

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/APN/167/2021

In the matter between:

HISHAM PARKER

APPLICANT

and

DIRECTOR OF IMMIGRATION

1ST RESPONDENT

DIRECTOR, PASSPORT SERVICES

2ND RESPONDENT

**DIRECTOR, NATIONAL IDENTITY AND
CIVIL REGISTRY DEPARTMENT**

3RD RESPONDENT

COMMISSIONER OF POLICE

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

Neutral Citation: Hisham Parker v. Director of Immigration and 4 Others
(CIV)/APN/167/2021) [2021] LSHC 144.

Coram : **F.M. Khabo J.**

Date of hearing : **12th November, 2021**

Date of Judgment: **13^h December, 2021**

JUDGMENT

ANNOTATIONS

CITED CASES

1. Makhubedu and Another v Ebrahim 1947(3) SA 155
2. Liau Jaase and 5 Others v Mputi Jaase and 4 Others C of A (CIV) A/62/17
3. Chen Zheng Hong and Another v Gu Jinxin C of A (CIV) 76/2018
4. Moliehi Letsie v Maseru City Council and 2 Others C of A (CIV) A 12/2016
5. Zwelakhe Mda v Minister of Home Affairs and Others CC/04/2014
6. Setlogelo v Setlogelo 1914 AD 221
7. Lebala Kolobe v Futho Hoohlo CIV/APN/10/04
8. Mahlelebe Khabo v `Matau Khabo C of A (CIV) 72/2018
9. Mahlomola Nkhabu v Mojela Lerotholi C of A (CIV) 27/2016

STATUTES & SUBSIDIARY LEGISLATION

1. High Court Act, 1978
2. Subordinate Courts Act, 1998
3. Aliens Control Act, 1966
4. National Identity Card Act, 2011

LITERATURE

1. Herbststein & Van Winsen - Civil Practice of the High Courts and Supreme Court of Appeal of South Africa (2009) 5th ed., Vol 1
2. Mhungu Valentine: Dispossessed and unimpressed: The *mandament van spolie* remedy (<https://www.saflii.org>).

Khabo J.,

- ***Spoliation - Application to have passport restored to the Applicant ante omnia***
- ***Interdicts - Application to have Applicant's national identity card unblocked from the national identity civil registry***

Introduction:

[1] At the heart of this application is the release of Applicant's travel document and the unblocking of his identity document in 3rd Respondent's system. The Applicant is before Court on an urgent basis seeking the following orders:

- 1.1 An order directing the first and fourth Respondents to restore to the Applicant ***ante omnia*** and forthwith his passport bearing number RC 854961 issued on the 20th December 2019 and expiring on the 19th December 2029;
- 1.2 An order directing third Respondent to unblock in third Respondent's system, Applicant's National Identity Card bearing number 057111145322;
- 1.3 Costs of suit on an attorney and client scale in the event of opposition; and
- 1.4 Further and/or alternative relief.

[2] I observe that the nature of prayer 1.1 above is a remedy of ***mandament van spolie***, and further that the net effect of prayer 1.2 above is that of an interdict. In my view, this is a rather intricate way of pleading on the part

of the Applicant because the two prayers moved together are not tested the same. Spoliation is limited to possession and being despoiled, and there is no enquiry as to ownership as enunciated in *Lebohang Phooko v J & M Properties (Pty) Ltd.*¹ On the other hand, for purposes of an interdict, particularly, of a final nature as the unblocking of Applicant's National Identity Card, an Applicant must establish a right which is protected in law. As it shall be seen later in this judgment, Respondents challenge the jurisdiction of this Court in hearing a spoliation matter, and are also of the view that Applicant is in no way entitled to the interdict he is seeking from this Court.

Background:

- [3] These proceedings emanate from Applicant's birth certificate issued in 1980. According to it, Applicant's birth was registered in the Register of Births at the Office of the District Secretary in Leribe, Lesotho. It appears the Applicant was five years old at the time because his date of birth was recorded as 01/10/1975. His father was the informant. Applicant himself later amended his date of birth to be 01/01/1975.
- [4] In Lesotho, a birth certificate is one of the requirements to being issued with a passport. Between July, 2005 and December, 2019 Applicant was issued with at least eight passports. A standard passport carries at least 32 pages and is given a lifespan of ten years. In some instances, Applicant was issued with a new passport at intervals of just over a year. Applicant's explanation for the many passports over the years is that he is a businessman and his trade requires him to travel between Lesotho and South Africa regularly. Applicant's last passport, and the subject matter herein, was issued on 20th December, 2019.

Applicant's case

¹ C of A (CIV) 36/2013

- [5] It is common cause that this passport was seized by a Lesotho Immigration Officer on 23rd December, 2020 when the Applicant was travelling from Johannesburg, South Africa and crossing into Lesotho through the Caledonspoort border, Butha-Buthe. The officer told him to get his passport from the first Respondent in Maseru. After a few unsuccessful attempts, Applicant says he eventually met first Respondent who interrogated him about his origins, parents and family tree and ultimately indicated that she was not convinced that he was born in Lesotho nor that his parents were Lesotho citizens.
- [6] It is also indisputable that the first Respondent still has not released Applicant's passport. Instead, Applicant says first Respondent informed him that she has handed over his passport to the Assistant Commissioner of Police. This is denied by the Respondents. Their version is that the Applicant was informed (we are not told if this was done verbally or in writing) that his passport had been handed over to the police pending investigations. Respondents say the Applicant was informed that his application and document were put in a "stop list" where all applications and documents which have queries are put. I became lost here because I have not come across Applicant's complaint about an "application." It has always been his passport and blocked identity document.
- [7] Be that as it may, the Applicant still does not have them back, hence the present proceedings nor has he been called to any police station to give assistance in relation to any investigations about his citizenship. The Applicant says that he is a Lesotho citizen. All State functionaries have always appreciated that he is a full Lesotho citizen, as evidenced by the fact that he was issued with a birth certificate as well as numerous passports between 2005 and 2019. Respondents aver that this does not

mean that those passports were authentic. They had just not picked the fraud yet.

Urgency

- [8] As already indicated, the Applicant moves this matter on an urgent basis. In motivating the urgency the Applicant avers that since the seizure of his passport, he is unable to do his business outside the country and in the meantime, Respondents are not taking any legal steps towards determining the lawfulness or otherwise of his passport. Respondents, in contrast, say that the matter is not urgent because the Applicant has been doing nothing for close to four months after they called him to their office. They say that the matter is being investigated and once investigations are concluded, the Applicant will be charged.
- [9] In my view, Respondents themselves created the issue of urgency or greatly contributed thereto by investigating Applicant's situation indefinitely. By their own pleadings they have established a host of discrepancies which arouse a suspicion of fraud on Applicant. They seized the passport in December, 2020. The Applicant launched the application five months later, in May 2021. He says he waited and allowed time to see if any action to charge him would be taken. None of that has been done still. It is almost a year now and I am not persuaded as to why no criminal charges have not been preferred against him.
- [10] Applicant's livelihood is negatively affected as he is unable to carry out his trade as he has been doing for years. Not only is his business at stake but his personal freedom and liberty as well. Our Constitutional Court has said in *Zwelakhe Mda v Minister of Home Affairs & Others*² that "a measure

² CC/04/2014

by means of which an individual is dispossessed of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement...” Based on the above quotation, as well as the circumstances of this case, I find that the Applicant was justified in moving this Court to hear the application urgently.

Spoliation

[11] The Applicant seeks an order directing first and fourth Respondents to restore to him *ante omnia* and forthwith his passport. The elements of a spoliation remedy have long been established. They are firstly, that the applicant was in peaceful and undisturbed possession of the property and secondly, that the respondent unlawfully or forcibly deprived him of same. It relates to possession and not ownership. In this regard See *Mahlelebe Khabo and Another v `Matau Khabo*.³ Respondents plead lawfulness for seizing Applicant’s passport and rely on the Aliens Control Act, 1966 as well as the National Identity Card Act, 2011. They do not refer this Court to any specific section/s, regrettably. I say regrettably because in my own perusal of the Aliens Control Act, I have not come across a provision on seizure of documents such as a passport.

[12] However, this court does recognise that lawfulness is one of the limited defences against the remedy of *mandament van spolie*. Respondents argue that the remedy cannot be successful in *casu* because the seizure was effected by virtue of a statutory instrument. For this proposition Respondents rely on an article authored by Mhungu Valentine, “Dispossessed and unimpressed: The *mandament van spolie* remedy.”⁴ Locally, W.C.M Maqutu J., in *Lebala Kolobe v Futho Hoohlo*⁵ quoted

³ C of A (CIV) 72/2018

⁴ (<https://www.saflli.org>)

⁵ CIV/APN/10/04

with approval Blackwell J., in *Makhubedu and Another v Ebrahim*⁶ that “in the present case the act which deprived appellants of their possession was a legal action, as respondent had a judgment in her favour, and therefrom no question of actual spoliation arises ...” Based on the authorities cited above, Respondents would be justified in seizing Applicant’s passport in execution of statutory provisions. However, they have not referred this court to the provisions they rely on. I could not find them either. I am not satisfied that they discharged the onus of demonstrating that they acted lawfully and were justified in keeping Applicants passport for so long. I am satisfied that the Applicant for years had peaceful and undisturbed possession of various passports issued by the kingdom of Lesotho until his latest one which was seized almost a year ago. For purposes of spoliation and the two requirements discussed, I find that the remedy is available to the Applicant.

Jurisdiction

[13] I am making this finding in the preceding paragraph mindful of the fact that part of Respondent’s opposition is that this Court does not have jurisdiction in the matter, and I found it befitting to touch on the merits to come to whether their opposition holds water. In this regard Respondents correctly refer the court to Sections 6 of the High Court Act and 18 (1) of the Subordinate Courts Act 1998 (as amended). Respondents argue, and I agree, that a matter such as spoliation with its original jurisdiction in the Magistrate Court cannot be entertained by the High Court.

[14] Of course, this is with a proviso that unless it is by a judge of the High Court on his own motion or with leave of a judge upon application made to him in chambers and after notice to the other party. A lot of decisions within our jurisdiction have demonstrated this position of the law. For

⁶ (1947)30 SA 155 at p. 168

illustration the decision of the Court of Appeal in *Liau Jaase and 5 Others v Mputi Jaase and 4 others C of A (CIV) A 62/17* and *Chen Zheng Hong and Another v Gu Jinxin C of A (CIV) 76/2018*. Indeed, as Musonda AJA., pointed out in *Moliehi Letsie v Maseru City Council and 2 Others C of A (CIV) A 12/2016* that “*unlimited jurisdiction*” contained in Section 2 (1) (a) of the High Court Act, 1978 does not mean limitless.

[15] I pause here to note that the question of jurisdiction was not pleaded in Respondent’s answering affidavit but argued in their written heads of argument. As such, Applicant was not in a position to react to same in reply. Factually though, no leave was sought by Applicant to have this matter moved before this court. Applicant in founding jurisdiction simply avers at paragraph 3 of his Founding Affidavit that this Court “has jurisdiction to entertain this application and grant the reliefs sought in the notice of motion.” This court finds refuge in the proviso that a civil cause within the jurisdiction of a Subordinate Court may be instituted in the High Court “by a judge acting on his own motion.” The following are factors which this court took into consideration in assuming jurisdiction herein:

- 15.1 Applicant’s passport was seized in December, 2020 and learned in Respondents’ answer filed in June, 2021 that it was a subject of criminal investigations;
- 15.2 At the time these proceedings were launched in May, 2021 no criminal charges were laid against Applicant;
- 15.3 No criminal charges were laid against Applicant at the penning down of this judgment;

- 15.4 Respondents allege fraud on the part of Applicant because the entry number on his birth certificate revealed a different person than Applicant;
- 15.5 The signature in the entry number did not correspond with the signature that appears on the register;
- 15.6 The signature that appears in the register is consistent with the one that appears in the other birth certificate belonging to one Moloi Mokafo, being regarded the rightful person by Respondents;
- 15.7 The date of issue on Applicant's birth certificate seems to have been on a weekend not a working day;
- 15.8 The date of registration of the birth certificate appears to have been on a Saturday;
- 15.9 The birth certificate and/or its registration does not appear in the birth register; and
- 15.10 The date stamp on Applicant's old birth certificate bears the 4th March 2000 while his birth was registered in 1980.

[16] All the above are discrepancies identified by Respondents to suspect Applicant of fraud in acquiring his birth certificate which fraud invalidates all other documents (passports) that he acquired thereafter. Despite all of that, no criminal charges have been preferred against the Applicant. Had they been initiated, a criminal court might have or be in the process of, coming to a final determination of the fraud allegation. In the meantime, his personal status as a citizen or otherwise, of the Kingdom of Lesotho remains unanswered. Even if it were to be established that the Aliens Control Act, 1966 authorises the seizure of

Applicant's passport, I doubt that the legislature intended for such seizure and investigations to run indefinitely lest they become arbitrary.

[17] There must be finality to this situation the Applicant finds himself in. The allegations of fraud are of course challenged by the Applicant and he ought to have long been afforded an opportunity to defend his case. This Court cannot be meek, standby and perpetuate an injustice meted out to private citizens by those in positions of power such as Respondents. Reasonableness must be observed and applied in the discharge of government official duties. It would have been unjust to remit this application to the Magistrate Court under the circumstances, hence, this court on its own finding it just and prudent to hear it. Applicant's passport is a subject of enquiry on its authenticity, but such challenge must be on legitimate grounds and by following recognised legal procedures - *Mda v Minister of Home Affairs (supra)*. The correct legal procedure in *casu* ought to have been a criminal trial.

Interdict:

[18] The Applicant seeks an order directing third Respondent to unblock in its System his National Identity Card bearing number 057111145322. The Applicant says he learned that his card had been blocked in the National Identity Registry for reasons not known to him. In answer to this complaint Respondents refer this court to annexure "RM." This is the letter through which the third Respondent was informing the Applicant that he was disqualified to be in possession of his Birth Certificate and National Identity Card.

[19] The Applicant in Reply continues to deny that he was informed by anyone that his ID Card had been blocked on account of any investigations in relation to anything affecting him. Could it be that Applicant was never

served with “RM?” The letter appears to have been authored and date stamped on 23rd December, 2020. The same day that Applicant had his passport seized as he was entering our borders from South Africa. Does it then mean that Applicant’s passport was seized and thereafter “RM” was authored to him, but he never received it? Indeed, there is no evidence that he did receive the letter. However, Applicant himself does not deny receipt of the letter which forms part of Respondents’ pleadings save to deny that he was ever informed.

[20] The long-standing principle on interdicts as enunciated in *Setlogelo v Setlogelo 1914 AD 221* still forms part of our law; that the requirements for a successful claim to an interdict are a clear right, an injury actually committed or reasonable apprehension as well as the absence of similar protection by any other ordinary remedy. Respondents quote Herbstein & Van Winsen - Civil Practice of the High Courts and Supreme of Appeal of South Africa⁷ in the following terms:

the question whether applicant has a right is a matter of substantive law, the onus is on the applicant applying for a final interdict to establish on a balance of probability, the facts and evidence which prove a clear and definite right in terms of substantive law ... the right which applicant must prove is a right which is protected in law.

[21] It is Respondents’ submission that Applicant has not established a clear right which is protected in law. According to Respondents, “RM” has stated in clear terms the reasons why his ID Card was blocked, that being that the birth certificate he used to acquire a new one was not assigned to him but to one Moloi Mokafo. The letter says in part “the birth certificate you used as a breeder document to acquire a new one was acquired fraudulently.” In effect Respondents through “RM” disqualified Applicant from possessing a National Identity Card and birth certificate which he already had issued in his names.

⁷ (2009) 5th ed, Vol. 1 at p. 185

[22] In *Mda v Minister of Home Affairs (Supra)*, the Constitutional Court enquired whether or not the District Manager, National and Civil Registry had the power and authority to remove an entry relating to applicant's birth from the register and effectively cancel his birth certificate upon being convinced that it was obtained on a false premise. The Constitutional Court found the actions of the respondents to have been unlawful and invalid. I similarly find based on this decision by the Constitutional Court that in *casu* Respondents are wrong in withdrawing Applicant's National Identity Card. The prayer that they unblock Applicant's ID Card therefore succeeds.

Costs

[23] The Applicant moves this Court for a costs order on an attorney and client scale. The general principle is that costs follow the event. My brother Mokhesi J., in *Mahlomola Nkhabu v Mojela Lerotholi C of A (CIV) 27/2016* pointed out that "the award of costs falls within the discretion of the court awarding them." I am of the view that nothing in the circumstances of this case warrants an award of punitive costs. There is no frivolity in Respondents' defence nor is their opposition vexatious.

ORDER

The following is, therefore, the order of this Court:

1. The first and fourth Respondents are ordered to restore to the Applicant *omnia ante* his passport bearing number RC 854961 issued on 20th December, 2019 expiring on 19th December, 2029;
2. The third Respondent is ordered to unblock in its system Applicants National Identity card bearing number 057111145322;

3. The Order does not bar the relevant authorities from exercising their rights within the precincts of the law; and
4. The Applicant is awarded costs on an ordinary scale.

F.M. KHABO
JUDGE

For the Applicant : Adv. S. Ratau
For the Respondents : Adv. Makhoali - Boroko