




**IN THE HIGH COURT OF SOUTH AFRICA GAUTENG  
LOCAL DIVISION, JOHANNESBURG**

**Case No: 38151/2019**

(1)REPORTABLE: <del>Yes</del> /No	
(2)OF INTEREST TO OTHERS JUDGES: <del>Yes</del> /No	
(3)REVISED	
26 November 2019	
DATE	SIGNATURE

In the matter between:

GRANT SIMONS

APPLICANT

And

THE CITY OF JOHANNESBURG FORENSIC DPT

1<sup>ST</sup> RESPONDENT

MR PUTI KABEKO

2<sup>ND</sup> RESPONDENT

MR JOHN MOUGHALI

3<sup>RD</sup> RESPONDENT

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## JUDGMENT

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Molahlehi J

### Introduction

- [1] On 26 November 2019, the applicant's urgent application was dismissed. The application concerned the claim for an order directing the first respondent, the City of Johannesburg to reconnect the electricity at his leased premises situated at the Raymond Street, Bellevue Johannesburg.
- [2] In the initial notice of motion, the applicant sought an order directing the first respondent to restore electricity supply or any other utility. In the amended notice of motion he sought to restore electricity and water supply to the property.
- [3] The first respondent opposed and filed the answering affidavit in the un-amended application. There are no further papers filed in relation to the supplementary papers of the applicant. There was also no representation at the hearing of the matter from any of the respondents.
- [4] At the hearing and during the debate the applicant indicated that he no longer wished to pursue the issue of water as the same was reconnected. He accordingly abandoned the claim for the reconnection of water.
- [5] From the reading of the answering affidavit of the first respondent the facts in this matter are largely common cause. The property that is the subject of the dispute is

owned by the second respondent. The applicant has leased the property from the second respondent. He after that sublet to other people.

- [6] The applicant contended that the respondents were not entitled to disconnect the electricity supply to the property because he uses prepaid meter and thus he owed no payment for electricity.

### **The issues**

- [7] The relief sought by the applicant is *mandament van spolie*. The key and crisp question to answer is whether the applicant is in the circumstances entitled to the remedy based on spoliation. To succeed, the applicant in a claim of this nature has to demonstrate that possession was clearly enjoyed.<sup>1</sup> Furthermore, the applicant has to establish the nature of his or her possession.
- [8] The question of whether or not spoliation is an appropriate remedy in matters of this (i.e electricity or water supplies) nature was dealt with in this court by Adams J in *Zungu v Nilgra Flats*.<sup>2</sup> Similar to the current case the court in that matter dealt with a situation where the landlord cut off electricity because the applicant was in arrears. The court found that the relief of spoliation did not find application because the relationship between the parties was "solely contractual."
- [9] In applying the principles governing the relief of spoliation the court in the *Zungu* matter [paragraph 9] said:

"[9]. Applying these principles to this matter, I am of the view that the spoliation order is not the appropriate remedy in the circumstances. A spoliation order is available where a person has been deprived of his

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<sup>1</sup> See *Yeko v Quana* 1973 (4) SA 735 (A).

possession of movable or immovable property or his or her quasi – possession of an incorporeal. A fundamental principle in issue here is that nobody may take the law into their own hands. In order to preserve order and peace in society the court will summarily grant an order for restoration of the status quo where such deprivation has occurred, and it will do so without going into the merits of the dispute.”

- [10] In the recent judgment of the Supreme Court of Appeal (the SCA) in *Eskom Holdings Limited v Masinda*,<sup>3</sup> the Court dealt with the same issue of whether or not electricity supply in itself was an incident of possession of the property to which it is supplied to or a mere personal right and whether such supply is protectable by the *mandament*.
- [11] In the past the remedy of *mandament van spolie* was limited to protecting only physical possession of movable and immovable property. The remedy has since been developed and extended to certain incorporeal rights such as servitude. [See *Telecom v Xsinet (Pty) Ltd* <sup>4</sup>at paragraph 9]. This has been regarded as "quasi-possession" of certain rights, such as those of servitude. However, the development in the law of protecting real rights did not extend to all such rights. The protection in this regard was available in, for instance, matters involving servitudes. It does not apply to disputes involving contractual obligations and personal rights. In other words the protection does not apply to a mere personal right. Put in another way, the possession or exercise of personal rights are not protected by *mandament*.

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<sup>2</sup> CC (2017/44199) [2017] ZAGPJHC 417 (23 November 2017).

[12] For quasi-possession to deserve protection it has to be shown that it is in the form of a right of use or is an incident of possession or control of the property. The court in the Eskom matter [at paragraph 17] held that, "The mere supply of water or electricity to a property, in itself, and without more," does not "constitute an incident of possession of property protected by mandament." The court further held [at paragraph 22] that:

[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

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<sup>3</sup> [1225/2018] 2019] 98 [18 June 2019].

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.”

[13] In the Eskom matter, Mrs Masinda was the owner of the property at which Eskom had cut off the supply of electricity. Similar to the current case she purchased electricity on credit through the prepaid system. In the circumstances of the case, the court found that her right to receive what she had paid for not from the possession of the property but that that was a personal right from the sale. The court further held in relation to the supply of electricity that:

"This personal right was purely contractual right, cannot be construed as an incident of possession of the property. As the mandament does not protect such contractual right for this reason too the claim ought to have been dismissed."

[14] The applicant in the current matter contended that he was not in arrears, with the payment of his electricity as he used a prepaid meter and in this regard, attached to his papers payment receipts which indicated when he purchased electricity from the electricity vendor. He also disputed that there were any illegal connections on the property as alleged by the respondents.

[15] The applicant represented himself during the hearing. It is also apparent that he drafted the papers himself.

[16] According to the applicant on the 25 October 2019 the second and third respondents cut off electricity at his premises. They also removed the prepaid electricity meter. The second respondent is an employee of the first respondent.

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<sup>4</sup> 2003 [1st] SA 309 (SCA).

[17] The applicant contended that the respondents were not entitled to discontinue electricity because there were no arrears on the payment of his electricity.

**The issues**

[18] During the hearing the applicant as indicated earlier he no longer wished to proceed with the claim for the restoration of the water supply because that issue was resolved with the respondents.

[19] The key and crisp issue is whether the applicant is in the circumstances entitled to the remedy based on spoliation.

[20] The question of whether or not spoliation is an appropriate remedy in matters of this nature was dealt with in the Zungu (supra). The court in that case dealt with the situation where the landlord cut off electricity because the applicant was in arrears. The court found that the relief of spoliation did not find application because the relationship between the parties was as alluded to earlier "solely contractual."

[21] In applying the principles governing the relief of spoliation the court in the Velaphi matter said the following:

"[11]. I reiterate that the point about this matter is this: The applicant had nothing more than a contractual right to the supply of electricity by the respondent. Therefore, the *mandament van spolie* is not the appropriate remedy for the enforcement of contractual rights. In reaching this decision I have had regard to the decisions of the Supreme Court of Appeal, in particular *Telkom SA Ltd v Xsinet (Pty) Ltd*; and *FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO and Others*, which have held that in order for rights to qualify for protection through the grant of a spoliation order, they must be rights to use property or incidents of

the possession or control of property. The purpose of spoliation orders, it is trite, is to stop people from taking the law into their own hands, and to preserve the peace, rather than to order specific performance of a contract."

[22] The applicant represented himself during the hearing and it is apparent that he drafted the papers himself. Thus his pleadings had to be read in a broad and liberal manner as he is a lay litigant.

[23] It is clear from all his papers and what he stated in court that, similar to Mrs. Masida in the Eskom matter, he purchased his electricity on credit through the prepaid system. It follows from these circumstances that his right to electricity did not arise from the possession of the property but from the purchase and sale of electricity.

[24] In applying the principles discussed earlier in this judgment it follows that the applicant's rights arising from the electricity supply are personal, pure contractual rights that cannot be construed as an incident of possession of the property. Because the right accepted by the applicant is contractual it means the remedy *mandement* does not find application in the circumstances of this case.

[25] For the above reasons, the applicant's claim stands to fail because the spoliation remedy sought by the applicant in his papers is not the appropriate remedy.

### **Order**

In the premises the applicant's application is dismissed with no order as to costs.



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E Molahlehi

Judge of the High Court;

Johannesburg

Representation:

For the Applicant: In person

For the Respondents: No appearance.

Date of order:

Date of reasons: 26 November 2019.