

SOUTH AFRICA / JUDGMENT

JC Impellers Proprietary Limited v Erven 1[...] Wadeville Proprietary Limited (2024-107540) [2024] ZAGPJHC 1025 (2 October 2024) [2024] ZAGPJHC 1025

COURT

South Gauteng High Court, Johannesburg

BEFORE

ML Senyatsi

CASE / FILE NUMBER

2024-107540

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Numbers: 2024-107540

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE

02/10/2024

SIGNATURE...

ML SENYATSI...

In the matter between: JC IMPELLERS
PROPRIETARY LIMITED
Applicant
and
ERVEN 1[...] WADEVILLE
PROPRIETARY
LIMITED
Respondent

JUDGMENT

SENYATSI, J

Introduction

- [1] This is an opposed urgent application in terms of which the applicant seeks, among other things, an order that the respondent be directed to restore the electricity supply at 1[...] I[...] Road, Wadeville (“the premises”). At the hearing of the application, the court was required to determine whether the application was urgent and more importantly, whether the mandament van spolie is available for the respondent for the relief it seeks.
- [2] Both counsels were invited to address the court on urgency first and after considering their submissions, I determined that the matter was urgent and worthy of being heard in the urgent court. The other issue which was raised by the respondent was a point in limine that there was pending litigation between the applicant and the respondent (lis pendens) relating to rent interdict and that as such, the applicant is precluded from instituting relating to the alleged disputed cancellation in terms of the arbitration clause in the lease. However, the important issue that needs determination is whether the applicant has been spoliated by the respondent by termination of electricity to the property.

Background

- [3] The applicant operates a business of a foundry which manufactures custom castings (“the products”) for various clients across various sectors. Amongst other things, the applicant uses the electricity to operate its furnaces which it utilizes to manufacture the products. The premises from which the applicant operates, belongs to the respondent and is occupied in terms of a lease agreement concluded for a duration of three years to terminate on 31 December 2025.
- [4] The electricity at the premises, is supplied without interruption and is not affected by load shedding. It is common course that the applicant failed to honour its rental and utilities charges and on 12 August 2024, the respondent issued a notice of breach of the lease agreement to the applicant and demanded that the applicant pay arrear rental and utilities charges of R 322 663.23. However, as will be shown later in this judgment, in spoliation proceedings, the court is not called upon to determine the contractual disputes of the

parties. I will therefore not comment further on this point.

- [5] After the applicant failed to remedy the breach, the respondent, on 24 August 2024, sent a notice of lease cancellation and stating the applicant was required to vacate the property. The respondent then sent a notice warning the applicant that it would terminate services to the premises if it didn't pay the utility component within seven days. On 8 September 2024, the respondent terminated the electricity at the premises, leaving the applicant with just under R 600,000 in arrears, with at least R 283,898.00 in electricity arrears.
- [6] The applicant paid the August 2024 arrears in the sum of R 322 663.23 on 14 September 2024. However, when the applicant's employees arrived at the premises on 16 September 2024, the electricity had not been restored by the respondent. It was for that reason that an application was launched which is now the subject of this judgment.
- [7] The applicant contends that the respondent took the law into its hands by terminating the electricity

without following the due process and in so doing, deprived it of the undisturbed use of the premises and that the supply of the

electricity to the premises is the incident of possession thereof and seeks the intervention of this court for spoliation relief for restoration of the supply pending the determination of other related disputes.

- [8] It was submitted on behalf of the applicant that the supply of the electricity to its premises which it occupies is in terms of the lease agreement. The respondent contends that the lease it been cancelled and that it has instituted rent interdict proceedings against the applicant and that the supply of electricity to the premises is a personal right which does not meet the protection requirement afforded by mandament van spolie and that the application should be dismissed.

The

Legal Framework

- [9] The onus to prove that the termination of electricity is not only unlawful and that it amounts to spoliation is borne by the applicant. The mandament van spolie is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property that is in the possession of another, without the latter's consent.[1] Therefore a spoliation application can be brought against the person who had taken the item (called "the dispossessor"). In spoliation proceedings the claimant is not confined to a simple restoration of possession[2].The spoliator may be obliged to restore the despoiled property in its former state, which may require some positive act on his part[3].

[10] Although mandament van spolie originally protected only the physical possession of movable or immovable property, the SCA pointed out in *Telkom v Xsinet*[4] that in the course of scientific development it was extended to provide a remedy to protect so-called ‘quasi-possession’ of certain incorporeal rights, such as those of servitude.[5] The mandament is not concerned with the underlying rights to claim possession of the property concerned, it seeks only to restore the status quo ante (in other words the situation prior to being dispossessed. The essential rationale for the remedy is that the rule of law does not countenance resort to self-help.

[11]

In *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others (Rikhotso)*[6] it was held that:

“The remedy afforded by the mandament van spolie, expressed in the maxim spoliatus ante omnia restituendus est, is generally granted where one party to a dispute concerning possession of property seizes the property pursuant to what he believes to be his own entitlement thereto. In such cases a court will summarily order return of the property irrespective of either party’s

entitlement to possession, and will not entertain argument relating to their respective rights until this has been done. The principle

underlying the remedy is that the entitlement to possession must be resolved by the courts, and not by a resort to self-help.

By its nature then a spoliation order will usually operate as no more than a preliminary order for restoration of the status quo until the entitlement to possession of the property is determined. The assumption underlying the order is that the property exists and may be awarded in due course to the party who establishes an entitlement thereto.”

[12] Two requirements must be met in order to obtain the remedy. Firstly, the party seeking the remedy must, at the time of the dispossession, have been in possession of the property. The second is that the dispossessor must have wrongfully deprived them of possession without their consent. As indicated in *Rikhotso* the assumption underlying the granting of the remedy is that the property exists and is capable of being restored to the possession of the party that establishes entitlement thereto. It is for this reason that the remedy is not available in circumstances where it has been destroyed. It is also not available, generally, in circumstances where the property is no longer in the possession of the spoliator.[7]

[13] In approving this doctrinal basis for the remedy, in *Tshwelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*[8] Cameron JA (as he then was) stated the following:

“The doctrinal analysis in Rikhotso is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function).”

[14] In *Firststrand v Scholtz*

[9] the court said the following:-

*“[12] The mandament van spolie is a remedy to restore to another ante omnia property dispossessed ‘forcibly or wrongfully and against his consent’.[10] It protects the possession of movable and immovable property as well as some forms of incorporeal property.[11] The mandament van spolie is available for the restoration of quasi possessio of certain rights and in such legal proceedings it is not necessary to prove the existence of the professed right: this is so because the purpose of the proceedings is the restoration of the status quo ante and not the determination of the existence of the right.[12] The quasi possessio consists in the actual exercise of an alleged right[13] or as formulated in *Zulu v Minister of Works, Kwazulu, and others*[14] in ‘die daadwerklake uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word’.*

[13] The mandament van spolie does not have a ‘catch-all function’ to protect the quasi possessio of all kinds of rights irrespective of their nature.[15] In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy,[16] but not where contractual rights are in dispute[17] or specific performance of contractual obligations is claimed:[18] its purpose is the protection of quasi possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right

characterized to establish whether its quasi possessio is deserving of protection by the mandament.[19] *Kleyn*[20] seeks to limit the rights concerned to ‘gebruiksregte’ such as rights of way, a right of access through a gate or the right to affix a name plate to a wall[21] regardless of whether the alleged right is real or personal.[22] That explains why possession of ‘mere’ personal rights (or their exercise) is not protected by the mandament.[23] The right held in quasi possessio must be a ‘gebruiksreg’ or an incident of the possession or control of the property.”

[15] Mr Mabaso relied on *Eskom Soc Ltd v Masinda*[24] where the court said the following in restating the principles of spoliation remedy :-

“[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property ‘as a preliminary to any enquiry or investigation into the merits of the dispute’ as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant’s existing right to property, as opposed to their possession of it, in order to grant relief. But

what needs to be stressed is that the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in Eskom v Nikelo[25] is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.”[26]

[16] In *Telkom SA Ltd v Xsinet (Pty) Ltd*[27] in restating the principle on extension of spoliation relief to what the court referred to as quasi possession said the following :-

“[9] Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal

*rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has ‘quasi-possession’ of it, when he has exercised such right. Many theoretical and methodological objections can be raised against this construct, inter alia that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of ‘quasi-possession’ has passed into our law. This is all firmly established. See *Nino Bonino v De Lange*[28]; *Nienaber v Stuckey*[29]and *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*[30].”*

[17] In *Wilrus Trading CC and Another v Dey Street Properties (Pty) Ltd and Others*[31], Rogers J stated that the difficult question in spoliation based on termination of supply of electricity “is to identify the precise basis on which an alleged right to electricity is to be characterised as being of one kind or the other.

In general terms, one must, in terms of *First Rand v Scholtz and Masinda*,[32] enquire whether the alleged right to electricity was a ‘gebruiksreg’ (a right of use) or an ‘incident of the possession or control of the property’ served by the electricity. If so, the mandament is available to protect the alleged spoliation.”

The court went on after considering various authorities and said :-

“[32] The authorities discussed in Masinda can be divided into three categories:

(a) First, there are cases where the alleged right to a service (typically water) takes the form of an alleged servitude or alleged

registered statutory right. Into this category one can place *Bon Quelle (Edms) Bpk v Munisipaliteit van Octavi 1989*

(1) SA 508 (A), *Impala Water Users Association v Lourens NO & others 2008*

(2) SA 495 (SCA), *Sebastian & others v Malelane Irrigation Board 1 950*

(2) SA 690 (T) and *Painter v Strauss 1951*

(3) SA 307 (O) (as the latter case was explained in *Masinda* para 17). These are uncontentious cases of quasi-possession enjoying protection under the mandament.

- (b) Second, there are the cases in which the alleged right to electricity or other service has been held to be 'purely personal in nature'. These cases, in which no servitude or similar right was alleged, include Masinda itself as well as *First Rand v Scholtz*, *Telkom SA Ltd v Xsinet* 2003
- (5) SA 309 (SCA) and *Zulu v Minister of Works*. One may infer, from Leach JA's disapproval of the case, that *Eskom v Nikelo* should also be placed in this category. These cases do not involve quasi-possession enjoying protection under the mandament.
- (c) Finally, there are cases such as *Naidoo and Froman*, which do not appear to have been disapproved in *Masinda*, where the alleged right to a supply of electricity was an alleged personal contractual right but where, nonetheless, the mandament's

protection was held to be available.

- [33] The potentially difficult question is whether a case should be placed in category (b) or (c). A unifying feature of the cases falling into category (b) is that the person alleged to be under an obligation to supply the service – *Eskom*, *First Rand*, *Telkom*, the *Irrigation Board* – was not the person who had conferred on the claimant the alleged right to occupy the property to which the service was supplied. The supplier of the service had no interest in possession of the property. In each case, the only alleged contract which the supplier had with the occupant was the contract for the supply of the service.
- [34] In the cases falling into category (c), by contrast, the alleged right to the service is an adjunct to, or part of, the alleged right to occupy the property. The same person (typically a landlord) who was allegedly obliged to allow the claimant to be in possession of the property was the party who was allegedly obliged to supply, or to allow a supply, of services such as electricity and water. (Cf *ATM Solutions (Pty) Ltd v Olkru Handelaars CC & another* [2008] ZASCA 153; 2009
- (4) SA 337 (SCA) paras 9-12). In such cases, the landlord has a direct interest in the possession of the property itself. The landlord's act in cutting off electricity and water is an act which interferes not only in the claimant's alleged right to receive those services but simultaneously interferes in the claimant's alleged right against the landlord to be in undisturbed possession of the premises with the amenities forming part of the alleged right of occupation. The claimant's alleged right to receive electricity and water is part of the cluster of alleged rights making up the occupation to which he claims to be entitled. And in such cases it may be difficult to avoid the conclusion that the landlord who has intentionally cut off the electricity and water is trying to eject the occupant without due legal process. In cases falling in category (b), by contrast, the supplier does not and could not have any such intention.

Each case determined on its own facts. The factual question under the circumstances is whether the termination of electricity under these circumstances owing to the alleged termination of the lease and protecting the interests of the respondent, as argued by Mr Carstens, entitles the applicant to the spoliation relief sought.

[18] The passages quoted from the authorities above supports the proposition that indeed under certain circumstances,

electricity supply may be incidental to possession of premises and therefore termination thereof may, in appropriate circumstances, be protected by mandament.

[19] Each case is determined on its own facts. The factual question under the circumstances is whether the termination of electricity under these circumstances owing to the alleged termination of the lease and protecting the interests of the respondent, as argued by Mr Carstens, entitles the applicant to the spoliation relief sought.

[20] Mr Carstens on behalf of the respondent, implored me to follow Masinda[33] and dismiss the application on the basis that the right to the supply of electricity is personal. This is not that simple for reasons that will become clearer below.

[21] It has not been denied by the respondent that it terminated the electricity supply without following due process. In fact, the respondent stated that it terminated the electricity supply based on the notice to do so by way of the letter which it sent to the applicant in August 2024 and the letter was followed up by the cancellation of lease notice during September 2024 and the electricity supply termination was done on the 8 September 2024. This act, in my considered view, amounts to self-help and cannot be justified under the circumstances. It is not good enough to argue that the respondent terminated the supply of electricity due to the applicant's default in paying for the utilities without due process. This is so because without going into the underlying rights of the parties, the status quo ante must be restored.

[22] The applicant operates from the premises a business which requires consistent supply of electricity and it is common course that the premises are never loadshed. The respondent under the circumstances, unlike municipalities and Eskom, which by legislation, are empowered to terminate electricity under certain circumstances without due process, the respondent does not by way of legislation, enjoy a similar power. Accordingly, as already stated, the Masinda

[34] the termination of the supply of electricity under the present circumstances, should be regarded as incidental possession of the premises and therefore protectable by mandament.

[23] As far as I am concerned, it will not be in the interests of justice not to order the restoration of supply of the electricity to the premises and whatever rights which the parties may want to ventilate in the appropriate forum will take place then and ensure that the rule of law is adhered to. I will not venture into the controversy of the parties' disputed rights at this stage except to confirm that the applicant has in my view, discharged the onus of proving spoliation as alleged which the respondent has failed to rebut.

[24] It follows therefor that the application must succeed

Order

[25] The following order is made:

25.1. The applicant's non-compliance with the Rules is condoned and the matter is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court;

25.2. The Respondent is directed to forthwith, upon granting of this order, to restore the electricity supply at 1[...] I[...] Road, Wadeville ("the property");

25.3. The Respondent is interdicted and restrained from disconnecting the supply of electricity or any other services from the property pending finalisation of the arbitration proceedings which will be initiated by the Applicant;

25.4. In the event that the Respondent fails to comply with this Court Order, the Sheriff of the Court having jurisdiction over the property is hereby authorised and directed to take all measures necessary to restore the electricity supply at the property, including cutting the padlock on the electricity box;

25.5. The Respondent is directed to pay the costs of this application on Scale B.

ML SENYATSI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 2 October 2024.

Appearances:

For the applicants: Adv S Mabaso Instructed by Mota Africa Inc For the first respondent: Adv JC Carstens Instructed by Martin Attorneys Date of Hearing: 26 September 2024 Date of Judgment: 02 October 2024

[1] Nino Bonino v De Lange 1906 TS 120 at 122

[2] Makeshift 1190 (Pty) Ltd v Gilliers [2020] ZAWCHC 41; [2020] 3 All SA 234 (WCC); 2020 (5) SA 538 (WCC) para [52]

[3] See Eskom Holdings Soc Ltd v Masinda 2019

(5) SA 386 (SCA) para 10, approving Zinman v Miller 1956

(3) SA 8 (T).

[4] ZASCA 35; 2003 (5) SA 309 (SCA) para [9]

[5] See Bon Quelle (Pty) Ltd v Otavi Municipality 1989

(1) SA 508 (A) at 514D-516E.

[6] 1997

(1) SA (W) at 532G-I.

[7] Monteiro and Another v Diedricks (1199/2019)

[2021] ZASCA 15; 2021 (3) SA 482 (SCA); [2021] 2 All SA 405 (SCA) at para 18.

[8] 2007

(6) SA 511 (SCA) para 24.

[9] [2006] ZASCA 99; [2006] SCA 98 (RSA); 2008 (2) SA 503 (SCA) ; [2007] 1 All SA 436 (SCA)

[10] Nino Bonino v De Lange 1906 TS 120 122 approved in Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989

(1) SA 508 (A) 511H–512B.

[11] Nino Bonino v De Lange above 122; Tigon Ltd v Bestyet Investments (Pty) Ltd 2001

(4) SA 634 (N) 640H–642D.

[12] Bon Quelle 513B–516C approving the view of Duard Godfried Kleyn Die mandement van spolie in die Suid-Afrikaanse reg LLD dissertation University of Pretoria (1986) p 395 that to require proof of the right would

entail “dat die hof op die meriete van die geskil sal moet ingaan, wat ontoelaatbaar is in die lig van die karakter van die mandement as besitsremedie.” Also Van Wyk v Kleynhans 1969

(1) SA 221 (GW) 223D-H.

[13] Bon Quelle 514I.

[14] 1992

(1) SA 181 (D) 188C.

[15] Duard Kleyn ‘Possession’ in Reinhard Zimmermann and Daniel Visser Southern Cross: Civil Law and Common Law in South Africa (1996) 819 at p 830; JC Sonnekus ‘Mandement van spolie en ongeregistreerde serwitute vir water’ 2006 TSAR 392 p 400; MJ de Waal ‘Naidoo v Moodley 1982 4 SA 82 (T)’ 1984

(47) THRHR 115 p 118.

[16] Bon Quelle 514D-E and see Zulu v Minister of Works Kwazulu 188D.

[17] Parker v Mobil Oil of Southern Africa (Pty) Ltd 1979

(4) SA 250 (NC) 255B-C; Rooibokoord Sitrus (Edms) Bpk v Louw’s Creek Sitrus Koöperatiewe Maatskappy Bpk 1964

(3) SA 601 (T) 607A-B. Cf Slabbert v Theodoulou and another 1952

(2) SA 667 (T).

[18] Kotze v Pretorius 1971

(4) SA 346 (NCD) 350D-E.

[19] See the approach of PC Combrinck J in Tigon Ltd v Bestyet Investments (Pty) Ltd 2001

(4) SA 634 (N) 642D–643C.

[20] Die mandement van spolie in die Suid-Afrikaanse reg above 393-394; Kleyn ‘Possession’ above 830 and PJ Badenhorst, Juanita M Pienaar, Hanri Mostert assisted by Marisa van Rooyen Silberberg and Schoeman’s The Law of Property 4 ed (2003) p 275.

[21] Shapiro v South African Savings & Credit Bank 1949 (4) SA 985 (W) 991.

[22] Duard Kleyn ‘Ntshwaqela v Chairman Western Cape Regional Services Council 1988 3 SA 218 (K)’ 1989 De Jure 154 pp 162-163.

[23] Impala Water Users Association v Lourens NO and others [2004] 2 All SA 476 (SCA) 481a-b; Telkom SA Ltd v Xsinet (Pty) Ltd 2003

(5) SA 309 (SCA) 314C-D; Zulu v Minister of Works, Kwazulu, and Others 1992

(1) SA 181 (D) 190F-I; Plaatjie and Another v Olivier NO and Others 1993

(2) SA 156 (O) 159J–160G.

[24] [2019] ZASCA 98; 2019 (5) SA 386 (SCA) (18 June 2019)

[25] [2018] ZAECHMHC 48 (21 August 2018)

[26] Bon Quelle at footnote 9 above.

[27]

[2003] ZASCA 35; 2003 (5) SA 309 (SCA) (31 March 2003)

[28] See footnote 1 above

[29] 1946 AD 1049

[30] 1989(1) SA 508 (A)

[31][2021] ZAGPPHC 42 (9 February 2021)

[32] [2006] ZASCA 99; [2006] SCA 98 (RSA); 2008 (2) SA 503 (SCA) ; [2007] 1 All SA 436 (SCA)

[33] Footnote 24 above.

[34] Ibid.

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