

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



Case number: 1750/2021

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

In the matter between:

WILRUS TRADING CC

First Applicant

**SALENTIAS TRAVEL AND HOSPITALITY CC
V**

Second Applicant

DEY STREET PROPERTIES (PTY) LTD

First Respondent

NONYA PROPERTIES CC

Second Respondent

IDEAL PRE-PAID (PTY) LTD

Third Respondent

REASONS FOR ORDER DATED 21.01.2021

BASSON J,

PARTIES

[1] The first applicant conducts its business from a premise situated at the Shell filling station, Middel Street Motors, 256 Dey Street, Nieuw Muckleneuk, Pretoria, Gauteng (“the property”). The second applicant occupies shop no. 4 on the property and conducts a laundromat.

[2] The first respondent is Dey Street Properties (Pty) Ltd. The second respondent is Nonya Properties CC and is the managing agent of the first respondent in respect of the immovable property referred to hereinabove. The third respondent is Ideal Pre-Paid (Pty) Ltd and is the pre-paid metering service provider in respect of the business premises situated on the property at issue in this application.

NATURE OF THE APPLICATION

[3] This is an urgent spoliation application in terms of which the applicants seek an order that the first respondent be ordered to restore the applicants’ peaceful and undisturbed possession of their respective business premises.

[4] More in particular, an order is sought that the first respondent be ordered to restore the electricity supply to the abovementioned premises by instructing the third respondent to cancel and rectify the negative and arrear balances loaded on the applicants’ pre-paid electricity meters.

BACKGROUND FACTS

[5] Both the applicants have been conducting businesses from the premises for several years: The first applicant for a period of some 23 years and the second applicant since 2013.

[6] The disputes between the first applicant and the first respondent have a protracted history. Several court applications and actions have been instituted since 2016. The most recent litigation is a pending application, instituted by the first respondent against the first applicant in respect of, *inter alia*, alleged arrear electricity charges which application is opposed.

[7] The first respondent claims that since the second respondent took over the management of the property, the applicants have failed to pay a single cent towards their electricity consumption. It further claims that the first applicant's consumption amounts to R204 292.95 and the second applicant's consumption amounts to R34 592.01.

[8] The first respondent claims that the applicants' failure to pay, is causing it to face financial ruin. The applicants claim that these disputes are the subject of pending litigation between them under case no. 50169/2020 in this Division.

[9] It is common cause that during the first week of December 2020 a pre-paid electricity meter was installed at the first respondent's request, on the business premises. The applicants state that they welcomed the installation of the pre-paid electricity system due to the fact that it would limit further disputes between the applicants and the first respondent in relation to electricity charges.

[10] On 7th of December 2020, the first applicant loaded the first credit tokens on the pre-paid electricity meter. The pre-paid meter was credited accordingly and the correct amount of electricity units (KWA) were received in respect of the credit tokens loaded.

[11] On 19 January 2021, the first applicant received a phone call from the first applicant's attorney of record (who is also the second applicant's attorney of record), inquiring as to whether the first applicant's pre-paid meter was functioning properly. The first applicant was informed that the second applicant's pre-paid meter was not credited with electricity units despite the loading of an amount of R2 000.00 (two thousand rand).

[12] The first applicant then also attempted to load an amount of R2 000.00 (two thousand rand) on its pre-paid electricity meter. The meter was, however, not credited with any electricity units. By that time the first applicant's available units were already running low and was nearing depletion.

[13] It then transpired that on 19 January 2021, the first respondent instructed the

third respondent to load the arrears (referred to hereinabove) onto the applicants' respective meters. Accordingly, any additional credits purchased by either of the applicants would first be allocated to the arrears and once the arrears had been settled, would be credited to the applicants' meter and grant electricity to them. The applicants then launched this spoliation application.

Letter confirming the facts

[14] The first applicant received a letter from the second respondent in which it was alleged that the electricity consumption on the first applicant's premises, for the period from 26 May 2020 to 1 January 2021, amounted to R204 292.95 (two hundred and four thousand two hundred and ninety-two rand and ninety-five cents) which amount is allegedly in arrears.

[15] The letter confirmed that the second respondent, acting on behalf of the first respondent, instructed the third respondent to load the alleged arrears onto the pre-paid electricity meter and that the first applicant was required to clear the negative balance in order to purchase further electricity units.

[16] I have already referred to the fact that the applicants dispute the indebtedness regarding to arrear electricity. The applicants contend that the merits of the dispute regarding any alleged arrears are not relevant to this application and should the first respondent be of the opinion that any amounts are due and owing by the first applicant, it should issue summons. The applicants further contend that the first respondent proceeded in an unlawful manner by disposing of their peaceful and undisturbed possession of their business premises. More specifically, by restricting the applicants' access to its electricity supply. They argue that this unlawful conduct of the first respondent culminates to an act of spoliation.

Spoliation

[17] The general principles regarding what constitutes spoliation are well known and need not be restated. However, in dispute in this matter is whether the applicants have established an entitlement to relief relying on the principles of spoliation.

[18] The respondents claim that the applicant's rights to electricity was purely personal in nature and accordingly spoliation should be refused. They rely on the decision in *Eskom Holdings SOC Limited v Masinda*¹ where the court considered whether electricity supply in itself was an incident of possession of the property to which it is delivered or a mere personal right. Eskom Holdings SOC Limited (Eskom) disconnected the supply of electricity to the immovable property owned by the respondent. It transpired that the respondent's property was one of several properties having an illegal connection. When the respondent's electricity was cut, she sought an order, relying on the *mandament van spolie*, obliging Eskom to forthwith restore the electricity supply to her home. The court pointed out that the obvious difficulty standing in the way of the relief being granted to the respondent was the fact that the electricity supply that was sought to be restored was said to be unlawful and constituted a danger to the public. The respondent's counsel nonetheless argued that, in spoliation proceedings, the legality or otherwise of an applicant's possession is not an issue to be decided. It was further argued that the supply had to be reconnected before any dispute as to its legality could be determined.² The court was not persuaded by this submission and pointed out that Eskom undoubtedly was under a common law duty to take steps to guard against its electrical supply constituting a hazard to the public. This fact, the court pointed out, entitled a court to decline to issue a spoliation order as "*directing it to restore the electricity connections that were removed would compel it to commit an illegality*":³

"[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

¹ (1225/2018) [2019] ZASCA 98; 2019 (5) SA 386 (SCA) (18 June 2019).

² *Ibid* at para [11].

³ *Ibid* at para [13].

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."

[19] Returning to the present application. The respondents argue (relying on the *Masinda*⁴ judgment) that the applicants' right to electricity has its basis in contract and therefore the applicants' right to electricity was purely personal.

[20] Neither of the parties attached the rental agreement between them. The first respondent merely argued that the applicants received the supply of electricity from the first respondent pursuant solely to a contractual relationship. Despite the fact that there is no contract before me (although the existence of a contract was not disputed in argument), it can be inferred from what the first respondent states in its answering affidavit that it (the first respondent) is liable to the City of Tshwane for the electricity bill and that, because the applicants allegedly did not pay, it has a massive impact on the first respondent. In fact, the first respondent goes as far as to say the applicants do not pay "purely out of spite".

[21] Can it be said that the applicants, who were in lawful possession of the property, were entitled to receive electricity. Put differently, is the supply of electricity in this particular matter an incident of possession and so qualifying for such protection or is the alleged right to electricity purely personal in nature and therefore not susceptible to spoliatory protection?

⁴ *Ibid.*

[22] A case in point is the decision of *Makeshift 1190 (Pty) Ltd v Cilliers*.⁵ The (full) court in that matter pertinently considered the decision in *Masinda* and considered how that judgment should be interpreted.

[23] This judgment is important in that it confirms the following principles:

- (i) Relying on *Masinda*, the court confirms that certain rights, although incorporeal, may be the subject of quasi-possession for purposes of spoliatory relief.
- (ii) An incorporeal right (such as an alleged right to electricity) may, depending on the circumstances, be capable of protection under the *mandament van spolie*.
- (iii) The enquiry should start with an investigation into the precise basis on which the right to electricity is to be characterised. The inquiry therefore is whether an alleged right to electricity is a “*gebruiksreg*” (a right of use) or an “*incident of the possession or control of the property*” served by the electricity. If it is an incident of the possession, then the mandament is available to protect the alleged right.⁶
- (iv) Where electricity is interrupted, particular where the supply of electricity is considered a practical necessity in order for an occupant to use the property, the occupant will experience a “*significant disturbance in his occupation*”.⁷ However, notwithstanding, the supply of electricity should not “*without more*” be accepted as an incident of possession.⁸
- (v) Where electricity has been cut off by a landlord “*with a view to forcing the claimants to vacate the property*” the court has held on occasion that “*it was the claimants’ possession of the property, rather than quasi-possession of the electricity, that was being protected*”.⁹ The court in *Makeshift* explains:

⁵ 2020 (5) SA 538 (WCC).

⁶ *Ibid* at para [24].

⁷ *Ibid* at para [25].

⁸ *Ibid*.

⁹ *Ibid* at para [26] and the authorities referred to there.

“In Naidoo¹⁰ the claimant had previously had a lease of the first floor of a double-storey 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 (at 84A – B), and said that the landlord, by cutting off the electricity, 'substantially interfered with [the claimant's] occupation of the premises in question, and so performed an act of spoliation' (at 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.”

A similar inference, namely that the supply of electricity was cut to force the applicant (in that matter) to vacate, was drawn from the facts in the matter of *Froman v Herbmere Timber and Hardware (Pty) Ltd.*¹¹ The court in that matter was willing to draw this inference on the probabilities.

- (vi) It therefore seems, according to *Makeshift*, that the alleged right to electricity can fall into one of the following three categories:

“[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. These are uncontentious cases of quasi-possession enjoying protection under the mandament.

¹⁰ 1982 (4) SA 82 (T) at para 27.

¹¹ 1984 (3) SA 609 (W). Referred to by the court in *Makeshift supra* at para [28].

(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 *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) and *Zulu v Minister of Works, KwaZulu-Natal, and Others* 1992 (1) SA 181 (D). One may infer, from Leach JA's disapproval of the case, that *Eskom v Nikelo* should also be placed into 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 into category (b) or (c)...."

- (vii) Cases falling into category (c), are those where the alleged right to electricity is "an adjunct to, or part of, the alleged right to occupy the property".¹² Category (c), would typically include those cases where the landlord has a direct interest in the possession of the property itself. Where the landlord cuts the electricity off, it would constitute not only an interference with the alleged right to receive electricity, but would simultaneously interfere with the tenants right to undisturbed possession of the premises. The alleged right to electricity therefore forms part of the "cluster of alleged rights making up the occupation to which he claims to be entitled."¹³
- (viii) The court in *Makeshift* points out that in cases that fall within category (c), the true grievance is therefore not so much the despoliation of an alleged right to electricity, but an act that materially and adversely impacts on the tenant's occupation:

¹² *Makeshift supra* at para [34].

¹³ *Ibid* at para [34].

“[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 ... 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.”

[24] Returning to the facts of the present application. The applicant state in their papers that the right to access to electricity supply is an incident to the possession of the property from which they conduct their businesses. Without electricity, they say, it is impossible for them to conduct their businesses. They further tell the court that without electricity their businesses came to a complete standstill: The second applicant's dry cleaning and laundromat machines and equipment are dependent on electricity. The first applicant is a filling station and without electricity it is not able to operate the fuel pumps. There is also a convenience store on the premises which requires electricity in order for the refrigerators, ovens, cash registers and computers to function properly. Without electricity both businesses will not be able to conduct business and will suffer irreparable harm. The first respondent disputes this and claims that the

businesses are operating on generators. The applicants also claim that the first respondent will not suffer prejudice because all the applicants request is that they be credited with electricity units after payment thereof and that there can thus be no compounding of the arrears in the respect of electricity usage.

[25] I am persuaded that this is a matter where the interference on the supply of electricity (at the instance of the first respondent), constituted material interference of the possession of the property itself. The applicants conduct businesses (the one as a Shell filling station and the other a laundromat). It is difficult not to come to the conclusion that an interference to the supply of electricity materially interferes with their possession of the property itself.

[26] The first respondent states in its answering affidavit that the applicants' lease agreements have been cancelled but that the applicants continue to hold over the property. This fact coupled with the cut in electricity leads to the irresistible inference that the first respondent effectively cut the electricity (by uploading the arrears on the pre-paid meter) to force the applicants to vacate and to avoid having to follow due process to recover the alleged arrears.

[27] In respect of costs, costs follow the result. I am not persuaded that a special costs order is warranted.

[28] In the event the following order was made:

1. That the first respondent, with immediate effect, restores the applicants' access to their electricity supply in respect of their respective business premises situated at:

1.1 Shop 4, 256 Dey Street, Nieuw Muckleneuk, Pretoria, Gauteng;

1.2 Shell filling station, Middel Street Motors, 256 Dey Street, Nieuw Muckleneuk, Pretoria, Gauteng;

2. That the first respondent instructs the third respondent to cancel the negative and arrear balances loaded on the abovementioned business premises pre-paid electricity meters, with immediate effect;
3. That the first respondent be ordered to pay the costs of this application.

AC BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA
Electronically submitted therefore unsigned

Delivered: This judgment was prepared and authored by the Judge whose name is 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 9 February 2021.

Case number : 1750/2021

Matter heard on : 21 January 2021

For the Applicant : Adv DR Du Toit
 Instructed by : Rudman & Associates Inc

For the Respondent : Mr Jason Dorning
 Instructed by : Millers Attorneys