IN THE HIGH COURT OF LESOTHO

(COMMERCIAL DIVISION)

HELD AT MASERU **CCA: 0075/2021**

In The matter between:

ANDRIES JOHANNES SWANEPOEL t/a
THABO & THABISO ENTERPRISES (PTY) LTD **1ST APPLICANT**
THABO & THABISO ENTERPRISES (PTY) LTD **2ND APPLICANT**

AND

TŠUKULU RAMPHAHAMA **RESPONDENT**

Neutral Citation: Andries Johannes Swanepoel t/a Thabo & Thabiso Enterprises (PTY) LTD & Another v Tšukulu Ramphahama [2022] LSHC 103 COM. (09 MAY 2022)

CORAM: MOKHESI J

DATE OF HEARING: 24TH MARCH 2022

DATE OF JUDGMENT: 9TH JUNE 2022

SUMMARY

CIVIL PRACTICE: *Application for spoliation- requisites thereof- Application granted as prayed with costs.*

ANNOTATIONS:

CASE LAW

Letsie v Ntšekhe LAC (2009 – 2010) 423

Mbangamthi v Sesing-Mbangamthi (C of A (CIV) No.6/2005) (NULL) [2005] LSHC 206 (20 October 2005

Makoala v Makoala LAC (2009 – 2010) 40 at 42G – H

National Director of Public Prosecutions v Zuma 2009(2) SA 277 (SCA) (12 January 2009

Nino Bonino v De Lange 1906 T.S 120

JUDGMENT

Introduction

[1] This is an application for a spoliation which was moved on an urgent basis, seeking the following reliefs:

> *"1. Dispensing with the ordinary rules of court pertaining to normal forms and modes of service of process on account of the urgency herein;*
>
> *2. That rule nisi issued returnable on the date and time to be determined by this Honourable Court, calling upon the respondent to show cause (if any) why –*
>
> *(a) he shall not be ordered to Omnia ante restore to applicants the possession and control of the business premises on plot number 23134 – 041 situated at Maputsoe in the district of Leribe.*
>
> *(b) he shall not be ordered to remove the barricades to the premises on plot number 23134 – 041 situated at Maputsoe in the district of Leribe with immediate effect, failing which the Deputy Sheriff of this Honourable Court shall remove them.*
>
> *(c) he shall not be restrained and stopped forthwith from disturbing and obstructing the applicant's possession and control of the aforesaid business premises without the process of the law.*
>
> *(d) he shall not be directed to pay cost hereof."*

[2] This matter served before a Duty Judge on the 29th of September 2021, who granted interim reliefs in terms of prayer 2(a) and (b) of the Notice of

Motion. During that time this court did not have full-time Judges due to the untimely passing on its two incumbents. The *rule nisi* was extended on several occasions until the matter was heard on the 24th of March 2022. The respondent denies every averment the applicant makes in his founding affidavit. It will therefore be determined whether these denials constitute genuine dispute of facts.

[3] It is apposite to summarise each party's case before determining whether a material dispute of facts exists.

Applicant's case:

It is the applicant's case that around 1997 he entered into a written Deed of Sale in respect of plot number 23134 – 041 situated at Maputsoe. The applicant is a South African Citizen. He avers that the purchase price was M45,000.00. He annexed the said Deed and marked it "AJ1". This Deed of sale was signed by both T. Ramphahama and the applicant. It was not witnessed. He avers that he bought the plot for the company, which was not yet incorporated, Thabo and Thabiso Enterprises (Pty) Ltd (second respondent). He averred that the respondent applied for consent for purposes of effecting the transfer of the said plot to the said company. He annexed "AJ2" as proof. Annexure "AJ2" does not bear any date on which it was made.

[4] He averred that after the conclusion of the Deed of sale and pursuant to its clause 7, conducted business on the plot peacefully and without disturbance. The 1st applicant even developed the site by rehabilitating it as it is a wetland and erected structures and buildings on it. He erected a concrete wall around

the site's perimeter to the tune of six million Maloti (M6,000,000.00). He used some rooms for purposes of running a business of heavy machinery, earth moving excavations, trucks and auto repairs. Other rooms were rented out to people conducting various business. He says he currently has tenancy agreements with these business operators. It is important to mention that no such tenancy agreements were annexed to the papers. On or around 7 September 2021, he got information from one of his employees that the respondent was fencing off the site, which activity the latter completed on the 08 September 2021. After finishing fencing off the site, the respondent installed an access gate which he used a padlock to lock in order to block access to the site with the result that the tenants and their clients could not access the premises.

[5] **Respondent's case**

In opposing the application, the respondent raised two points in *limine, viz;*

(i) That this court does not have jurisdiction over the matter on the basis of case No. CC:25/2012 which is pending before Leribe Magistrates' Court;

(ii) That this court does not have jurisdiction as the matter falls within the jurisdiction of the land courts; and

(iii) Lack of urgency

[6] On the merits, the respondent disputes every averment made by the applicants. He disputes that there was a sale agreement between himself and

the 1st applicant. He, however, avers on the contrary, that he entered into a fifteen-year sublease agreement with the applicants which expired in 2012. He did not annex the said sublease agreement as proof. He avers that when the said sublease agreement expired, he sought ejectment of the applicants before the Leribe Magistrates' Court under case no. CC/25/2012 a matter which is still pending before that court. When the sublease agreement expired, he avers, he discovered that the applicants "had fraudulently applied for Ministerial consent. I had never intended to transfer my property to Applicants."

[7] In paragraph 6 he acknowledges that the applicants took possession of the plot even though he disputes that the basis of possession was a sale agreement, but rather a fifteen-year sublease agreement which expired in 2012. He denies that the applicants were in peaceful and undisturbed possession of the plot as he applied for ejectment of Applicants in 2012 before Leribe Magistrate Court under case number CC:25/2012. He averred that he closed off the premises in March 2021.

[8] The applicant, in reply, denied that there is a pending case CC:25/2012 before the Leribe Magistrates' Court as that matter was withdrawn on the 02 July 2018. He annexed a notice of withdrawal marked "AJ3" as proof of that fact.

[9] Issues to be determined.

(i) Points in *limine*

(ii) The merits

[10] **The so-called points in *limine***

The approach to dealing with the points in *limine* is trite. In order to determine the validity of the point in *limine* raised, the applicants' founding affidavit alone must be looked at to determine whether they make out a *prima facie* case for the reliefs sought. The factual averments contained therein must be taken as truthful for purposes of determining the validity of the point raised (**Makoala v Makoala LAC (2009 – 2010) 40 at 42G – H).** I then consider the points:

[11] (i) **This court has no jurisdiction because the same matter is pending before Leribe case No. CC25/2012.**

I do not regard this as a point in *limine*, but rather as a defence to the merits. When the applicants' founding affidavit are looked at, it is clear that it makes out a *prima facie* case for the relief sought before this court, i.e. a spoliatory relief. The plea of *lis pendens* does not necessarily entail the dismissal of the application when it is upheld. In my view it cannot be raised as a point *in limine*. When *lis pendens* is upheld, the correct approach is to stay the proceedings until the first matter has been adjudicated upon. It follows that the point has been wrongly taken.

[12] (ii) **The matter falls within the jurisdiction of the Land Court**.

This point is without any merit. What is being sought before this court is a spoliatory relief. This relief is not one that can only be granted by a specialized court such as the Land Court. It is a common law remedy which

this court has the power to grant. Section 2 of the High Court Act 1978 as amended by Act No. 34 of 1984, grants this court an unlimited jurisdiction to hear and determine civil and criminal matters. While it is true that subordinate courts have jurisdiction to grant spoliatory relief, section 18 (1) of the Subordinate Courts Act No.9 of 1988 puts a monetary ceiling to that jurisdiction when spoliation is sought. Jurisdiction of the Subordinate Court is limited to the value of the despoiled property as per section 17(1) of the same Act (**Letsie v Ntšekhe LAC (2009 – 2010) 423).** In the present matter, the 1st applicant averred in his founding affidavit that he bought the plot from the respondent for M45,000.00 and erected a perimeter wall to the tune of M6,000,000.00 for security purposes. These figures are way above the monetary ceiling of the subordinate courts. It follows that this point should be dismissed.

[13] (ii) **Lack of urgency**

This point lacks merit as well as spoliation relief by its nature is urgent.

[14] **The Merits**

It is important to recount the salutary legal principles which will play a pivotal role in the determination of this matter before I deal with the merits. It is trite law that, since this is a motion proceeding, its resolution will be based on legal issues and common cause issues. Being motion proceedings, they are not meant to determine probabilities. Where dispute of facts arises on affidavits, a final order will only be granted if the facts averred by the applicant together with those which have been admitted by the respondent,

together with those averred by the latter justify the order. There are, however, exceptions to this rule, such as where the version of the respondent consists of bald or untrustworthy denials, it is palpably implausible, raises fictitious disputes of fact, far-fetched or it is so clearly untenable that the court is justified by merely rejecting them on the papers without the need for *vica voce* evidence (**National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) (12 January 2009).**

[15] Even though the impression might be created that there are disputes of fact in this matter, those are not genuine. The applicant averred in his founding affidavit that he was in peaceful and undisturbed possession of the plot in question following a Deed of sale between him and the respondent. The respondent averred in counter that there was no sale agreement between the parties. The applicant annexed the Deed of Sale to prove this. The respondent disputes the authenticity of this Deed of Sale and further averred that the relationship between the parties stemmed from the sublease agreement which expired in 2012. He did not annex the said sublease agreement as proof. The respondent averred that in 2012 he instituted CC25/2012 to eject the applicant among other reliefs sought. It emerged in reply by the applicant that the said case was withdrawn in July 2018 by the respondent. The respondent did acknowledge that he closed the premises in 2021. These factual averments by both applicant and respondent show quite clearly that the applicants were in possession of the plot in dispute when they were dispossessed of it. The respondent seeks to create fictitious disputes of fact which should be rejected on paper.

[16] It is well established that in applications of this nature, the applicant must prove that he was despoiled of possession unlawfully. Whether possession was lawful or illegal is irrelevant (**Mbangamthi v Sesing-Mbangamthi (C of A (CIV) No.6/2005) (NULL) [2005] LSHC 206 (20 October 2005).**

[17] In **Nino Bonino v De Lange 1906 T.S 120** the Court stated (at p. 122) 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 or wrongfully and against his consent of the possession of the 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 an inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle to clear."*

In the present matter the applicants have successfully proved that they were in peaceful and undisturbed possession of the property in question by and were despoiled of it by the respondent.

[18] In the result, therefore:

(a) The *rule nisi* is confirmed and the application granted as prayed with costs.

MOKHESI J

For the Applicants:	**Adv. Tšenoli instructed by E. M. Sello Attorneys**
For the Respondent:	**Adv. K. Monate instructed by T. M. Maieane & Co. Attorneys**