

## Spoliation of The Matrimonial Bedroom in Botswana: Paledi V Paledi

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### **ABSTRACT**

*Spoliation as a swift remedy has been commonly used in the sphere of property law. This remedy seeks to restore possession of an item of property without hearing the merits of the case. It is easy to apply and enforce in respect of tangible assets. Never before has this remedy been sought in respect of access of a portion of immovable property particularly in matrimonial proceedings. This paper seeks to present a novel sphere where spoliation was sought in matrimonial proceedings in respect of access to the matrimonial bedroom. The paper seeks to argue that in the past, spoliation dealt with actual or perceived possession of property. Possession should be given a broad and liberal meaning to include access to a part of a building.*

### **1. INTRODUCTION**

In matrimonial proceedings, divorce may either be relaxed or protracted and acrimonious. However, before the final order dissolving the marriage is granted, a lot of applications and counter applications may be made by the respective parties. The remedies that one may obtain in a matrimonial matter are the traditional ancillaries which are mostly sanctioned by statute<sup>1</sup> while others arise from the nature of the proceedings before the court. Be that as it may, a spoliation action is one of the least expected remedies in matrimonial proceedings. The High Court has dealt with a case, by way of urgency, where an application for spoliation of the matrimonial bedroom was made and granted. This was a first of its kind in matrimonial proceedings particularly where the issue of dissolution of the marriage had not been decided on. The novelty of the remedy in matrimonial proceedings goes to affirm the sacrosanct rule of law that where there is a right there is a remedy and that the court cannot turn a case away for lack of a remedy. The decision also further confirms that the jurisdiction of the

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1 The Matrimonial Causes Act of 1973 Cap 29:06 Laws of Botswana.

High Court is unlimited with respect to matters brought before it.<sup>2</sup> This however does not imply that the remedy of spoliation in relation to immovable property has not been dealt with in other jurisdictions. This paper seeks to interrogate the extent to which spoliation may be a remedy in matrimonial proceedings. Before interrogating the case, we turn to outline the background facts.

## 2. THE FACTS

The applicant wife sought as a matter of urgency to be restored *ante omnia* to the possession, occupation and access to the matrimonial bedroom. Further she wanted her husband to restore her personal belongings. Lastly, she wanted the husband to be interdicted from denying her access, possession and occupation of the matrimonial bedroom.

The applicant and her husband were married to each other out of community of property on the 4<sup>th</sup> December 2008 in Gaborone. At the time of the application for spoliation, the said marriage subsisted though an action for divorce had been instituted. The civil law marriage was preceded by customary rites. The parties established their matrimonial home in Gaborone where the wife had, among others, a matrimonial bedroom suite and other personal belongings and accoutrements.

Prior to the marriage, the applicant wife ran a successful law practice in Durban and, by agreement with her husband, continued to live there while the husband stayed in Gaborone. The parties however visited each other regularly. The husband had on numerous occasions suggested that his wife relocate to Botswana, a suggestion which she was reluctant to carry through.<sup>3</sup> This living arrangement continued and the parties visited each other on alternate weekends. In 2010, the husband intensified his relocation suggestion.<sup>4</sup> His wife agreed to sell the law practice though the sale took quite some time. In 2012, the parties amicably agreed on the relocation and that the practice would be sold from

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2 Section 95 (1) Constitution of Botswana.

3 Relocation was a difficult decision to make as it meant that she would have to abandon her livelihood and become her husband's dependant since their marriage was out of community of property. As a professional woman with certain aspirations she was a member of the Board of two companies listed with the Johannesburg Stock Exchange, Metropolitan Holdings and International Convention Centre (Durban).

4 The husband contended that he has a huge estate in Botswana enough to cater for her personal and social needs. She was not fully convinced and continued to stay in Durban.

Gaborone, to which she agreed. The following year, she was appointed an acting High Court judge in one of the local divisions in South Africa, an achievement which her husband was not happy with.<sup>5</sup> This caused so much tension that the husband deserted the matrimonial home and lived with his mother. This tension resulted in the husband instituting an action for divorce in November 2013. However, the parties subsequently resolved their differences and resumed their respective roles as husband and wife. On July 2014, when the applicant wife visited the matrimonial home, she found her husband and his son moving her personal effects from the matrimonial bedroom to the guest room. When she enquired no reasons were given for their removal. The matrimonial bedroom was then locked and the applicant wife was denied access. Each time she visited the matrimonial home, the bedroom was locked thus denying her access to the bedroom in her house which caused her inconvenience.

The second respondent, the husband's son, was in possession of the keys at all material times but he denied applicant wife access on the basis that he had been instructed not to give her any access. She was of the view that she was denied access to the matrimonial bedroom in her house and that such conduct was unlawful and intolerable.

Dissatisfied with this state of affairs, the applicant wife approached the court by way of urgency to protect and enforce her rights. She contended that she stood to suffer irreparable harm if she was denied access to the matrimonial bedroom. She alleged that she suffered from intimidation, harassment and humiliation in the presence of her husband's son as well as the domestic worker. She was of the view that she had the right to stay not only in the matrimonial home but the matrimonial bedroom as well since she was unlawfully removed.

The matter was opposed by the husband who contended that the matter was not urgent and that his wife was not expelled from the matrimonial home. The issue that came for determination before the court was whether the actions of respondent amounted to unlawful eviction.<sup>6</sup> The court then interrogated the issue of whether the remedy of *mandament van spolie* was suitable under the circumstances.

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5 From the transcript, the husband had indicated that he would rather divorce than have a wife who was judge.

6 The dispossession in the case under discussion comprised of the removal of personal effects from the bedroom to the guest bedroom, locking the bedroom and denying her access.

### 3. NATURE AND CONTENT OF A SPOLIATION ORDER

Spoliation action is available to any party who, being in peaceful and undisturbed possession of a thing, has been unlawfully dispossessed of the thing.<sup>7</sup> The rights of the parties with respect to the thing are never considered during the possessory suit.<sup>8</sup> It is recognised as a convenient remedy for unlawful dispossession of a thing which is the subject matter of the dispute. Restoration of possession should be made at once (*ante omnia*) to the possessor so as to prevent people from taking the law into their own hands.<sup>9</sup> Spoliation offers a temporary relief and as such it is regarded as a robust and speedy remedy which is not aimed at the restoration of rights.<sup>10</sup> It offers interim relief only and is a preliminary to the suit on the merits.<sup>11</sup> It is only available when property and rights that can be possessed are dispossessed and cannot be used in relation to human beings nor can it force human beings to take actions that are of a personal nature.<sup>12</sup> In the premises, spoliation as a remedy does not have an interlocutory nature but is a final determination of the immediate right to possession.<sup>13</sup>

For a spoliation order to be successfully granted, one has to allege and prove that they were:

- a) in possession;
- b) and that they were unlawfully disposed.

In the event the application is successful, possession must be restored at once (*ante omnia*). Justice Innes in *Stock Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Cultural Services*<sup>14</sup> opined as follows:

“The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful if it was by force or threat of force, or by stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession is without the consent of the person

7 Silberberg and Schoeman, *The Law of Property* 5<sup>th</sup> edition Lexis-Nexis, Butterworths p287; Kgosana v Otto 1991(2) SA 113. The main objective of the remedy is to put an end to the unlawful taking of the law into one’s own hands.

8 *Supra*.

9 Silberberg and Schoeman, *The Law of Property* 5<sup>th</sup> edition Lexis-Nexis Butterworths p289, Sillo v Naude 1929 AD 21, *George Municipality v Vena* 1989(2) SA [263](A).

10 *Ibid* at [289].

11 *Ibid*.

12 *Ibid*.

13 *Ibid* at [290].

14 1996 (4) SA [231] (C).

deprived of possession, since consent to giving up of the property, if the consent is genuinely and freely given, negates the unlawfulness of the possession.”<sup>15</sup>

The nature of the spoliation as mentioned earlier is such that the court is not concerned with the merits of the case since the enquiry is focused on two grounds;

- a) Whether there was dispossession of an item of property; and
- b) Whether such dispossession was unlawful.

It has been stated in the case of Eskom Holdings SOC Limited v Masinda that a court hearing a suit of spoliation does not require proof of the Claimant’s right to property but the possession of it.<sup>16</sup> In that particular case the Court was asked to determine, on appeal the correctness of the determination of the court a quo in determining whether or not Masinda was in possession of electricity that had been unlawfully connected to her property and whether or not Masinda was entitled to a spoliation order over the disconnection of the said electricity supply by Eskom. To this end the South African Supreme Court of Appeal stated that decision of the court a quo was problematic as it went beyond the re-establishment of a right whereas spoliation only requires that the status quo ante be restored.<sup>17</sup>

To this end, the court in the Eskom case relied on the decision taken in Zinman v Miller which stated that the *mandament van spolie* not only envisaged the return of possession, but also a restoration.<sup>18</sup> The focus of a spoliation order and its consequence are not the mere return of the property that had been unlawfully taken but rather the return to the position the claimant was in prior to the unlawful dispossession. The court in Zinman stated that the moment a claimant demands the return of an article or its value the claim stops being a *mandament van Spolie* but becomes a vindicatory action.

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15 Stock Housing (Cape) (Pty) Ltd v Chief Executive Director, Department of Education and Cultural Services [231],[240].

16 Eskom Holdings SOC Limited v Masinda (1225/2018) [2019] ZASCA [98]; 2019 (5) SA [386] (SCA) (18 June 2019).

17 Ibid at para 10.

18 1956 (3) SA [8].

#### 4. POSSESSION

Over the centuries property has changed in nature and form, particularly with the technological developments of the past two centuries. There has been a development of property that individuals can own and can have in their possession whilst that particular property is impossible to touch or physically control. In *Telkom v Xsinet* the court pointed that although a spoliation order originally protected only the physical possession of movable and immovable property, it was extended over the course of scientific development to provide a remedy to protect so called “quasi-possession” of certain incorporeal rights.<sup>19</sup>

This extension of the protection was however qualified by the case of *First Rand v Scholtz NO & Ors* which stated that the spoliation order does not have a catch-all function to protect the quasi-possession of all kind of rights irrespective of their nature.<sup>20</sup> The court further stated that the nature of the professed right, even if it need not be proved, must be determined to be a right that is deserving of protection by the *mandament*.<sup>21</sup> However the qualification created by the court in the *First Rand* case qualifies the protection of quasi-possession to the rights of use or rights that are incident of the possession or control of the property. The protection thus granted, as seen from the authorities cited in above seem to exclude personal rights and limit the protection mainly to real rights. An exception does seem to arise from the qualification that where the right is greatly linked to a real right then the courts would grant an order of spoliation. In the *Masinda* case cited above the court implied that where a claimant seeks to enforce personal rights they must accrue to the claimant by the incidence of possession.<sup>22</sup>

From what the cases cited above show, there are two models under which the concept of possession can be interrogated with respect to spoliation orders. The first is the traditional exertion of control over the actual property which is the subject of a spoliation order. This is the traditional way of thinking under which the claimant for spoliation would have been physically in control of the property he was unlawfully denied possession of.

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19 2003 (5) SA 309 (SCA) para 9.

20 [2006] ZASCA 99; 2008 (2) SA [503] (SCA) para 13.

21 Ibid.

22 *Masinda Supra* at para [22].

The second concept is to look beyond the form of property and the continual physical control thereof and consider possession as a question of rights at the time of the unlawful deprivation. In the case of *D v S and Another* it was held that the fact that the Applicant had been in possession of the property in dispute since prior to his divorce.<sup>23</sup> The property that was the subject of the spoliation applicant had been the matrimonial home of the Applicant in that case had been executed pursuant to a judgment against the Applicant and sold to his sister. The Applicant had leased the property to students and received rentals for his own benefit. The court took the opinion that there need not be continual physical possession of the property by the party seeking spoliation for the application to be successful but the fact that the party had intended to derive a benefit, had kept his possessions on the property and had exerted some form of control, though not on a continual basis, was enough to show that the Applicant had been in continual possession despite not being physically present on the property. However, the court took the opinion that the mere fact that the Applicant's possession had been moved in the house did not amount to him being deprived of possession but a disturbance of such possession and that since the Applicant still had access to the property he could not have been deprived thereof.

The right of possession is a real right that is enforceable and defensible against all persons apart from the owner of the property. As a right it affords other rights that are, as argued above, incidental to it and thus can be recovered through a spoliation order. This creates an avenue through which protection over incorporeal property that individuals are deemed, at law, to exercise some form of control and can enforce rights thereof against all persons. Under the second model, it would be clear that in recognising a matrimonial home and a matrimonial bedroom thereof the law recognises the possession over the said home and, by extension, the bedroom in that where they have the right of use of the designated matrimonial home. Secondly, and more evidently in marriages entered into in community of property, it is presumed that a married couple that establishes a matrimonial home exercise control jointly over such a home and share equal entitlement over the property. This allows any spouse to exercise control over the property to the exclusion of persons outside the marriage and they thus can seek spoliation against any person who unlawfully deprives the

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23 (5451/2017) [2018] ZAECGHC 5 (30 January 2018).

marriage of the property.

Differing from the traditional understanding of possession there exists the point of constructive possession. It is constructive when there is control or dominion over the property without actual possession or custody of it.<sup>24</sup> The test for whether there is constructive possession is similar to that of actual position in that the party claiming it must demonstrate that he holds the property for his own interest and exercises control over the property. The stark difference between actual possession and constructive possession is that the party in possession does not need to be in physical control over the property or present at the location of the property. The main determinant would be whether or not the said possessor exercises some form of control over the property. In the case of *D v S* and another<sup>25</sup> the Applicant was not physically present on the property that was the subject of the suit. He however exercised some form of control where he could determine who resided on the premises. He was thus deemed to be in possession of the property despite the fact that he was not actually in the premises at all material times. This is one example of constructive possession of property. Another example can be found through agency. This example was the focus of the dispute in the criminal appeal of *Russel*<sup>26</sup> where the major question was whether or not the Appellant had been convicted of being in possession of drugs by the court a quo. In that case the Ghanaian Police had arrested a certain Maxwell who was in the possession of a white substance that was found to be drugs. Maxwell had claimed that he had acted under the direction of the Appellant and the Prosecution charged the Appellant as a principal.

The question before the court was whether or not the Appellant had been in possession of the drugs. The contention thereof was whether one can be deemed to be in possession of illicit substances even if the claimed possessor was not in physical control of the said drugs. The court was of the opinion that constructive possession does allow for one to be a possessor of property even if they are not in his actual possession if the property is held for his benefit and he can exercise sufficient and reasonable control over the said property. There is no requirement at law that the principal possessor exercise absolute control over the property but there must be sufficient control over the property for a

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24 *Russel v Republic* (J3/5/2014) [2016] GHASC 41 (13 July 2016).

25 *D v S and Anor.* supra.

26 *Russel v Republic* supra.



reasonable person to deduce that the said possessor has influence over the said property or over the individual who has actual or physical control. The question then becomes; what would dispossession look like where the claimant possessor never had actual physical control and or was never in the premises? Since possession on the issue of spoliation revolves around an exercise of control over the property dispossession would be the limitation of control. Looking at the case of *D v S and Another*, the disturbance of peaceful possession can be adduced where the control that the possessor has over the property has been disturbed either through restricting access to the property, restricting the actions of the agents of the possessor or interfering with the benefits that accrues to the possessor. This leads to the conclusion that a party can successfully seek a spoliation order even if they are not physically interacting with the property that they claim they have been unlawfully dispossessed of.

## 5. APPLICABILITY OF SPOILIATION IN MATRIMONIAL MATTERS

It is a well settled principle of marital law that upon marriage, both husband and wife owe each other a reciprocal duty of support.<sup>27</sup> This support is an invariable consequence of marriage and cannot be altered by the parties either before marriage or during the subsistence of the marriage. It is also not dependant on the marital regime chosen by the parties. By extension, regardless of marital regime chosen by the parties, a husband has an obligation to provide a matrimonial home to his wife for as long as they remained married. This obtains even where the husband has instituted an action for divorce. According to Hahlo:

“Since the duty of support is reciprocal in modern law, husband and wife are legally in the same position. However, in practice, the duty rests primarily on the husband, be it because he is head of the family, be it because this is recognised by customary law, or be it because he is in most instances the main if not the sole money earner. He has to provide the matrimonial home. To support his wife and family, he must use, where the marriage is out of community of property his income, and if need be his capital and where it is in community of property whatever income and, if need be, capital assets he controls.”<sup>28</sup>

27 *Louw v Ogilvie* [2000]1 BLR [355],[360]-[361]

28 *The South African Law of Husband and Wife*, 7<sup>th</sup> edition, Juta [135]; para [53] of the transcript.

Cronje and Heaton<sup>29</sup>echoed the same sentiments:

“During the subsistence of the marriage, both spouses are entitled to live in the matrimonial home and use the household assets (such as furniture and appliances) irrespective of whether they are married in or out of community of property and irrespective of which spouse owns or rents the matrimonial home or household assets.”<sup>30</sup>

*Mandament Van Spolie* applies with equal force in respect of jointly held property and is not confined to individually owned property. Dispossession of a share of the joint property could also be the subject matter of *mandament van spolie*. In *Rosenbuch v Rosenbuch*<sup>31</sup>Colman J stated as follows:

“It seems to me that in principle a joint possessor who has been deprived of his share of the possession of something should be entitled to the remedy of a spoliation order as if the factors requisite for such relief are present. When one of two joint possessors of a thing illicitly takes possession of that thing against the will of his co-possessor, the ratio underlying the remedy of a spoliation order would seem to me to be as fully applicable as in the case where a person has been wrongfully deprived of exclusive possession.”

The parties in the case under discussion were married and their matrimonial home has at all material times been in Gaborone, Plot 3087 Extension 9. It is access to the matrimonial bedroom which was the subject matter of the dispute. Although the husband admitted preventing his wife from accessing the matrimonial bedroom, his motive or the legality of such an action on his part was irrelevant for purposes of being granted a spoliation order. The only two issues to be determined are whether there was dispossession and whether it was unlawful. It has been shown that before she was locked out of the matrimonial bedroom, applicant wife enjoyed peaceful and undisturbed possession of the matrimonial bedroom together with her husband. Although applicant was in

29 South African Family Law, Lexis Nexis 5<sup>th</sup> edition [78]; para [54] of the transcript.

30 Supra at page 78; para [55] of the transcript; *Buck v Buck* 1974(1) SA [609]; *Modise v Modise* [1991] BLR [333].

31 1995(1) SA [183], [F-G].

Durban most of the time away from the matrimonial home, possession should be given a liberal meaning to include not only physical possession but the intention to possess the thing in this instance the matrimonial bedroom. Her absence from the matrimonial home did not mean she lacked peaceful and undisturbed possession of her matrimonial home in Botswana. The court ruled that applicant had been unlawfully disposed from the matrimonial bedroom. The removal of her personal effects from the bedroom, locking it and denying her access amounted to unlawful dispossession and according to the nature of the spoliation application; restoration of possession must be made *ante omnia*. To do otherwise would defeat the whole purpose of the order. In the premises the order was granted.

It would seem that the spoliation order is inappropriate to be granted in respect of the matrimonial bedroom. Most cases which the courts have dealt with pertained to dispossession of items of property of the parties to a marriage. In *Mandandi v Mandandi*<sup>32</sup> a spoliation order was entertained in a marriage setting. Although the application therein was not successful the court reiterated the requirements as well as the fundamental purpose of the remedy of *mandament van spolie*. The brief facts of the case are that a lawfully married man sold his brother a car without the knowledge of his wife. The car remained in the possession of the said husband as his brother had to go for further studies in South Africa. His wife later found out about the sale and at this point they were estranged and in the process of divorce. The wife took the spare keys and took the car which was in Masunga and drove it to Francistown. The application was brought by the brother to respondent's husband. The applicant failed to prove the elements of a spoliation order. He sought to rely on ownership rights and the court reiterated that ownership was not a necessary relevant factor to be proved. He failed to prove that he was in possession of the vehicle at the time of dispossession as the said car was in the possession of his brother who was not a party to the proceedings.

It would appear that the remedy of a spoliation order is available even in respect of parties who are married but live separately, each in peaceful possession of a portion of their joint matrimonial property, for his or her personal use before the dissolution of their marriage, he or she cannot without

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32 [2003]2 BLR 88 (HC).

lawful justification be dispossessed of that property. When the parties who are married by civil rites and in community of the property live separately, in fact or de jure, each in peaceful possession of the portion of their joint matrimonial property, each party is entitled to retain such peaceful possession until it is lawfully disturbed or disrupted. Where such peaceful possession is unlawfully disturbed or disrupted, he or she is entitled to a restoration order.<sup>33</sup>

It is submitted that a spoliation order is usually granted in matrimonial causes in respect of items of property to which each respective party has an interest. But never before has the matrimonial bedroom been the subject matter of a spoliation order in court. This perhaps goes to show the extent to which the court would go in protecting the rights of married persons prior to the divorce being granted. In the case of Paledi,<sup>34</sup> the court viewed the matrimonial bedroom as property to which both parties were entitled to the peaceful and undisturbed possession. On the other hand, the right to use the matrimonial property could be used or viewed as an aspect of the duty of reciprocal support that the parties cannot depart from prior to dissolution of the marriage. Married couples have a right to the equal enjoyment of the joint estate and there is nothing stopping the court from issuing such an order pending divorce proceedings.<sup>35</sup> In essence, the Mandandi case dealt with among other things restoration of possession of a motor vehicle which belonged to the joint estate of the parties. Although the court did not invoke use of the *mandament van spolie*, it gave an order for restoration of the motor vehicle to the wife plaintiff on the basis that she was also entitled to the equal enjoyment of the property of the joint estate pending finalisation of the divorce action. An alternative argument was made to the effect that the use of the motor vehicle constituted maintenance to which the husband was obliged to provide.

It is apparent and well settled that dispossession may not necessarily be in respect of the whole thing as deprivation of only a part thereof entitles one to relief.<sup>36</sup> Although usually reserved for restoration of tangible objects,<sup>37</sup> it is

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33 *Mohanela v Mohanela* Civ/APN/414/05 or (2005 LSHC [228]), a decision of the High Court of Lesotho which dealt with spoliation of assets of the marriage.

34 MLHGB-000711-13(Unreported)

35 *Mothokgo v Mothokgo*; In re: *Mothokgo v Mothokgo* [2007]1 BLR 286(HC).

36 Silberberg and Schoeman, *The Law of Property* 5<sup>th</sup> edition Lexis Nexis Butterworths p295.

37 *Ibid* at 297.

submitted that in the case under discussion there was possession in the form of access to the bedroom by the couple and that one did not have more rights than the other.

## 6. CONCLUSION

Spoliation as a remedy has been exclusively used in respect of being disposed of a tangible asset. However over the years it has extended its application to other forms of property. As a speedy remedy, possession as a concept has been generously interpreted to cover other form of property which are not susceptible to human control as well as access to a portion of a building as has been clearly shown in the discussion above. the Paledi case as a first of its kind demonstrates the growing jurisprudence in respect of extension of the *mandament van spolie* as a remedy in m matrimonial matters.