IN THE HIGH COURT OF LESOTHO

HELD AT MASERU **CIV/APN/436/2020**

CIV/APN/BB/42/2020

In the matter between:

LEKHULA LEFALAMANG	**1ST APPLICANT**
ARABANG ZAKHIEL	**2ND APPLICANT**
CHOPHO KOATSA	**3RD APPLICANT**
PHOKOJOANE NKUTU	**4TH APPLICANT**

AND

LEARNED MAGISTRATE (MRS MTHETHO)	**1ST RESPONDENT**
THE CLERK OF COURT	**2ND RESPONDENT**
KEKETSO KEKETSI	**3RD RESPONDENT**
MESSENGER OF COURT BOTHA-BOTHE MAGISTRATE'S COURT	**4TH RESPONDENT**
OFFICER COMMANDING BOTHA-BOTHE POLICE STATION	**5TH RESPONDENT**
COMMISSIONER OF POLICE	**6TH RESPONDENT**
ATTORNEY GENERAL	**7TH RESPONDENT**

Neutral Citation: Lekhula Lefalamang & 3 Others v The Learned Magistrate (Mrs Mthetho) & 5 Others CIV/APN/436/2020 [2021] LSHC 81

JUDGEMENT

CORAM: BANYANE J

DATES OF HEARING: 10/02/2021

DATE OF JUDGEMENT: 25/06/2021

Summary

Application for review – Mandament van spolie remedy – Magistrate deciding the matter on its merits on first appearance without respondent's affidavit thereby assuming what his case would be and failing to apply her mind to the issue she is bound to consider in a spoliation application – procedure adopted resulted in failure of justice to the applicants – application succeeds.

ANNOTATIONS

Cited cases

1. Teaching Service Commission and Others v Learned Judge of the Labour Court and Others C of A (CIV) 21 of 2001
2. Ramabele v The Learned Magistrate and Others CRI/APN/364/08
3. Kaleme Tech and Hire v Metsi A Pula Fleet Management Agency C of A (CIV) 60 of 2015
4. Phooko v J & M properties C of A CIV 36/14
5. Mbangamthi v Sesing Mbangamthi LAC (2005-2006) 295
6. Johannesburg Consolidated Investment v Johannesburg Town Council 1903 TS 111
7. Liberty Life Association of Africa v Kachelhoffer and Others 2001(3) 1094.
8. Visser v Estate Collins 1952(1) SA 546
9. Berkin Motors v Kotze No and Another 1992(1) SA 505
10. Goldfield Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551
11. Inano v North West Gambling and Others 2012 (6) SA 67 (SCA)

Legislation

1. The High Court Act 1978
2. The Subordinate Court Rules 1996

Books

1. Silberberg and Schoeman; The Law of Property (3rd edition) Butterworths (Durban)
2. Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa; 5th edition (Juta)

BANYANE J

[1] This is an application for review of the decision granted by the Botha-Bothe Magistrate's Court dismissing the applicants' application for spoliation in relation to a certain piece of land situated near Crocodile Inn, in the Botha-Bothe District.

Factual background

[2] The synopsis of facts giving rise to this application is as follows;
The applicants are occupiers of a certain plot identified as No. 30082-543. They operate various types of businesses thereon. The 3rd respondent claims to be the title holder of this plot thus entitled to its possession. In August 2020, the 3rd respondent (as applicant) sued the applicants and other occupiers (as respondents) for ejectment under CIV/APN/BB/15/2020. This application is still pending before the Botha Bothe Magistrate's Court. During the pendency of the ejectment application, the applicant herein filed an urgent *mandament van spolie* application. This application was moved before court on *ex parte* basis on 27/11/2020. They sought an order dispensing with the ordinary rules regarding service of court processes, and that a rule be issued calling upon the respondents to show cause, if any, why the following orders may not be made absolute;

(a) That the first respondent (3rd respondent herein) and or his agents be directed or ordered forthwith to restore to applicants omnia ante, possession of an unnumbered site situated at Botha Bothe between Crocodile Inn Hotel and Botha Bothe Book Centre.

(b) That the first respondent and or his agents be ordered to refrain from interfering with applicants' occupation and usage of plot.

2.1 These were sought to operate with immediate effect as interim relief.

[3] In support of this application, the 1st applicant deposed to an affidavit, to which other occupiers filed their supporting affidavits. He avers that they have all been in occupation of the land in question since 1998 and operated various types of businesses including Motor Mechanics. He states that they peacefully occupied the land at all material times.

[4] He avers that subsequent to the first hearing of the main application on the 20th November 2000, the 3rd respondent frequented the site. That on the 25th of the same month, he came to the site in company of heavily armed men. Without any communication with the occupiers, these men started digging a foundation around the main entrances of the premises. He says this act forced them to close down their businesses and vacate the area. He avers that the 3rd respondent has since then commenced operations or development on this plot, and even fenced in their properties (and those belonging to their customers).

[5] He avers that these acts are *spoliatory* hence they seek to protect their possession. He contends that the 3rd respondent's acts of developing the plot during the pendency of the ejectment proceedings, and while they still were in occupation, is tantamount to taking the law into his hands because he is in effect ejecting them from the premises before finalization of the ejectment application.

Judgment of the court below

[6] On the 27th November 2020, advocate Lenkoane appeared before court on behalf of the applicants and motivated the application. After hearing counsel, the learned Magistrate dismissed the application on the following grounds;

> That the site is the subject-matter of a pending litigation between the parties, which, the applicants failed to pursue nor treat with

urgency. That they cannot approach the court on urgent basis and without service, three months after institution of the eviction application.

6.1 Addressing the allegation that the 3rd respondent went to the site in company of armed men, who upon arrival started digging foundations on the plot, she reasoned that;

> "Even if this is true that the 1st respondent's labourers are working under guard of armed men, he is the one who is afraid that these applicants might attack his workers because, he wrote them a letter of demand on 05/06/2020. That letter was written in both English and Sesotho languages for the benefit of all. These applicants chose to ignore that letter and continued to use that plot. If they had any intention of resolving that matter amicably, they could have approached the 1st respondent or his lawyers. At that moment, their possession of this piece of land was disturbed and that was some 5 months ago. (underlining mine)
>
> It was disturbed further some 3 months ago in August when they received notice of application and chose to ignore the 1st applicant and his court processes. On that reason alone, this case is dismissed.

6.2 She went further to say;

> "it is clear that this application was instituted with the intention of frustrating 1st respondent and the proceedings in CIV/APN/15/2020. If the 1st respondent had any intention of evicting them from the plot forcefully, he could have done so the moment he sent armed men to guard his workers. Instead of instituting the said application, he could have sent those armed men to evict them with firearms. What the applicants are doing in this application, is to force the court to give them permission to use this plot without dealing with its ownership and or lawful possession. They did not have a good reason to approach this court in the manner they did nor to institute this application at all. In their own words at paragraph 16 of the founding

affidavit, 1st respondent did not talk to them but dug the foundation. He did not ask them to close their businesses.

6.3 She went on;

"if there were any legitimate concerns regarding his actions on the plot in dispute, he should have approached the very court that is handling the main case in the very application which is pending before court. When they continued to occupy the land in question despite the letter of demand and receipt of the court process and decided to ignore all the processes, the applicants themselves were resorting to self-help. They have not come to court with clean hands. In the light of the foregoing the applicants' application is dismissed in toto."

The review grounds

[7] Against this judgement**,** the applicants filed this application for review. They impugn the decision on a myriad of grounds. They contend that the Learned Magistrate erred and / misdirected herself in;

i) In entertaining the application in open court without any justification for doing so.

ii) Deciding the matter based on the merits when the application was before court for the first time.

iii) In not making a determination on the interim reliefs sought.

iv) In failing to record the reasons for her decision.

v) In delivering her ruling referring directly to applicants therein contrary to the procedure in motion proceedings.

vi) In basing her decision on the eviction matter that has been instituted by the 3rd respondent, of which that matter is still pending in another court.

vii) In making out a case for the third respondent regarding the ownership of the subject-matter.

viii) In expressing her personal knowledge of the fact that the site in issue belongs to the 3rd respondent when that issue was not for consideration at all in spoliation matters.

ix) In presiding over a matter when she actually revealed that she has personal knowledge of the 3rd respondent regarding his ownership of the site in issue. Thereby, being biased against applicants herein.

[8] The applicants aver that the above amounted to gross irregularities in the impugned proceedings. They aver further that when they appeared before court in relation to the eviction application on 20th November 2020, they saw all Magistrates stationed at Botha Bothe Magistrates' Court entering the 3rd respondent's vehicle interchangeably. That they were not surprised that the learned Magistrate handled their application in the manner she did. They further aver that the learned Magistrate is the 3rd respondent's neighbour and the most senior in the District. They are apprehensive that she might influence other junior Magistrates to favour the 3rd respondent, should this review application succeed. It is apparently for this reason that they seek leave to remove the matter from the court below pursuant to section 6 of the High Court Act 1978.

Submissions

[9] Addressing the first ground for review, Advocate Lenkoane contended on behalf of the applicants that only opposed applications must be heard in open court in terms of Rule 52(15) of the Subordinate Court Rules of 1996, and that the court erred in hearing the application in open court.

[10] On grounds 2 and 3, he submitted that the applicants were entitled to bring the application *ex parte* pursuant to Rule 54(1) which reads;

> Except where otherwise provided, every application to the court for an order of arrest, an interdict or attachment or for **mandament van spolie** under section 18 of the order may be made **ex parte.**

10.1 It is his further contention that the Learned Magistrate acted improperly by dismissing the whole application instead of addressing the interim reliefs sought where a case had been made out to justify the granting of same. He contends that the court was obliged to deal with the interim reliefs instead of focusing on ownership of the plot, an issue only arising in ejectment proceedings.

[11] With regard to the 4th ground, he submitted that the impugned decision is arbitrary for the fact that the Learned Magistrate failed to record her reasons for the decision, that she orally reasoned that the 3rd respondent is the owner of the site in question.

[12] In relation to the 5th, 6th and 7th grounds, he submitted that the Learned Magistrate failed to properly exercise her discretion and apply her mind to the case before her, in that she ignored the urgency of matter and relevant applicable principles in spoliation, and instead focused on an issue of ownership, which is irrelevant in a spoliation application.

[13] Under the 8th ground, the applicants' counsel is of the view that the Learned Magistrate ought to have recused herself from the matter since she had already recused herself from the main application (CIV/APN/15/20) on the ground that she personally knows the 3rd respondent. He submitted that failure to recuse herself from the matter led to the impugned biased decision.

[14] Advocate Malokotsa conversely contented on behalf of the 3rd respondent that the applicants' complaints can best be addressed on appeal; not through review proceedings. For this contention, he relies on the case of **Johannesburg Consolidated Investment Johannesburg Consolidated Investment v Johannesburg Town Council 1903 TS 111.** He argued that review is invoked where the complaint against the impugned proceedings relates to grave irregularities or illegalities that occurred during the conduct of the proceedings. He submitted that in the present matter, there is no procedural irregularity complained of; and that the grounds as formulated by the applicants are not proper grounds for review but appeal. He concludes that the application has erroneously been filed as a review instead of an appeal.

[15] His further contention is that the applicants are clearly challenging the correctness of the impugned decision as opposed to the procedure adopted in arriving at this decision.

[16] He further referred the Court to the case of **Teaching Service Commission and Others v Learned Judge of the Labour Court and Others C of A (CIV) 21 of 2001** in terms of which he submitted that a distinction between appeal and review has been clearly set out, that an appeal is appropriate where a litigant contends that a court came to an incorrect decision whether on the law or on the facts and that from the facts of this matter, the applicants are clearly questioning the correctness of the decision of the Court below.

[17] Addressing the applicant's contention that the Learned Magistrate failed to furnish reasons for her decision, he referred the Court to the case of **Ramabele v The Learned Magistrate and Others CRI/APN/364/08** to submit that failure to furnish reasons for judgement and for sentence does not vitiate the entire proceedings.

[18] With regard to the interim reliefs sought, he is of the view that the orders sought in the interim were final in their effect and for this reason, the magistrate was entitled to decline the granting of such reliefs. He relied on **Kaleme Tech and Hire v Metsi A Pula Fleet Management Agency C of A (CIV) 60 of 2015** to submit that interim orders with final effect may be taken in review or on appeal even before the main proceedings are terminated.

[19] He also contended that the urgent *ex parte* procedure adopted by the applicants in the court below was correctly dismissed by the court because by granting the interim reliefs sought, the court would have in effect, denied the 3rd respondent the right to be heard before an adverse order is issued against him. He adds that the application was, on the evidence presented, correctly dismissed.

Issues

[20] From these arguments arise mainly two issues; namely; whether the application before court is a disguised appeal. Secondly whether the procedure adopted by the learned magistrate in dismissing the spoliation application on its merits prior to the filing of full sets of affidavits in motion proceedings amounts to a reviewable irregularity. I deal with them in turn.

Review versus appeal

[21] An appeal and review are distinct and disparate proceedings. The former concerns the correctness or otherwise of a decision whereas the latter is concerned with regularity and validity of proceedings. **Liberty Life Association of Africa v Kachelhoffer & Others 2001 (3) 1094 @ 1110J-1111 A-C.**

[22] Gross irregularity is a ground upon which the court might review the decision of an inferior court but an irregularity in proceedings does

not mean an incorrect judgement. It refers not to the result, but the method of trial such as a mistaken action that prevented the aggrieved party from having his case fully and fairly determined. Put differently, a reviewable irregularity is one that is material to the matter and calculated to cause prejudice to the aggrieved party. **Herbstein & Van Winsen: The Civil Practice of the Supreme Courts of South Africa (5th ed.) p 1275, Visser v Estate Collins 1952(1) SA 546@ 551**, **Berkin Motors v Kotze No and Another 1992(1) SA 505 @508.**

[23] With regard to mistakes of law, the court in **Goldfield Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551,** held that a mistake of law is not in itself an irregularity, but through its consequences, it may create an irregularity, for example, where a magistrate, through misreading a section, refuses to the aggrieved party a hearing to which he is entitled. Initially the error arises from a mistake of law, but before relief by way of review is granted, one has to consider the consequences. That if the mistake leads to the court not merely missing or misunderstanding a point of law on the merits, but to it misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then the losing party has not had a fair trial.

Consideration of the review grounds

[24] I proceed now to deal with the grounds. At first blush, the manner in which they are couched gives an impression that they are appeal grounds. Upon close examination however, it appears that grounds i, ii, iii, and iv are directed at the procedure adopted in the court *a quo*. Ix deals with bias while some of these grounds (in particular grounds vi,vii,viii) may, as correctly pointed out by the 3rd respondent's counsel, be raised as appeal grounds because they are directed at the correctness of the decision or errors arising from a

mistake of the Law i.e on requisites for a successful *mandament van spolie* application.

[25] The applicants' first complaint is that the Learned Magistrate heard the unopposed matter in open court. I cannot discern any prejudice nor did the applicants explain how this was calculated to prejudice them. The ground is therefore untenable.

Dismissal of the application on the merits before close of pleadings

[26] Another complaint is directed at the manner in which the Learned Magistrate dealt with the application on its merits when the sets of affidavits usually filed in motion proceedings were yet to be filed.

[27] The question that arises is whether this approach amounts to an irregularity entitling this Court to interfere.

[28] To answer this, it is necessary to restate the procedural requirements in adjudication, neutrality of the court in the process, and its duty to decide disputes based solely on the evidence presented by the parties.

[29] The principle of the law is that in adjudication over any matter, the court is confined to the pleadings and evidence contained therein. The court cannot adjudicate matters which the parties have not raised in the pleadings, make out a case for the litigants, nor can it properly decide the matter on the basis of what might or should have been pleaded or prayed for. This is a procedural injunction upon a court. **Phooko v J & M properties C of A CIV 36/14,** para 22.

[30] To put it differently, in the adversarial procedure, it is left to the parties to formulate and state their respective cases in their pleadings. It is not the duty of the court to make a case not pleaded,

formulate a case for the parties or assume what their respective cases are. It should not decide any defence or claim not made by the parties because to do so would be to enter upon the realm of speculation, and the other party might be prejudiced or denied justice as a result of the decision given on the basis of such speculation or assumption.

[31] In the instant matter, the magistrate dismissed the application on the basis of assumptions on what the 3rd respondent's case would be. She reasoned; a) that the 3rd respondent's alleged conduct of carrying out construction on the plot under armed guard was justified because "he was afraid that applicants might attack him because they continued to occupy the plot despite service of the letter of demand and ejectment application," b) that his act did not amount to spoliation because he directed none of the occupiers to vacate the plot, c) that if the 1st respondent had an intention to evict the applicants, he could have done so through the aid of these armed men.

[32] It will be observed that these issues were not placed before her by the 3rd respondent himself because he was yet to file his pleadings.

[33] Clearly, she decided the matter on the basis of unpleaded facts. In my view, she was not entitled to take such a cause. She did not only flout the fundamental procedural rules but the conduct also amounted to miscarriage of justice. She did not address the interim relief sought but assumed facts, speculated and formulated a case for the 3rd respondent and dismissed the application. By doing so, she denied the applicants a fair and full hearing of their application.

[34] There is another reason why the applicants were denied a fair trial of the issues. It is the Magistrate's mistaken approach to the spoliation

remedy. In dismissing the application, she opined that the applicants were not entitled to the remedy because firstly, they resorted to self-help when they continued to occupy the plot in the face of the letter of demand and the ejectment proceedings, secondly that their possession was disturbed when they first received the letter and application respectively; thirdly that the application was intended to frustrate the pending ejectment matter, fourthly that the applicants seek to force the court to give them permission to use this plot without dealing with its ownership.

[35] It is clear from her reasoning that she misconceived the nature and requirements of the remedy and consequently the nature of the inquiry before her. The effect of this mistake of law was denial of a trial of the issues. The order issued is therefore irregular. I explain below.

[36] *S*poliation is the wrongful deprivation of another's right of possession **Ivano v North West Gambling & Others 2012 (6) SA 67 (SCA).** *Mandament van spolie* proceedings are therefore aimed at every unlawful and involuntary loss of possession by any possessor. Its object is no more than restoration of the status *quo ante* as a preliminary to an inquiry or investigation of the merits of the respective claims of the parties to the thing in question. **Phooko v J & M properties** (*supra*) at para 12.

[37] The Court of Appeal in **Mbangamthi v Sesing Mbangamthi LAC (2005-2006) 295 @ 301** held that in spoliatory proceedings, the person deprived of possession (the spoliatus) needs only to prove that he or she had possession of the kind warranting legal protection and that he or she was unlawfully ousted. Melunsky JA held further that;

"Whether possession is lawful or lawful or illegal is irrelevant. See Yeko Vana 173 (v) SA 735 (CA) at 739 D-G. It is therefore not open to a respondent to contend, whether by way of defence or counter-claim, 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 one is not allowed to take the law into their own hands, and that conduct conducive to a breach of peace should not be tolerated. The rights of a party despoiled are encapsulated in the maxim *spoliatus ante omnia restituendus est*. [i.e. a person dispossessed must first, before everything else, be restored to his or her possession]. 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." See also **Phooko v J & M Properties** (*supra*).

[38] It is clear from these authorities that the aim of spoliation is to prevent self-help and that in spoliation proceedings the cause for possession is irrelevant. That is why unlawful possession is also protected. (See also **Inano v North West Gambling and Others 2012 (6) SA 67 (SCA). Silberberg and Schoeman's: The Law of Property (3rd ed) p135** explain that when unlawful possession is protected, it does not mean that the court approves such possession. It is merely a result of application of the principles of a possessory remedy that offers interim protection only. What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession maybe and however exposed he may be to ejectment proceedings, can only be interfered with in his possession by due process of the law.

[39] Regarding the expeditiousness nature of the remedy, these authors at p134 state that the mere fact the application is one of spoliation, does not automatically imply that the matter becomes one of urgency. That the respondent will be served with the rule nisi

ordering him to show cause why he should not be ordered to restore possession at a future date because a final order will not be granted *ex parte*.

[40] Regard being to these principles, it is clear in my view that in approaching the matter in the manner which she did, the learned Magistrate misconceived the nature of the inquiry before her. For the fact that in terms of Rule 54, spoliation proceedings may be made *ex parte* in appropriate circumstances, the preliminary inquiry was whether the facts of the matter warranted the granting of interim relief *ex parte*. If she was of the opinion that the facts do not justify the granting of the order sought without notice to the other party, she was entitled to direct that the respondents be served with the rule interms of which they would show cause on the fixed date, why the relief sought should not be granted.

40.1 On the return date of the rule, having considered the respondents affidavit (if filed), she would then embark on a full inquiry into the requirements of spoliation on the evidence presented by the parties and decide whether the application should be granted or dismissed.

[41] Conclusion

In the light of a foregoing, I come to the conclusion that the procedure adopted in the court below amounts to a reviewable irregularity for the reasons that; firstly; it departs from the established rules of procedure; secondly it prevented a fair trial of the issues raised by the applicants, thus prejudiced them. The judgement of the magistrate must therefore be set aside.

[42] In view of the conclusion reached above, it is unnecessary to comment on the other submissions.

[43] Lastly the prayer for removal of the matter from the Magistrate's Court into the High Court pursuant to section 6 of the High Court Act 1978 must be refused for the following reasons. The mere fact that the learned Magistrate is the supervisor of other junior magistrates or head of the court is not singly sufficient to support the apprehension of bias. To accept the argument that she might influence the outcome of the application if it were to be handled by a different magistrate, would in effect imply that the Magistrates posted in that court lack judicial independence. Secondly, it would be inconvenient to both parties to have the hearing of ejectment proceedings and spoliation proceedings in separate courts.

Costs

[44] The outstanding issue is the costs order to be made. In exercising my discretion, the main consideration here is the fact that the 3rd respondent is not responsible for the irregular order made. The magistrate acted *mero motu*. The 3rd respondent will not therefore be mulcted with costs.

Order

[45] In the result, the following order is made;

a) The application succeeds
b) The order granted by the Botha Bothe Magistrate Court under CIV/APN/BB/42/2020 is reviewed and set aside.
c) The application be heard de novo by a different magistrate.
d) There will be no order of costs.

P. BANYANE
JUDGE

For Applicant: Advocate Lenkoane

For Respondent: Advocate Malokotsa