



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: **567/2022**

In the matter between:

**HARRISMITH INTABAZWE TSIAME RESIDENTS
ASSOCIATION (PTY) LTD ("HIT")**
(Reg no: 2019/301720/08)

1st Applicant

WILHELM KÖNIG

2nd Applicant

SHILOH RETAILERS (PTY) LTD t/a HARRISMITH SPAR

3rd Applicant

ARVARO FILL UP CC t/a ENGEN

4th Applicant

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

1st Respondent

FUTHULI P MOTHAMAHA, MUNICIPAL MANAGER

2nd Respondent

In the matter between:

Case No: **824/2022**

**HARRISMITH INTABAZWE TSIAME RESIDENTS
ASSOCIATION (PTY) LTD**
(Reg no: 2019/301720/08)

1st Applicant

WILHELM KÖNIG

2nd Applicant

MONOTSA TRUST (IT366/2000)

3rd Applicant

MR EMILE DE BEER N.O.

4th Applicant

and

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

1st Respondent

FUTHULI P MOTHAMAHA, MUNICIPAL MANAGER

2nd Respondent

CORAM: JP DAFFUE J

HEARD ON: 21 APRIL 2022

DELIVERED ON: 14 JUNE 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 14 June 2022.

I INTRODUCTION

- [1] The electricity supply to various businesses in Harrismith has been terminated, in the one case on 8 February 2022 and in the other case on 23 February 2022.
- [2] On 11 February 2022 and following upon an urgent application filed under application 567/2022 a rule *nisi* was issued with return date 3 March 2022. The respondents were *inter alia* ordered to immediately restore the electricity supply to the relevant premises.¹ On 25 February 2022 another urgent application was set down for hearing. On that day a rule *nisi* was issued in application 824/2022 with return date 7 April 2022. Similar orders were granted as in application 567/2022, save that costs stood over for later adjudication.² In the first application a costs order on an attorney and client scale was made against the respondents jointly and severally.
- [3] Both rules *nisi* were extended and the applications eventually postponed to the opposed motion court roll of 21 April 2022 when they were allocated to me for adjudication. Heads of argument were filed on behalf of the applicants in both applications, but I only received the respondents' heads of argument in respect of application 824/2022. I agreed with the parties that I would prepare one judgment only as the real and substantial issues in both applications are the same. After hearing the parties' oral submissions, I reserved judgment and extended the rules *nisi* pending finalisation of the judgment.

¹ Application 567/2022: pp 98/9

² Application 824/2022: pp 76/7

II THE PARTIES

- [4] The first and second applicants in both applications are the same, to wit Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd (“HIT”) and Mr Wilhelm König, a major male businessman. Mr König deposed to the affidavits in his capacity as director and chairperson of the first applicant.

- [5] The third and fourth applicants in application 567/2022 are Shiloh Retailers (Pty) Ltd t/a Harrismith Spar (“Spar”) and Arvaro Fill Up CC t/a Engen (“Engen”), the two companies having their places of business within the jurisdiction of the first respondent.

- [6] The third and the fourth applicants in application 824/2022 are the Monotsa Trust (“the Trust”) and Mr Emile De Beer in his capacity as trustee of the Trust. The Trust is conducting several businesses within the jurisdiction of the first respondent, to wit a filling station, Wimpy, Debonairs and a Spar Extra.

- [7] The applicants were represented by the same counsel, to wit Adv DH Wijnbeek, instructed by Andreas Peens Attorney c/o Rosendorff Reitz Barry Attorneys Bloemfontein. I shall herein refer to the various businesses as “the customers” if I intent to refer to them as a class of entities.

- [8] The first respondent in both applications is the Maluti-A-Phofung Local Municipality. Its municipal manager, Mr Futhuli P Mothamaha was cited as second respondent in both applications. Mr MC Radebe of MC Radebe Attorneys in Bloemfontein appeared for the respondents.

III THE NATURE OF THE APPLICATION

- [9] The applicants brought their application within the purview of spoliation. As mentioned, they approached the court on an urgent basis on 11 and 25 February 2022 respectively. Both presiding officers dealing with the separate applications regarded the applications as urgent and issued rules *nisi* as mentioned above. The respondents were called upon to show cause why the

following orders should not be made final, quoting *verbatim* from the order granted in application 824/2022:

- "2.1 The First, alternatively the First and Second Respondents, further alternatively the Respondents jointly and severally is ordered to:
- a. Restore the supply of electricity to the respective premises of the First Applicant members, inclusive of the Third and Fourth Applicants,
 - b. Which supply was terminated by the 1st Respondent's employees and/or contractors; and or termination caused on instruction of the First and/or Second Respondents on, or since 23rd February 2022.
- 2.2 The First and Second Respondents is directed to ensure that all relevant officials, employees, and contractors of the First Respondent is duly instructed and have taken the necessary actions to give effect to this order.
3. The costs is reserved for argument on the return date.
4. Pending the return day, paragraphs 2.1 and 2.2 shall serve as an interim interdict with immediate effect."

The order in application 567/2022 differs from the quoted order in that the date in paragraph 2.1.b is 8 February 2022 and a costs order was made contrary to what was ordered in paragraph 3 above.

- [10] The applicants submitted that they had established the requisites to obtain urgent relief in accordance with the *mandament van spolie* insofar as they were in peaceful and undisturbed possession of the supply of electricity at their business premises, that the respondents unlawfully terminated such supply on 8 and 23 February 2022 respectively without following a fair administrative process before interrupting the supply in circumstances where they as consumers were not in breach of their payment obligations towards the first respondent and consequently, as a result of the respondents' unlawful action and resort to self-help, they were entitled to initial relief and are also entitled to final relief.

IV THE FACTUAL MATRIX

[11] The following facts which are common cause, unless mentioned and addressed, are relevant to the adjudication of the applications:

- 11.1 The first applicant is commonly known as HIT. It is a duly registered non-profit organisation. Shiloh Retailers (Pty) Ltd trades as Spar Harrismith from 42 Hamilton Street, Harrismith. It is also known as Spar Supermarket. It is a departmental store in the food and beverage sector, serving a large clientele of all creeds in town as well as customers passing by on the N3 on route to either Johannesburg or Durban.
- 11.2 Arvaro Fill Up CC operates as an Engen filling station as well as a convenience store. It is situated at Route N5 Mckechnie Street from where it services clientele on route from Harrismith to Qwaqwa and the Eastern Free State. Many of the clientele commuting between Harrismith and Qwaqwa are low income citizens that depend on the type of products and pricing of such products at the convenient store on the premises also known as Harrismith Convenience Centre.
- 11.3 The Monotsa Trust conducts various businesses such as a filling station, Wimpy, Debonairs and Spar Express. The Municipality's tax invoices describe the Trust as Sedibeng Service Station, Edidor 176 (Wimpy) and Sedibeng Liquor Store. These businesses are serving not only local residents, but also customers passing by on the N3 on route either to Johannesburg or Durban. These businesses serve a large clientele and offer fast food, restaurants, a Shell filling station, as well as rest rooms.
- 11.4 On 8 February 2022 the electricity supply to Harrismith Spar and Engen was terminated and on 23 February 2022 the electricity supply to the Shell garage, Wimpy, Debonairs and Spar Express was terminated,

where after orders were obtained on 11 February and 25 February 2022 respectively to restore the electricity supply as mentioned above.

- 11.5 The respondents did not notify any of these customers of their intention to terminate the electrical supply, save for the contentious letter to be dealt with in the next sub-paragraph.
- 11.6 An undated termination notice, signed by the first respondent's Chief Financial Officer, was circulated during 2020 to certain members of HIT.³ This letter was not addressed to anybody in particular, not sent to a particular address and no reference was made to the name of the customer, the account number, any amount in arrears and in respect of which municipal services unspecified amounts were claimed.
- 11.7 Mr Radebe correctly conceded that the termination notice relied upon and attached to the applicants' papers referred to earlier – annexure "WK5" – was inadequate, bearing in mind the judgment of the Constitutional Court in *Joseph v The City of Johannesburg*.⁴
- 11.8 Written and formal disputes were declared in terms of s 95(f) read with s 102(2) of the Local Government: Municipal Systems Act ("the Systems Act")⁵ and also as fully set out in the letters of HIT's attorney dated 8 July 2020 and 29 September 2020.⁶
- 11.9 The first respondent abandoned its termination notice as no further steps were taken to terminate the supply of electricity or water to customers, but nearly two years later and without sending termination notices to the customers involved in the present litigation, their

³ Application: 567/2022, para 17 and annexure "WK5" on p 36; also annexure "WK6" on p 41 of application 824/2022

⁴ 2010 (4) SA 55 (CC) at paras 24, 26 & 31

⁵ 32 of 2000

⁶ Application 567/2022: para 15, p 11 and annexures "WK3" & "WK4", read with annexure "WK6" pp 37 - 41; application 824/2022 para 15, p 10 and annexures "WK4", pp 26 – 38 read with annexure "WK5" on p 39 - 40 and "WK7" on pp 42 - 46

electricity supply was terminated in February 2022 as mentioned above.

11.10 After the electricity supply to consumers in application 567/2022 was terminated, two letters were sent to the first respondent dated 8 and 9 February 2022 respectively, but no courtesy of a reply was shown.⁷ The process was repeated in respect of the customers involved in application 824/2022.⁸

11.11 The first respondent is in dire straits and Eskom in particular had taken judgment against it for failure to settle its bills. The respondents conceded that this debt is in excess of 6 billion Rands.⁹ At a stage first respondent's bank accounts were even attached and frozen.¹⁰

11.12 *Ex facie* the current accounts issued by the first respondent to the customers, they were not in arrears in respect of their accounts when the electricity supply was terminated.¹¹

11.13 The first respondent claims that the customers owe it hundreds of thousands of rands in respect of historic debts pertaining to consumption of electricity – *ie* debts allegedly incurred prior to the implementation of a Service Level Agreement ("SLA") between the first respondent and Eskom signed on 19 May 2020¹² - for which amounts no formal accounts and/or invoices were provided *ex facie* the application papers.

⁷ Annexures "WK12" & "WK13" on pp 51 - 56

⁸ Annexures "WK12" & "WK13" on pp 55 - 58

⁹ Application: 562/2022: answering affidavit para 4.2, p 113; application 824/2022: answering affidavit para 2.12, p 85

¹⁰ Application: 567/2022, p 10

¹¹ Application: 567/2022, para 22, p 13 read with "WK7" to "WK11" pp 42 – 50; application 824/2022, para 22, p 12 read with "WK8" to "WK10" pp 47 - 52

¹² Application 824/2022: para 3.3, p 192 & application 567/2022, para 2.6, p 107

- 11.14 In the case of Harrismith Spar the amount allegedly due, but not specified, is R785 055.83 and in the case of Engen the claim is for R318 468.64.¹³ The account details were apparently generated by an entity called e-Venus, but the author and veracity of the account details are unknown. In the case of the Sedibeng filling station the outstanding amount was R420 068.96.¹⁴ In a supplementary affidavit by the respondents the amount due by the third respondent in application 824/2022 was stated to be R555 531.79, to wit R89 469.36 in respect of Sedibeng Liquor, R160 883.27 in respect of Wimpy and R305 179.16 in respect of Sedibeng Service Station.¹⁵ These e-Venus accounts are not only hopelessly confusing, but also fail to comply with the definition of “account” in the first respondent’s policy to which I shall refer later herein.
- 11.15 Although it is not denied by the respondents that the relevant consumers have declared disputes pertaining to their accounts,¹⁶ they deny that the amounts mentioned in the e-Venus statements presented on behalf of the respondents were placed in dispute. More about this later when the evidence is evaluated.
- 11.16 The first respondent’s policy dealt with in more detail hereunder defines an account as: “an account rendered specifying charges for municipal service provided by the municipality, and which account may include assessment rates levies.” The credit control measures are set out in clause 7.6 of the policy and the dispute procedure is set out in clause 8. More about this later. Although the respondents admitted in the answering affidavit that the termination notice was not dated, they denied that it lacked particularity.¹⁷ As mentioned, their attorney conceded the incorrectness of this allegation in his written heads of argument as well as during oral argument.

¹³ Application: 567/2022, pp 108 read with annexures “TDO1” – “TDO3”, 126 & 128

¹⁴ Application: 824/2022: annexure “SSS1”, p 101 & 102

¹⁵ Paras 3.5 – 3.8, p 193, read with annexures “CAD1 - 11”, pp 228 - 238

¹⁶ See for example paras 4.5 & 4.6 of the answering affidavit in application 567/2022 on p 114

¹⁷ Answering affidavit in application: 567/2022, para 4.8, p 115

- 11.17 Although the respondents tried to make out a case that the third applicant in application 824/2022 only raised a dispute pertaining to a relatively small water account, it is clear from the founding affidavit that over and above that dispute, both the third and the fourth applicants in application 824/2022 as well as the consumers in application 567/2022 formed part of the class of consumers mentioned in annexures “WK4” and “WK5”.¹⁸
- 11.18 None of the official invoices issued by the first respondent to any of the consumers indicate outstanding amounts, save in respect of current accounts, or put otherwise, nothing is in arrears in respect of the 30, 60, 90 and 90+ days periods. The respondents alleged in application 824/2022 that “there is no dispute concerning the amounts owed by the applicants; and” that the “disputes that may have been lodged, refer to historic debts dating from the year 2015;” whilst the “debts referred to above herein (in this application by the respondents,) are both for historic and for everyday and current consumption by the applicants – which they refuse to pay”.¹⁹ This is not only nonsensical, but clearly denied in paragraph 14 of the replying affidavit.²⁰ It is pointed out that annexure “SSS1” relied upon by the respondents in application 824/2022 incorporates the Spar Supermarket and Engen (the consumers in application 567/2022) and that neither the third, nor the fourth applicant in application 824/2022 is involved with these consumers. The consumers in both applications are all in agreement that there is confusion in the administration of the first respondent and an inability to correct its billing system.
- 11.19 It is reiterated on behalf of the Monotsa Trust which is running a Spar Express, filling station, Wimpy and Debonairs that it had never received any account of indebtedness in the amount of R420 068.96 prior to the spoliation application. It is also reiterated that its accounts are wrong

¹⁸ Founding affidavit in application: 824/2022, para 15, pp 9 & 10, annexures “WK4” & “WK5” pp 26 – 37, read with answering affidavit para 4.9, p 91

¹⁹ Paras 3.1 – 3.3.3, application: 824/2022, p 88

²⁰ P 170

and formally disputed. All of a sudden, the amount of R420 068.96 mentioned in the answering affidavit as the outstanding amount on 23 February 2022 increased as on 4 April 2022 to R555 531.97. Reliance was placed on a computer printout from e-Venus which was not only nonsensical, but did not set out how the outstanding amount had been calculated. In response to this supplementary affidavit the applicants averred that the SLA was irrelevant to the case. It was again emphasised that the first respondent's accounting systems were in a shambles and that none of the amounts now suddenly disclosed could be trusted and would have to be debated if rendered per invoice to the relevant consumers. Although, for example the Sedibeng liquor store had been making payment directly to Eskom as it was obliged to do in accordance with invoices actually rendered for the past two years, the first respondent continued to raise "interim electricity accounts" of about R13 000.00 per month.

V LEGAL PRINCIPLES PERTAINING TO THE TERMINATION OF ELECTRICITY SUPPLY AND THE *MANDAMENT VAN SPOLIE*

[12] The Constitutional Court summarised the applicable principles pertaining to the mandament van spolie in *Ngqukumba v Minister of Safety and Security* as follows:²¹

"[10] The essence of the mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.

[11]

[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation

²¹ 2014 (5) SA 112 (CC) paras 10 - 13

order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

- [13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law. All that the despoiled person need prove is that—
- (a) she was in possession of the object; and
 - (b) she was deprived of possession unlawfully.”

- [13] The legal principles in respect of the mandament van spolie are clear. Very few defences can be raised. The applicant’s possession must be restored first and foremost (if it would be legal to do so) and thereafter the dispute as to the legality of any right relied upon could be considered.

- [14] When an applicant relies on the mandament van spolie, endeavouring to prove the second requirement, *ie* an unlawful deprivation of possession of property without his consent or without due legal process, the respondent contending that dispossession was lawful bears the onus of establishing same.²²

- [15] Having mentioned the aforesaid authorities, the judgment of the Supreme Court of Appeal in *Eskom Holdings SOC Ltd v Masinda*²³ must be considered. The facts in *Masinda* are totally distinguishable from those *in casu*. Ms Masinda sought restoration of her electricity supply notwithstanding the fact that she was unlawfully connected to the system which connection did not comply with safety requirements. Leach JA mentioned the following:

“[11] The obvious difficulty standing in the way of relief being granted was that the supply that was sought to be restored was said to be unlawful and constituted a danger to the public. This notwithstanding, the respondent’s counsel argued that, as in spoliation proceedings the legality or otherwise of an applicant’s possession is not an issue to be decided, the supply had to be reconnected before any dispute as to its legality could be determined.

²² *Impala Water Users Association v Lourens NO and others* 2008 (2) SA 495 (SCA) para 17 read with paras 22 – 27 and *Bill v Waterfall Estate Homeowners Association NPC and another* 2020 (6) SA 145 (GJ) para 35

²³ 2019 (5) SA 386 (SCA)

- [12] 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."

Leach JA continued and dealt with *Impala Water v Lourens* as follows:

- "[15] Depending upon 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. That this is so is apparent from the decision of this court in *Impala Water v Lourens* 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.....This court, in dismissing an appeal against an order that the appellant restore the flow, held that such rights were an incident of the possession of each farm, and that the mandament was therefore available."

After considering several other judgments, the learned justice summarised the application of the mandament van spolie as follows:

- "[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." (Emphasis added)

- [16] It is also apposite to refer to *Makeshift 1190 (Pty) Ltd v Cilliers*,²⁴ ("Makeshift") a judgment of the Western Cape full bench. Rodgers J (Cloete J concurring) put the issue in perspective as follows:

²⁴ 2020 (5) SA 538 (WCC), quoted with approval in *Wilrus Trading CC and another v Dey Street Properties (Pty) Ltd and others*, case no 1750/2021, an unreported judgment from the Gauteng Division, Pretoria delivered on 9 February 2022

- [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 *FirstRand 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.
- [30] I do not understand this passage [paragraph 22 in *Masinda* quoted above] 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.
- [33] The potentially difficult question is whether a case should be placed into 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, FirstRand, 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 (compare *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* 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 into 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 AJ van der Walt's note on *Naidoo* in 1983 (46) *THRHR* 237 and MJ 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 emphasis):

'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 Herbmores 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 spoliatiebevel 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, constitutes 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." (Emphasis added)

VI EVALUATION OF THE EVIDENCE AND SUBMISSIONS BY THE PARTIES

- [17] It is the first respondent's contention that the three applicants, to wit Spar, Engen and the Monotsa Trust, are indebted to it for historic electricity consumption and that it was entitled to disconnect the consumers' electricity

supply. Relying on the Constitution and other authorities,²⁵ the first respondent submitted it was not unlawful to do so. Its case, as presented, was that the consumers wrongfully believed that they were entitled to municipal services without having to pay for that. The first respondent was entitled to utilize its debt enforcement processes to terminate the electricity supply of the recalcitrant non-paying consumers. The factual matrix has been provided above and I do not intent to repeat most of it in my evaluation. That does not mean that I preferred to ignore those facts.

[18] The Municipality shall set the tone, showing respect to *inter alia* the Constitution, while it has to protect the rights of its citizens as clearly set out in *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni*.²⁶ I shall soon conclude whether it has done just that.

[19] I reiterate as mentioned above that insofar as the applicants rely on the mandament van spolie, the respondent contending that dispossession was lawful bears the onus of establishing same.²⁷

[20] I am prepared to accept in favour of the respondents and merely for purposes of the conclusion to be arrived at (although the issue remains in dispute and therefore contentious) that a valid Credit Control & Debt Management Policy ("the policy") was in place although the applicants pointed out disturbing facts such as that the second respondent signed the policy – the document serving before the court - on 25 February 2022 only, which is after the electricity supply was terminated in both instances and after rules *nisi* had been obtained. Also, no proof was provided that the approved policy was communicated to consumers as provided for in clause 13 thereof. Having said this, I accept that the first respondent has the right to credit control and to take effective measures to ensure that the debts of its customers are recovered in a lawful manner.

²⁵ Sections 152(1)(b), 155 & 156(5) of the Constitution, ss 96 & 102 of the Systems Act, *Rademan v Moqhaka Municipality* [2013] ZACC 11 at para 10 as well as its policy

²⁶ [2022] ZACC 3 (14 February 2022, at para 38

²⁷ *Impala Water Users Association v Lourens NO and others* 2008 (2) SA 485 (SCA) paras 22 – 27 and *Bill v Waterfall Estate Homeowners Association NPC and another* 2020 (6) SA 145 (GJ) para 35

- [21] The credit control measures are contained in clause 7.6 of the policy. Clause 7.6.1 stipulates that a warning notice, stating that the account has not been paid on due date, shall be delivered to a debtor's physical address and that in the case of failure to pay within seven days, services will be restricted and/or disconnected. It continues: "Accounts owing 90 days and more will be subject to cut off and other credit control measures." Furthermore, clause 7.6.1(c) is clear: electricity disconnection must be accompanied by a further notice setting out the reason for discontinuance of the service. The first respondent failed to comply at all. The notice – annexure "WK5" in application 567/2022 and "WK6" in application 824/2022 – does not comply with this provision as correctly conceded by the respondents' attorney. In any event, this notice was not delivered at the physical addresses of the consumers, did not provide any details of the account numbers, the services rendered, the period during which services were rendered and what amounts were due and payable. This undated letter must have been generated about two years before the electricity supply was eventually terminated. Disconnection occurred notwithstanding the letters of the applicants' attorney mentioned above to which no response was forthcoming.
- [22] The policy also makes provision for a dispute resolution process in clause 8 and over and above that, clause 12 deals with enquiries and appeals. I do not intend to deal with the process, but it is apparent that notwithstanding the letter of the applicants' attorney dated 8 July 2020 the first respondent did nothing to resolve the disputes raised, while clause 8.2.2(f) stipulates that disputes must be resolved within three months. In fact, in this letter the attorney recorded that several disputes had been lodged in the past, but not attended to. Clause 12.2 stipulates that "every customer has the right to ask and to be provided with a clear explanation as to the services being charged and a breakdown of all amounts shown on their account." The respondents' failure to respond in this regard as requested is inexcusable.

- [23] The respondents allege that huge amounts are payable by the various consumers as indicated above. No affidavit has been provided by first respondent's financial manager or any other senior person in the Finance Department. No tax invoices and no breakdowns of the alleged outstanding amounts were provided. The reliance on e-Venus printouts is nonsensical as the author thereof has not been identified. It is uncertain from which information and/or primary sources the printouts were generated. The bases for the alleged indebtedness in each and every case, such as the services allegedly rendered and during which time frames these were rendered, are absent from the documents. The alleged historic debt is thus not explained at all.
- [24] I am satisfied that the respondents failed to prove that it acted lawfully when the electricity supply to the customers was disconnected. They ignored their own policy, did not follow a due process, including a process of administrative fairness, and resorted to self-help. It was not shown that the consumers were in breach of their obligations to pay what was due to first respondent at any relevant time.
- [25] The respondents irresponsibly refused to engage with the consumers in an attempt to resolve the interruption dispute in circumstances that they should have appreciated that serious harm would be suffered if urgent relief was not granted.
- [26] I am satisfied that the applicants have made out a proper case to succeed with the mandament van spolie. They have proven the two requirements. They have been in peaceful and undisturbed possession of the properties of which the right to electricity was an incident of possession and they have been unlawfully despoiled of their rights when the electricity supply was terminated. I therefore agree with the *dicta* in *Makeshift supra*. I repeat that the consumers' right to electricity is an incident to their right to occupation of the particular business premises and is therefore considered as the subject of quasi-possession. Spoliation of such quasi-possession is an act of spoliation in relation to the respective premises. There can be no doubt that the supply of electricity is an essential service to the consumers. These conclusions are in

line with the following *dictum* in *Masinda supra* which I repeat: “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.” The Supreme Court of Appeal found against Ms Masinda who relied on the mandament van spolie, but the facts *in casu* are clearly distinguishable from those in *Masinda* in that unlike in *Masinda*, the restoration of the supply of electricity will not be unlawful or constitute a danger to the public. In fact, it will be to the public benefit.

[27] I should mention that it is not the respondents’ case that the mandament van spolie can never be relied upon by consumers. They do not doubt that my conclusion pertaining to the law is correct, but maintain that *in casu*, the consumers were not in peaceful and undisturbed possession by virtue of their indebtedness and consequently, the first respondent was entitled to disconnect the electricity supply. They are wrong. The facts speak for themselves: electricity was disconnected without any prior warning, contrary to the first respondent’s own policy and without an accusation that the consumers were not entitled to quasi-possession because of their alleged indebtedness.

[28] Although unnecessary to discuss in any detail, I am also satisfied that the applicants proved that they were not afforded any procedural fairness as explained in *Joseph supra*. The consumers were not given an opportunity to participate in the decisions that would affect them. They did not receive any of the notices mentioned in the policy referred to above. Proper statements and invoices are non-existent. The process adopted failed to enhance the legitimacy of the decisions to disconnect the electricity. Quite the contrary. When the facts are considered, the first respondent, led by the second respondent as its accounting officer, did not live up to the constitutional commitment to a responsive and accountable public administration.²⁸

²⁸ See in general: *Joseph supra*, *Grey’s Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA) para 23 and s 3(2) of the Promotion of Administrative Justice Act (“PAJA”)

VII CONCLUSION

- [29] I am satisfied that the applicants in both applications have made out proper cases to be awarded final relief. The rules *nisi* shall be confirmed. The rule *nisi* in application 567/2022 was extended on 3 March 2022, the costs having been reserved. The respondents' answering affidavit was filed on that day, necessitating a postponement. Those costs shall form part of the costs order to be awarded. The court granting the rule *nisi* on 11 February 2022 already made an order that the respondents shall pay the "costs of this application" jointly and severally on an attorney and client scale. That order did not form part of the rule *nisi* and I cannot interfere with it. It remains operative. Insofar as costs stood over in application 824/2022 for later adjudication as mentioned above, there is no reason why those costs should not form part of the costs order to be granted. A proper case has been made out for urgent relief. I did not deal with urgency in this judgment as my learned sisters who granted the rules *nisi* accepted that the applications were urgent. The issue of urgency has become moot. I merely wish to point out that although the consumers can utilize generators for short periods and at excessive costs when their electricity supply is cut during power outages experienced from time to time, they have made out a clear case, which was in any event not disputed, that electricity as a basic municipal service has become virtually indispensable, bearing in mind the type of businesses conducted.
- [30] In part B of the notice of motion issued under application 567/2022 provision was made for an order directing the first and second respondents to resolve disputes declared under s 102 of the Systems Act within 90 days, alternatively such time considered reasonable by the court. This issue was not specifically dealt with during oral argument and I was not asked to make an order in this regard. The first respondent knows what it has to do. It has to comply with its own policy pertaining to the disputed claims and it is not necessary to make any order in this regard.

[31] The applicants, being the successful parties, are entitled to their costs on a party and party scale.

VIII ORDERS

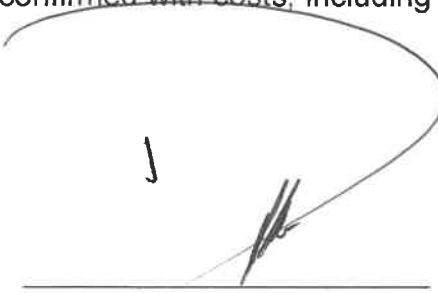
[32] Consequently, the following orders are issued:

application 567/2022

1. The rule *nisi* issued on 11 February 2022 is confirmed with costs, to wit such costs incurred after 11 February 2022 and including the costs occasioned by the postponement on 3 March 2022.

application 824/2022

1. The rule *nisi* issued on 25 February 2022 is confirmed with costs, including the costs reserved on 25 February 2022.



JP DAFFUE J

On behalf of the applicants in both applications:
Instructed by:

Adv DH Wijnbeek
Andreas Peens Attorneys
c/o Rosendorff Reitz Barry
BLOEMFONTEIN

On behalf of the 1st and 2nd respondents in both applications:
Instructed by:

Mr MC Radebe
Radebe Attorneys
BLOEMFONTEIN