

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A326/2021

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED: **YES**

DATE: 1/6/2023

SIGNATURE:

In the matter between:

MC ADMIN

First Appellant

EDGED HOUSE BODY CORPORATE

Second Appellant

and

MAHLOBOSHANE WIDAS MOHLALA

Respondent

JUDGMENT

NEUKIRCHER J:

1] This is an appeal against the whole of the judgment and order handed down by Phahlane (AJ) on 3 February 2021, in which she granted the following orders:

1.1 That the respondent¹ is ordered to reconnect the electricity supply to the applicant² with immediate effect;

¹ The present appellant (MC Admin)

1.2 The first and second respondents³ were to pay the attorney and client costs of the application.

BACKGROUND

- 2] On 27 January 2021 the respondent issued out of the Division a spoliation application in terms of Rule 6(12). The application was served, by the Sheriff, on the appellants on 28 January 2021.
- 3] The respondent alleged that he was the owner of unit 1[...] E[...] H[...], L[...] Street, Kempton Park (the premises) which he'd rented out. He also alleged that his levy account was up to date and that the unit is fitted with pre-paid electricity and that he pays this.
- 4] Despite this being so, the appellants cut the electricity to the premises on 20 January 2021 which the respondent alleges amounts to little more than spoliation and that the demand to restore the electricity supply fell on deaf ears – hence the urgent application.
- 5] What is quite apparent from the papers is that there was an ongoing dispute between the parties regarding monies allegedly owed by the respondent to the appellants for repairs to a water leak on the common property which affected the premises and caused damage not just to the premises, but several items belonging to the tenant. As the dispute is not relevant for purposes of the outcome of this appeal, nothing more need be said regarding this.
- 6] Suffice to say that, by the time the application was launched on 27 January 2021, the relationship between the parties was no longer cordial.
- 7] The appellants filed an answering affidavit in which they took several points *in limine*:

² The present respondent (Mohlala)

³ The 2nd respondent was the Edged House Body Corporate (the Body Corp)

7.1 that the court did not have jurisdiction as the amount allegedly owing by the respondent to the appellants falls within the jurisdiction of the Magistrate's Court;

7.2 that the electricity supply to respondent's property was restored on 26 January 2021 and thus, by the time the application was issued, the issue had become moot and the relief therefore academic.

8] It is important to note that the respondent elected not to file a replying affidavit.

9] At the hearing, the court accepted the word of counsel appearing for the respondent that the electricity had not been reconnected. After an exchange with the court, the respondent's counsel states:

"There is no electricity connected M'Lady and the attorneys of record did not even confirm that. They did not tell us. They should have written a letter to say remove the matter from the roll, electricity is connected. Then we will deal with the issue of costs. Nothing. They say we are opposing."

10] In granting the order, the court took into account the existing dispute between the parties regarding alleged monies owed by the respondent, that the respondent was using prepaid electricity, that the appellants had threatened to cut off respondent's electricity and stated that:

"I have considered all the circumstances of this case and took into account the fact that there is nothing before this court to suggest that the respondents were entitled in law to cut electricity supply to the applicant ..."

and

"... I have also taken due regard to the attitude displayed by the respondents whom being threatened with the matter being brought before court that they

during that period, send an email to an employee to have the electricity of the applicant be reconnected because the applicant has threatened to come to the high court ...”

11] In their Notice of Appeal, the appellants raise several points of fact and law. In my view only two points require discussion, as the decision reached will dispose of the appeal on those two alone. They are the following:

11.1 that the court *a quo* erred in granting a spoliation order despite the electricity supply having been restored on 26 January 2021;

11.2 that the court *a quo* erred in disregarding the evidence regarding the reconnection set out in the Answering Affidavit and in accepting respondent’s hearsay evidence from the bar.

12] These two issues are, of course, interrelated.

13] It is trite that a court of appeal may only interfere with the decision of a court *a quo* if there was a misdirection or an error of law – *in casu* there is both.

14] Bearing in mind that a spoliation has in mind the restoration of the status quo ante, the unlawful disturbance of undisturbed possession must exist as a fact at the time that the court pronounces its judgment and order. Anything less is simply a *brutum fulmen* and at best, a waste of the court’s time and the parties’ money.

15] In their Answering Affidavit the appellants state the following:

“1[...]. The Applicant issued out the Notice of motion on the 27th January 2021 out of the above Honourable Court, in which the Respondents were duly served. The Applicant and as well as his attorneys of record were notified on the 26th January 2021 that the first Respondent has reconnected electricity to the Applicant’s Unit on the same day, 26th

January 2021. The copies of the email are attached hereto and marked as annexure “MTN7”.

- 16] The email attached as MTN7 to the answering affidavit is dated 26 January 2021 at 13:49 and states, *inter alia*:

“MC Admin, did re-connect the electricity to Unit 1[...] 26 January 2021 at 13:30.”

- 17] This was confirmed in another email of 28 January 2021 at 12:03 as follows:
“Please see below the electricity was re-connected: Sent: Tuesday 26 January 2021 13:49” – this with reference to the email set out in paragraph 16 *supra*.

- 18] Thus it is clear that the day before the application was issued, and 2 days before it was served on appellants, the entire issue had become moot. Given that the application was heard on 2 February 2021, the electricity had been restored some 6 days prior.

- 19] It must be emphasized that as no replying affidavit was filed the evidence set out in paragraphs 16 and 17 *supra* were uncontroverted. But instead of applying the well-traversed and trite Plascon-Evans⁴ rule, the court chose to accept evidence from the bar. This it was not entitled to do: firstly, that evidence is not evidence in the true sense of the word as it is not under oath; secondly it is hearsay; and thirdly it amounts to no more than a trial by ambush.

- 20] What the court should have done was to disallow those submissions and apply the rule in Plascon-Evans. That being so, it should have been the end of applicant’s case and the main relief should have been dismissed.

- 21] Given this the appeal must succeed.

⁴ Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A).

THE ORDER

22] In the result it is ordered that:

22.1 the appeal is upheld with costs;

22.2 the order of the court *a quo* is set aside and replaced with the following:

“The application is dismissed with costs.”

**B NEUKIRCHER
JUDGE OF THE HIGH COURT**

I AGREE

**C COLLIS
JUDGE OF THE HIGH COURT**

I AGREE

**NL TSHOMBE
ACTING JUDGE OF THE HIGH COURT**

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 1 June 2023.

Appearances:

For 1 st & 2 nd Appellant	:	Adv K Poee
Instructed by	:	Ngoetjana Attorneys Inc.
For Respondent	:	Mr LE Thobejane

Instructed by : Botha Massyn and Thobejane Associated
Attorneys

Date of hearing : 3 May 2023