THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: A38/2020

In the matter between

MAKESHIFT 1190 (PTY) LTD **APPELLANT**

And

COLLEEN CILLIERS **RESPONDENT**

Coram: Rogers and Cloete JJ

Enrolled: 8 May 2020

Delivered: 25 May 2020

This judgment was delivered electronically at about 10:00 on Monday 25 May 2020 by emailing it to the parties' legal representatives. The judgment was released to SAFLII on the same day.

JUDGMENT

Rogers J (Cloete J concurring)

[1] At issue in this appeal is whether the court *a quo*, the Riversdale Magistrate's Court ('the RMC'), erred and acted beyond its powers in making various orders pursuant to a spoliation application launched by the present respondent against the present appellant. Due to the Covid-19 lockdown, the parties agreed that we could adjudicate the appeal on the basis of the record and heads of argument. We reserved the right to call for oral submissions, but in the event we have found it unnecessary to do so.

[2] The appellant's heads of argument were filed very late. An explanation was furnished in a substantive application for condonation. Although aspects of the explanation are open to criticism, this is not a case in which we would non-suit the appellant. The respondent in the appeal was afforded an opportunity to file supplementary heads. Because we are adjudicating the appeal without an oral hearing, the lateness of the appellant's heads has not resulted in a day's wasted costs.

[3] I should mention that Mr Ferreira, who was briefed to appear for respondent in the appeal and drafted the supplementary heads, was not the author of the main heads filed on the respondent's behalf.

[4] The appellant, Makeshift 1190 (Pty) Ltd ('Makeshift'), is the owner of a farm in the Riversdale area. The respondent, Colleen Cilliers, occupies a building on the farm together with her husband, Tom, and their children. I shall refer to this building as 'the store', in keeping with terminology used in the papers. Since it will be necessary to make reference to other members of the Cilliers family, I

shall refer to the respondent and her husband by their first names, meaning no disrespect. Tom and his family occupy the store as a home. On Makeshift's version, Tom and the family moved into the store in April 2015.

[5] The shares in Makeshift used to belong to Tom's father, Martinus. Until his death in October 2019, Martinus resided in another dwelling on the farm.

[6] In December 2014 Martinus sold the Makeshift shares to Tom, but a dispute about performance of the sale led to Martinus selling 75% of the shares to Tom's siblings, Humboldt Cilliers, Rykie Erasmus and Salome Doman. Precisely what happened to that sale is unclear, because in March 2018 Martinus transferred all the shares in Makeshift to Humboldt and Rykie in equal shares.

[7] The collapse of the sale of Makeshift to Tom led to, or was perhaps indicative of, a fractured relationship between him on the one hand and his father and siblings on the other. There were various legal proceedings apart from those at issue in the present appeal:

(a) In 2016 Tom obtained from the RMC an interim protection order against Martinus which was still pending at the time of the alleged spoliation.

(b) In 2017 Tom launched an application in this court for specific performance of the sale agreement. In October 2017 Tom's attorneys notified the attorneys acting for Tom's father and siblings that Tom would be withdrawing the application and issuing summons for the same relief. (This subsequently happened, and the action is pending.)

(c) Also in 2017, Makeshift launched an application in this court for Tom's eviction. Engers AJ dismissed the application on the basis that because of the pending dispute about control of Makeshift, it could not be concluded that Tom was an unlawful occupier.

[8] The store was served by Eskom electricity. The Eskom contract was in Makeshift's name but Tom paid the bills, at least since the time he began occupying the store. The respondents in the court *a quo* stated that in July 2016 Martinus installed solar panels on the roof of his dwelling, which provided sufficient electricity for his own requirements and those of the farm. On the other hand, there is evidence from Colleen that she encountered an electrician on the farm on 31 October 2017, who said that he was there to convert Martinus' electrical supply and that this entailed a termination of the Eskom supply. At any rate, it seems that for some time before December 2017 Martinus had not been dependent on Eskom for electricity.

[9] On 20 or 21 December 2017 the Eskom electricity on the farm was disconnected. The only part of the farm served by Eskom electricity at that time was the store and its related facilities. The electricity was disconnected because Makeshift had cancelled its contract with Eskom. As a result of this cancellation, Eskom sealed the electricity box on the farm.

[10] On 21 December 2017, at which time Tom was working on a mine in the Free State, Colleen launched an urgent *ex parte* spoliation application in the RMC, citing Makeshift and Martinus as respondents. In her founding affidavit, Colleen said that because of the prevalence of farm murders, she was very scared when the external lights were not on at night. Her husband had recently slaughtered a cow and two sheep, which were in the freezer and would go rotten without electricity.

[11] On the same day an *ex parte* order was issued calling on the said respondents to show cause why final orders should not be granted (a) ordering them to remove the locks on the electricity box or to provide Colleen with a key; (b) ordering them to switch on the supply of electricity to the store or to authorise

Colleen to do so; (c) ordering them to restore the electricity supply to the property by not later than 16:00 on 21 December 2017; (d) prohibiting them from depriving Colleen of her possession and use of electricity and water without a court order. The rule nisi was to operate as an immediate interim order pending the final determination of the application.

[12] The respondents did not comply with the interim order. They opposed the application. The extended return day was heard in November 2018. The RMC, having seemingly raised the point *mero motu*, ruled that the orders sought by Colleen could not be granted without Eskom's joinder. Colleen noted an appeal against that ruling. In May 2019 this court (per Sievers AJ, Steyn J concurring) dismissed the appeal on the basis that the RMC's ruling was not an appealable order.

[13] Colleen caused Eskom to be joined. In October 2019 Martinus died, so Makeshift became the sole respondent. The case was argued in November 2019. On 6 December 2019 the RMC granted final orders in terms of the rule nisi and ordered Makeshift to pay the costs on the attorney and client scale.

[14] No point was taken, on the papers or in argument, that Colleen did not have standing to apply for spoliatory relief. At the time she brought the application she had factual control (*detentio*) of the store and its appurtenances, and clearly intended to hold it, at least in part, for her own benefit and that of her children (cf *Mbuko v Mdinwa* 1982 (1) SA 219 (TkSC) at 222F-H; *Dlamini & another v Mavi & others* 1982 (2) SA 490 (W) and cases there reviewed). It matters not that she may also have been exercising control for Tom's benefit or that she and Tom may both have had possession, because the claimant in spoliation proceedings need not have exclusive possession (*Nienaber v Stuckey* 1946 AD 1049 at 1056).

[15] The author of the main heads of argument on Colleen's behalf (not Mr Ferreira) raised two matters which it is desirable to clear out of the way at the outset.

Extension of Security of Tenure Act 62 of 1997 ('ESTA')

[16] The first matter is his invocation of s 6(1) of ESTA as a basis on which Tom and his family were entitled to continue enjoying access to Eskom electricity, such supply having been a service agreed upon as part of their right of occupation.

[17] This argument must be rejected, because nowhere in her papers did Colleen allege that she was relying on ESTA, and she did not allege the facts necessary to bring herself within the ambit of that legislation. (This would have included the question whether Tom and Colleen's income exceeded the prescribed amount contemplated in the definition of 'occupier' and whether their right of occupation had been lawfully terminated.) A person who asserts a claim under ESTA is relying on a substantive right to be in possession and to enjoy the agreed services. Spoliation proceedings, by contrast, are not concerned with the question whether or not the claimant enjoys the alleged right.

Authority to represent Makeshift

[18] The second matter is the submission that as at December 2017 Martinus was Makeshift's sole director, and that Humboldt and Rykie, who in their opposing affidavits claimed responsibility for the decision to terminate the Eskom supply, had not been empowered to do so.

[19] This is a self-defeating argument. If it were right, it would mean that the act of spoliation was not the act of Makeshift but the act of Humboldt and Rykie, and it would follow that they, rather than the company, should have been cited as the respondents. Factually, however, I do not think that the evidence shows that

Humboldt and Rykie were acting without their father's authority. At very least, his opposition to the application, including a confirmatory affidavit, demonstrates that he ratified Humboldt and Rykie's actions.

Possession

[20] I can now deal with the issue that lies at the heart of the appeal. Makeshift disputes that Colleen had possession of an electricity supply in the sense required for spoliatory relief. Makeshift places particular reliance on the recent judgment of the Supreme Court of Appeal in *Eskom Holdings Soc Ltd v Masinda* 2019 (5) SA 386 (SCA).

[21] *Masinda* confirms that certain rights, although incorporeal, may be the subject of quasi-possession for purposes of spoliatory relief. Although in spoliation proceedings a court is not concerned with whether or not the right has been established, the facts must show that prior to the alleged spoliation the claimant enjoyed undisturbed quasi-possession of the alleged right, in the sense of performing acts demonstrating the exercise thereof. As Malan AJA said in para 13 of *First Rand Ltd t/a R Merchant Bank & another v Scholtz NO & others* [2006] ZASCA 99; 2008 (2) SA 503 (SCA), in a passage quoted with approval in para 14 of *Masinda*,

'the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its *quasi-possessio* is deserving of protection by the mandament'

[22] Immediately after the above sentence, Malan AJA continued (footnotes omitted):

'Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is a real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandament. The right held in *quasi-possessio* must be a 'gebruiksreg' or an incident of the possession or control of the property.'

[23] After quoting this passage, Leach JA in *Masinda* said that, depending on the circumstances, the supply of electricity or water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. From what the learned judge carries on to say, however, it is equally clear that he envisaged that an alleged right to a supply of electricity or water may be no more than a 'mere' personal right, and this is indeed what he found to be the position in that particular case.

[24] The difficult question is to identify the precise basis on which an alleged right to electricity is to be characterised as being of one kind or the other. In general terms, one must, in terms of *First Rand v Scholtz* and *Masinda,* enquire whether the alleged right to electricity was a 'gebruiksreg' (a right of use) or an 'incident of the possession or control of the property' served by the electricity. If so, the mandament is available to protect the alleged right.

[25] In the modern day, a supply of electricity and water to a residential property is a practical necessity in order for an occupant to use the property as a dwelling. When such supply is terminated, the occupant experiences a significant disturbance in his occupation. It is apparent, however, from *Masinda* that this does not suffice to make the alleged right to electricity and water an 'incident of the possession or control of the property'. *Masinda* dealt with the supply of electricity to a residential dwelling, but it was held that the alleged right of supply was not protected by the mandament. Leach JA also disapproved cases which treated the 'mere' supply of electricity and water, 'without more', as constituting an incident of possession, citing as one example of such a case *Eskom v Nikelo* [2018] ZAECMHC 48 (see *Masinda* para 16).

[26] On the other hand, 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.

[27] In *Naidoo* the claimant had previously had a lease of the first floor of a double-story residence. There was a dispute as to whether he was bound by a purported settlement agreement requiring him to vacate by a specified date. When he did not vacate, the landlord cut off the electricity supply. Eloff J rejected the landlord's argument that the mandament was precluded because the claimant's only alleged entitlement to electricity was contractual. The learned judge described the claimant's use of electricity as an incident of his occupation of the first floor (84A-B), and said that the landlord, by cutting off the electricity, 'substantially interfered with [the claimant's] occupation of the premises of the premises in question, and so performed an act of spoliation' (84E-F). Although the judgment in *Naidoo* does not expressly record that the landlord's intention was to force the claimant out, Leach JA appears to have inferred such an intention from the circumstances of the case.

[28] In *Froman* the applicant had purchased a townhouse from the respondent. The latter purported to cancel the contract, but the applicant declined to vacate. The respondent then severed the supply of electricity and water. O'Donovan J said that on the probabilities the respondent's only purpose in cutting off the water and electricity was to force the applicant to vacate, adding (610H-I):

'If this is correct, the action of the respondent amounted to a deprivation of applicant's right to obtain water and electricity. There is no reason why an incorporeal right of this nature should not form the subject of spoliation proceedings.'

[29] After discussing further authorities, including several decisions of the Supreme Court of Appeal, Leach JA in *Masinda* summed up as follows (para 22, my underlining):

'As was pointed out in *Zulu* [*Zulu v Minister of Works, KwaZulu, & others* 1992 (1) SA 181 (D) at 186E-190G], 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.

[30] I do not understand this passage to mean that, in order to enjoy protection, the alleged right to a supply of electricity must be an alleged servitude or a right that has been registered or conferred by statute. Between such cases, and alleged rights which are 'purely personal in nature', lie cases in which, despite the personal contractual nature of the alleged right, the right is not 'purely' personal but 'an incident of the possession or control of the property' served by the supply of electricity. There seems to have been approval for the view of the author, Duard Kleyn (referenced in para 13 of *FirstRand Ltd v Scholtz*), that a right enjoying protection under the mandament could be real or personal.

[31] Furthermore, I do not read Leach JA's concluding statement to mean that among the cases wrongly decided were *Naidoo* and *Froman*. I understand the

learned judge to have meant that any reasoning in earlier cases to the effect that the supply of electricity to property is, without more, an incident of the possession of the property, is wrong. I may add that during the 1980s there was a lively academic debate, on various aspects of the mandament, between A J van der Walt, M J de Waal, J C Sonnekus and Duard Kleyn. This debate touched on the decisions in *Naidoo* and *Froman*. Although the academics in question had differing views on the basis and scope of spoliatory relief, none of them disagreed with the fact that spoliatory relief was granted in these cases. (See *inter alia* 1983 (46) *THRHR* 237 (Van der Walt); 1984 (47) *THRHR* 115 and 429 (De Waal and Van der Walt respectively); 1985 *TSAR* 331 (Sonnekus); 1986 *TSAR* 223 (Van der Walt); 1989 (52) *THRHR* 444 (Van der Walt); 1989 *De Jure* 154 (Kleyn).)

[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 (5) SA 309 (SCA) and *Zulu v Minister of Works*. One may infer, from Leach JA's disapproval of the case, that *Eskom v Nikelo* should also be placed in this category. These cases do not involve quasi-possession enjoying protection under the mandament.

(c) Finally, there are cases such as *Naidoo* and *Froman*, which do not appear to have been disapproved in *Masinda*, where the alleged right to a supply of electricity was an alleged personal contractual right but where, nonetheless, the mandament's protection was held to be available.

[33] The potentially difficult question is whether a case should be placed in category (b) or (c). A unifying feature of the cases falling into category (b) is that the person alleged to be under an obligation to supply the service – Eskom, First Rand, Telkom, the Irrigation Board – was not the person who had conferred on the claimant the alleged right to occupy the property to which the service was supplied. The supplier of the service had no interest in possession of the property. In each case, the only alleged contract which the supplier had with the occupant was the contract for the supply of the service.

[34] In the cases falling into category (c), by contrast, the alleged right to the service is an adjunct to, or part of, the alleged right to occupy the property. The same person (typically a landlord) who was allegedly obliged to allow the claimant to be in possession of the property was the party who was allegedly obliged to supply, or to allow a supply, of services such as electricity and water. (Cf *ATM Solutions (Pty) Ltd v Olkru Handelaars CC & another* [2008] ZASCA 153; 2009 (4) SA 337 (SCA) paras 9-12). In such cases, the landlord has a direct interest in the possession of the property itself. The landlord's act in cutting off electricity and water is an act which interferes not only in the claimant's alleged right to receive those services but simultaneously interferes in the claimant's alleged right against the landlord to be in undisturbed possession of the premises with the amenities forming part of the alleged right of occupation. The claimant's alleged right to receive electricity and water is part of the cluster of alleged rights making up the occupation to which he claims to be entitled. And in such cases it may be difficult to avoid the conclusion that the landlord who has intentionally

cut off the electricity and water is trying to eject the occupant without due legal process. In cases falling in category (b), by contrast, the supplier does not and could not have any such intention.

[35] Although *Masinda* did not in terms highlight this distinction, in my view it provides a rational basis on which to distinguish between an alleged personal right to a supply which is 'purely' personal on the one hand and one which is 'an incident of possession of the property' on the other.

[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.

[39] In regard to the second of the conclusions just mentioned, it is trite that a significant disturbance in possession can be the subject of spoliatory relief, even though the claimant has not been wholly deprived of possession (*Burger v Van Rooyen en 'n ander* 1961 (1) SA 159 (O) at 160G-161C; see also A J van der Walt's note on *Naidoo* in 1983 (46) *THRHR* 237 and M J de Waal's note on the same case in 1984 (47) *THRHR* 115).

[40] It may be said that if, in such cases, there is an act of spoliation constituting a material interference in the claimant's possession of the property itself, it is unnecessary to justify the granting of relief on the basis of the quasi-possession of an alleged right to a supply of electricity. That may be so, but in order to decide whether the cutting off of electricity is indeed an act of spoliation in relation to the property itself, it is necessary to focus on the nature of the alleged right to the supply of electricity, in order to satisfy oneself that the case falls into category (c) rather than category (b). Furthermore, the fact that spoliatory relief can be based on a conventional interference in the possession of corporeal property does not mean that the alternative (or additional) justification,

based on quasi-possession of an alleged right, is unsound. In this regard, Hefer JA said the following in *Bon Quelle* (at 516D-E, my underlining):

'In sy *Sakereg Vonnisbundel* (op 54) wys prof Sonnekus daarop dat dit in sommige van die beslissings onnodig was om die begrip van die besit van 'n reg te gebruik. Dit was gevalle waar die uitoefening van 'n reg so nou verbonde was aan die besit van 'n liggaamlike saak, dat die verlies daarvan beskou kan word as inbreuk op die besit van die saak self. (*Froman v Herbmore Timber and Hardware (Pty) Ltd (supra)* waar die krag- en watervoorsiening aan 'n huis afgesny is, was bv so 'n geval. Vgl *Naidoo v Moodley* 1982 (4) SA 82 (T) op 84A-B.) Maar dit is nie altyd so nie, en die feit dat dit in sommige gevalle moontlik is om 'n spoliasiebevel op 'n ander basis te verleen, is onvoldoende rede vir die verwerping van die begrip.'

[41] In the above analysis, I have spoken throughout of 'alleged' rights. This is because in spoliation proceedings the claimant does not need to establish his alleged rights. However, the claimant does need to establish acts demonstrating the possession of the corporeal property or quasi-possession of the alleged right. In my category (c), the claimant's occupation of the premises, and his or her use of its electrical appurtenances, constitute the possession of the premises and the quasi-possession of the alleged right to electricity as an incident of his or her possession of the premises.

[42] I must now apply the law, as I conceive it to be, to the facts of this case. The nature of the alleged right to electricity exercised by Tom and his family does not seem to have been clearly articulated before the alleged spoliation. Colleen did not allege in her founding affidavit that her family's right to electricity was in the nature of a servitude. Even the basis for her family's occupation of the store is not clearly identified. There is no allegation that they leased it from Makeshift or that they paid rent.

[43] On Colleen's version, however, her family had permission to build the store and occupy it. In the absence of further facts, one cannot go further than

saying that, on her version, they occupied the store by virtue of a *precarium*, ie that Makeshift gave them a precarious right to build and occupy the store, terminable on reasonable notice (*Pezula Private Estate (Pty) Ltd v Metelerkamp & another* [2013] ZASCA 188; 2014 (5) SA 37 (SCA) para 10) and, perhaps, with good cause (cf *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others* [2009] ZACC 16; 2010 (3) SA 454 (CC) para 281).

[44] Their alleged right to electricity must have been of a similar kind. In terms of the *precarium*, Makeshift permitted Tom and his family, as an incident of their occupation of the store, to use the electricity supplied by Eskom to Makeshift, on the basis that Tom would pay the monthly bills.

[45] This appears to be consistent with what Engers AJ recorded as being Tom's case in the eviction proceedings. Tom alleged in those proceedings that Martinus had expressly agreed that he could occupy the store, and it was on that basis that Tom had made improvements and paid for utilities, rates and maintenance. Tom also alleged that the improvements gave rise to a lien. Tom does not seem to have relied upon a lease or any real right.

[46] This conclusion is not, in my view, affected by the unresolved dispute as to the shareholding in Makeshift. In the eviction proceedings, that dispute was thought to be relevant because if Tom were in control of Makeshift (as he claimed to be entitled), the company would not be requiring him to vacate the property. After considering the shareholding dispute, Engers AJ concluded

(a) that he could not exclude the possibility that Tom might succeed in his application to compel delivery of the shares to himself; and

(b) that, for this reason, Makeshift had failed to show that Tom was an unlawful occupier.

[47] I express no opinion on whether Engers AJ was right to find that conclusion (b) above flowed from conclusion (a). For present purposes, I need only say that a change in control of Makeshift would not in itself affect the legal nature of the relationship between Makeshift and Tom regarding possession of the store. Tom's acquisition of control of Makeshift would simply mean that, factually, Makeshift was unlikely to terminate the *precarium*.

[48] A *precarium* is a contractual relationship. In the present case, and as with the landlord who has leased premises to a tenant together with a supply of electricity and water, the alleged contractual relationship embraced possession of the store and a right to Eskom electricity, provided that Tom and Colleen paid the Eskom bills. Makeshift was not a person whose sole alleged contractual relationship with Tom and Colleen was a supply of Eskom electricity. The supply of Eskom electricity was an adjunct to, or incident of, the *precarium* in terms of which Tom's family occupied the store.

[49] This appears to place the case in my category (c) above, ie a case similar to *Naidoo* and *Froman*. While I consider that this suffices to cause the alleged right to the Eskom supply to be more than a 'mere' personal right to a supply of electricity and to be an incident of the possession of the store, there is the further feature that – as in *Naidoo* and *Froman* – the discontinuation of the Eskom supply was an act intended to force Tom and his family off the farm, ie to disturb them in their peaceful possession of the store. I am aware that this allegation was not explicitly made in the papers, but I think it is the only inference to be drawn from the totality of the following circumstances:

(a) There was a fraught relationship between Tom on the one hand and his father and siblings on the other. One of the disputes related to control of Makeshift.

(b) Makeshift (as a vehicle for the interests of Martinus and Tom's siblings) wanted Tom and his family off the farm.

(c) Makeshift's application to have Tom ejected had recently been dismissed with costs.

(d) Makeshift had for some time had its own source of solar electricity, whereas Tom was dependent on Eskom electricity. The electricity was also crucial to the supply of water to the store, because water was conveyed by a pump powered by the Eskom electricity.

(e) Tom had for several years been paying the full Eskom bills, and at the time the electricity was disconnected the payments were up to date.

(f) In their answering affidavits, Humboldt and Rykie gave conflicting and unsatisfactory evidence as to why the Eskom electricity was disconnected. Humboldt said that this was done because Martinus had acquired solar panels and no longer needed supply from Eskom. However, this state of affairs had prevailed for some time, yet it was only very shortly before Christmas that the supply was cut off. Furthermore, the fact that Martinus no longer needed an electricity supply is neither here nor there, because he was not the person paying the bills.

(g) In a supplementary answering affidavit, Rykie said that she notified Eskom to terminate the supply to the farm, her reasons being that Makeshift could no longer afford to continue with the contract, that she and Humboldt were concerned about the quantity of electricity being consumed, that the supply was expensive, that the farm did not generate enough income to cover its costs, and that she and Humboldt could not see their way clear to paying for the consumption, most of which was unnecessary. This explanation is bogus, given the undisputed evidence that Tom and Colleen had been paying the full amount of the Eskom bills for several years.

(h) In the circumstances, the versions of Humboldt and Rykie on this aspect do not raise a genuine dispute of fact. What they say is so far-fetched and untenable that it can be rejected on the papers.

(i) Objectively, the termination of the Eskom supply did not serve any legitimate interest of Makeshift. Such an interest may have been served if there were a dispute as to whether Makeshift or Tom was liable to settle the bills, or if Makeshift had a real concern about liability to Eskom, but that was not the case.

[50] I thus consider that, on the facts of the present case, Tom and Colleen's alleged right to a supply of Eskom electricity was an incident of their possession of the store and was not a 'mere' personal right. The alleged right was thus one enjoying the protection of the mandament.

Form of order

[51] The order requiring Makeshift to restore the supply of Eskom electricity was, in my view, an order which could properly be made as spoliatory relief. To the extent that the order by necessary implication required Makeshift to re-establish its supply contract with Eskom, there is nothing to suggest that Makeshift was unable to do so. Indeed, it is an open question whether Eskom's joinder was necessary in order for such an order to be made, but since the point was not argued I express no opinion one way or the other.

[52] In spoliation proceedings the claimant is not confined to a simple restoration of possession. Although he is not entitled to delivery of a substituted article where the spoliated article has been destroyed or lost (see *Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan Municipality & others* 2007 (6) SA 511 (SCA) paras 22-24 and *Ngomane & others v Johannesburg (City) & another* 2020 (1) SA 52 (SCA) paras 18-19, disapproving

the reasoning in *Fredericks & another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) at 117D-118A), the spoliator is obliged to restore the despoiled property *in its former state*, which may require some positive act on his part (*Masinda* para 10 fn 7, approving *Zinman v Miller* 1956 (3) SA 8 (T)).

[53] In *Zinman*, where the spoliator had removed the main panel from the electrical meter chamber in the claimant's house and cut the electric wiring, it was held competent for the court to order not only that the panel be returned but that it be replaced in the chamber and that the wiring be reconnected. In the course of his judgment, Rumpff J referred to an example given by Van der Linden of a spoliator who had removed a fence, an appropriate order being one which required him to restore the fence to its former condition, ie to re-erect it.

[54] In *Rikhotso v Northcliff Ceramics (Pty) Ltd & others* 1997 (1) SA 526 (W), a judgment approved in *Tswelopele supra* paras 23-24, Nugent J (at 533C-D) endorsed *Zinman*, and distinguished cases where the item possessed has been destroyed from cases where a spoliator had been ordered to restore a ceiling, rebuild a fence or restore a demolished house (533E-F):

'In all those cases the property concerned had not been destroyed. In one way or another it had been disassembled, and the effect of the order was to order the return of the property in its reassembled form.'

See, also, M J de Waal 'Die moontlikheid van besitsherstel as wesenselement vir die annwending van die mandament van spolie' (LLM disseration, University of Stellenbosch, 1982) at 41-43, 55-56 and 111-113; Kleyn 'Plakkery en die mandament van spolie' 1989 *De Jure* 154 at 166-167.

[55] In the present case, an order requiring Makeshift to re-establish the Eskom electrical supply to the store is an order which would place Colleen and her family back in possession of the alleged right of use of the electricity of which they had

quasi-possession before the act of spoliation, and back in full possession of the store, including its electrical supply as an incident thereof. This Makeshift can do by simply resuming its contract with Eskom. There is nothing to suggest that any new electricity box or any new electrical cabling needs to be introduced. The infrastructure remains in place; Eskom has merely sealed the electricity box.

Unlawfulness of occupation

[56] Makeshift alleged that Tom and Colleen's occupation of the store was unlawful in that the approved building plans had not permitted the construction of the store as a residence and that they did not have an occupation certificate as required by the s 14 of the National Building Regulations and Building Standards Act 103 of 1977. Makeshift's counsel submitted that the RMC was not empowered to make an order which required Makeshift to contract with Eskom for the supply of electricity to a structure which Colleen's family was not lawfully entitled to occupy.

[57] This submission is at odds with authority by which we are bound, namely that in spoliation proceedings the statutory unlawfulness of a claimant's possession or use of property is not a matter on which the court is called upon or entitled to adjudicate (*Yeko v Qana* 1973 (4) SA 735 (A) at 739A-H; *Ivanov v North West Gambling Board & others* [2012] ZASCA 92; 2012 (6) SA 67 (SCA) paras 18.) I would add that a contract between Makeshift and Eskom for a supply of electricity to the farm would not be an unlawful contract, even though that electricity might serve the store.

An order for specific performance?

[58] Makeshift contends that the RMC was not entitled to make the orders which it did, because these orders effectively required Makeshift to conclude a contract with Eskom, and it is beyond the power of a magistrate's court to order

specific performance in the absence of an alternative claim for damages (s 46(2)(*c*) of the Magistrates' Courts Act 32 of 1944).

[59] This contention overlooks s 30(1) of the Act, which provides that, subject to the limits of jurisdiction prescribed by the Act, a court may grant '*mandamenten van spolie*'. It was held by a full court in *Zinman supra* that a spoliation order was not an order for 'specific performance' within the meaning of s 46(1)(*c*). This reasoning, with which I agree, was approved in *Badenhorst v Theophanous* 1988 (1) SA 793 (C) at 796I-797D, but was not extended to the case where an interdict is in substance a claim for specific performance of a negative contractual obligation (prohibiting breach of a restraint of trade).

Conclusion

[60] The notice of appeal does not attack the RMC's costs order independently of the outcome on the merits. I would simply add that it was reprehensible that Makeshift did not comply with the interim order. It may be questioned whether the RMC should have granted an interim order without any notice whatsoever to Makeshift, but the latter's remedy was to have urgently anticipated the return day, which it did not do. Court orders must be complied with until they have been set aside or suspended. Indeed, it might have been open to the RMC to refuse to entertain Makeshift's opposition in the main case until it had purged its default.

[61] As to the costs of the appeal, it was submitted in Colleen's main heads of argument that Humboldt and Rykie should be held jointly and severally liable with Makeshift for such costs, on the basis *inter alia* that if Tom succeeds in his claim to the shares in the company, it would not be just that his company should be impoverished by costs. Whatever the merits of that argument, we cannot accede to it, because Humboldt and Rykie are not parties to the proceedings in their personal capacities.

[62] A further submission in the main heads was that Makeshift should be ordered to pay the costs on an attorney and client scale. I do not think that there is anything in the conduct of the appeal which warrants a punitive costs order. For the guidance of the taxing master, I record that it was reasonably necessary for Colleen's counsel to file supplementary heads of argument, having regard to the lateness of Makeshift's heads of argument.

[63] I make the following order:

The appeal is dismissed with costs.

Owen Rogers

O L Rogers
Judge of the High Court
Western Cape Division

APPEARANCES

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