

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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE <u>2/3/2015</u>	SIGNATURE 

CASE NO: A427/2014

DATE: 4/3/15

IN THE MATTER BETWEEN:

ESKOM LIMITED

APPELLANT

AND

**PETRUS JOHANNES GERHARDUS
ADRIAAN STRYDOM**

RESPONDENT

JUDGMENT

KOLLAPEN J:

INTRODUCTION

1. This is an appeal against the whole of the judgment delivered by the Honourable Magistrate H Engelbrecht on the 5th of December 2013 in the Magistrate's Court for the District of Witbank, sitting at Witbank.

THE NATURE AND SCOPE OF THE APPEAL PROCEEDINGS

2. The proceedings in the Magistrate's Court relative to this matter commenced with the grant of an *ex parte* application on the 18th of October 2012 directing the appellant to restore the electricity supply to the property known as Holding 69 Kendal. The rule *nisi* was extended by Magistrate Malinda on the 30th of

May 2013 and a written judgment was delivered that dealt exclusively with the points *in limine* raised by the appellant in resisting the confirmation of the rule.

3. The matter thereafter came before Magistrate Engelbrecht, who in his judgment made reference to, and associated himself with the judgment of Magistrate Malinda, dealt with the application on the merits and then proceeded to make an order dismissing the opposition to the rule and confirmed the rule.
4. I traverse the background as the Notice of Appeal filed in these proceedings relates only to the judgment of Magistrate Engelbrecht and not that of Magistrate Malinda, whose judgment deals with the points *in limine*. When one however has regard to the judgment of Magistrate Engelbrecht, then he also deals with the points *in limine*, even if largely to the extent of associating himself with the reasons and conclusion of Magistrate Malinda. In addition the Notice of Appeal covers the points *in limine* as well as the merits and the parties have prepared to argue the appeal on both the points *in limine* as well as the merits.
5. My view accordingly is that the interests of justice would be best served if the appeal proceeded on all of the issues raised and while there may strictly speaking not have been a notice of appeal filed in respect of the judgment of Magistrate Malinda, all of the issues in dispute are properly before us and no prejudice will be caused to any of the parties if the appeal proceeds on the points *in limine* as well as on the merits.

THE BACKGROUND FACTS

6. The respondent occupies the property known as Holding 69, Kendal Mpumalanga and has been living there since 1975. There is a hostel that is occupied by some 33 tenants, being operated from the premises as well as the business of a piggery.

7. The appellant supplies electricity to the premises and it appears that after an account was rendered by the appellant during September 2011, the respondent fell into arrears with his payments, largely as a result of the fact that the contract workers who occupied the hostel ceased to do so and the resultant loss in income led to the respondent being unable to pay his electricity account with the appellant.
8. The respondent alleges that during or about August 2012, the arrears on his account amounted to some R80 114-20 and that the supply of electricity was terminated on the 22nd of August 2012. There does not appear to be any dispute raised about the lawfulness of this termination of the electricity supply.
9. According to the respondent a payment in the sum of R80 114-20 was made on the account by a Mr Nothnagel, a friend of the respondent. It is alleged that this payment was made on the 23rd of August 2012, resulting in the reconnection of the electricity supply to the property on the same day. There was a dispute as to whether the payment of R80 114-20 was taken into account and deducted from the respondent's account and in addition whether the respondent paid the other amounts that were levied. The applicant denies that it received the payment of R80 114-20 and says that it called upon Mr Nothnagel to provide details of the payment, which he failed to do despite undertaking to do so.
10. The consequence of all of this was that the electricity supply was terminated on the 16th of October 2012, which resulted in the *ex parte* application and the order of the 18th of October 2012 to which reference has been made.

ISSUES FOR DETERMINATION IN THE APPEAL

11. The issues for determination in this appeal are:
 - **In Limine:**
 - i. Did the Court *a quo* have the necessary jurisdiction to hear the application?
The stance of the appellant is that to the extent that the relief sought was an

order for specific performance, it was not competent for the Court to have considered and granted the relief it did in the absence of an alternate claim for damages, reliance being placed on Section 46 (2)(c) of the Magistrate's Court Act, and related to that:

- ii. Was the Court *a quo* correct in concluding that the supply of electricity was an incident of the possession of the property thus bringing it within the scope of the *Mandament van Spolie*?

▪ **On the merits:**

- iii. Was the appellant justified in terminating the supply of electricity on account of non-payment and if it was, did it follow the correct procedure in doing so, in particular with regard to the mode and form of the pre-termination notice that had been given?
12. The two points *in limine* are inextricably linked and it may be convenient to deal with them together.

Was the use of electricity an incident of possession or a matter regulated by contract?

- 13. Section 46(2)(c) of the Magistrate's Court Act 32 of 1944 ('the Act') provides that a Magistrate's Court shall not have jurisdiction 'in matters in which specific performance is sought without an alternate of payment of damages...' and it then provides for various exceptions to the prohibition, none of which are applicable in this appeal .
- 14. The stance of the appellant is that the relief sought and granted was in the nature of specific performance and thus, absent an alternate prayer for damages, it fell outside of the jurisdiction of the Court *a quo*. When one has regard to the relief claimed, the action brought and the relief granted was premised on the cause of action being the *mandament van spolie*. Section 30 of the Act does indeed enable the Magistrate's Court to grant an order in the nature of a *mandament van spolie*.

15. Clearly on the jurisdictional challenge, it will ultimately depend on whether the nature of the right that the respondent sought to protect was contractual in nature or on the other hand, it was a quasi-possession right that fell within the scope of the *mandament van spolie*.
16. The appellant's stance was that the supply of electricity by itself to the respondent did not result in it becoming an incident of possession and thus the *mandament* was not the applicable remedy in the circumstances.
17. Our Courts have over time expressed themselves on the nature of the remedy of the *mandament van spolie*. The Courts have also explored the scope of the remedy in relation to what has become known as quasi-possession rights and in particular have dealt with the use of electricity in relation to its protection and inclusion under appropriate circumstances by the *mandament van spolie*.
18. In ***FIRSTRAND LTD t/a RAND MERCAHT BANK v SCHOLTZ 2008 (2) SA 503 SCA***, MALAN AJA (as he then was) stated that (at 510B-D):

'The mandament van spolie does not have a 'catch-all function' to protect the quasi-possession of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: Its purpose is the protection of quasi-possession 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 characterised to establish whether its quasi-possession is deserving of protection by the mandament. 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 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'.

- 19 In this regard it follows that the right sought to be protected must either be a 'gebruiksreg' or an incident of possession. The appellant contends that the supply of electricity and its use had become an incident of possession and it is this proposition that requires further examination.
- 20 In **NAIDOO v MOODLEY 1982 (4) SA 82 (TPD)**, the Court concluded that in the context of the facts of the case the use of electricity was an incident of occupation and its termination was an act of spoliation. In that matter the occupation of the premises as well as the concomitant use of electricity came into existence as a result of an agreement between the parties and the occupation of the premises in question was linked to the right of the occupier to use electricity as well. I do not understand **NAIDOO'S** case to be authority for the proposition that the use of electricity will always constitute an incident of possession. Indeed if one has regard to the *dicta* of MALAN AJA in **FIRSTRAND** (supra) then it is incumbent on the Court to examine the nature of the professed right in determining whether its quasi-possessio is deserving of protection by the *mandament van spolie*.
- 21 In **TELKOM v XSINET (PTY) LTD 2003 (5) SA 309 (SCA)**, the Court concluded that the disconnection of a telephone and bandwidth system did not activate the *mandament van spolie* as the rights were mere personal rights and the relief sought in the form of the *mandament* was essentially to compel specific performance of a contractual right. The Court however also made reference in its judgment to the reality that in certain circumstances the use of water or electricity may be an incident of occupation of residential premises.

22. The use of the word 'may' is instructive in that it certainly cannot be said that the use of water and electricity will always be an incident of possession. In addition the reference to its use in a residential setting may also suggest that use of water and electricity for residential as opposed to commercial or business purposes may well be a factor in determining the nature of the professed right.
23. In *IMPALA WATER USERS ASSOCIATION v LOURENS NO AND OTHERS 2008 (2) SA 495 SCA* the Court dealt with the claim that water rights that had been used had become an incident of possession. In distinguishing the *XSINET* matter, the Court concluded (at 500H) that 'the water rights interfered with were linked to and registered in respect of a certain portion of each farm used for the cultivation of sugar cane, which was dependent on the supply of water forming the subject matter of the right. The use of water was accordingly an incident of possession of each farm...'
24. Thus it was not simply the use of water that had rendered it an incident of possession but also the circumstances under which such use came into existence and its linkages to the possession of the property.
25. It would thus follow that the mere use and enjoyment would not in itself satisfy the requirement of an incident of possession. What is required is not simply some connection between the use of electricity and the possession of the property but rather something more that elevates the use and enjoyment to being an incident of possession. If this was not so then there is the real risk that the *mandament* develops a 'catch-all function' to protect the quasi-possession of all rights irrespective of their nature – precisely what the Supreme Court of Appeal in *FIRSTRAND* (supra) said the remedy was not about.
26. *In casu* and from the undisputed facts the property in question has both a residential and a commercial use. The existence of a hostel and a piggery on

the property is a factor to be considered in determining whether the rights sought to be protected is contractual in nature or an incident of possession.

27. In **JOSEPH AND OTHERS v CITY OF JOHANNESBURG 2010 (4) SA 55 (CC)**, the Court described the relationship between the municipality and its citizens as a special cluster of relationships shaped by the public responsibilities that a municipality bears in terms of the Constitution. It took the view that administrative law principles operated to govern those relations beyond the law of contract.
28. *In casu* the appellant is not a municipality but is an organ of State and while it must be eminently arguable that certainly some administrative law principles may be applicable to its relationships with its consumers, it stands on a different footing to a municipality which has constitutionally sanctioned obligations to its citizens, if regard is had to Section 152 of the Constitution. In addition **JOSEPH** dealt with the disconnection of electricity in terms of the Promotion of Administrative Justice Act 3 of 2000 and the Court concluded that in that context administrative justice principles were applicable. It did not apply its mind to the applicability of the *Mandament van Spolie* as an appropriate remedy.
29. When one accordingly considers the nature of the right involved in this appeal, it was the right to use electricity for personal and business reasons that was largely governed by a relationship and an understanding that payment would be made for the services being rendered as well as an understanding that failing payment there was a right, subject to procedural fairness, to disconnect the electricity supply.
30. On the respondent's version, he fell into arrears when the business of the hostel went into decline and which then resulted in arrears in excess of R 80 000-00 accumulating. The respondent was then mindful that a payment would be

necessary in order to restore the electricity supply and the purported payment of R80 114-20 was made on the 23rd of August 2012 resulting in the reconnection of the electricity supply. There was then a dispute raised with regard to the receipt of such a payment and attempts to resolve such a dispute then ensued.

32. In all of this the parties were certainly engaging with each other in the context of the purchase and supply of electricity fully cognisant of the nature of the relationship that was premised on essentially the purchase of electricity. Given that much of the electricity use was for business purposes, it would also reasonably follow that the supply of that electricity was a part of the commercial operations of the appellant. This in my view is also a factor to be considered in characterising the right the respondent contended for.
33. In addition, the respondent in his Founding Affidavit in advancing the argument, states under oath that for some twelve years an agreement existed between the parties in terms of which the supply of electricity would be regulated on the basis that the respondent would make a monthly payment and in return, the appellant would supply electricity. This relationship is in my view substantially contractual in nature and is indeed supported by the parties' acceptance and reliance on the monthly invoices that were issued as evidencing the contractual relationship that had come into existence.
34. It must accordingly follow that when the electricity supply was discontinued on the 16th of October 2012, the respondent in approaching the Magistrate's Court for relief, was essentially seeking to enforce the contractual arrangement for the supply of electricity that he maintains was in existence for twelve years. It is clear from his papers that what he sought to protect and preserve was his right to be supplied with electricity in terms of the agreement he had concluded with the appellant. Thus even though it may well be that he enjoyed the use of electricity while he was in occupation of the property, such usage arose out of a

contractual relationship with the appellant and was not an incident of possession.

- 34 . Under such circumstances I am not satisfied that it could be said that the nature of the right rendered it as an incident of possession. The supply and use of electricity by the appellant while it may have some elements of administrative law attached to it, does not have the effect of changing the essential character of the relationship between the parties which is the foundation of the claim of the right. That relationship in the context of what is largely or substantially the commercial use of the premises, was essentially one of contract, albeit with administrative law elements attached to it, particularly with regard to procedural fairness.
- 35 . In conclusion and when I have regard to the nature of the right contended for by the respondent, I am not satisfied that it is in the nature of a quasi-possession right that warrants the utilisation of the remedy of the *mandament van spolie*. To do so would be to effect an unwarranted extension of what has been properly described as a robust remedy.
- 36 . From this it must follow that the *mandament* was not the appropriate remedy to protect the right the respondent contends for. For these reasons I would uphold the point *in limine* and the appeal should on account of that succeed.

ORDER

37. In the circumstances I would propose the following order:

- 37.1 The appeal is upheld.
- 37.2 The orders of the learned Magistrates Malinda and Engelbrecht of the 30th of May 2013 and the 5th of December 2013 are set aside and replaced with the following:
- 37.2.1 The rule *nisi* issued on the 18th of October 2012 is discharged with costs.

371.2.2 The appellant is ordered to pay the costs of this appeal.


N KOLLAPEN
JUDGE OF THE HIGH COURT

I AGREE,


R TOLMAY
JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A427/2014

HEARD ON: 17 FEBRUARY 2015

FOR THE APPELLANT: ADV. S G WEBSTER

INSTRUCTED BY: GILDENHUYS MALATJI INC. (ref: R Venter/vp/01688731)

FOR THE RESPONDENT: ADV. A Le R STEMMET

INSTRUCTED BY: DANIEL S GOOSEN ATTORNEYS (ref: DS Goosen/DS0484)