

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION – MAKHANDA]**

CASE NO.:3771/2024

In the matter between:-

THOMAS IGNATIUS VAN KERKEN

APPLICANT

and

ESKOM HOLDINGS SOC LIMITED

FIRST RESPONDENT

MANFRED L. THATHE

SECOND RESPONDENT

JUDGMENT

NORMAN J:

[1] On 02 September 2024 at 15h00 applicant brought this application on an urgent basis and sought the enrolment of the matter outside the normal court rules. This court issued a directive that:

- “1. Applicant must serve on the respondent by no later than 12h00 on 03 September 2024.
2. Respondents are to file their answering affidavit by no later than 04 September 2024 at 13h00.
3. Applicant is to file her reply by 16h00 on 04 September 2024.
4. Application will be heard on 05 September 2024 at 09h30.”

[2] It appeared that the respondents were not made aware of the directive and their legal team travelled from Bloemfontein to be at court on 03 September 2024 as

indicated in the notice of motion. At the request of the parties the court enrolled the matter for hearing on 4 September 2024 instead of 05 September 2024.

[3] The applicant sought the following order:

“1. An order directing the First and Second respondents to restore to the possession of the Applicant the following:

1.1 Electricity supply to Farm Vimy Ridge, Comm 120, account number 8[...] district Grahamstown.

1.2 Electricity supply to Farm Dikkopvlakte, Comm 119, account number 81[...] district Grahamstown.

1.3 Electricity supply to Farm Vimy Pump Installation, Comm 88, account number 9[...], district Grahamstown.

1.4 Electricity supply to Farm Buffelsdrift, Comm 96, account number 5[...]; and

1.5 That the Sheriff be directed to restore the electricity supply, immediately, after the Court made an order.

2. That the forms and service provided for in terms of the Rules of Court of the above Honourable Court be dispensed with and that the matter be heard as one of Urgent in terms of Rule 6(12).

3. Cost of this Application on an Attorney and Own Client Scale and Scale B for one (1) Advocate.”

[4] The applicant further placed the respondents on certain time frames:

(a) for the delivery of their notice of intention to oppose by email on or before 16h00 on Monday 02 September 2024;

(b) to deliver answering affidavits, if any, together with any relevant documents on or before 16h00 on Monday 02 September 2024;

(c) the applicant to deliver its replying affidavit on or before 22h00 on Monday 02 September 2024 and that the application as aforementioned was to be made on Tuesday 03 September 2024 at 10h00.

[5] The applicant, Mr Thomas Ignatius van Kerken, in his founding affidavit stated that he currently resides on Farm Dikkopvlakte, Grahamstown, Eastern Cape. The

first respondent is Eskom Holdings SOC Limited an electricity supplier. The second respondent is an employee of Eskom, Mr Manfred L. Thathe.

Applicant's case

[6] Applicant described himself as the account holder in respect of all the electricity accounts with Eskom. He alleged that he had been unlawfully deprived of electricity supply to which he, at all times, had undisturbed and peaceful access. He is a livestock farmer farming at the farms Vimy, Dikkopvlakte and Buffelsdrift in the district of Grahamstown and has been so farming in excess of two decades. He describes his farming enterprise as enormous. An integral part of his farming involves livestock and growing feed such as lucerne and oats, amongst others, to provide feed to the livestock which is essential during drought. To grow these crops, to feed his sheep, goats and sybokke water must be pumped with electricity to the various irrigation systems to ensure that the plants grow and stay in a condition to feed in excess of 1500 herds of sheep, goats and sybokke combined.

[7] All the above-mentioned farms do not have any other source of water and as such drinking water for the livestock is also pumped with electricity. This period is breeding season and is thus a crucial time to have electricity and water for two critical reasons: First, if the feed, that is lucerne and oats, do not get proper irrigation, the plants will expire, alternatively, wilt which in turn will result in the ewes that are in the process of giving birth to contract a disease known as bloodnier. That will inevitably result in a total loss of their livestock and result in the death of their young animals. Second, should the ewes not get water when giving birth they will not be able to produce sufficient milk to feed their newborn offspring. That will also lead to the inhumane deaths of both the ewes and their offspring.

[8] The applicant stated the following, amongst others:

"3.6 On 30 August 2024, a Friday, in the late afternoon the Second Respondent acting on behalf of the First Respondent, without my knowledge and consent, and unlawfully switch off my electricity supply and by acting in this vexatious manner, hindered me to approach the court for relief as it was impossible to obtain legal representation and the courts are closed over

weekends and as such my livestock and feed has been without water for days on end. It is clear that the Second Respondent acted strategically to get this effect and to deprive me of seeking immediate intervention from the above Honourable Court.”

[9] He stated that the purpose of the application is to get an order that the respondents be ordered to restore the electricity supply to which he had enjoyed undisturbed and peaceful access. He contended that he was deprived of the supply unlawfully by the respondents. He stated that he is a client of the first respondent and was at all times in undisturbed and peaceful possession of electricity. The deprivation of his undisturbed possession of electricity constitutes a direct act of spoliation. He contended that the respondents have gone about this procedure in a wrong way because they should issue summons against him and follow the correct procedure. The respondents, by their conduct had taken the law into their own hands and were attempting to circumvent the legal process.

[10] In dealing with urgency, he submitted that, the matter is inherently urgent due to the fact that he has been deprived of his undisturbed possession of the electricity supply. Should this court fail to intervene he would suffer irreparable harm because he had been farming for decades and this is the only method of income that he has. He had been advised that spoliation is always considered to be urgent. He is already suffering as a result of the illegal disconnection of electricity for several days. His livestock will not survive if immediate intervention of the court does not take place. He would suffer severe prejudice and financial harm. He asked that the court must show its displeasure with the conduct of the respondents for taking the law into their hands by granting a punitive costs order against them. He also asked that the respondents should be ordered to pay costs for the sheriff should such costs be incurred.

[11] The applicant simply attached three Eskom invoices without making reference to those invoices in his founding affidavit or attaching them as annexures as is the procedure.

Respondents case

[12] Mrs Margarita Elizabeth Schoeman deposed to an affidavit on behalf of the first and second respondents. She is employed in the position of Officer Revenue and Credit Management within Eskom. She had delegated authority to depose to the affidavit and to oppose the application. She complained that the truncated periods were extremely unreasonable, unfair and prejudicial to Eskom as it was only given less than a day, to file its answer, after service of the unissued application on the respondents.

[13] The respondents raised a point that the application lacks urgency as urgency was self-created. They contended that the applicant seeks to restore a contractual right in respect of which the applicant essentially seeks specific performance. They stated that such right is not protected by the *mandament van spolie*. She stated that the applicants failed to disclose to the court that there are contractual obligations between the applicant and Eskom in terms of the commercial agreement that is in place between them. Applicant received a notice of disconnection for non-payment dated 13 August 2024 amongst others, by email on 19 August 2024 from Eskom. In that notice it was stated that should applicant fail to pay the arrear amount by the 26th August 2024, the applicant's electricity supply, in terms of the commercial agreement, concluded with Eskom, would be terminated. She further stated that the applicant was well aware that non-payment of his contractual obligations under the contract would result in disconnection but he failed and/or refused to pay his invoice. The disconnection happened solely as a result of the applicant's own inaction. It was only then that the applicant deemed it prudent to rush to court for assistance on self-created urgency.

[14] The respondents further stated that there was a reaction to the notice of disconnection which was sent to Eskom by Ms Carine van Kerken who is the person who has been corresponding on behalf of the applicant with Eskom. She replied that the documents have been forwarded to the relevant Eskom division and that the email was merely for Eskom's records. On 20 August 2024, Mr Daven Marais of Eskom responded to the email of the applicant sent by Ms Carine van Kerken by stating that the applicant's response does not suspend the notice of disconnection and that same remains valid and in place. Ms Schoeman attached the email

correspondence and requested that it be considered as part of the evidence. She further stated that on 29 August 2024 Mr Adrian Cawthorn of Eskom attempted to implement the disconnection. However, a supervisor or manager of the applicant intervened and requested Mr Cawthorn to speak with the applicant's attorney over the phone. According to the Mr Cawthorn that attorney conveyed to him that there was an existing court order which prevented Eskom from disconnecting the electricity supply to the applicant. He told him not to proceed with the disconnection. Mr Cawthorn left the property following such conversation with the person that was identified as the attorney of the applicant.

[15] Having gone back to the office he established that there was no court order. On Friday, 30 August 2024 he, together with his colleague Mr Ntsika Menze, returned to the applicant's property to effect the disconnection of the electricity supply. She contended that the applicant's reliance on spoliation was misplaced. She stated that the invoices attached evinced the extended indebtedness of the applicant to Eskom for a period of 31 to 60 days. She moved for the dismissal of the application with costs on a scale as between attorney and client. She stated that the application is vexatious and is an abuse of process of court. She also asked that counsel's fees be ordered to be on scale C.

[16] In his replying affidavit and in response to the allegations that the truncated time frames were unfair to the respondents, the applicant, stated that on 29 August 2024 his legal representatives had warned Mr Cawthorn that should they persist with the disconnection they would bring an urgent application. He also stated that there was a real threat and that he would lose in excess of R1million due to the starvation of his livestock and their young. He contended that the respondents created urgency by switching off the electricity supply after court hours on a Friday afternoon because that left his livestock without necessary water supply and thus endangered their lives. He reiterated the fact that he had been advised that in a mandament *van spolie* only two points should be considered by the court and no merits need be dealt with. The first being that the applicant had peaceful and undisturbed possession of electricity and secondly that the said undisturbed possession of electricity was unlawfully dispossessed from the applicant.

[17] I shall quote, for context, the applicant's response to certain allegations made in the answering affidavit by the respondents:

"12. What the applicant however conveniently failed to disclose to this honourable court is the fact that Eskom following non-payment by applicant of his contractual obligations in terms of the commercial agreement in place between the applicant and Eskom received a notice of disconnection for non-payment dated 13th of August 2024 by inter alia email on 19th of August 2024.

13. I append as annexure "ESK1" a copy of the email and as annexure "ESK2" hereto a copy of the disconnection notice for non-payment.

The applicant's reply to that is:

AD PARAGRAPH 12 THEREOF:

The contents of this paragraph is noted. However, I am advised by my legal representative whose advice I accept to be true and correct that the court should not dwell into the merits of the matter in an application for a mandament van spolie. The court should consider only two main factors. The first being that the applicant had peaceful and undisturbed possession of electricity. And secondly was said undisturbed possession of electricity was unlawfully dispossessed from the applicant? If the answer is yes the applicant has undisturbed peaceful possession and yes it was unlawfully dispossessed from the applicant the court must restore the undisturbed possession of the electricity supply. The court simply cannot dwell into the merits of this matter. When the applicant had to deal with the allegations of the respondent where they state facts of what transpired prior to the 30th of August 2024 the response was simply, the contents of this paragraph 12, supra is repeated verbatim."

[18] As aforementioned in paragraph 12 the applicant was emphatic that the court should not enter the merits. His response to paragraph 12 of the answering affidavit, supra, is repeated verbatim in respect of many positive facts made or alleged by the respondents which required proper responses. He disputed that his legal representatives had conveyed to Mr Cawthorn that a court order existed. He stated

that Mr Cawthorn was informed that should they disconnect electricity an urgent application for mandament *van spolie* would be brought against Eskom.

Legal submissions

[19] Mr Snyman appeared for the respondents and Mr Olivier for the applicant. Mr Olivier submitted that the respondents switched off electricity prematurely in that the notice given ought to have caused them to switch off electricity on 02 September 2024 and not on 30 August 2024. He submitted that conduct constitutes an unlawful act or unlawful conduct and that on its own create a spoliation to which order the applicant is entitled. He submitted that when electricity was switched off the applicant was in lawful possession thereof. He submitted that the possession of the applicant falls within the *quasi- possession* because for farming he depended on the electricity supply. He relied heavily on the decision by JP Daffue J in ***Harrismith Intabazwe Tsiame Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*¹** (the *Harrismith decision*). On the issue of *quasi - possession* he referred the court to paragraph 38 where JP Daffue J stated, amongst others:

“[38] In order to discern why the one case is actionable under the mandament while the other is not, it is necessary to identify the distinguishing feature. As I have said, the distinguishing feature appears to me to be whether or not the alleged right to electricity is an incident of, or an adjunct to, the alleged right which the claimant has against the spoliator to be in occupation of the premises. If the alleged right to electricity is an incident of the claimant's occupation of the premises in this sense, one can then justly conclude (a) that the alleged right to electricity is the subject of quasi-possession for purposes of the mandament; and (b) that a spoliation of the said quasi-possession is simultaneously an act of spoliation in relation to the premises themselves.”

[20] Mr Snyman argued that the facts in the *Harrismith* judgment relied upon by the applicant are distinguishable from the case at hand in that, amongst others, the

¹ *Harrismith Intabazwe Tsiame Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another* (567/2022) [2022] ZAFSHC 151 (14 June 2022).

electricity supply was interrupted in circumstances where the consumers in the *Harrismith* case were not in breach of their payment obligations towards the Maluti–A-Phofung Local Municipality; the municipality acted on the termination notices after two years, and the relevant consumers had declared disputes pertaining to their accounts. He submitted that in this case the applicant was forewarned that if he did not pay the minimum amount that was in arrears there will be a disconnection. Applicant was further reminded that the termination notice was valid. The applicant ignored that in the hope that if his animals died he will seek damages from Eskom. He argued that if the court were to come to the rescue of the applicant that would mean that a party would fail to honour its obligations, wait for Eskom to disconnect electricity supply and thereafter rush off to court. The applicant failed to honour his contractual obligations, he argued. He submitted that this court must follow the decision of the Supreme Court of Appeal in ***Eskom Holdings SOC Ltd v Masinda***² and refuse to grant the relief sought.

Discussion

[21] In ***Mangala v Mangala***³ Munnik J remarked as follows regarding spoliation as a remedy:

“It is true that a spoliation order is a remedy which in the nature of things should be a speedy one, but the fact that there has to be restitution before all else simply means that, once an applicant has proved that he was in peaceful possession and his possession was disturbed, the respondent must restore that position before entering into the merits of the ownership or otherwise of the subject matter. It does not follow that, because an application is one for a spoliation order, the matter automatically becomes one of urgency. The applicant must either comply with the Rules in the normal way or make out a case for urgency in accordance with the provision of Rule 6 (12) (b).”

[22] Rule 6(12) (b) of the Uniform Rules of Court provides that in every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which render the matter urgent

² *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 SCA.

³ *Mangala v Mangala* 1967 (2) SA415 ECD at 416 para-F.

and the reasons why the applicant claims that the applicant could not be afforded substantial redress at the hearing in due course. The applicant failed to satisfy this requirement. He simply stated that he was advised that spoliation is always considered to be urgent and that he will suffer irreparable harm if electricity is not restored. He did not respond meaningfully to the allegations relating to the sequence of events leading up to the disconnection. It is well established that an applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied, as the applicant did in this case. I accept the respondents' version in that regard as uncontroverted. The manner in which the notice of motion was tailored lacked proper consideration for the respondents. The application was issued on 2 September 2024. The respondents were called upon to file their notice to oppose and answering affidavit on the same day at 16h00. They were called to appear on Tuesday, 03 September 2024 at 10h00. Those time frames were very inconsiderate and unreasonable in the circumstances where the applicant was made aware about the disconnection on 16 August 2024. He did not disclose the events that led to the disconnection of electricity supply as he is obliged to. It is such conduct that attracts a punitive cost order. However, for the reasons which I will deal with later I am not persuaded that this is one of those cases where the court should make such a cost order.

[23] In ***Ngqukumba v Minister of Safety and Security and Others***,⁴ Madlanga J remarked as follows about the essence of spoliation:

“[10] The essence of mandament van spolie is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim spoliatus ante omnia restituendus est (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.”

⁴ *Ngqukumba v Minister of Safety and Security and Others* (CCT 87/13) [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) (15 May 2014).

[24] It is also a possessory remedy, the unlimited and exclusive function of which is to restore the *status quo ante*, and therefore, it matters not that the spoliator might have a stronger claim to possession than the person spoliated or that the latter has indeed no right to possession. The purpose of a *mandament van spolie* is a speedy restoration of possession to the person who has been unlawfully deprived of possession.

[25] *Mandament* provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final. In ***Bon Quelle (Pty) Ltd v Otavi Municipality***⁵ the court held that a spoliation order is no more than a precursor to an action over the merits of the dispute. In ***Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan & others***,⁶ the court dealt with the nature of the *mandament* and remarked:

"Its object is the interim restoration of physical control and enjoyment of specified property— not its reconstituted equivalent."

[26] In *Masinda*, the Supreme Court of Appeal gave clear and unambiguous reasons why restoration of electricity could not be ordered. First, Eskom in that case did not do the electrical installation at Ms Masinda's home. Eskom found that that installation did not comply with the necessary requirements of safety. Second, the installation was illegal and unlawful and constituted a danger to the public. Third, the order of the court a quo was problematic in that it went beyond requiring the re-establishment of what there was before, whereas spoliation only requires the *status quo ante* to be restored.⁷ Most importantly, the Supreme Court of Appeal set the correct approach in matters of this nature, and found that the supply of electricity to Ms Masinda was therefore dependent upon it being paid for in advance. The Supreme Court of Appeal specifically found that a personal right, was purely a contractual right that cannot be construed as an incident of possession of the property. It found that the *mandament* does not protect such a contractual right and it upheld the appeal and substituted the court a quo's decision by dismissing the application. The same principle applies herein.

⁵ See *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 512A-B.

⁶ *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* (303/2006) [2007] ZASCA 70; [2007] SCA 70 (RSA); 2007 (6) SA 511 (SCA) (30 May 2007).

⁷ *Zinman v Miller* 1956 (3) SA 8 (T).

[27] In *Masinda*, Leach JA analysed various decisions where there was termination of water, telephone services and electricity and came to a conclusion in paragraphs 20 to 22 that:

“[20] In these cases the mere existence of the water supply which was terminated, was held in itself to be insufficient to constitute an incident of the possession of the properties, and that more than a purely personal right was required in order to show that to be the case.

[21] This was echoed in Telkom v Xsinet, a case which is probably the most comparable to the present in that it involved the supply by Telkom of electronic impulses to the Xsinet’s premises, thereby providing the telephone and bandwidth system used by it to conduct its business as an internet service provider. Alleging that Xsinet was indebted to it in respect of another service, Telkom disconnected the supply. This court did not accept that the use of the bandwidth and telephone services constituted an incident of the possession of the property, even though those services were used on Xsinet’s premises. It observed that it would be both artificial and illogical to conclude that the use of the telephone, lines, modems, or electrical impulses had given Xsinet possession of the connection of its property to Telkom’s system. It also rejected the contention that Telkom’s services could be restored by the mandament as those services constituted ‘a mere personal right and the order sought is essentially to compel specific performance of the contractual right in order to resolve a contractual dispute’.

[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 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.” (footnotes omitted) (my underlining).

[28] The undisputed facts of this case are that the applicant and Eskom have a commercial relationship where Eskom supplies electricity to the applicant's farms and bills applicant for the supply. The tax invoices show that the meter numbers, consumption and arrears, total amounts due, are, amongst others, recorded therein. The ‘*deprivation of a prior supply of electricity*’ as Gorven AJA (as he then was) termed it in, ***Blendrite v Moonisami***⁸, is regulated by that contractual relationship which is purely personal in nature. As found by the Supreme Court of Appeal in *Masinda* such supply does not constitute an incident of possession of the farms to which it is delivered. It follows that spoliation in these circumstances finds no application. The application must accordingly fail.

Costs

[29] I now proceed to the issue of costs. In light of the decision taken in this matter I do not find it necessary to delve into the unreasonable truncated time frames given to the respondents by the applicant. The respondents were able to put up their answering affidavits including brief heads of argument within two days. The applicant, throughout, in the founding affidavit made it apparent that he acted on legal advice in bringing the application and the posture adopted therein. I cannot punish him by mulcting him with a punitive cost order. Similarly, to the extent that his legal adviser invoked spoliation, a principle that has led to the Supreme Court of Appeal in *Masinda* to examine several decisions as a result of different approaches

⁸ *Blendrite v Moonisami* 2021 (5) SA 61 at page 66 at para [16].

by the courts on this principle, they too, do not deserve censure for that. Nevertheless, the costs must follow the result.

[30] I accordingly make the following Order:

The application is dismissed with costs, such costs to be on Scale B as set out under Rule 69 (7), to be paid by the applicant, and may be taxed as set out under Rule 67 A (4) (a).

T.V. NORMAN
JUDGE OF THE HIGH COURT

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Matter heard on	:	04 September 2024
Judgment delivered on	:	05 September 2024