

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2024-111687

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

15 October 2024

In the matter between:

SHENG TENG (PTY) LTD

(Registration No.: 2016/183746/07)

Applicant

And

**SA BULK COMMODITY TRADING AND STORAGE
SERVICES (PTY) LTD**

(Registration No.: 2000/003572/07)

Respondent

JUDGMENT

Noko J

Introduction.

[1] The applicant launched urgent proceedings for an order directing the respondent to restore the supply of electricity in respect of Building 2[...] corner B[...] and S[...] Streets, G[...] N[...], Germiston (*“leased property”*). The said leased property was leased by the applicant from the respondent to conduct a business enterprise for a period commencing from 2020 and ending in 2025.

[2] The respondent averred that it has discovered that there was tempering with the electricity metre as a result of which the applicant was paying less than what the applicant was consuming. The respondent then installed a new mechanism and alleges that the reading of consumption is now correct. The last invoice rendered is in the sum of R3 956 657.03 which was issued during September. The amount said out in the said invoice has not been paid and together with the contention that the applicant tempered with the electricity metre the respondent decided to disconnect the electricity supply.¹

[3] The applicant construes the disconnection as being unlawful and launched these proceedings and seek the following orders:

1. “Declaring that this matter to be heard on an urgent basis, and for that purpose, condonation be granted for dispensing with the forms and services provided for in the Uniform Rules 6(12);
2. The respondent is directed to immediately, upon the granting of the order restore the electricity supply to the leased property;
3. The respondent is ordered not to further disconnect the electricity supply to the lease property without an appropriate Court Order and

¹ See para 8 of the Respondent’s Answering Affidavit at CL 25.4 where it is stated that “Accordingly, the respondent was left with no choice but to cut off applicant’s electricity supply. The above two factors are related. The fact that evidence of illegal tempering has been uncovered, coupled with the large outstanding amounts means that the applicant cannot be trusted as a tenant to (a) allow for the accurate reading of its electricity consumption and (b) pay what is owed.”

4. Costs on a C scale, including the costs of counsel,”

[4] I had regard to the submissions by both parties on the question whether the application deserves to be enrolled in an urgent court. The respondent contended, inter alia, that the applicant delayed to approach the court timeously and urgency was therefore self-created. I determined that the attempts by the applicant to seek audience of the respondent to resolve the matter amicably and to avoid approaching court on urgent basis were reasonable. I therefore determined that the matter was urgent and deserves audience of the urgent court.

Background

[5] As stated in paragraph 1 above the purpose for which the leased property was occupied was for business enterprise which the applicant asserts, required a continuous supply of the electricity. The claim is predicated on the contention that the applicant was in lawful possession of the electricity supply and the respondent without exploiting available legal recourses proceeded to disconnect the supply of the electricity to the leased property. The applicant submitted that its case is on all fours with the decision in *JC Impellers*² where the court ordered in similar circumstances that the respondent to immediately reconnect electricity supply.

[6] The respondent contended in retort that the correct legal position is set out by the Supreme Court of Appeal in *Masinda*³ where the court held that where the claim for services is of personal nature and based on contract the available recourse to a party is to claim for specific performance and not approach the court for a relief in terms of *mandament van spolie*. In addition, respondent

² *JC Impellers (Pty) Ltd v Erven 176/177 Wadeville Proprietary Limited (107540/2024)* [2024] ZAGPJHC (02 October 2024)

³ *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA).

counsel continued, this Division in *Simons*⁴ followed *Masinda* and further that *JC Impellers* was incorrectly decided and should therefore not be followed.

[7] The respondent further contended that the Supreme Court of Appeal has stated spoliation proceedings would be available to the applicant where a claim is of personal nature if it can be demonstrated that the supply of electricity was not only of a personal nature but also incidental to the possession.

[8] The issue for determination is whether indeed the applicant's rights to the supply of the electricity is incidental to the possession of the property.

[9] The legal principles underpinning the remedy of *mandament van spolie* were clearly explained in the judgments alluded to by counsels for both parties that it is intended to proscribe self-help. Further that the applicant is required to demonstrate that the applicant was in possession of the property and was unlawfully dispossessed of the property by the respondent.

[10] It is correct, as submitted by the respondent's counsel based on the Supreme Court of Appeal decision in *Masinda* that "*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.*"⁵ As an example the court referred to rights bestowed by servitudes, registration or statute. It was also held in *First Rand*⁶ that the right held is quasi possessio must be a 'gebruiksreg' or an incident of the possession or control of the property." However, if the rights sought to be exercised arise from a contract the recourse lies in the contract and mere possession thereof would not entitle one to approach court for a redress in terms of the spoliation application.⁷

⁴ *Simons v The City of Johannesburg Forensic DPT* 2019 JDR 2664.

⁵ See 394 E.

⁶ *First Rand v Scholtz* [2006] ZASCA 99.

⁷ See *Masinda* at para [17]. See also *Makeshift* at para [25].

[11] In answering the central question, one may need to determine whether the electricity supply to the leased property was incidental to the possession thereof. Oxford dictionary defined the word incidental to as meaning "...liable to happen as a consequence of..."⁸ The applicant has demonstrated that the possession of the leased property was in pursuance of the lease agreement entered into with the respondent and was to conduct business which requires supply of electricity. The possession of the property will not be of any use if there is no electricity. The link established between the possession and electricity supply becomes an insurmountable hurdle for the respondent to persuade this Court that the applicant's case is bound to fail as spoliation cannot be based just on the right to supply which is only of a personal nature.

[12] In contrast the Supreme Court of Appeal judgment in *Masinda* which was followed by *Simons* were both concerned with the discontinuation of the electricity to private homes. Such private home appeared not to have been made available by the applicants and possession was not linked to electric supply to the control or possession of the premises. Masinda purchased the electricity through prepaid system hence her right flow from the purchase and not from possession of the property.⁹ To this end the judgment can be distinguishable.

[13] In conclusion it is axiomatic that the applicant was indeed had access to the electricity and the respondent without approaching the court discontinued the supply of the electricity. The facts demonstrate that supply of the electricity is inextricably intertwined with the possession and the use of the leased property. In the premises the applicant's case met the requirements for the redress as envisaged by *mandament van spolie*.

Costs.

⁸ See South African: Concise Oxford Dictionary.

⁹ See *Simons* at para [6] "The Applicant contended that the respondents were not entitled to disconnect the electricity supply to the property because he uses prepaid meter and thus he owed no payment to electricity."

[14] There are no arguments advanced to persuade me to depart from the principle that the costs follow the results.

Order.

[15] In the premises the following order is granted.

1. The applicant's non-compliance with the Rules is condoned and the matter to be heard as one of urgency in terms of Rules 6(12) of the Uniform Rules of Court.
2. The respondent is directed to immediately, upon the granting of the order, to restore the electricity supply at property at Building 2[...] corner B[...] and S[...] Streets, G[...] N[...], Germiston.
3. The respondent is ordered not to further disconnect the electricity supply to Building 2[...] corner B[...] and S[...] Streets, G[...] North, Germiston without an appropriate Court Order.
4. Costs on a C scale, including the costs of counsel.

M V NOKO

JUDGE OF THE HIGH COURT.

GAUTENG DIVISION, JOHANNESBURG.

Dates:

Hearing: 9 October 2024.

Judgment: 15 October 2024.

Appearances:

For the Applicant: Adv M Rasivhetshele.

Instructed by Singhs Attorneys.

For the Respondent: M van der Berg.

Instructed by Nourse Incorporated.