

SOUTH AFRICA / JUDGMENT

Tsele and Another v Kgetleng Rivier Local Municipality and Another (273/25) [2025] ZANWHC 116 (9 July 2025)

[2025] ZANWHC 116

COURT

North West High Court, Mafikeng

BEFORE

Masike

CASE / FILE NUMBER

273/25

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and SAFLII Policy

FLYNOTES: CIVIL LAW – Spoliation – Electricity supply – Restoration – Adequate notice – Disconnection due to a faulty meter – Electricity supply was an incident of possession – No proper notice was given – Wrongful deprivation – Disconnection substantially interfered with occupation of property – Forced to seek alternative accommodation – Urgent intervention justified – Spoliation order was appropriate to prevent self-help and maintain rule of law – No alternative remedy – Rule nisi confirmed.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO.: 273/25

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between:

PETER MARUTLENG TSELE

FIRST APPLICANT

SEMAKALENG MARTHA TSELE

SECOND APPLICANT

And

KGETLENG RIVIER LOCAL

FIRST RESPONDENT

MUNICIPALITY

MR ANDREW PHOLOSE

SECOND RESPONDENT

REASONS

FOR ORDER

MASIKE AJ

INTRODUCTION

[1] On 24 January 2025, this Court made an order which reads as follows:

“1. The non – compliance with the ordinary rules of court relating to dies and service be and are hereby condoned and this matter is disposed as an urgent application.

2. The First alternatively the First and Second Respondents are ordered to:

2.1 Restore the electricity supply to the respective premises of the First and Second Applicant known as [...] N[...] Street Koster which supply was terminated by the First Respondent’s employees and / or agents on instructions of the First and/or Second Respondent since 22 January 2025;

2.2 The restoration of the electricity supply to the property described in 2.1 above be effected via the current meter at the property of the First and Second Applicants;

3. a Rule Nisi be and is hereby issued calling upon the First and Second Respondents to show cause, if any, on 28 January 2025 at 10H00 why the following orders should not be made part of a final order of this Court, the orders under paragraphs (3.1 to 3.4):

3.1 The First, alternatively the First and Second Respondents, further alternatively the Respondents, jointly and severally, are ordered to restore the supply of electricity to the respective premises via the current meter on the premises of the First and Second Applicants, which supply was terminated by the First Respondent’s employees and/or agents on instructions of the First and/or Second Respondent since 22 January 2025;

3.2 The First and Second Respondents are directed to ensure that all relevant officials, employees, and contractors of the First Respondent are duly instructed and have taken the necessary actions to give effect to this order;

3.3 Failing restoration of the supply of electricity within two (2) hours from granting of the order, that the Applicants be authorized to employ a duly qualified electrician to restore such supply.

3.4 The First Respondent, alternatively the Respondent, jointly and severally, are ordered to pay the Applicants costs of this application on attorney and client scale.

4. The order in paragraph 2.1 and 2.2 operate with immediate effect.
5. The costs of 24 January 2025 are reserved.
6. The First and Second Respondents to file their answering by no later than 10H00 on 25 January 2025, the answering affidavit may be served by way of email to the email address of the attorneys of the Applicants.
7. The Applicants to file their replying affidavit not later than 13H00 on 27 January 2025.
8. The Court file to be indexed and paginated.”

[2] On 28 January 2025, having heard submissions from counsel for the first and second applicant and counsel for the first and second respondent. The Court made an order in the following terms:

“1. The rule nisi issued on the 24th of January 2025 is confirmed.

2. The First Respondent to pay the costs of 24th January 2025 on attorney and client scale.
 3. The reasons for this order will be provided to the parties on request which is to be made within 10 days from the date of this order.”
- [3] On 3 February 2025, the first and second respondent filed a notice requesting written reasons for the order the Court handed down on 28 January 2025.

BACKGROUND FACTS

- [4] The first and second applicant (the applicants) are married to each other in community of property and residing at [...] N[...] Street, Koster 0348 (the property). The applicants reside on the property with their son.
- [5] On 10 January 2025, employees of the first respondent attended on the property when the applicants were not at the property to remove the electricity meter. The son of the applicants refused the removal. The son of the applicants referred the employees of the first respondent to the first applicant. No formal notice was handed to the son of the applicants. The electricity supply to the property is supplied via prepaid electricity vending system. Ideal prepaid is the vendor that sells the electricity tokens. On 22 January 2025, the first respondent’s employees or agent attended on the property and without notice terminated the electricity supply.

- [6] The first applicant contacted Mr Hennie Du Bruyn (Du Bruyn) of Ideal prepaid to establish why he was not receiving electricity. Du Bruyn established that the electricity breaker from the first respondent was removed.
- [7] The first applicant phoned the customer care of the first respondent to establish why the electricity breaker was removed. The first applicant was informed that the meter was faulty. The first applicant was informed by Du Bruyn that he had spoken with George, an employee or agent of the first respondent who had removed the electricity breaker from the property.
- [8] George informed Du Bruyn that the Ideal Prepaid meter which is installed on the property read an error and the circuit breaker was removed because the applicants were receiving free electricity. The first applicant denied having received free electricity.
- [9] On 22 January 2025 at around 14H00, the attorney of the applicants forwarded a letter of demand to the first respondent demanding that the electricity supply be restored to the property by 16H00 on 22 January 2025. At about 16H30 on 22 January 2025, the attorney of the applicants forwarded a second letter to the first respondent in which the attorney of the applicants advised the first respondent that he held instructions to bring an urgent application for restoration of the electricity supply and the first respondent would be liable for the costs. It is noted that in the letter which was forwarded to the first respondent at around 16H30 specially reads at paragraph 3 as follows; "Our client requires the supply of electricity for the meaningful occupation of his premises".
- [10] On 22 January 2025, after hours, the attorney of the first respondent and second respondent (the respondents) replied to the letters from the attorney of the applicants. In the letter dated 22 January 2025, the attorney for the respondents indicated the reason for the termination of the electricity supply to the property was because the electricity meter was faulty. The letter further read that the first applicant was denying the employees of the first respondent access to the property.
- [11] The letter read further that the first respondent requested the first applicant to permit the employees of the first respondent access to the property to install a new electricity meter. It is worth noting that when the employees or agents of the first respondent terminated the electricity supply to the property, they did so by removing the circuit breaker to the electricity meter which is located within the property of the applicants.
- [12] On 23 January 2025, the attorney of the applicants wrote a final letter to the attorneys of the respondents. In this letter, the attorney for the applicants denied that employees of the first respondent had informed his client that the meter to the property was faulty nor was there written notice given that the meter was faulty. It was further stated in the letter that the meter was working properly, and his client was charged accordingly for his usage. The respondents were given until 11:00 to restore the electricity supply to the property, failing which the applicants would approach the courts.

- [13] The respondents in their answering affidavit deposed to by the second respondent averred that the applicants knew on or about 10 January that the officials of the first respondent had been to the property to inspect and/or replace the electricity meter. The inspection revealed that the meter had been tempered with and showed an error. The applicants resisted the attempt to replace the meter.
- [14] It is the case of the respondents that following the refusal to have the meter replaced, officials of the first respondent approached the first applicant at his workplace and officially informed him of the tempering of the meter and the need to have it replaced. It is the case of the respondents that the first applicant requested three days indulgence before the new meter could be installed which was to expire on 20 January 2024 (sic).
- [15] It is the case of the respondents that after three days, the applicants were given an official notification that their meter is faulty and would need to be replaced with a smart meter as the first respondent was, in any event, in the middle of replacing the old meters with the new smart meters. The first applicant refused to accept the official notification insisting instead that he would not accept a replacement of his meter until a public participation process has been undertaken.
- [16] The second respondent attached a copy of an undated letter to the answering affidavit of the respondents which reads as follows:

“

REPLACEMENT OF ELECTRICITY METER

On this date 17 Jan 2025 the abovementioned premises was visited to replace the existing electricity meter with a new smart meter, as part of the infrastructure upgrade program. Please be advised that, in terms of the Standard Electricity Supply By – law, access to the electricity meter, which is the property of Kgetlengrivier Local Municipality, may be required from time to time.

The existing electricity meter will be replaced by a smart meter that is linked to the new municipal billing system. All consumers are urged to allow the installation with Kgetlengrivier Local Municipality ID cards and appointed letters to install the new meter. Detailed instructions on how to operate the CIU (Customer Interface Unit) are printed on the back of this document.

Kindly contact the Revenue Protection office and or Kgetlengrivier Local Municipality's Contractor on the following number.

Cell phone number: 0[...]within two (2) working days of the above date to arrange for a Meter Technician to access your premises and install the new meter.

It is important that you either make telephonic contact or visit the municipal office within 2 working days of the date of this letter to avoid disconnection of your electricity at the external point of supply.

Electricity purchase can be done at any sales point with an R&A or Flash Vending machine. This includes the BP Garage and general stores in the townships”

- [17] It is averred by the second respondent that it was only after this process that the supply of electricity to the applicants’ property was terminated. It is the case of the respondents that instead of the applicants explaining what happened between 10 and 22 January 2024 (sic), to justify this extremely urgent application, the applicants litter the founding affidavit with irrelevant allegations about service delivery, billing and raw sewerage challenges in the municipality.
- [18] The second respondent in the answering affidavit deposed to by him, states that it appears the broad reliance by the applicants on the spoliation order somehow removes their need to justify urgency. The second respondent goes on to aver that the application of the applicants is not urgent and the urgency is self-created. The case of the respondents is further that there is no spoliation in the application of the applicants, the first respondent is merely rolling out smart meters in its jurisdiction the purpose of which is to ensure reliable electricity supply and its financial stability.
- [19] The respondents have further tied to the mast the alleged failure by the applicants to plead the requirements for final interdictory relief. It is the case of the respondents that in order for the applicants to succeed with the relief that they seek, the applicants must satisfy the court that they have a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy.
- [20] The second respondent contends that the applicants have failed to surmount the first requirement of a clear right. The debate of the second respondent is that the right that the applicants are seeking to assert is a contractual obligation and contractual obligations cannot be restored through a spoliation remedy. The second respondent further avers that the first respondent gave notice of its intention to change the electricity meter, which attempts were rebuffed by the applicants.
- [21] The second respondent avers further that the applicants retain an alternative and suitable remedy. This alternative and suitable remedy is to allow the first respondent to replace the electricity meter with the new smart meter and the electricity supply will be restored to the property.
- [22] It is further the case of the respondents that the remedy for spoliation is preliminary to any investigation into the merits of the dispute. In essence, it provides interim relief, pending final determination of the parties respective rights. However, the applicants in their application are seeking the remedy without any intention to have the merits of the matter adjudicated at some point in the future. They simply want the electricity supply to be restored and are not interested in having the issues they have against the meter replacement project ventilated and finally determined by the court.

- [23] The second respondent contends that because the applicants seek final relief in their application, the court would have to adjudicate the dispute of fact, in terms of which the version of the respondent should prevail unless it is proven that the version is palpably false or far – fetched. The second respondent further contends that the right the applicants are asserting is a contractual right in which case the remedy of spoliation is not applicable, the mere existence of a terminated electricity or water supply in itself is insufficient to consider an incident of possession.
- [24] The first applicant in his replying affidavit to the answering affidavit of the respondents, denies having spoken with an employee of the first respondent regarding an error in the electricity meter. The first applicant further denies having received a formal or informal notice thereof.

THE LAW

- [25] Rule 6(12) (a) and (b) reads as follows:

“(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.

- (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which it is averred render the matter urgent and the

reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”

- [26] The test for urgency is two pronged. In satisfying the requirements for rule 6(12)(b), the applicant must firstly set forth explicitly the circumstances which it is averred render the matter urgent. Urgency does not relate only to some threat of life or liberty. It has been held that a matter is urgent because of imminence and depth of harm if the relief is not given, not because of the category of right, the applicant asserts. (See: Erasmus: Superior Court Practice at D1 Rule 6–52).
- [27] Urgency is not determined by the nature of the claim brought, but by the circumstances in which the applicant seeks adjudication. There is accordingly no class of proceedings that enjoy inherent preference. (See: Avis Southern Africa (Pty) Limited v Porteous 2024
- (2) SA 386 (GJ) at para [17]–[21])
- [28] The second aspect of urgency, that the applicant must satisfy the court, is that the applicant will not receive substantial redress at a hearing in due course.

(See: Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin’s Furniture Manufacturers) 1977

- (4) SA 135 (W) at 137F; East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd (unreported, GJ case no 11/33767 dated 23 September 2011) at para [6]–[9]; Kgendlengrivier Local Municipality v Bertorbrite (Pty) Ltd (unreported, NWM case no UM118/2023 dated 26 June 2023) at para [12])
- [29] It is axiomatic that the application must be brought as soon as possible, cogent reasons must be advanced to the court for any delay in bringing the application. (See: Venter v Els 2024)
- (4) SA 305 (WCC) at paragraph [19])
- [30] In urgent applications, the court is entitled to admit hearsay evidence in an affidavit provided the source of the information and the grounds for belief in its truth are stated. (See: Lehani NO v Lagoon Beach Hotel (Pty) Ltd 2015 (4) SA 72 (WCC) at 79F – G, partially overturned on appeal but not on this point, in Lagoon Beach Hotel (Pty) Ltd v Lehani NO 2016 (3) SA 143 (SCA).
- [31] The mandament van spolie displays the following three characteristics:
- (a) It is a possessory remedy;
 - (b) It is an extraordinary and robust remedy;
 - (c) It is a speedy remedy.
- [32] The mandament van spolie is in the first place a possessory remedy. Possession is most commonly defined as a combination of a factual situation and of a mental state consisting in factual control or detention of a thing (corpus) coupled with the will to possess the thing (animus possidendi) (See: Blendrite (Pty) Ltd v Moonisami (Blendrite) 2021 (5) SA 61 (SCA) at para 5).
- [33] The essential characteristic of a possessory remedy is that the legal process whereby the possession of a party is protected (iudicium possessorium), is kept strictly separate from the process whereby a party's right to ownership or other right to the property in dispute, is determined (iudicium petitorium). The object of the order is:
- “Merely to restore the status quo ante the illegal action. It decides no rights of ownership; it secures only that if such decision be required, it shall be given by a court of law, and not affected by violence. If before the spoliation either party needed a legal decision to establish his rights, he requires it just as much after, as before, the order. He is in no better, and not worse, position than he was before the spoliation. There is consequently nothing inherent in a mandament van spolie which demands that it should be conditioned as being granted pendente lite.”*
- (See: Erasmus: Superior Court Practice at D7–1 and the authorities referred to therein; Ivanov v North West Gambling Board (Ivanov) 2012
- (6) SA 67 (SCA) at 77B–C; Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality (Schubart) 2013

(1) SA 323 (CC) at 330G–331A)

[34] The reason behind the practice of granting spoliation orders is that no man or government entity or functionary is allowed to take the law into his own hands, and to dispossess another illicitly of possession of property. (See: Ngqukumba v Minister of Safety and Security and Others (Ngqukumba) (CCT 87/13) [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) (15 May 2014) at para 10 and 11).

[35] A court hearing a spoliation application does not concern itself with the rights of the parties (whatever they may have been) before the spoliation took place; it merely inquires whether or not there has been a spoliation, and if there has been, it restores the status quo ante. (See: Ivanov at 75B – D; Schubart at 331A; Ngqukumba at para 10; Blendrite at para 6 – 7).

[36] In spoliation proceedings the court will, therefore, neither enter into the lawfulness of the applicant's possession, nor into the question of ownership. (See: Ivanov at 75B – 77C – D).

[37] A spoliation order does not resolve the ultimate rights of the parties, it is however a final determination of the immediate right to possession. It is the last word on the restoration of possession ante omnia. (See: Mankowitz v Loewenthal 1982

(3) SA 758 (A) at 767).

[38] The fact that a spoliation order is a final order has three important results:

(a) It is not sufficient for the applicant merely to make out a prima facie case, he must prove his case on a balance of probabilities as in any other civil case.

(b) It is an order having the effect of a final

judgment.

(c) An order for costs should be made in the spoliation proceedings.

(See: Malan v Green Valley Farm Portion 7 Holt Hill 434 CC 2007

(5) SA 114 (E) (Malan) at 123H–I).

[39] The remedy by way of spoliation is an extraordinary one and a robust one. Except for the recognized defences that may be put up by a respondent, the rule *spoliatus ante omnia* is absolute. Discretion and considerations of convenience do not enter into it. This means that once the applicant has discharged the onus resting upon him and no recognized defence has been raised with success, the court has no discretion to refuse the grant of a spoliation order on the ground of considerations relating to the merits of the dispute between the parties. (See: Blendrite at para 5 and 6; Malan at 123I – 124A).

[40] The mandament van spolie is designed as a 'speedy remedy' which provides 'summary relief'. The restoration of possession

should take place ‘at once’ or ‘dadelik’. The policy of the law underlying the procedure in applications for a mandament van spolie is that speedy relief is envisaged on short affidavits dealing with the essentials of possession and dispossession. This does not, however, mean that because an application is one for a spoliation order, the matter automatically becomes one of urgency. As a general rule, a possessor who alleged that he had been dispossessed of a right was obliged to act within a reasonable time to have his possession restored. If he delayed for more than a year before bringing the application there would have to be special circumstances present to allow him to proceed. Conversely, if the application were brought within a year of the act of spoliation, special circumstances would have to be present for the relief to be refused merely on the basis of excessive delay. In some cases it may be necessary to determine whether delay was inordinate so as to constitute acquiescence. (See: Blendrite at para 6; Markos v Minister of Police NO (unreported, NWM case no 3945/2024 dated 12 September 2024) at paragraph [23]; Willowvale Estates CC v Bryanmore Estates Ltd 1990

(3) SA 954 (W) at 961E–F; Minister of Agriculture and Agricultural Development v Segopolo 1992

(3) SA 967 (T) at 971J–972A; Mangala v Mangala 1967

(2) SA 415 (E) at 416; Le Riche v PSP Properties CC 2005

(3) SA 189 (C) at 198F, 204B–C and 205B)

[41] In order to obtain a spoliation order, two allegations must be made and proved:

(a) that the applicant was in possession of the property; and

(b) that the respondent deprived him or her of the possession forcibly or wrongfully against his or her consent

(See: Yeko v Qana 1973

(4) SA 735 (A) at 739; Nino Bonino v De Lange (Nino Bonino) 1906 TS 120 at 122; Blendrite at para 6)

ANALYSIS

[42] The second respondent took issue with the applicants having issued the application on 23 January 2025 when they knew on 10 January 2025, that employees of the respondent had been at the property to inspect and/or replace the electricity meter. In my view, the second respondent overlooks it was the termination of the electricity supply to the property of the applicants that sparked the urgency in the matter.

[43] It is not in dispute that the electricity supply was terminated on 22 January 2025. The answering affidavit of the second respondent is cryptic in detail. It made it difficult for this Court to follow the chronology of events according to the second respondent. It is not disputed that the employees of the first respondent were at the property of the applicants on 10 January 2025 to inspect and/or replace the electricity meter.

- [44] According to the second respondent, following the refusal to have the meter replaced, the officials of the first respondent informed the first applicant of the meter and the need to have it replaced. The second respondent does not take the court into his confidence and indicate when exactly this interaction occurred and who these officials are. No confirmatory affidavits are attached to the answering affidavit of the second respondent. The averments of the second respondent are hearsay, and the second respondent has failed to state the source of the information and the grounds for belief in its truth. For those reasons, I did not put much weight into the alleged meeting between officials of the first respondent and the first applicant regarding the meter and the need to have it replaced.
- [45] Even if I had accepted that the meeting between the applicant and the officials of the first respondent had taken place, that the first applicant requested an indulgence of three days before the new meter could be installed, which according to the second respondent expired on 20 January 2025. This timeline contradicts the letter attached to the answering affidavit of the second respondent and marked “KLM2”.
- [46] The contents of the letter have been quoted in paragraph 16 above. From the reading of the first paragraph of the letter, the author writes amongst others “On this date 17 Jan 2025...”. From the reading of the answering affidavit of the respondents, this was the official notification that the meter of the applicants is faulty and would need to be replaced. The official notification could not have been issued before 20 January 2025, because according to the second respondent, the three days indulgence before the new meter could be installed was to expire on 20 January 2024 and the official notice was dispatched after the requested period of three days had lapsed. I have accepted that the reference to 20 January 2024 is a typing error, and it was intended to be 20 January 2025. My belief that the reference to the date 20 January 2024 is a typing error is fortified by the reference to the public participation process which had commenced on 7 January 2025 from the reading of “KLM1” but in the answering affidavit of the respondents, the second respondent refers to 7 January 2024.
- [47] The respondents took issue with the applicants not setting out why they will not be able to protect their legal rights later unless they are given specific relief now. In my view, the second respondent had overlooked the contents of the letter from the attorney of the applicants to the first respondent marked “TS3” contents of which the first applicant requested be incorporated into the founding affidavit.
- [48] At paragraph 10 of the letter, the letter reads as follows: “Our client requires the supply of electricity for the meaningful occupation of his premises.” The second respondent had further overlooked the contents of paragraph 45, 45.1, 45.2 and 45.3 of the founding affidavit of the first applicant which reads as follows:

“45. Given the nature of the property, the supply and use of electricity form an integral part of and/or incident of possession or control of the premises. Absent the supply of electricity, my wife and I cannot meaningfully occupy the premises.

45.1 As such we may sleep over at the house maybe for one night more, but will be destined to seek other accommodation from 24 January 2025.

45.2 I am not in a position, financially, to for example purchase and run a generator around the clock to allow for continuous supply of electricity. Absent that option, we are in the dark.

45.3 And similar, is our son deprived of his livelihood.”

[49] I was for the reasons detailed in paragraphs 42 to 48 above satisfied that the applicants had made out a proper case for urgency and the matter was heard on an urgent basis.

[50] The respondents placed reliance on Eskom Holdings Soc Ltd v Masinda (Masinda) 2019

(5) SA 386 (SCA). In Masinda, the Supreme Court of Appeal (SCA), held that the application to have electricity supply reinstated, in the context of prepaid meters, was personal and purely contractual right that could not be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, it was not applicable in the circumstances. The applicants relied on Makeshift 1190 (Pty) Ltd v Cilliers (Makeshift) (A38/2020)

[2020] ZAWCHC 41; [2020] 3 All SA 234 (WCC); 2020 (5) SA 538 (WCC) (25 May 2020) to counter the argument.

[51] Having considered Naidoo v Moodley (Naidoo) 1982 (4) SA 82 (T) and Froman v Herbmore Timber and Hardware (Pty) Ltd (Froman) 1984 (3) SA 609 (W), I noted as eloquently stated by Rogers J in Makeshift, that in Masinda, Leach JA did not disapprove of the Naidoo and Froman. Rogers J explains it as follows at para 26 of Makeshift:

“Leach JA referred to Naidoo v Moodley 1982

(4) SA 82 (T) and Froman v Herbmore Timber and Hardware (Pty) Ltd 1984

(3) SA 609 (W) – both cases where a landlord had severed a tenant’s electricity supply – without evident disapproval, explaining

them on the basis that in those cases the electricity seemed to have been cut off with a view to forcing the claimants to vacate the property and that it was the claimants’ possession of the property, rather than quasi-possession of the electricity, that was being protected.”

[52] Rogers J went on to observe as follows in para 32 – 34 of Makeshift:

“[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* 1950 (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 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.”

[53] Rogers J went on to state the following at para 36 – 38 of Makeshift:

“[36] Leach JA observed in Masinda that in Naidoo and Froman the courts granted relief in order to protect the claimants’ occupation of the premises rather than their quasi-possession of the alleged right to electricity. Eloff J’s concluding paragraph in Naidoo indeed described the cutting off of the electricity as an act which substantially interfered with the claimant’s occupation of the premises. In Froman, by contrast, O’Donovan J seems to have conceived himself as protecting the claimant’s quasi-possession

of an alleged incorporeal right to obtain water and electricity.

[37] It is no doubt so that in cases such as Naidoo and Froman (my category (c)) the claimant’s true grievance is not a despoiling of an alleged right to water or electricity viewed in isolation but the material adverse impact this has on his occupation of the premises. I respectfully venture to suggest, however, that this is equally true of cases which fall into my category (b). When Eskom cuts off a user’s electricity because of a contractual dispute, the user’s ultimate grievance is the adverse impact this has on his use of the premises served by the electricity. The supply of electricity is of no benefit to the user independently of his occupation of the premises.

[38] In both cases, therefore, one might say that the act of cutting off the electricity materially disturbs the claimant in his possession of the premises, and that the latter occupation is worthy of protection under the mandament. In order to discern why the one case is actionable under the mandament while the other is not, it is necessary to identify the distinguishing feature. As I have said, the distinguishing feature appears to me to be whether or not the alleged right to electricity is an incident of, or an adjunct to, the alleged right which the claimant has against the spoliator to be in occupation of the premises. If the alleged right to electricity is an incident of the claimant’s occupation of the premises in this sense, one can then justly conclude

(a) that the alleged right to electricity is the subject of quasi-possession for purposes of the mandament; and (b) that a spoliation of the said quasi-possession is simultaneously an act of spoliation in relation to the premises themselves.”

[54] The observations by Rogers J in Makeshift and Leach JA in Masinda, support the suggestion that under certain circumstances, termination of electricity supply may be protected by mandament. On the examination of the papers, and from submissions made by counsel for the respondents, the inescapable conclusion that I found on a balance of probabilities was that the electricity supply to the property of the applicants was terminated to force the applicants to agree to the installation of the new meter. The first respondent had an interest in the installation of the new meters. It was agents and/or employees of the first respondent who were installing the new meters. Our jurisprudence is unambiguous on this issue, spoliation is an illicit deprivation of another of the right of possession which he has whether in regard to movable or immovable property, or even in regard to a legal right (See: Nino

Bonino at 122).

- [55] The termination of the electricity to the property of the applicants made meaningful occupation of the property inadequate, the termination of the electricity supply substantially interfered with the applicants' possession of the property. The uncontested averment by the first applicant is that they would be destined to seek alternative accommodation from 24 January 2025 if the electricity supply was not restored. In my view, the conduct of the first respondent is no different from that of the landlords in Naidoo and Froman. The first respondent, in my view, when it caused the electricity supply to the property of the applicants to be terminated without following due process, took the law into its own hands and dispossessed the applicants illicitly of their right to obtain electricity. The occupation of the property by the applicants accordingly had to be protected.
- [56] On the issue that the applicants failed to make out a case for a final interdict. The applicants dealt with the right to electricity supply in the founding papers, they dealt with the question of an injury committed or reasonably apprehended in that the electricity supply to the property had been terminated and lastly, they dealt with why they were of the view they had no other remedy. It was surprising to the Court when counsel for the respondents submitted that the applicants had not pleaded the requirements of a final interdict. It appears counsel for the respondents expected the applicants to structure their affidavit in sections with headings and detailing the different aspects of a final interdict.
- [57] Counsel for the respondents submitted that a spoliation order is preliminary to any enquiry or investigation into the merits of the dispute as to which of the parties is entitled to possession and because the applicants were not moving for an interim order pending the instituting of other proceedings to determine the rights of the parties, I should be loath to grant the order sought.
- [58] The authorities have made their voices heard on this issue. In *Beukes v Crous* 1975 (4) SA 215 (NC) at 218 the court said a spoliation order has an interim or preliminary or contingent character in the sense that it merely determines the question of interim possession pending the determination of the matter by litigation, it is not an order 'hangende 'n ander proses'. Hangende 'n ander proses in English is pending another process. In *Masinda* at para 8, Leach JA said the following:

"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."

[59] In *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others* 1997(1) SA526 (W) Nugent J stated the following at 532G – I:

“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.”

[60] From the uncontested facts of the matter that served before me, there was electricity supply to the property until 22 January 2025 when agents or employees of the first respondent terminated the supply. In my view, it is the first respondent who is obliged to institute proceedings for a declarator that it is entitled to terminate the electricity supply to the property of the applicant (a final determination of the parties rights) or follow due processes before terminating the electricity supply to the property of the applicants, if the first respondent was of the view that it was entitled to remove the meter or the circuit breaker. There was, in my view, no obligation to institute proceedings for a declarator on the rights of

the applicants to receive electricity supply to the property. This is so because the applicants were receiving electricity supply to the property before the first respondent caused the electricity supply to be terminated without following due processes. What was sought by the applicants was restoration of the status quo preceding the termination of the electricity supply. The electricity supply had to be restored before any enquiry or investigation into the merits of the dispute could be entertained.

[61] I granted costs on an attorney and client scale because the courts do not approve of self – help. Government entities are not excused from the relief available in a spoliation order. Self – help may lead to breaches of the peace. The cunning manner in which the first respondent went about in terminating the electricity supply to the property of the applicants was deplorable. Also, the answering affidavit of the second respondent was based on hearsay evidence and the second respondent contradicted himself and the annexures to the answering affidavit. I was of the view that the conduct of the first

and second respondent was deserving of a punitive costs order to show the displeasure of the Court to the conduct of the respondents.

[62] For these reasons the rule nisi issued on 24 January 2025 was confirmed.

T MASIKE

ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE FOR HEARING

: 24 & 28 JANUARY 2025

DATE REQUESTED FOR

REASONS :

03 FEBRUARY 2025

DATE REASONS GIVEN

: 9 JULY 2025

FOR APPLICANTS

:

ADV D.H WIJNBEEK

INSTRUCTED BY :

ANDREAS PEENS ATTORNEYS

C/O MAREE & MAREE INC

11 AGATE AVENUE

RIVIERA PARK

MAHIKENG

REF: BB1777

Email: Apeens@apalaw.co.za

FOR RESPONDENT

: ADV P MTHOMBENI

INSTRUCTED BY

: FIHLA AND ASSOCIATES

ATTORNEYS

C/O SEHLABO TA ATTORNEYS INC

REF: SN/BTF/KLM8011

Email: reception@fihlaassociates.co.za

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2025/116.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/tsele-and-another-v-kgetleng-unknown-topic-anwhc-2025>

Prepared on 9 October 2026 · Esheria