REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 40667/2018

[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
[3] REVISED.

13.11.18
Date:

WHG VAN DER LINDE

In the matter between:

Claudia Niehaus — Applicant

and

High Meadow Grove Body Corporate — Respondent

J U D G M E N T

Van der Linde, J:

[1] The applicant is the owner of an apartment at number 29 High Meadow Grove, Estelle Road, Paulshof, Johannesburg. The respondent is the body corporate of that property. In terms of the rules of the body corporate the applicant has to pay levies in respect of general expenditure; electricity; CSOS; and sewage. She fell into arrears with her levies and although for the last twelve months she says she has not missed a monthly payment, she has been unable to settle the arrear amount.

[2] The body corporate decided to reduce her supply of electricity and it implemented that decision. As a result of the reduced electricity supply the applicant, who has two minor children with her, is unable to use the stove and/or the oven to cook and prepare food, to boil water, to use the microwave, to use her geyser, to bath or shower unless she uses cold water, to bath her children, and her children are unable to do their homework or study for their upcoming exams.

[3] The applicant therefore brought an urgent application, after the electricity was reduced on the 23rd October 2018, by notice of motion dated the 1st November 2018, for an order directing the respondent to restore the electricity supply to her property at number 28 High Meadow Grove. She asks for costs on the scale as between attorney and client.

[4] The body corporate resists the application on the basis that first, it is not urgent and second, no act of spoliation has taken place. As to the former, in my view the matter is urgent. The argument in the latter regard is that the body corporate is entitled by virtue of section 10 of the Sectional Titles Schemes Management Act 8 of 2011, and the rules of the Sectional Titles Scheme, to reduce the electricity supply. The respondent points out that in terms of section 4(h) of the Act it is entitled to enter into an agreement with any occupier or owner of a section for the provision of amenities or services by the body corporate to such section or to such owner.

[5] In terms of section 38 of the Sectional Titles Act 94 of 1986, the predecessor to the Act, the body corporate duly entered into an agreement with the local authority for the supply of electricity and electrical current to the building concerned. The respondent submits that it is an on-seller of electrical current to the occupiers of units in the Scheme, and such resale is specifically permitted in terms of the Greater Johannesburg Metropolitan Electricity Bylaws.

[6] The respondent submits that it is "*an express, alternatively tacit, alternatively implied term*" of the agreement (presumably an agreement between the applicant and the body corporate) that the applicant pays for the electrical supply which has been metered, "*... failing which she*

is in breach of the terms of this agreement and in terms of the Rules as referred to above, and in terms of which the respondent has reserved to itself the right to reduce the electrical supply to the applicant's section".

[7] The defence therefore is that the body corporate relies on "*an express, alternatively tacit, alternatively implied term*". Before turning to deal with the authorities on this issue, it is necessary to remark that an affidavit by a deponent who asserts that a specific term of an agreement is "*express, alternatively tacit, alternatively implied*", helps naught. The deponent is a witness who is expected to give evidence of the agreement and its terms; of course, it is permissible to make legal submissions and indeed necessary to do so.

[8] But here the evidence consists only of the legal submission and there is no evidential material of the term of the agreement upon which the body corporate relies, and from which the inferences of either a tacit or an implied term are drawn. Where that leaves one is with a case in which the applicant asserts being a possessor of electricity supply, and being deprived of that supply. But at the end of the day, as appears below, that does not matter to the outcome of this application.

[9] In any number of cases it has been held that to deprive a person of electricity supply, is an example of the deprivation of quasi-possession, which is remediable by the *mandament van spolie*. A full bench decision in this Division in *Queensgate Body Corporate v Claesen* (A3076/98) [1998] ZAGPHC 1 (26 November 1999) is one such case. There Blieden, J with whom Serobe, AJ agreed, dismissed with costs an appeal from a Magistrates' Court which granted a spoliation order against a body corporate.

[10] There, too, as a result of the owner's refusal to pay monthly levies, the body corporate cut off the electricity supply to her two units. The body corporate claimed that it was entitled to do this because of the house rules which were promulgated in terms of Act 95 of 1986. The magistrate, relying on *Nino Bonino v De Lange* 1906 TS 120, upheld the argument of the owner that she was despoiled of her possession.

[11] Blieden, J said:

"The clause giving the appellant the right to cut off electricity of any unit owner who is in arrears with his or her levies is clearly contrary to the common law. It constitutes nothing but a power to interfere with such person's right to use the existing electricity supply. The instant case is an a fortiori example of spoliation. Here unlike the Nino Bonino case, no court would have had the power to deprive any holder of his or her electricity supply in the circumstances the appellant has done. It is a clear act of spoliation and there was no consent valid in law to such an act. In the circumstances the magistrate was correct in making the order which he did."

[12] In *Naidoo v Moodley*, 1982 (4) SA 82 (T), a full court granted a spoliation order where a lessee had failed to vacate the property on an agreed date and the lessor then cut off electricity supply to the lessee's apartment. That court held that the use of electricity was an incident of occupation and that by cutting off the electricity, the lessor had substantially interfered with the lessee's occupation and had performed an act of spoliation.

[13] In *Fisher v Body Corporate Misty Bay (*2012 (4) SA 215 (GNP)) [2011] ZAGPPHC 234, 56 (12 April 2011) Legodi, J directed the body corporate to restore to Mr Fisher possession of and access to premises, on an urgent application based on the *mandament van spolie*. That case was not concerned with electricity supply but the body corporate had interfered with Mr Fisher's access by disabling his vehicular access disc. The body corporate argued that in terms of the rules of conduct of the rules of the body corporate, the body corporate was entitled to suspend the access discs of those owners who failed to make payment of their levies.

[14] Legodi, J responded to that defence in these terms (at [19]):

"Even if it was, in my view, the respondent would not have been entitled to spoliation without due process of the law. In other words, it could not have taken the law into its own hands as it is the case in the present case."

[15] Apart from the *Fisher*-judgment, the two other judgments referred to above are binding on me and whether I agree with the conclusion reached, is accordingly neither here nor there. There is no doubt an argument along the following lines: spoliation relief seeks to protect the real right of possession. It does not matter whether the possession was obtained through prior private treaty or some other legal form such as an inheritance; the possessor has a real right enforceable against the world at large to protect his or her possession.

[16] That real right is enforceable also against the possessor's contracting party, such as in a relationship of lessor and lessee, with which the possessor stands in a relationship defined by personal rights and not real rights. The lease agreement may provide that the lessor is entitled to refuse access to the property whether movable or immovable, should the lessee not pay the monthly rental. But despite the lessor having that personal right against the lessee, that right is not enforceable without access to a court, because possession is a real right, enforceable against the world at large, and the *mandament van spolie* protects that real right.

[17] An extension to this principle became available in cases where the possessor enjoyed possession not of a movable or immovable, but of incorporeal right, such as a personal right to the supply of electricity, or the possession of electricity supply; and likewise the possession of water supply. The leading cases that have permitted that extension are fully explored by my colleague Adams, J in *Zungu v Nilgra Flats CC* (2017/44199) [2017] ZAGBJHC 417 (23 November 2017).

[18] My colleague there held that spoliation relief did not avail an applicant whose electricity supply was discontinued for failing to pay rental due in terms of the lease with the landlord. His Lordship stressed there that a spoliation order was not available if it was being used to enforce a merely personal right, such as a contractual right. His Lordship held that since the right of the tenant to electricity was purely contractual and had not been subsumed into any

statutory or constitutional right enforceable against the lessor, he had a mere personal right and therefore spoliation relief was not available to him.

[19] But there is an exception to the general principle articulated by my colleague. It applies in the case where the supply of electricity is an incident of the possession of immovable property. Then the discontinuance of electricity is a partial deprivation of possession of the immovable property itself.

[20] Accordingly, where the incorporeal right, such as a right to the supply of electricity, is – as a matter of fact – an incident of the possession of immovable property, then the *mandament van spolie* will protect interference with such possession, as if it were (partial) interference with possession of the immovable property itself. See *Impala Water Users Association v Lourens NO and Others,* [2204] 2 All SA 476 (SCA).

[21] In an unreported judgment of *Haribhai v Bushwillows Body Corporation*, Case Number 4666/2010, my colleague Nicholls, J was called upon to reconsider an order granted by Coppin, J in which his Lordship had interdicted the body corporate from disconnecting electricity supply to the occupants. The occupants conceded that they had not paid their levies for water and electricity for two years and that a significant amount was owing.

[22] Her Ladyship, having reconsidered the matter, dismissed the urgent application that Coppin, J had granted on 17 November 2010. She did it on the basis that in that matter all that the occupants had been deprived of was electricity supply to non-essential luxuries. Her Ladyship argued that that being so, the occupants were not being spoliated of their basic right to electricity.

[23] She referred also to the judgment of Malan, AJA in *Firstrand Limited t/a FNB and Another v Schultz and Others* 2008 (2) SA 503 (SCA) in which his Lordship was concerned with the right to water. In that case his Lordship held that the right to water was a contractual right, and it was therefore distinguishable from statutory water rights and could not be protected by spoliation relief.

[24] He said (emphasis supplied): "*[13] The mandement van spolie does not have a 'catch-all function' to protect the quasi possessio of all kinds of rights irrespective of their nature.*[10] *In cases such as where a purported servitude is concerned the mandement is obviously the appropriate remedy,*[11] *<u>but not where contractual rights are in dispute</u>*[12] *<u>or specific performance of contractual obligations is claimed:</u>*[13] *its purpose is the protection of quasi possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterized to establish whether its quasi possessio is deserving of protection by the mandement.*[14] *Kleyn*[15] *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 name plate to a wall*[16] *regardless of whether the alleged right is real or personal.*[17] *That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandement.*[18] *The right held in quasi possessio must be a 'gebruiksreg' or an incident of the possession or control of the property."*

[25] In the present matter, the applicant's possession clearly included possession of the incorporeal right of use of electricity. She could not live in that apartment without access to electricity, given the needs of the two minor children that were her charges.

[26] It is necessary finally to say something about the argument that not all of the electricity supply was cut but only a portion of it. That argument seems to me to be without merit; in *Burger v Van Rooyen* 1961 (1) SA 159 (O) a full court held that the spoliation relief avails even where the applicant has not been entirely deprived of possession of the whole of his property.

[27] In these circumstances, the applicant is in my view entitled to the relief that she seeks, but not to a special costs order. I therefore grant an order in terms of prayers 2 and 3 of the notice of motion dated 1 November 2018, the costs being on the scale as between party and party.

WHG van der Linde
Judge, High Court
Johannesburg

On behalf of the applicant: Adv K Mitchell

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Date argued:	Friday 9 November 2018
Date judgment:	Tuesday 13 November 2018