

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3811/2012

In the matter between:-

MARTHINUS JACOBUS VAN ZYL

Applicant

and

JOHANNES STEPHANUS DE BRUYN

1st Respondent

MARIA CORNELIA DE BRUYN

2nd Respondent

DIHLABENG LOCAL MUNICIPALITY

3rd Respondent

HEARD ON:

13 SEPTEMBER 2012

JUDGMENT BY:

RAMPAL, J

DELIVERED ON:

23 NOVEMBER 2012

- [1] These were motion proceedings. The matter came to court by way of an urgent application (rule 6(12)) on 13 September 2012. The primary relief sought by the applicant against the third respondent was an order whereby the third respondent was compelled to immediately restore his free and undisturbed electrical power supply to certain premises. The subsidiary relief sought was an order whereby the first and

the second respondent were directed to pay the costs of the application.

- [2] The application was opposed by the respondent couple. The third respondent, Dihlabeng Local Municipality, decided to abide. In view of this, the word “respondents” wherever it appears later in this judgment must be narrowly understood to be reference to the first and the second respondents collectively unless the context indicates otherwise.
- [3] Certain facts were common cause. The respondents once carried on ice business on a property situated at 1 Young Street, Eureka, Bethlehem in the Free State Province. The business enterprise was known as Bahama Ice.
- [4] The applicant purchased Bahama Ice from the respondent couple on 13 November 2011. The sale agreement was reduced to writing. At the same time the applicant and the respondents also entered into a lease agreement in addition to the sale agreement. The applicant leased the property commonly known as 1 Young Street, Eureka, Bethlehem, the same property on which the ice business enterprise was

conducted from the respondents for a period of nine years and eleven months. The lease period began on 13 November 2011 and it was envisaged that it would endure until 12 November 2021.

[5] There was a house on the leased property. Prior to the signing of the lease agreement, the respondent couple occupied the house in question. After the signing of the lease agreement the couple vacated the house and moved to Bloemfontein. The house, unlike the cottage or flat, did not form part of the leased premises. Like the respondents the applicant did not reside at Bethlehem but at Winburg at the time these proceedings were initiated.

[6] The third respondent supplied the property as a whole with constant electrical power. From the street the third respondent directly provided the main house on the property with electrical power supply. Somewhere in the main house there was an electrical distribution box mounted on the wall. The box had the main switch. Among others, the electrical distribution box had a component called a trip switch. There was also a prepaid electrical power meter in the main house.

The electricity consumed in the house was purchased from the third respondent by way of prepaid coupons. The flat on the property was indirectly provided with electrical power supply via the main house. The indirect electrical power supply was done by means of connective electrical wiring.

- [7] In the flat there was a separate prepaid meter installed. Therefore the electricity utilised in connection with the ice processing operations in the flat also had to be separately purchased in advance. There was a separate electricity distribution box in the flat. Among its constituent electrical components, was a component termed earth leak. The flat, like the main house, used a prepaid coupon system.
- [8] Notwithstanding the two separate meters used in order to separately measure the quantity of electrical power consumed in the house and in the flat, there was but one electrical power line through which electrical power was supplied by the third respondent to the house as well as the flat.

[9] The applicant lived at Winburg. He was a business man over there. The manager of his ice business enterprise at Bethlehem was a certain Mr H.J Roets (annexure “b”). His private electrician over there was a certain Mr S.P Burger (annexure “a”). The attorney for the applicant was Mr J Kruger of Breytenbach Mavuso Inc (annexure “c”).

[10] The respondents lived in Bloemfontein. Subsequent to their move from Bethlehem they decided to sell the property, in other words the main house together with the flat. They appointed as their estate agent a certain Mr J.C Erasmus of Realnet, an estate agency at Bethlehem and instructed him to put the property on the market (*vide* par 33 founding affidavit read together with par 24 answering affidavit). The attorney for the respondent was Mr J.A Botha of Human Le Roux & Meyerowitz (annexure “js3”). The purchaser of the property is a certain Ms Potgieter.

[11] The official of the third respondent whose duty it was to receive complaints from the public concerning the supply of electricity was a certain Mr Samuel Masoeu (*vide* par 3 annexure “c”). The municipal manager of the third

respondent was a certain Mr T Tsoaeli (annexure “d”). A certain gentleman referred to merely as Kenneth, was seemingly an electrician in the employ of the third respondent (par 4 annexure “js2”).

[12] The foregoing historical background to the dispute broadly encapsulates the common cause in the matter. There were several disputed factual allegations. I do not intend reciting or summing them up here. I shall examine a few of them during the course of the analysis stage. I shall confine myself to those disputed factual allegations that appeared to me to be relevant to the issues.

[13] The crucial issue in the matter was whether there was constant supply of electrical power to the leased premises as on 31 August 2012 for constant use by the applicant. The events of that particular day precipitated the current stand-off. The cause of action arose from those events.

[14] On behalf of the applicant Mr Zietsman argued that the applicant was in a free and undisturbed actual possession of the leased property and that the respondents wrongfully and

unlawfully deprived him of such lawful and beneficial possession by cutting off the constant supply of electrical power to the leased property. Counsel submitted, therefore, that the issue had to be affirmatively determined in favour of the applicant.

[15] On behalf of the respondent Mr Groenwald argued that the applicant was an architect of his own misfortune. The essence of counsel's submission was that the applicant's private electrician illegally interfered with the electrical wiring on the leased property. The main defensive argument was, therefore, that the applicant himself was to blame for his electrical predicament. Here disturbance was denied.

[16] The respondents also put up an alternative defence. Their contention was that the applicant illegally tampered with the electrical installations. The interference, so went the argument, created an imminent danger. To prevent such a dangerous situation, the immediate disconnection of the constant electrical power supply to the leased property became necessary. Here there was a plea of confession and avoidance. Accordingly counsel submitted that the

respondents did not wrongfully and unlawfully deprived the applicant of his free and undisturbed possession of the leased premises on 31 August 2012 as contended.

- [17] A brief exposition of the applicable principles of law seemed useful. At the heart of the matter was the legal *maxim* “*spoliatus ante omnia restituendus est*”. Through this restorative remedy of possession a victim of an act of illegal dispossession can claim to be restored, first and foremost, in his position as it were before dispossession. The remedy entitles the dispossessed to demand restoration of possession from the spoliator before the substantive merits of his possession can be considered. The spoliation remedy, legally termed “mandament van spolie” is only available in cases of actual disturbance of possession but not threatened or contemplated disturbance of possession – **NINO BONINO v DE LANGE** 1906 TS 120.

- [18] The word “spoliation” was defined as any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right. This definition, adopted from Leyser’s

Meditationes, was approved, *inter alia*, in SILLO v NAUDE 1929 AD 21 and VAN ECK, NO, AND VAN RENSBURG, NO, v ETNA STORES 1947 (2) SA 984 (AD) at 1000 per Davis AJA.

[19] In NTSHWAQELA AND OTHERS v CHAIRMAN, WESTERN CAPE REGIONAL SERVICES COUNCIL, AND OTHERS 1988 (3) SA 218 (C) at 221J – 222A the court said the following about the efficacy of the spoliation remedy:

“The essence of the remedy is speedy restoration of the *status quo*. Only thereafter does one go into the parties’ rival claims.”

Howie J, as he then was.

[20] In BON QUELLE (EDMS) BPK v MUNISIPALITEIT VAN OTAVI 1989 (1) SA 508 (AD) at 513A – B the court per Hefer JA held that:

“Die mandament van spolie is 'n besitsremedie waarvan die beperkte en uitsluitlike funksie is om die herstel van die *status quo ante* te bewerkstellig (*Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D) op 274F - G) en daarom kom dit nie daarop aan dat die

spoliator 'n sterker aanspraak op besit as die gespolieerde mag hê nie of dat laasgenoemde inderdaad geen reg op besit het nie. Die beginsel is eenvoudig: *spoliatus ante omnia restituendus est* ongeag die partye se daadwerklike regte op besit. *Van Wyk v Kleynhans*1969 (1) SA 221 (GW) op 224A; *Burger v Van Rooyen en 'n Ander*1961 (1) SA 159 (O) op 161D - H.”

[21] This makes it clear that the possession remedy is not about the comparative strength of the spoliator’s claim, but rather the factual possession of the thing by the despoiled before the dispossession. It is not about the lawfulness of the spoliator’s possession or the unlawfulness of the despoiled’s possession. It is all about the preservation of the status quo which prevailed before the spoliator’s act of dispossession. It is about preserving social orderliness and societal peace.

[22] The following passage needs to be considered:

“The main purpose of the mandament is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to submit the matter to the jurisdiction of the courts. Peace in a community could not be

maintained if every person who asserted that he had a claim to a particular thing were entitled to resort to self-help to gain possession of a thing.”

LAWSA, Vol 27, p 182, par 265 and the authorities cited at footnote 3.

[23] In **NAIDOO v MOODLEY** 1982 (4) SA 82 (T) the respondent was the appellant’s tenant. The parties signed a deed of settlement whereby the lease agreement was mutually terminated and a specific date agreed upon on which the respondent was obliged to vacate the electrified leased property. The expiry of the deadline notwithstanding, the respondent stayed put. Extremely irritated, the appellant summarily cut off the supply of electricity to the then illegally occupied premises.

[24] Undeterred by the belligerent landlord’s drastic action by way of self-help, the respondent rushed to court and successfully invoked the protective remedy of possession - *spoliatus ante omnia restituendus est*. On appeal, the full bench held that the use of electricity was an incident of

occupation which the respondent had of the leased first floor of the appellant's building:

“On this view of the matter, appellant, by cutting off the electricity, substantially interfered with respondent's occupation of the premises in question, and so performed an act of spoliation. In my judgment the order appealed against was correctly granted. The appeal is dismissed with costs.”

NAIDOO, *supra*, at 84E per Eloff J.

[25] Section 9 of the Electricity Supply By-law - Free State Province, which was published under the Municipal Systems Act 32 of 2000 - empowers a local government, in other words, a municipality such as the third respondent, to disconnect electricity if the consumer uses electricity in an unsafe manner or if the consumer improperly interferes with the efficient supply of electricity. The disconnection powers of the municipality are subject to certain conditions. I shall revert to them later.

[26] To obtain a spoliation order two essentials have to be averred in the founding affidavit and established in court.

The first requisite is that the applicant had to aver and prove that he was in the *de facto* possession at the time of the alleged dispossession. The second requisite which the applicant had to aver and prove was that the respondents wrongfully deprived him of such free and undisturbed possession. Erasmus: **Superior Court Practice**, E9–p6 to p10A.

[27] I now proceed to examine the facts. The applicant and the respondents concluded two separate legal transactions on 13 November 2011. The one transaction concerned the sale by the respondents and the purchase by the applicant of an ice producing and distribution venture called Bahama Ice. The actual operations of the ice enterprise were, after the sale, still to be conducted from the applicant's property. The property was situated at 1 Young Street, Eureka, Bethlehem.

[28] The other transaction concerned the hiring by the applicant and the letting by the respondents of the same property. The lease agreement entitled the applicant to occupy and use the flat on the leased premises, in other words, the same 1 Young Street, Eureka, Bethlehem for the purpose of

carrying on the business as an icemaker for a period of almost one decade. The effective date of the lease agreement was 13 November 2011. The terminal date of the lease agreement as agreed upon was 12 October 2021. I hasten to point out that the main house was exempted from the terms and conditions of the lease agreement. Put differently, the applicant was not, by virtue of the lease agreement, entitled to use the main house on the leased premises for any purpose whatsoever.

[29] The leased premises were electrified. The applicant's refrigerators, ice machines, ice equipment and related ice tools of trade in general utilised in the ice processing operations entirely depended on electricity. The applicant commented as follows about the importance of the amenity:

“Dit verdien geen betoog dat elektrisiteitstoevoer tot 'n ysbesigheid van kardinale belang is. Inteendeel, sonder elektrisiteit kan 'n ysbesigheid nie funksioneer nie omdat al die ysmaak masjiene en die vrieskaste met elektrisiteit werk.”

[30] The respondents did not deny the foregoing averment. It must, therefore, be accepted as an undisputed fact that the applicant's ice venture greatly depended on the constant supply of electricity to the leased premises and that the respondents were well aware of the commercial importance of the amenity (electricity) to the applicant. The tacitly affirmative stance of the respondents was perfectly understandable bearing in mind that they previously carried on the same type of business. They were icemakers before they trekked from Bethlehem after the sale transaction.

[31] It was the applicant's case that he was the *de facto* possessor of the electrified premises which he had leased from the respondents and that he was still in the effective and actual control thereof on Friday, 31 August 2012 on which day he was denied the full benefits of his occupation. Let me first deal with the first requisite – actual possession.

[32] The respondents did not seriously deny the applicant's averment that he was in actual possession of the property on Friday, 31 August 2012. On 4 September 2012 their

attorney, Mr Botha, replied to the letter from the applicant's attorney, Mr Kruger. He wrote:

“Ons erken ontvangs van u brief van 3 September wat vandag onder skrywer se aandag gekom het. Ons het instruksies om soos volg daarop te antwoord:

Behalwe om –

1. te erken dat u kliënt 'n 'ys vervaardigings- en verspreidingsbesigheid' onwettig **vanaf ons kliënt se perseel** wat nie vir besigheid gesoneer is nie, bedryf;
2. u aandag daarop te vestig dat die eertydse huurkontrak tussen die partye op 23 Julie 2012 gekanselleer is en dat **u kliënt versuim om die perseel te ontruim;**”

[33] The stance of the respondents was clearly spelled out in that particular letter. The respondents reasoned that because the lease agreement was cancelled on 13 July 2012, as they alleged, the applicant was an illegal occupier of their unleased property. In a way they suggested that the applicant neglected to vacate their property even though he no longer had any occupational rights to remain on the property let alone any contractual rights to use the property for commercial purposes. Their property had not, as a

matter of fact, been rezoned for such commercial use. Therefore, so they said, the manufacturing on and distribution of ice from the property were outright illegal activities.

[34] The aforesaid argument was not a sound proposition of law. It was not about the substantive demerits of the applicant's possession *vis-a-vis* the substantive merits of the respondents' possession, but rather about the preservation of the status quo – *vide* NTSHWAQELA, *supra* and BON QUELLE, *supra*.

[35] What really emerged from the letter (annexure "f") was an admission that the applicant was a *de facto* possessor of the property owned by the respondents, but actually occupied by the applicant. The one admission was that the applicant refused to vacate the property; the second admission was that the applicant continued to trade on the property, even though he did this very much against the decision of the respondents whereby they unilaterally cancelled the lease agreement. Certainly the respondents were the *de iure* owners of the property in question. However, the law has

engineered the remedy of *spoliatus ante omnia restituendus* in order to protect actual possessors and not actual owners – *vide* **NINO BONINO**, *supra*.

[36] In the circumstances and on the strength of these undisputed facts, I would, therefore, find that the applicant has established the first requisite for the grant of a spoliation order – *viz* that he was in actual possession of the property which was, in the ordinary course of events, constantly supplied with electrical power by the third respondent through the respondent couple.

“The very essence of the remedy against spoliation is that the possession enjoyed by the party who asks for the spoliation order must be established.”

Vide Erasmus: *supra* at E9– p6.

On the respondents’ own papers, the possession enjoyed by the applicant has been established. The first requisite has been proven.

[37] In the second place the applicant averred that the respondents wrongfully deprived him of his free and undisturbed possession of the property (6 founding affidavit). The dispossession of an actual possessor by any illicit means boils down to a civil wrong termed spoliation.

“... spoliation is any illicit deprivation of another of the right of possession.”

Innes CJ in **NINO BONINO**, *supra*.

[38] The respondents denied the alleged illicit dispossession.

“Die Eerste en Tweede Verweerder Respondente ontken die beweerde onregmatige besitsontneming van die elektrisiteitstoevoer tot die perseel vanwaar Applikant besigheid doen, soos meer volledig hierin later uiteengesit sal word.”

Mr J.S de Bruin par 7 answering affidavit. See p 45 of rec.

[39] At par 30 of the founding affidavit the applicant asserted that he had free and undisturbed possession of the electricity supply to the leased premises. However he complained that

he was deprived of such free and undisturbed possession on account of certain actions, which he attributed to the respondents.

“Ek doen met respek aan die hand dat ek vrye en ongestoorde besit van die kragtoevoer tot die huurperseel gehad het en dat ek van sodanige ongestoorde besit ontnem is weens die Eerste en Tweede Respondent se optrede.”

[40] At par 23 of the answering affidavit the first respondent strongly refuted any improper conduct attributed to him or the second respondent. He answered the allegation of wrongful dispossession as follows:

“AD PARAGRAAF 30

Die inhoud van hierdie paragraaf word ten sterkste ontken. Ek submitteer eerbiediglik dat:

- a) die Applikant, alternatiewelik Roets van die Applikant, alternatiewelik Burger ‘n opdrag van voorgenoemde, ‘n onwettige elektriese koppeling aan die verdeelbord van die woonstel gemaak het en daarmee gepeuter het;
- b) as gevolg van ‘n inspeksie deur Erasmus en drie beamptes van die Derde Respondent op 31 Augustus 2012, daar inderdaad bevind is dat met voormelde

verdeelbord en elektriese bedrading gepeuter en onwettige installasies aangebring is;

- c) as gevolg van die wesenlike en onmiddellik dreigende moontlikheid en gevaar dat die eiendom van Eerste Respondent aan brandgevaar blootgestel is en persone se lewens daardeur geraak word, het ek besluit om die Derde verweerder ter versoek om nie die kragtoevoer na die woning en woonstel te hervat nie;
- d) dit statutêr van die eienaar/huurder en verbruiker van elektrisiteit verwag word om onwettige koppelings aan die elektrisiteitsverskaffer (Derde Respondent) te rapporteer. Voordat sodanige onwettige koppelings en peutering herstel word ooreenkomstig statutêre vereistes, nog ek, nog Tweede of Derde Respondent, onder enige regsplig is om die elektrisiteitstoevoer na die perseel van die Applikant te herstel. Regsargument sal in hierdie verband aan hierdie Agbare Hof voorgehou word;
- e) die Applikant, handelende soos hierbo gesubmiteer, die outeur van sy eie probleme is en alleen aandadig is.”

[41] As regards allegation 23(a) *supra* the applicant's reply was negative (par 20 replying affidavit) see p 77. The applicant denied the allegation that he or his manager, Mr Roets, or his private electrician, Mr Burger, had tampered with the

electrical distribution box in the flat by means of illegal electrical connections.

[42] The respondents' allegation was informed by the report they received from their estate agent, Mr Erasmus. In his confirmatory affidavit (3 annexure "js2") Mr Erasmus stated:

"Ek verklaar verder dat ek om 07:00 op 31 Augustus 2012 deur die bure van die Eerste respondent gebel is. Ek is meegedeel dat '*iets nie reg is nie aangesien die garagedeur die heelnag oopstaan*'. Ek het my die perseel gehaas en om die woonhuis en woonstel geloop en die garagedeur oop gevind. Ek het ook deur die venster van die woonstel gekyk en opgemerk dat die rooi liggie van die betaalmeter nie flikker nie. Ek het ook gesien dat die drade van die verdeelbord uitsteek en lyk of dit gelas is. Ek het 'n foto daarvan geneem soos per Aanhangsel 'X' hiertoe, welke ook by die Opponerende Verklaring van die Eerste Respondent aangeheg is."

He stated that he made the observation early in the morning at or about 07h00 on Friday, 31 August 2012.

[43] About that apparent interference with the electrical installation as depicted in the photo (annexure “x”) Mr Burger had stated in his confirmatory affidavit (annexure “a”) firstly, that on Thursday, 30 August 2012, he went to 1 Young Street, Eureka, Bethlehem at the request of the applicant to inspect the electrical failure of the power supply (par 3 annexure “a”) and secondly, that he found that the earth leak on the electrical distribution box in the flat needed to be replaced (4 annexure “a”). Seemingly the earth leak was worn out or irreparably defective. He then removed the earth leak from the distribution box.

[44] The wiring in the distribution box had clearly been interfered with as the photo shows. However I am not persuaded that what the private electrician did amounted to an improper manner of interfering with an electrical installation as envisaged in section 9. The gentleman was an experienced electrician whose experience extended well over a period of thirty years.

[45] There was no substance in the allegation made by the respondents.

[46] As regards allegation 23(b) I shall comment later.

[47] As regards allegation 23(c) the respondents suggested that on account of imminent danger, to their property and to human life, created by the applicant's illegal electrical connections, they requested the third respondent to disconnect the electricity. It has to be remembered that the next morning on Friday, 31 August 2012, the day after the applicant's electrician had removed the earth leak, the respondents estate agent went to the property.

[48] On his arrival there he discovered that the electrical distribution box was open and that the wiring had been disconnected. Without much ado, he then and there concluded that there had been some illegal interference with the electrical installation in the flat used by the applicant and that such disconnections had caused the first power failure on Monday, 27 August 2008 and the second power failure on Thursday, 30 August 2008. He then took a photo (annexure "c"). All this was done before the applicant's private electrician had returned to install the new earth leak

in the place of the old one which he had removed the previous day.

[49] Mr Erasmus did not contact Mr Roets, who managed the ice making business enterprise to ascertain why there was apparent interference with the electrical installation, viz the distribution box in the flat. If only he had done so, he would probably have gathered that there were no irresponsible, unsafe and illegal connection at all, but rather work still in progress. The work was done and completed three hours after the photograph (annexure "x") was taken. The work was performed by a qualified, experienced and independent electrician, Mr Burger. He replaced the defective earth leak which was clearly implicated in the electrical power failure. Every power failure triggered the automatic operation of the trip switch to prevent danger or harm.

[50] I got the impression that he was not really interested in knowing the truth. He was just too happy to find something the respondents could use against the applicant. He had vested interest in the matter. He had sold the house on behalf of the respondents. Like the respondents, he also

wanted to see the applicant vacating the property to make way for Ms Potgieter, his client. His financial interest in the matter badly influenced his actions.

- [51] The respondents' attorney arrived on the scene as did the employees of the third respondent. One of them was apparently an electrician. The attorney arrived on the scene at or about 10h00 on Friday, 31 August.

“Ek verklaar verder dat ek op versoek van die Eerste Respondent ongeveer 10vm die oggend van 31 Augustus 2012 'n besoek by die huurperseel ter sprake afgelê het. By my aankoms het ek gevind dat twee persone van die Dhlabeng **Munisipaliteit besig was om die kragtoevoer na die huis en woonstel af te sny.**”

- [52] The quotation was significant for three reasons. Firstly, it corroborated the version of the applicant that there was electrical power supply to the main house. Secondly, it corroborated the applicant's version that besides the earth leak of the distribution box in the flat, the rest of the electrical components in the single power line were all in the state of repair. Thirdly, it indicated Mr Erasmus was untruthful when

he stated that the employees of the third respondent disconnected electricity late in the afternoon after 15:00.

[53] The first passage that needs to be considered is the following:

“Dihlabeng Local Municipality received a request from the owner of Young Street no 1, Eureka, Bethlehem to switch off the electricity until further notice due to the fact that the electricity box was allegedly tampered with and was unsafe.”

Wrote the municipal manager (*vide* annexure “d”).

[54] The second passage that needs to be considered is the following:

“Erasmus het my onmiddellik telefonies gekontak en onderneem om met die Derde Respondent te reël dat hulle die onwettige koppelings kom ondersoek. Erasmus het saam met drie werknemers van die Munisipaliteit na die perseel gegaan waarna die beamptes van die Derde Respondent saam met Erasmus die onwettige koppelings deur die venster waargeneem en te vestig het. **Die kragtoevoer is toe summier deur die Munisipaliteit afgesit.**”

Said Mr J.S de Bruyn, the first respondent (*vide* par 18.2 answering affidavit p 49 of the record.

“24.2 Vir redes soos reeds hierbo genoem, **word dit nie in geskil geplaas dat ek inderdaad die Derde Respondent versoek het om die kragtoevoer af te sny nie.** Ek voer eerbiediglik aan dat daar geen voldoende regsgronde bestaan waarom hierdie Agbare Hof die nienakoming van die reëls moet kondoneer nie, onder andere op grond van die volgende:

- a) **Die Applikant die outeur van sy eie probleem was en steeds is;”**

Said Mr J.S de Bruyn, the first respondent (*vide* par 24.2 answering affidavit p 53 of the record.

[55] The third passage that needs to be considered is the following:

- “3. u aandag daarop te vestig dat die kragtoevoer-probleem wat u kliënt ervaar het, **deur die industriële aard en oormatige kragverbruik van sy toerusting veroorsaak is;**

4. u aandag daarop te vestig **dat u kliënt, alternatiewelik werksmense, onwettig op 30 Augustus met die elektriese drade van die verdeelbord gepeuter het** (soos duidelik blyk uit die aangehegte foto en wat ook deur amptenare van die Munisipaliteit besigtig en bevestig is);
5. **te erken dat ons kliënt onmiddellik na die peutering, versoek het dat die kragtoevoer na sy huis vir veiligheidsredes afgesny word** en omdat die peutering en/of beweerde herstel nie aan die veiligheidsvoorwaardes voldoen nie.”

Said Mr J.A Botha, the attorney for the respondents (*vide* paras 3 – 5 annexure “f”).

[56] The foregoing passages reveal the prominent role played by the first respondent in the disconnection of electricity by the third respondent.

[57] As regards allegation 23(d) I am not persuaded by Mr Groenewald's contention that the third respondent cut off the electricity supply in terms of section 9. It is so that the consumer is expected to report illegal electrical connections to the third respondent. However, the third respondent is a

local government. It is not expected to simply accept the owner's complaint as true and correct. Section 9 required the third respondent to investigate the complaint by the respondents against the applicant's in order to determine its veracity.

- [58] The third respondent was also obliged to notify the alleged delinquent consumer of its belief that he had improperly interfered with the electrical installation and to warn him of its intention to disconnect the supply of electricity to the property concerned. Therefore, the disconnection of electricity by a municipality was subject to certain conditions. There has to be an independent municipal investigation. There has to be a reasonable belief that an improper interference with electrical installation has been done. There has to be a reasonable notice to the delinquent consumer to remedy the situation unless the requisite can be lawfully dispensed with. These are statutory conditions which obviously precede the exercise of the right to disconnect electricity. None of the precedent conditions was met.

[59] On the strength of the foregoing extracts I have come to the conclusion that the third respondent disconnected the constant supply of electrical power to the property on the mere instructions of the first respondent as the owner. I am persuaded that such conduct on the third respondent was not in keeping with the provisions of section 9. Therefore, the contention that the third respondent was bound by legal prescripts to disconnect the supply of electricity to the property could not be sustained.

[60] Still on Friday, 31 August 2012, at or about 10h00 the applicant's private electrician had already returned to the property where he replaced the old earth leak with the new one. In that way the power line between the main house and the flat was repaired. Notwithstanding the repairs effected by the applicant's private electrician, the third respondent declined to reconnect the supply of electricity to the property.

[61] At paragraph 23(c) answering affidavit the first respondent had this to say about the third respondent's refusal to reconnect electricity:

“... het ek besluit om die Derde Verweerder te versoek om nie die kragtoevoer na die woning en woonstel te hervat nie;”

[62] At paragraph 23(d) answering affidavit the first respondent went further to say:

“Voordat sodanige onwettige koppelings en peutering herstel word ooreenkomstig statutêre vereistes, nog ek, nog Tweede of Derde Respondent, onder enige regsplig is om die elektrisiteitstoevoer na die perseel van die Applikant te herstel.
.....”

[63] At paragraph 23(e) the first respondent concluded as follows:

“die Applikant, handelende soos hierbo gesubmiteer, die outeur van sy eie probleme is en alleen aandadig is.”

[64] At paragraph 5 annexure “f” the respondents’ attorney confirmed that his client, in other words, the first respondent not only requested the third respondent to cut off the electricity to the property, but also not to restore the supply of electricity to the property on account of certain unspecified

safety grounds. The attorney further denied that the respondents had thereby committed an act of spoliation against the applicant and averred that the applicant was an architect of his own misfortune.

[65] The attorney was clearly appointed before 31 August 2008, the date on which the supply of electricity to the property was connected. In fact, he was on the scene at the time the employees of the third respondent disconnected the electricity. It is significant to note that the respondents themselves were not on the scene at the time the electricity was disconnected. However, their attorney was. Because they were not on the scene they would not have known that the applicant's private electrician had not done proper repair works or that the quality of the work he had performed, did not comply with the safety conditions. It has to be readily appreciated that there was no confirmatory affidavit, by an electrician of any sort, filed in support of these allegations made by the respondents. It follows therefore that the allegation by the respondents about the alleged poor workmanship attributed to the applicant's private electrician, had absolutely no substance.

[66] This disposes of the question of disconnection. I now turn to the next question of reconnection. It is, therefore, probable that the respondents requested the third respondent not to reconnect the electricity on the advice their attorney. He was, after all, on the scene but they were not.

[67] At paragraph 7 annexure “a” Mr S.P Burger, the applicant’s private electrician said the following about the respondents’ attorney:

“Ek bevestig voorts dat nadat ek die aardlek vervang het, het **Mnr Braam Botha** opdrag gegee aan **Dihlabeng Munisipaliteit** se personeel dat hulle onder geen omstandighede die krag weer mag aanskakel voordat hulle nie toestemming van hom of die eienaar ontvang het nie.”

[68] His averment was corroborated by Mr H.J Roets, the applicant’s manager.

“Ek bevestig dat nadat hy die aardlek vervang het, en die kragtoevoer herstel was, het **Mnr Braam Botha** opdrag gegee aan **Dihlabeng Munisipaliteit** se personeel dat hulle onder

geen omstandighede die krag weer mag aanskakel voordat hulle nie toestemming van hom of die eienaar ontvang het nie.”

[69] The applicant’s attorney stated that on 7 September 2012 he contacted Mr Samuel Masoeu seemingly a senior official in the electricity department of the third respondent and requested that electricity be reconnected. The response of Mr Masoeu was that it could not be done unless the owner of the property made such a request (*vide* par 3 and 4 annexure “c” p 29 of the record.

[70] In a letter addressed to the applicant’s attorneys on 7 September 2012, the municipal manager of the third respondent wrote:

“Dihlabeng Local Municipality received a request from the owner of Young Street no 1, Eureka, Bethlehem to switch off the electricity until further notice due to the fact that the electricity box was allegedly tampered with and was unsafe.

I confirm that **it is a general policy at Dihlabeng that our personnel may only take instructions from the owner in matters concerning electricity** because at the end of the day they are responsible for the payment of the account.

It is thus with great regret that we wish to inform you that we cannot restore the power to the said premises up until such time as we have received instructions from the owner or his/her representative.

We do not want to get involved in any dispute between the Landowner and his tenant.

We will, however, abide by any court order granted in favour of any of the parties.”

- [71] The letter is more important for what it does not say than what it says. Nowhere in the letter does the senior official say electricity cannot be reconnected on account of any risk or harm or danger posed by the poor, incompetent, hazardous or reckless manner in which the applicant's private electrician had replaced the earth leak electrical component of the electrical distribution box in the flat. There was virtually no complaint about any of the aspects on which the respondents heavily relied in this matter. It was clear and obvious, therefore, that the third respondent did not rely on any statutory prohibition, but its own general policy for its refusal to reconnect electricity.

[72] This letter strongly militates against the contention of the respondents to the effect that the applicant himself, as a consumer, was at liberty to approach the third respondent with the request to reconnect the electricity seeing that the supply of electricity was factually cut off by the third respondent and not the first or second respondent. The letter made it clear that, as a matter of general policy, the third respondent would not have entertained a request by anyone, other than the property owner, as to whether to reconnect the electricity or not. Moreover the letter further showed that the disconnection had nothing to do with any danger whatsoever posed by the alleged illegal connections. Certainly, Kenneth would have advised the municipal manager of any danger posed by the alleged illegal connections and threatening danger. Apparently, he did not. At paragraph 18.2(b) of the answering affidavit the first respondent said the following about the reconnection of electricity:

“(b) Daar geen regsplig op enige van die respondente rus om toestemming te gee of verplig te word om die kragtoevoer te herstel nie, welke die aansoek in sy

geheel, insluitend die beweerde dringendheid, geheel en al oorbodig maak.”

[73] This is sharply in contrast with the general policy of the third respondent. According to that policy the first respondent, as the owner, is obliged to authorise the third respondent to reconnect the electricity. This makes perfect sense because the third respondent, in the first place, disconnected the electricity on the instructions of the first respondent, as the owner of the property.

[74] Notwithstanding repeated requests by the applicant and his attorney, the respondents would not authorise the third respondent to reconnect the electricity to his property occupied by the applicant. However, the respondents refused. It was that the refusal that precipitated these urgent proceedings. There had to be reconnection of the electrical power supply within a reasonable time after the electrical fault had been rectified. The respondents frustrated the applicant to have the electricity reconnected without undue delay.

[75] I now wish to revert to allegation 23(c). The first respondent submitted that:

“c) as gevolg van die wesenlike en onmiddellike dreigende moontlikheid en gevaar dat die eiendom van Eerste respondent aan brandgevaar blootgestel is en persone se lewens daardeur geraak word, het ek besluit om die Derde Verweerder te versoek om nie die kragtoevoer na die woning en woonstel te hervat nie;”

[76] This paragraph must be read together with par 4 of the confirmatory affidavit by Mr Erasmus (annexure “js2”). He stated:

“Aangesien ek die hele oggend in Harrismith werksaam was, kon ek eers teen ongeveer 15:00 op 31 Augustus 2012 by die Dihlabeng Munisipaliteit uitkom om die probleem aan Samuel Maseue gerapporteer. Hy het vir sekere Kenneth en twee ander persone aangesê om saam met my na die woonstel te gaan. Hulle het die onwettige koppeling en peutering aan die elektriese drade gesien en op sterkte daarvan, die kragtoevoer onmiddellik afgesny.”

[77] The respondents clearly heavily relied on the version of Mr Erasmus, the estate agent. According to him the electricity was cut off after 15h00 on Friday, 31 August 2012 by the employees of the third respondent. This particular allegation was at odds with the entire body of undisputed facts. The applicant averred that the electricity was cut off at or about 10h00 on 31 August 2012. His manager said the same. His private electrician said the same. The respondents' own attorney said the same. The only person who sang a different tune, was the estate agent, Mr Erasmus. I say no more about his veracity.

[78] In the light of all this I have come to the conclusion that the applicant has established the second requisite for the grant of a spoliation order. Although the electricity was cut off by the third respondent and although the third respondent refused to reconnect the required electricity, there is overwhelming material proof that the first respondent was instrumental to the spoliation committed by the third respondent against the applicant. It is clear that but for the lamentable instructions given by the first respondent to the third respondent, the constant supply of electricity to the

property occupied by the applicant would not have been disconnected.

[79] By indirectly cutting off electricity, through the third respondent as an intermediary who was a mere instrument in their hands, the respondents themselves committed the civil wrong. They and not the municipality, substantially interfered with the applicant's occupation of the premises – **NAIDOO**, *supra*. They enormously disturbed his free and peaceful - actual possession. They materially diminished the enjoyment he derived from the electrified premises he occupied. By so doing, they committed an act of spoliation. Accordingly I find that the applicant was indeed despoiled and that the respondents were behind his spoliation. I am thus inclined to grant the remedial relief sought.

[80] The applicant has been successful. There was a clear ulterior motive in the way the respondents conducted themselves in this matter. In the first place they leased the property to the applicant for a period almost a decade. Subsequent to that lease agreement the first and the second respondent went ahead and sold the same property to a

third party, Ms Potgieter. In the second place it will be recalled that the applicant the ice making enterprise from the very same respondents, who were conducting the same business on the same premises. Now they are complaining that the applicant is conducting an illegal business on their property on the grounds that it had not been rezoned for business purposes. This accusation by the respondents has all the classic hallmarks of a litigant who was *in pari delicto*. I say no more about it.

[81] The aforesaid two scenarios indicate, in my view, that the spoliation was calculated to force the applicant off the property. It would seem that Ms Potgieter was unaware that the property she purchased was subject to a very burdensome lease contract of almost ten long years.

[82] Upon my perusal of the papers to figure out exactly what was going on here, I got the feeling, and it was a very strong feeling, that the respondents, on purpose it would seem, withheld from Ms Potgieter vital information relating to the lease agreement in terms of which the applicant was entitled to occupy the property she bought. The courts frown upon

such scrupulous conduct. In this instance, I am satisfied that it is fair and equitable that the respondents be visited with a punitive order of costs.

[83] These then are the reasons for the order I made *ex temporae* on 16 September 2012. I now close the chapter.

[84] Accordingly I make the following order:

84.1 Kondonasie verleen word vir nie-nakoming van die Hofreëls met betrekking tot vorms en betekening en dat hierdie aansoek aangehoor word as 'n dringende aansoek.

84.2 Die derde respondent onmiddellik die vrye en ongestoorde kragtoevoer tot die perseel bekend as **Youngstraat 1, Eureka, Bethlehem** sal herstel.

84.3 Die eerste en tweede respondent die koste van hierdie aansoek sal betaal op die skaal soos tussen prokureur en kliënt.

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Breytenbach Mavuso Inc
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