REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 22375/2019

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

13/8/19 .....

In the matter between:

Metchem Steelpoort CC — Applicant

and

Eskom Holdings SOC Ltd — Respondent

Judgment

Van der Linde, J

[1] This urgent application is for relief in terms of section 18 (1) of the Superior Courts Act 10 of 2013. The applicant conducts the business of a metallurgical laboratory which tests precious metals including gold, diamonds, chrome, and platinum. These metals are stored on the applicant's premises, and the applicant is responsible for their safekeeping. The applicant's business activities are dependent on a constant electrical power supply.

[2] After the respondent, a state-owned enterprise and this country's largest electrical power supplier, cut the electricity supply to the applicant's premises earlier this year, the applicant brought an urgent application before this court on 12 July 2019, its cause of action being spoliation. After an opposed application, the relief was granted.

[3] The respondent did not restore the electricity supply, it would appear for two reasons. First, after the hearing it purported to cancel the underlying agreement in terms of which it had supplied electricity to the applicant before the hearing on the basis of formally accepting after the hearing what it considered was a repudiation of the agreement by the applicant's counsel during the hearing.

[4] The second reason was that it gave notice of its intention to apply for leave to appeal the judgement and order of 12 July 2019, and it contended that by virtue of the provisions of

section 18 (1), *"the operation and execution of a decision which is the subject of an application for leave to appeal ..., is suspended pending the decision of the application ... ."*

[5] Since such a suspension may be lifted should a court under *"exceptional circumstances"* order otherwise, the applicant has brought the current application. In bringing the application, the applicant has accepted that the judgement and order of 12 July 2019 has the effect of a *"final judgement"*, implying that the mere giving of a notice of intention to apply for leave to appeal suspends the operation and execution of the order without more.

[6] Under section 18 (2) the position is different in regard to *"a decision that is an interlocutory order not having the effect of a final judgement"*. In such a case, the operation and execution of the decision is not suspended pending the decision of the application for leave to appeal.

[7] It is therefore immediately apparent that the first question to be asked is whether the judgement and order of 12 July 2019 is a final judgement or merely an interlocutory order. If it is the former, then this application is properly brought, and it must in addition be considered whether the applicant has shown on a balance of probabilities that it will suffer irreparable harm if the suspension is not lifted, and that the respondent will not suffer irreparable harm if the suspension is lifted.

[8] If it is the latter, then the judgement and order of 12 July 2019 – directing the respondent to restore electricity supply to the applicant – was not suspended by the respondent giving notice of its intention to apply for leave to appeal. Then, if the respondent wished for the 12 July 2019 judgement to be suspended, it would have been up to the respondent to have applied for relief under section 18. And the respondent has not done so.

[9] Of course, as I have indicated, the respondent also relies on its purported cancellation of the underlying agreement on 12 July 2019, but if the respondents persists in relying on this ground, that would found a fresh instance of deprivation of the electricity supply, which would require a fresh application by the applicant.

[10]The position of the respondent was the same as that of the applicant in one important respect: that in fact the 12 July 2019 decision was a final judgement and therefore the applicant, to succeed, has to show the existence of *"exceptional circumstances"*, as well as a favourable balance of irreparable harm. This it has not succeeded in showing, on the argument. Second, the respondent submitted that since it had cancelled the electrical supply agreement on 12 July 2019, this court did not have the power under section 18 to direct the respondent to restore the electricity supply. Finally, relying on the judgement of the Supreme Court of Appeal in Eskom Holdings SOC Ltd v Masinda (1225/2018) [2019] ZASCA 98 (18 June 2019), the respondent contended that the applicant did not have any prospects of success in the intended appeal.

[11]I deal first with the latter two propositions. The validity of the purported cancellation by the respondent of 12 July 2019 is not before me. That cause of action – if it is persisted in, as I have said - must be formulated, whether by the applicant as a fresh spoliation and/or breach of the underlying electrical supply agreement, or by the respondent as a defence to such a potential application; it is a matter *de novo*. As I see it, it would follow that it does not avail the respondent in these proceedings, which are concerned with an earlier event, being the judgement and order of 12 July 2019 and its consequences, to rely on that purported cancellation.

[12] As to the third proposition: there is little doubt that Masinda restated that spoliation relief is available to protect the deprivation of quasi-possession of incorporeal rights, such as a servitude. This was done in the following language:

"[14] ... Although it originally protected only the physical possession of movable or immovable property, this court pointed out in Telkom v Xsinet 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."

[13]But I agree with Mr Nalane, SC for the respondent that the Masinda court made it plain that unless the quasi-possession of electricity was an incident of the possession of immovable

property, and not merely a contractual entitlement giving rise to a personal right against the supplier of the electricity, spoliation relief was not available to a party who was deprived of electricity usage. Perhaps the following paragraph of the judgement summarises it most clearly:

"[22] As was pointed out in Zulu, the occupier of immovable property usually has the benefit of a host of services rendered at the property. However the cases that I have dealt with above graphically illustrate how, in the context of a disconnection of the supply of such a service, spoliation should be refused where the right to receive it is purely personal in nature. The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided."

[14]But that is not the end of the matter. It must be remembered that it is not the applicant who is applying for leave to appeal; it is the respondent. Therefore, the respondent is in effect submitting that its appeal has good prospects of success, and therefore the applicant should not be permitted in the meantime to have the automatic suspension of the operation and execution of the (final) judgement lifted. I have the following difficulty with this approach.

[15]I can understand that prospects of success are relevant where an applicant for relief under section 18 contends that the operation and execution of the decision should be permitted to continue pending the appeal by the losing party, because the losing party has no prospect of overturning the decision on appeal. In that sense the prospects of success on appeal of the losing party are relevant. But here the respondent has turned this notion on its head: it contends that the winning party *a quo*, who is not appealing, will lose the appeal of the losing party because the prospects of success of the losing party are so good.

[16]The difficulty that I have with that reverse reliance on prospects of success in the present matter, is that the court that gave the 12 July 2019 judgement has not yet considered the application for leave to appeal, and it is the province of that court to consider those prospects. It will decide whether the respondent has good prospects of success on appeal, and if it does, then such a decision would have been a relevant consideration had a section 18 application been set down after the judgement on the application for leave to appeal. But that is not what has happened here, and I have to decide this application now, unless I am persuaded that it is appropriate to defer this judgement until after the judgement on the application for leave to appeal.

[17]I am not persuaded that it is appropriate to do so. If the applicant is right in the submission it advances, namely that its business will close down, and that jobs will be lost, if electricity is not restored immediately, and there is no basis on which not to accept that submission, then it is not in the interests of justice to postpone this application. I therefore do not uphold the respondent's third contention.

[18]With that rather lengthy discourse done, I can now come to deal with what I regard as the primary issue, which is whether the decision (or the judgement and order, notions which I will take to be synonymous) of 12 July 2019 is a final judgement or an interlocutory order, for purposes of section 18.

[19]The starting point is again Masinda. That court said the following (emphasis supplied):

"[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 is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute."

[20]I take the concept of an *"interlocutory order"* for purposes of section 18 to refer to a decision which is made during the course of an action, and therefore not finally decisive of the case. Notionally, I have difficulty accepting that *"interim relief"* is anything different. Two situations may be postulated in which spoliation relief is sought: one is where there is no underlying dispute between the parties. That will apply where without any prior history the spoliator deprives the possessor of his or her possession. It is understandable that in those circumstances an order directing the restoration of possession before all else, is an order which has the effect of a final judgement for the purposes of section 18 (2).

[21]But where, as here, and as in the passage quoted from Masinda, there is an underlying dispute between the parties, spoliation relief is merely interim, or interlocutory, or temporary: the resolution of the merits of the underlying dispute has yet to occur; the spoliation relief – by definition – does not purport to resolve the merits finally.

[22]In Masinda the court held that the comment by the full court in Eskom v Nikelo (CA38/18) [2018] ZAECMHC 48 (21 August 2018) (a judgment penned by Huisamen, AJ before his untimely passing) to the contrary effect was clearly wrong. That court, relying on Nienaber v Stuckey 1946 AD 1049 at 1053, held: "[35] In essence a *mandament van spolie* order is final in effect".

[23]In Nienaber, Greenberg JA emphasised at 1053 that *"a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored"*. Nonetheless, that judgment is authority for the proposition that there is in fact an extent to which spoliation orders are final.

[24]It was put thus by Ponnan, JA in Gauteng Province Driving School Association and Others v Amaryllis Investments (Pty) Ltd and Others (006/2011) [2011] ZASCA 237; [2012] 1 All SA 290 (SCA) (1 December 2011):

"[3] ... I pause to record that although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders that the status quo be restored, it is to that extent a final order and is therefore appealable (Nienaber v Stuckey 1946 AD 1049 at 1053)."

[25]The transient nature of spoliation relief was alluded to in Venter and Others v Van Rensburg and Others (2121/2017) [2017] ZAGPPHC 906 (11 April 2017) in these terms:

"[33] Practically, as discussed in Cronshaw & Another v Coin Security Group (Pty) Ltd [1996] ZASCA 38; 1996 (3) SA 686 (A) 9[1996] 2 All SA 435) at 690D-E's case at 12-15, an appeal against the grant of a temporary interdict order would often be inconsistent with the very purpose of this remedy which is to protect the right of the complainant party pending an action or application to be brought by him to establish the rights of the respective parties (See also Davis v Press & Co [1994 CPD 108] at 119 (Fagan J)). As it is similar with a Spoliation order, basically a speedy remedy, intended to prevent the continuous harm suffered by the Applicant by remedying, at once, the effects of an unlawful action pending the resolution of the merits of their dispute. So the appeal against a spoliation order would defeat the very purpose of the remedy."

[26]As I see it, in a case where there is in fact an underlying dispute between the parties as to the entitlement to possession of a thing, spoliation relief is by definition only temporary or interim or interlocutory. It would be sophistry to suggest that in such a case spoliation relief is final, on the basis that at least it decides the issue of entitlement to possession *"finally"*, albeit that actually the court that decides the entitlement to possession down the line, will do so finally.

[27]Test it this way: of the essence of spoliation relief is the restoration, before all else, of the *status quo ante*. Such an order is granted upon an applicant satisfying two simple requirements – that it was in undisturbed possession of the thing, and that it was deprived of that possession without its consent. The low threshold for success, and the immediacy with which courts are required to deal, and do deal, with such applications, are essential for upholding the rule of law and deploring self-help.

[28]If by the simple device of a notice of application for leave to appeal, the successful applicant of a spoliation order became obliged to prove not only the existence of circumstances that are *"exceptional"*, but also that it will suffer irreparable harm if the court did not lift the

automatic suspension of the operation and execution of the spoliation order, and that the spoliator will not suffer irreparable harm if the court lifted the automatic suspension of the operation and execution of the spoliation order, then the efficacy of this essential uncomplicated mechanism against self-help will be undermined.

[29]I fully appreciate that the loser still has to succeed in obtaining leave to appeal. But the mere giving of a notice to apply for leave to appeal achieves the same result. And with busy court rolls, both *a quo* and on appeal to the SCA, it often takes a considerable while before an application for leave to appeal is disposed of. Rather that the loser in a spoliation application should persuade a court that the continued operation and execution of a spoliation order should be suspended pending the appeal of the loser.

[30]In this case there is in fact an underlying dispute. The application that came before the court on 12 July 2019 was placed before me. In paragraph 5.2 of the founding affidavit the applicant says in paragraph 5.2 that it engaged the services of the respondent during November 2009, *"in terms of an agreement entered into by and between the parties for the supply of electricity by the respondent to the applicant at its aforementioned laboratory facility."*

[31]It continues to explain that pursuant to that agreement the respondent invoiced it for the supply of electricity and it paid those invoices. During 2014 however a dispute arose between the applicant and the respondent as to whether the respondent was invoicing the applicants correctly. It would appear that in December 2014 the account reflected a substantial credit, and again in February 2015.

[32]In December 2015 the applicant received an account reflecting a zero balance due, and yet the next month, January 2016, the respondent issued an invoice reflecting that an amount in excess of half a million rand was due in respect of consumption for January 2016. This amount kept escalating and despite its best endeavours the applicant was being sent from pillar to post, without success. The applicant says that the respondent did not assist it and simply

elected to escalate the account on a monthly basis, adding interest to the outstanding balance.

[33]The founding affidavit goes on to explain in considerable detail the efforts made to resolve the problem of wrong accounts and what this led to was a letter from the respondents attorneys on 22 May 2019 which in the language of a final demand required of the applicant applicant to pay some R2.9 million of arrear monies owing in respect of electricity supplied by the respondent to the applicant. This led to the applicant taking legal advice, and while the applicant's attorney was endeavouring to obtain information from the respondent, the electricity supply was terminated. This led to the urgent application and the order of 12 July 2019.

[34]There can be little doubt therefore that there is an underlying contractual dispute between the applicant and the respondent as to whether the applicant owes the respondent payment in respect of electricity supplied by the respondent to the applicant in terms of their contract. That dispute led to the respondent terminating the supply of electricity on the basis that contractually it was not obliged further to supply the electricity, absent being paid for such supply.

[35]The response of the applicant, being to apply for the restoration of electricity supply on the basis of spoliation (I express no view as to whether this is sound in law, this being a matter for the court hearing the application for leave to appeal), seems to me plainly aimed at obtaining an order which – despite the fact that the order does not explicitly say that it is interim in nature (such orders never say this) - is temporary, or interim, or interlocutory, because it does not finally decide the merits between the parties.

[36]However, despite these misgivings, I do not believe that it can be said that the current state of our law is that spoliation orders do not have the effect of a final judgment for the purposes of section 18(2) of the Act. The Supreme Court of Appeal has not yet actually decided that. And Nienaber – which has been followed by the Supreme Court of Appeal itself - decided that

there is a feature of a spoliation order that has final effect, sufficient for it to be appealable as a final order. It is not precisely clear what the nature of the finality characteristic is; after all, it does not decide finally who has the right to possess the thing. All it really does is to order the return of the thing to the party who was in undisturbed possession before the spoliation.

[37]One rather suspects that the description of spoliation relief as being *"final"* was moved by a sense that such orders *should* be appealable. Nowadays interlocutory or interim orders are also appealable, as section 18(2) expressly envisages (leaving aside the more stringent threshold for such an appeal). But as a court of first instance I must accept that for purposes of section 18 relief, spoliation orders are still regarded as having *"the effect"* of a final judgment. I must then move to consider whether the applicant has shown exceptional circumstances, and a favourable balance of irreparable harm.

[38]The applicant's case for *"exceptional circumstances"* is its impending financial demise as a result of not having a constant electrical power supply. It explains that in the absence of power, it has no means of securing its facility and maintaining its security alarm system. Its ordinary business activities have in any event come to a complete standstill and it envisages as an inevitable consequence the liquidation of the business. The respondent suggested that the applicant might source power elsewhere, but did not suggest what an alternative source might be. Its argument was rather that if the applicant were to be liquidated, the respondent too would suffer financial harm because its debt would then not be repaid.

[39]In the view that I take of the matter, the following is the correct approach. The liquidation of the business of the applicant constitutes exceptional circumstances. The requirement that irreparable harm would follow if the suspension of the order of 12 July 2019 were not lifted, is also satisfied. As it happens, therefore, in this case the exceptional circumstances and irreparable harm overlap. As to the position of the respondent, I accept that it too will suffer irreparable harm, but it is far less catastrophic than that of the applicant.

[40]Further, and in any event, the respondent suffers that irreparable harm only if the suspension is not lifted, a position which it itself propagates. In other words, it will suffer irreparable harm if the applicant's relief is not granted, not if it is granted. If the suspension is lifted, then it will receive payment for electricity consumed; that was the applicant's tender, and that is the applicant's obligation in law. Any harm that it will suffer in those circumstances is negligible, compared to the harm the applicant will suffer unless the suspension is lifted.

[41]In the circumstances I believe the applicant has made out a case for the relief it seeks, and I grant the following order:

(a) The application is granted, with costs.

(b) It is declared that the operation and execution of the judgement and order of this court dated 12 July 2019 are not suspended in terms of section 18(1) of the Superior Courts Act 10 of 2013, and remain of full force and effect, despite any pending application for leave to appeal by the respondent, and any appeals pursuant to any successful application for leave to appeal.

Date argued: 8 August 2019
Date judgment: 13 August 2019

WHG van der Linde
Judge, High Court
Johannesburg

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