of Rule 8(14), this court, being of the opinion that the application cannot properly be decided on affidavit and with a view to ensuring a just and expeditious decision, directs that oral evidence be heard on whether or not the 1st applicant, Mahlalele Khabo, was living with the deceased (Francis Joseph Khabo) at his residential home … during the period 2013 to the date of his demise in April 2017, and whether or not she continued living there until she was dispossessed by his family in June 2017."

[20] The judge then directed that only the 1st appellant and the 1st respondent would give oral evidence on the disputed fact and be cross-examined on their evidence. The disputed fact to be resolved, as the judge ably pointed out, was whether the 1st

appellant was in occupation of the property immedately before and after the death of the deceased.

[21] On the facts of this case the critical period, in my opinion, was the period up to the death of the deceased because, if she returned to the property after the deceased was shot, that would tend to support the respondents' case that she "suddenly emerged and showed up" after the deceased's death. That would not be sufficient to establish the necessary *detentio* or occupation of the property for purposes of the possessory remedy.

[22] While the learned judge was correct to determine, as a matter of fact, that a dispute of fact existed on the narrow point that he identified, I think he erred in restricting the giving of oral evidence to the two protagonists - 1st appellant and 1st respondent. He should have permitted each of the protagonists to call evidence of other persons to shed light on the disputed fact. That is why after each of them gave evidence the judge, at paragraph 18 of his judgment, stated that their evidence did not assist the court. Each of them stuck to her evidence as contained in the affidavits. The judge fell into the same error that he criticised appellants' counsel for, as is apparent from the following paragraphs of his judgment, showing how he disposed of the matter before him:

"[19] As 'Mahlalele must have anticipated that 'Matau would resist her claim for spoliation, I do not understand why her counsel did not make efforts to fortify her evidence with corroborative affidavits of say, her neighbours (to support her assertion that she was in possession until her husband's funeral in 2017) and the independent third parties she claims that she roped in to mediate the dispute [viz. the police, the Principal chief and the Master's office].

[20] As matters stand, it is her word against that of 'Matau. And according to the *Plascon-Evans* rule, where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justfy such an order. In *casu* they do not, and the respondents' version must prevail. I do not agree with the applicants' counsel that 'Respondents' version consists of bald, hollow, fanciful and untenable denials safely rejectctable on paper.'

[21 Neither do I agree with applicants' counsel's invocation of the so-called continuance of possession. I endorse the view that the so-called

> presumptions of fact are not rules of law, but merely inferential reasoning. In my view this particular 'presumption' is singularly unhelpful in the evaluation of the evidence. Each case must be considerd on its own merits. The mere fact that 'Mahlalele resided at this property from 1996 does not give rise to an inference that she continued to reside there beyond 2013. The so-called presumption cannot affect the burden of proof.
>
> [22] In the result I, on 13 December 2018, delivered an *ex-tempore* judgment dismissing the application for spoliation with no order as to costs, and undertook to furnish reasons for my judgment."

[23] Except for restricting the witnesses to be called, the learned judge's conclusions cannot be blemished. In my opinion he correctly dismissed the application for good reason. I however would like to emphsise that Rule 8(14) permits the calling of more than one witness where the judge has exercised his discretion to hear oral evidence. In this case the judge should have allowed other persons who could shed light on the disputed issue to be called, including those that he mentioned in his ruling. The Rule focuses more on the issues in dispute, which must be specified, on which oral evidence is to be led and not on the number of witnesses. It reads:

"If in the opinion of the court the application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems appropriate with a view to ensuring a just and expeditious decision. In particular, but without limiting its discretion, the court may direct that *oral evidence be heard on specified issues* with a view to resolving any dispute of fact *and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear to be examined and cross-examined as a witness,* or it may order the matter to be converted into a trial with appropriate directions as to pleadings or definition of issues, or otherwise as the court may deem fit."
[*emphasis is mine*]

Grounds of appeal

[24] The appellants' grounds of appeal are that the judge erred in holding that a dispute of fact existed when no such dispute did, and even if it did, he should have held that it does not go to the "heart of the applicant's cause of action"; and the judge erred in not holding that the appellants were not entitled to judgment "on their version as coloured by respondents' admissions and averments". I conceive the latter ground to be

targetted at the application of the *Plascon-Evans* rule by the learned judge.

Law on dispute of fact

[25] It is necessary, I think, to revisit the law relating to disputes of fact. Urgent motion proceedings are appropriate even if a dispute of fact is foreseeable -*Dunlop SA Ltd v Metal & Allied Workers' Uniion & Anor* 1985 (1) SA 177 (D) at 189D. The position in this jurisdiction is, to my mind, that the urgent application procedure is much abused in this jurisdiction. The appellants instituted proceedings on an urgent basis long after the events giving rise to their complaint had occurred. Although the 1st appellant was permitted to proceed in that manner, it is incontrovertible that the matter was not urgent given the time it took for her to make the application. Her explanation for the delay is not convincing at all. She merely took advantage, as do almost all litigants in this jurisdiction, of the urgent application procedure which the High Court has, regrettably, permitted to become the normal procedure by which applications are commenced.

[26] Where there is a dispute of fact, the case cannot be settled on affidavit because the trial judge must consider probabilities and assess the credibility of witnesses, which he can not do on

affidavits. The determinant is therefore the proper method of determining the facts upon which claim is based and not the character or nature of subject matter. That is why the existence or non-existence of a *bona fide* dispute of fact, a dispute on a material question of fact, determines which route one takes, otherwise if there is no dispute of fact, motion proceedings can be adopted generally in all classes of disputes.

[27] The question whether a real and genuine dispute of fact exists is a question of fact for court to decide -*Ismail & Anor v Durban City Council* 1973 (2) SA 362 (N) at 373H-374B. In this regard, after referring to a passage in *Engar and Others v Omar Salem Essa Trust* 1970 (10 SA 77 (N) at 78, Harcourt J said –

> "… the decision of a court of first instance in this regard is to an extent discretionary. It should be noted, however, this relates solely to the decision as to which of the possible future courses for disposal of the application proceedings in question should be followed if it is decided that a genuine, real and relevant dispute of fact exists. The decision as to whether or not such dispute does exist is not, however, discretionary: it is a question of fact and a jurisdictional pre-requisite for the exercise of the discretion. Thus, in considering whether such a dispute exists, a Court of appeal is not considering

whether or not to set aside a discretionary decision of the Court *a quo* (which can only be done when a Court of appeal is satisfied that such has not been exercised judicially i.e. given not for substantial reasons but capriciously or upon a wrong principle – *James Brown & Hamer (Pty) Ltd v Simmonds N.O.* 1963 (4) SA 656 (D) at p. 660) but whether or not a dispute of fact of the above nature exists on the papers."

[28] The learned judge *a quo* approached the matter correctly because he was alive to the fact that a respondent's allegation of existence of a dispute of fact alone is not sufficient and the court should determine it - *Peterson v Cuthbert & Co. Ltd,* 1945 AD 420 at 428. Otherwise a respondent may raise fictitious issues of fact to delay proceedings. A real dispute of fact arises when respondent denies material allegations made by the applicant and produces positive evidence to the contrary.

Disposition

[29] The 1st respondent was clear in her evidence that the 1st applicant left the property in 2013 and her personal belongings were taken to her natal home by the deceased, and that she was not at the property at the material time. When a court is unable to resolve a dispute in absence of further evidence, a dispute of

fact exists and it is entitled, as did the judge *a quo*, to take a robust, common sense approach to the dispute of fact. His application of the *Plascon-Evans* was justified.

[30] An applicant who proceeds on motion risks that a dispute of fact may be shown to exist and the extent to which he accepted that risk is relevant to costs. If he should have realised that a serious dispute of fact was bound to develop the court may dismiss his application with costs -*Adbro Invest Co. Ltd v Ministry of the Interior* 1956 (3) SA 345 (A) at 350A. The learned judge did not adopt this rather drastic course but dismissed the application after hearing oral evidence on the one issue in dispute, which evidence he did not find to be helpful.

[31] The respondents raised two preliminary issues in the court below which the learned judge did not deal with in his judgment. These related to jurisdiction and non-joinder of the Master of the High Court. Although these issues were canvassed at the hearing before us, I do not intend to deal with them save to observe that, in relation to jurisdiction, the appellants contended that the value of the occupation was such that the matter was properly before the High Court. That is why at paragraph 3.1 of the founding affidavit they stated that "the value of restoration of all the property … between now and vindication is estimated to be M10 000 000.00." The respondents did not deal with this averment from the

jurisdictional perspective at paragraph 5.2 of the opposing affidavit but merely stated that the figures were a highly inflated and a ridiculous estimate of the property and that the matter falls within the jurisdiction of the Land Court as provided in s 73 of the Land Act 2010. *Le Roux v Le Roux* 1980 (2) SA 632 (C) at 635 lays down that the jurisdictional test is not the value of the property but the value of the possession for the time period between the making of a spoliation order and the decision of the court in respect of the rights in issue.

[32] The parties here did not therefore deal with the jurisdictional issue to any meaningful extent and for that reason the position of the appellants must prevail for lack of countervailing contentions by the respondents.

[33] Regarding the non-joinder of the Master the parties did not again meaningfully engage the matter nor did the judge. There is no need for me to deal with it also in view of the conclusion I have come to on the disputed fact in this case. In any event there is no appeal or cross-appeal in relation to the preliminary issues.

[34] As earlier stated the appellants's main contention was that no dispute of fact was shown to exist and the learned judge erred in finding that such a dispute of fact existed. I do not agree with that contention nor do I agree with the appellants that the

respondents' affidavit did not contain evidence to sustain their denials.

[35] The respondents stated that the 1st appellant did not do anything towards the burial of the deceased. If she had been living with him she surely should have been actively involved in the burial arrangements. The respondents averred that the 1st appellant left in 2013 and the deceased took all her personal belongings to her natal home. This was not disputed by the 1st appellant. There is also one glaring omission in the evidence of the 1st appellant which, if she had addressed, would have very easily established that she was living with the deceased at the time of his death. If indeed she was living with the deceased, she at least should have been able to disclose what she did soon after the deceased was shot, such as that she rendered some assistance or that she rushed to make a report to the police. There is nothing in her affidavits to show what role she played soon after the deceased was shot or in preparation of his burial. Her admission that she did not know the whereabouts of Motseki, the second born son compared with the 1st respondent's statement that he was at school in South Africa, speaks volumes about the whereabouts of the 1st appellant herself at the material time.

[36] Counsel for the appellants also submitted that the respondents' denials were bare. To the extent that that may be

so, which I do not accept, in *R Bakers (Pty) Ltd v Ruto Bakeries* (Pty) Ltd 1948 (2) SA 626 (T) the court stated that a bare denial may suffice without giving evidence in support of the denial unless the applicant can show that the denial is *mala fide* and unsupportable. In the present case although the appellant stated as much, they did not provide sufficient, if any, evidence of *mala fides* on the part of the respondents.

[37] I am satisfied that the judgment of the court *a quo* is correct. There was in the application before him a dispute of fact which the appellants should have foreseen, more so because of the bad blood between the parties, and which the judge failed to resolve even after oral evidence on it.

[38] In the result the judgment of the High Court is upheld. This appeal is dismissed with costs.

_____

M.H. CHINHENGO

ACTING JUSTICE OF APPEAL

I agree

_____

P.T.DAMASEB

ACTING JUSTICE OF APPEAL

I agree

_____

P. MUSONDA

ACTING JUSTICE OF APPEAL

For Appellants: Adv F Sehapi

For Respondents: Adv Z Mda KC