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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION
MBOMBELA (MAIN SEAT)**

CASE NO. 650/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES

24/02/2023

In the matter between:

CHRISTOPHER JOHN WILLIAMS

FIRST APPLICANT

KIRSTEN WALKER.

SECOND APPLICANT

SHARON DAWN HAMMOND N.O.

THIRD APPLICANT

MILLICENT AUDREY WATSON

FOURTH APPLICANT

AND

DYKRUS (PTY) LIMITED

RESPONDENT

JUDGMENT

SIBUYI AJ

THE BACKGROUND FACTS

[1] The applicants are owners and occupiers of portions in Erf, Dykrus township. The respondent is the owner of Erf [....] and Erf [....], Dykrus township. The respondent is also the developer of Dykrus township. At all material times hereto, the applicants have enjoyed a continuous supply of fresh potable water for domestic use which is supplied by the Mbombela Local Municipality, alternatively, their agent, Silulumanzi to the Dykrus township. The water supply connection point is situated on the respondent's property, Erf [....]. The applicants rely on this water supply for drinking, bathing and all other domestic purposes.

[2] On 18 November 2022 the respondent obtained a court order against the first to fourth respondents in this court. The order of 18 November 2022 reads as follows: 1) the first, second, third and fourth respondents' aqueduct over the property of the applicant is declared an unlawful infringement of the applicant's right in respect of its property; 2) the first, second, third and fourth respondents are ordered to remove the aqueduct unlawfully installed over the property of the applicant within 30 days of the order having been granted; 3) the first, second, third and fourth respondents are ordered to relocate the aqueduct in accordance with the conditions contained in the title deeds of the respective properties and the servitude listed therein. The first, second, third and fourth respondents referred to in the court order are the applicants and the applicant is the respondent herein.

[3] The applicants did not comply with the above mentioned court order. The respondent took matters into its own hands and disconnected the illegal water supply connection. The applicants became aware of the court order after the respondent's termination of the water supply to their properties on 3 January 2023. The applicants then launched this application seeking urgent relief to restore the applicants' water supply connection. In short, they are seeking a Mandment Van Spolie relief. The respondent opposes the application and contends that in the event that it is found that the applicant has been spoliated, the respondent has an absolute defence to the issues raised by the applicants in that the disconnection of the water supply was done under a court order, which court order has not been rescinded and or that the reconnection of the water supply is impossible.

[4] During argument counsel for the respondent, Mr Fourie, strongly contended that the applicants cannot claim relief under the Mandament Van Spolie because in his understanding, the applicants' claim is based on personal rights and or contractual rights which cannot be enforced via a spoliation relief. For these submissions, reliance was placed on the case of Eskom Holdings SOC Limited v Masinde 2019 (5) SA 386 (SCA). Mr Spoor for the applicants, submitted that I should find that there was spoliation and grant the necessary relief.

ISSUES FOR DETERMINATION

[5] The following issues require determination:

- (a) whether the applicants have been spoliated, and if so, whether they are entitled to the spoliation relief sought.
- (b) Whether the application was sufficiently urgent to warrant the way it was launched.

THE SPOLIATION

[6] The Mandament Van Spolie or 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. A spoliation order is thus no more than a precursor to an action over the merits of the dispute¹.

[7] Depending upon the circumstances, the supply of water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. That this is so is apparent from the decision of this court in *Impala Water v Lourens*² in which the respondents sought and obtained a spoliation order directing the appellant, a supplier of water, to restore the flow of water to reservoirs on their farms. There had been a dispute concerning the legality of certain water charges levied by the appellant and, although proceedings to recover these charges were pending, the appellant exercised its powers under the **National Water Act 36 of 1998** to restrict the flow of water to the respondents by closing certain sluices. The SCA found that the respondents' rights to receive water were not mere personal rights but were linked to and registered in respect of certain portions of each of the respondents' farms that were dependent on the supply of the water. In dismissing an appeal against an order that the appellant restore the flow, The SCA held that such rights were an incident of the possession of each farm, and that the mandament was therefore available³. Importantly, it was clear from the facts in that case that the right to the supply flowed from the exercise of possession of the immovable property. Put somewhat differently, whoever was in lawful possession of the relevant portions of land was entitled to receive water from the appellant⁴

[8] In this matter, the applicants can only succeed if they can prove that they had been deprived of quasi-possession of any statutory water rights which they were entitled to exercise, and not mere contractual rights relating to the use of the water⁵. It cannot be disputed that as owners and occupiers of erven's in the Dykrus township the applicants enjoy statutory constitutional right to be supplied water by the Mbombela Local municipality. The water in question is from Mbombela Local

¹ See *Eskom Holdings SOC Limited v Masinde* 2019 (5) SA 386 (SCA), para 8 thereof.

² See *Impala Water Users Association v Lourens NO & others* 2008 (2) SA 495 (SCA); [2004] 2 All SA 476 (SCA)

³ See *Eskom case above*, para 15 thereof.

⁴ See *Eskom case above*, para 16 thereof.

⁵ See *Eskom case above*, para 19 thereof.

Municipality. This access to water right is not a personal and or contractual right as argued by Mr Fourie. It is common course that the respondent disconnected the water supply. I therefore find that the applicants are, on the facts of this matter, spoliated. And that being the case, the matter is urgent as spoliation proceedings are by their nature urgent and should be treated as such.

[9] The next question is whether the applicants are entitled to the spoliation relief sought. Firstly, the application by the applicants is fatally defective as the applicants are claiming a final relief instead of an interim one under spoliation. As stated and stressed above, the mandament provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. We know the applicants could not claim interim relief because this court had already made a finding that the water supply connection was unlawful. In the Eskom case, the SCA, in para 10 thereof stated the following: *"Presumably the court did not intend for such electrical supply to be restored by way of an installation that was unlawful and a danger to the public but rather one which complied with the necessary requirements of safety – something, according to Eskom, the original installation had lacked. In this respect its order was immediately problematic as it seemingly went beyond requiring the re-establishment of what there was before, whereas spoliation only requires the status quo ante to be restored. (This was probably the product of the court a quo applying the principles of spoliation in circumstances where, effectively, final relief was being sought.)"* On this ground alone, the application must fail as the applicants are not legally entitled to the final relief under the mandament.

[10] Even if I were wrong, the application cannot succeed because the relief sought is unlawful and the court cannot authorise an illegality. In *Tswelopele*⁶ Cameron JA dealt with the nature of the mandament and said: *'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).'* For that

⁶ See *Eskom* case above, para 19 thereof.

reason he had earlier in the judgment accepted that the mandament is a preliminary and provisional order". In this matter, the current connection is illegal and cannot be restored in its original form, it has to be reconstituted to be lawful. Again, a reconstituted restoration cannot be claimed under the mandament.

[10.1] Although it is correct that spoliation requires restoration of possession as a precursor to determining the existence of the parties' rights to the property dispossessed, there may well be circumstances in which a court will decline to issue a spoliation order. Thus in *Ngqukumba*⁷, a case involving the spoliation of a motor vehicle, the engine and chassis numbers of which had been altered, the Constitutional Court stated: '*. . . in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the mandament van spolie might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that may be possessed quite lawfully makes all the difference . . . At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.*' This dictum raises the possibility of a court refusing to order the return of property to a person who may not lawfully possess it, although to do so would require reconsideration of a line of authority in this court that has not hitherto been questioned. ... and the fact that the electrical installation that was removed did not meet required specifications and constituted a public danger, might well be sufficient for a court to decline to issue a spoliation order. After all, directing it to restore the electricity connections that were removed would compel it to commit an illegality⁸.

[11] There is no lawful cause for the disturbed possession. We are now living in a constitutional state and the principle of legality is paramount. In the circumstances of this matter it will serve no legitimate purpose to order restoration of what this court

⁷ *Ngqukumba v Minister of Safety and Security & others* [\[2014\] ZACC 14](#); [2014 \(2\) SACR 325](#) (CC), para 15

⁸ See *Eskom case above*, paras 12 and 13 thereof.

has already declared unlawful and ordered that it be removed. Courts must strive for certainty than confusion. It is in the best interest of procedural justice, the parties, and the relevant community that a lawful connection be established. Hence, under these circumstances, the spoliation order must be refused. In the light of the above, it is not necessary to deal with the other defences raised by the respondent.

THE COSTS

[12] The applicants did not succeed in respect of their claim. The ordinary rule is that costs follow the result and there is no reason why the rule should not apply herein.

THE ORDER

[13] The following order is made:

1 This matter is heard as one of urgency in terms of Rule 6(12) of the uniform rules of this court and condonation for non-compliance with the prescribed forms and time limits for service of the documents as provided for in the rules is hereby granted.

2 The application is dismissed with costs.

H W SIBUYI
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 24 February 2023 at 10:00.

HEARD ON: 21 February 2023

COUNSEL:

For the Applicants: R Spoor, Richard Spoor Inc.

For the Respondent: H.F. Fourie, instructed by Michael van Resburg Attorneys