

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case Number: 597/2025

In the matter between:

JACOBUS THOMAS DU PREEZ

APPLICANT

and

FERNANDO DU PREEZ

RESPONDENT

Heard on: 14 March 2025

Delivered on: 28 March 2025

Summary: Urgent spoliation application – interruption of water supply to leased farming property. Was the applicant in peaceful and undisturbed possession? The applicant's purported possession of the water supply in the sense did not warrant spoliatory relief. Applicant further seeks an interdict which falls outside the ambit of spoliatory relief as it is claimed on the basis of a contract and a personal right.

ORDER

1. The application is dismissed with costs which costs shall include counsel fees on Scale C of Rule 69(7).

JUDGMENT

MAMOSEBO ADJP

- [1] The litigant protagonists are brothers. The issues in this matter are whether the applicant was spoliated when the respondent disconnected the supply of water to the farm Pringle occupied and leased by the applicant and whether the applicant can rely on an alleged contractual right to seek interdictory relief against the respondent. Allied to that is whether the applicant was correct in approaching the court on an urgent basis.
- [2] The applicant brought the application on an urgent basis which was heard on Friday, 14 March 2025, after the unopposed motion court roll, seeking the following relief:
1. That I condone the non-adherence to the Court rules and the matter be heard as one of urgency;
 2. An interdict, prohibiting the respondent from interfering with the water supply from the farm Springbokpan to the farms occupied and leased by him, by closing the distribution valve and/or disconnecting him from the distribution valve situated at Tuckey;

3. A *mandament van spolie*, restoring forthwith the applicant's peaceful and undisturbed possession of the water supply from Springbokpan to the farms occupied and leased by the applicant; and
4. Costs on an attorney and own client scale, including costs on Scale C in respect of the employment of counsel.

Background

[3] Mr Willem Frederick du Preez (the deceased) was a farmer who died on 17 May 2021. Following his passing, he left testate inheritance, which included his farms, to his now 81-year-old wife, Mrs Anna Magdalena Petronella du Preez, the mother to his three sons, Jacobus Thomas du Preez (the applicant), Fernando du Preez (the respondent) and Gideon du Preez. Gideon and their sister, Petronella du Preez, take no part in these proceedings. Mrs du Preez has leased a farm to each of her sons; the applicant leases the farm Pringle and two other farms; the respondent leases the farm Tuckey while Gideon leases Springbokpan. During his lifetime the deceased installed a pipeline supplying water to all the farms from Springbokpan through a distribution valve at Tuckey to Pringle.

[4] It is common cause that the water supply was mainly sourced from Springbokpan. The respondent disconnected the distribution of the water on 22 February 2025. The applicant attended to the distribution valve on 24 February 2025 and observed that the dams were suspiciously low. He directed a WhatsApp message to the respondent, annexed as JDT4, notifying him that he attended to the distribution valve on farm Tuckey to inspect the waterflow to his farm. He further directed a WhatsApp message to his mother, annexed as JDT5, enquiring whether she was

aware of the situation. She simply directed him to the respondent. He later established that the pipes connected to the distribution valve supplying his farm were disconnected. It is for this reason, so the applicant contended, that he brought the application on an urgent basis because the respondent's conduct amounted to an unlawful dispossession and deprivation of the daily waterflow to him, his employees, cattle and game. Although he has sunk a borehole on his farm providing 8800 litres per day, its pump is solar powered and therefore inconsistent and inadequate.

- [5] Clause 20 of the lease agreement entered into between the applicant and his mother stipulates:

'20 Water

- 20.1 Die partye boekstaaf dat die watervoorsiening vir die eiendom vanaf die plaas bekend as Springbokpan kom.
- 20.2 Die huurder sal op sy koste verantwoordelik wees vir instandhouding van die pyplyn wat oor die eiendom loop.
- 20.3 Die huurder sal saam met Gideon en Fernando verantwoordelik wees om gelykop maandeliks die elektriserekening vir die pomp van die water vanaf die Springbokpanboorgat, op aanvraag, te betaal.
- 20.4 Die huurder sal saam met Gideon en Fernando verantwoordelik wees vir die instandhouding van die Springbokpanboorgat en dampelpomp en indien nodig, die sink en toerus van enige nuwe boorgat ter vervanging van enige vorige boorgat.'

- [6] The applicant maintains that although their mother entered into an agreement with each of her sons referred to as the "borehole agreement" in which she gave to each son an amount of R100 000.00 to sink a

borehole on their respective farms, it was not meant to revoke or nullify the provision of Clause 20 which entitled him to enjoy the supply of the water from the Springbokpan borehole. Neither the respondent nor their mother issued a notice that after sinking a borehole it will be followed by a disconnection from the Springbokpan borehole. This, it was submitted, illustrates that the dispute ought to have been dealt with in a different forum and therefore seeks restoration. He maintains that the respondent interfered unlawfully with that right.

- [7] The applicant invoked *Naidoo v Moodley*¹, where a dispute existed whether the claimant was bound by a purported settlement agreement to vacate the landlord's property by a specified date. His failure to vacate was met with the landlord cutting off the electricity supply. The court rejected the landlord's argument that the *mandament* was precluded because the claimant's only entitlement was contractual. The court went on to say that by cutting the electricity the landlord substantially interfered with the claimant's occupation of the premises and therefore performed an act of spoliation. The *Moodley* case does not assist the applicant.
- [8] The version of the respondent is the following. The respondent disputes that the applicant had possession of the water supply in the sense required for spoliatory relief. On 20 June 2024 their mother concluded the 'borehole agreement' with her three sons in which they essentially agreed that the applicant and the respondent shall, on or before 30 November 2024, sink boreholes on their respective farms and she will contribute to each of her sons an amount of R100 000.00. The purpose of sinking such boreholes was to provide for their own water needs and to be self-

¹ 1982 (4) SA 82 (T)

sufficient. The applicant sunk a borehole on Pringle during August 2024 providing 8800 litres of water daily.

- [9] There were costs incurred emanating from the four Eskom electricity points used to pump water to the farms Tuckey and Pringle from which Eskom renders bills to them monthly for the consumption thereof. The brothers entered into a verbal agreement to share the costs evenly by rotating the payment obligation. The arrangement was seemingly repudiated by the applicant and Gideon, but the first respondent accepted it. The respondent was left with having had to repay the electricity consumed by his brothers for the supply of the water.
- [10] The respondent disconnected the water supply for the first time in October 2024 disabling the applicant from accessing water from Springbokpan. He received a letter of demand from the applicant's attorneys and through persuasion and intervention of their elder brother, Gideon, reconnected the valve. Their mother has redrafted another agreement which the respondent and Gideon have signed but the applicant has refused to sign. The disconnection of the water supply on 22 February 2025 was done because the applicant is refusing to contribute financially towards the costs incurred in the supply of the water from Springbokpan. The version of the respondent clearly demonstrates a dispute of fact.

Urgency

- [11] Mr Jagga, for the applicant, relied on *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*² for the proposition that the mere fact that the applicant brought a spoliation application makes the

² [2023/067290] [2023] ZAGPJHC 846 (1 August 2023) para 6

matter urgent. It is contended that the disconnection has a detrimental effect because the applicant cannot farm without water.

- [12] Mr Pienaar, for the respondent, contended that it was incorrect for the applicant to allege that he did not have water. He has sunk a new borehole providing 8800 litres of water daily which is sufficient for them. The fact that he opted for a solar system when there were other options cannot be laid at the door of the respondent. His WhatsApp message, JD4, directed at the respondent did not require any response. JD5 only refers to water for the cattle and not for him and his employees.
- [13] The respondent does not dispute that the applicant became aware of the disconnection on 24 February 2025. However, the application was only issued on 4 March 2025, eight days later. The respondent asked that the matter be struck from the roll for lack of urgency.
- [14] It is trite that for a court to hear a matter on an urgent basis the applicant would have to show fully the circumstances which render the matter urgent and state the reasons why he would not be afforded substantial redress at a hearing in due course.³ The principle enunciated by the Appellate Division in *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk*⁴ is that the applicant must show that the degree of relaxation or deviation from the rules, and the time afforded to the respondent to prepare his answering affidavit, are justified in the circumstances and that the respondent is not prejudiced.

³ East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2022 JDR 3786 (GP) paras 36 – 39

⁴ 1972 (1) SA 773 (A) at 782 and 783

[15] Whether there is urgency in this application requires us to examine closely the circumstances surrounding and the facts substantiating the spoliatory relief sought. These are intertwined and cannot be considered in isolation.

[16] In *Blendrite (Pty) Ltd and Another v Moonisami and Another*⁵ Gorven AJA gave this exposition of the remedy of the *mandament van spolie*:

‘The *mandament van spolie* remedy relates to possession. Possession is —

‘(m)ost commonly defined as the combination of a factual situation and of a mental state consisting in the factual control or detention of a thing (*corpus*) coupled with the will to possess the thing (*animus possidendi*)’.

In *Nino Bonino v De Lange* [1906 TS 120 at 122] Innes CJ explained the nature of spoliation:

‘Spoliation is 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.’ The remedy is a possessory suit based on the maxim *spoliatus ante omnia restituendus est*. In simple terms, this means that possession must be restored to the dispossessed person before enquiring into anything else.

The *mandament van spolie* is designed to be a robust, speedy remedy which serves to prevent recourse to self-help. The sole requirements are that the dispossessed person had ‘possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted’. All that must be proved is the fact of prior possession and that the possessor was deprived of that possession unlawfully. Unlawfully here means without agreement or recourse to law.’

[17] The applicant claims to have been in peaceful and undisturbed possession of the water until he was denied by the applicant. An instructive reminder

⁵ 2021 (5) SA 61 (SCA) para 5 and 6

pertaining to the spoliatory relief was echoed by Gorven AJA in *Blendrite*⁶ in this fashion:

‘Cases involving the supply of water and electricity have occasioned some uneven judgments. These sometimes refer to the deprivation of a 'right' to receive a supply of water or electricity. More accurately, however, it is the deprivation of a prior supply of water or electricity. *The crucial issue is that this is protected in limited circumstances, where it has been received as an incident of occupation of the property.* The limitation was made clear in *Eskom Holdings SOC Ltd v Masinda*, [2019 (5) SA 386 (SCA) para 22] where Leach JA considered what can be protected by the *mandament*, saying:

'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.'

This sets out the approach to be taken. The incorporeal of a prior supply of the service which qualifies is one which is an incident of the possession or control of corporeal property.'

⁶ Ibid para 16

- [18] The applicant contended that despite the ‘borehole agreement’ where he received money from his mother to sink a borehole to supply water to the farm(s) that he is leasing, that does not detract from his entitlement to receive water from Springbokpan as provided for by Clause 20 of the lease agreement. He unequivocally relies on Clause 20.1 of the lease agreement that stipulates that water is supplied to the immovable property leased to him from Springbokpan. The further terms of that agreement if scrutinised carefully placed obligations on the applicant to maintain the pipeline that runs over the property at his own expense and that he, Gideon and Fernando, be responsible for paying the electricity bill for pumping the water from the Springbokpan borehole, on demand, in equal monthly premiums. His failure to comply with the clauses that he himself relied on, led to the disconnection of the water supply. The applicant has not, in my view, established that he was in peaceful and undisturbed possession of the water supply and that there was wrongful deprivation of such a supply. See *Ivanov v Northwest Gambling Board*⁷.
- [19] In paras 61 and 62 of the applicant’s founding affidavit he relies on the right which he claims is firmly entrenched in the lease agreement for him to receive the water supply. That is both a contractual as well as a personal right. The supply of water is, in itself, insufficient to establish a right constituting an incident of possession of the substance, which is the water delivered to the property. What complicates the applicant’s position is that, in addition to seeking the restoration of the water supply, he also seeks an interdict that would prohibit the respondent from interfering with the water supply. The requirement for an interdict is a *prima facie* or a clear right. It is therefore plain that the applicant is enforcing a right and

⁷ 2012 (6) SA 67 (SCA)

not only seeking a spoliatory relief. It follows that the right that he seeks to protect falls outside the realm of the relief of *mandament van spolie*.

[20] In as far as the interdictory relief is concerned, the applicant would have to satisfy the following requirements to be successful in this application:

1. He will have to show an existing clear right to the supply of water from Springbokpan over Tuckey to Pringle;
2. He will also have to show that the disconnection of the water supply caused him to suffer harm or the harm was reasonably apprehended; and
3. The applicant had no other satisfactory remedy. See *Setlogelo v Setlogelo*⁸.

[21] In *Street Pole Ads Durban (Pty) Ltd v Ethekekwini Municipality*⁹ Cameron JA made these remarks:

‘This argument invokes the principle that an offending respondent in a spoliation application is generally not allowed to contest the spoliated applicant's title to the property. That is because good title is irrelevant: the claim to spoliatory relief arises solely from an unprocedural deprivation of possession. There is a qualification, however, if the applicant goes further and claims a substantive right to possession, whether based on title of ownership or on contract. In that case 'the respondent may answer such additional claim of right and may demonstrate, if he can, that applicant does not have the right to possession which it claims'. This is because such an applicant ‘...in effect forces an investigation of the issues relevant to the further relief

⁸ 1914 AD 221

⁹ 2008 (5) SA 290 (SCA) para 15

he claims.' Once he does this, the respondent's defence in regard thereto has to be considered.'

[22] The applicant has, *in casu*, gone beyond seeking restoration and claimed a right. I am therefore, taking cue from the *Street Pole Ads Durban*, considering other issues beyond the dispossession relevant to the further relief claims. It is plain that not only has the applicant received a boost of an amount of R100 000.00 from his mother to sink a borehole on the farm that he is leasing, but he is enjoying 8800 litres of water daily from the said borehole. His endeavour to paint a picture to this court that he, his employees, cattle and game are without water, is not persuasive. His refusal to meet his obligations stipulated in Clause 20 of the lease agreement by failing to contribute towards the expenses of pumping the water from Springbokpan and yet demand the enjoyment of such water supply, lacks logic.

[23] On the version of the respondent, the applicant failed to comply with their obligations in terms of the verbal agreement concluded between the brothers by failing to contribute financially which resulted in the repudiation of the contract. The borehole agreement was aimed at making each brother self-sufficient.

[24] The law recognises the following defences in spoliation proceedings:

1. the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;
2. the dispossession was not unlawful and therefore did not constitute spoliation;

3. the restoration of possession is impossible; and
4. the respondent acted within the limits of counter-spoliation in regaining possession of the article.

[25] Mr Jagga urged the Court to grant final relief. The courts are, however, enjoined to consider the granting of such relief only if the facts as alleged by the applicant which are admitted by the respondents in the answering affidavit, together with the facts expressed by the respondents, justify such relief. In *Wightman v Headfour (Pty) Ltd*¹⁰ Heher JA made these pronouncements:

‘[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A – 153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)’

[26] The applicant failed to make out a case for the relief sought. In *National Director of Public Prosecutions v Zuma*¹¹ where Harms DP restated the rule as follows:

“[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the

¹⁰ (66/2007) [2008] ZASCA 6 (10 March 2008) at para 12

¹¹ 2009 (2) SA 277 (SCA) at 290D – F, para 26)

circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

I do not think the respondent's version is far-fetched or untenable warranting rejection.

[27] I find that the applicant has not established such a right against the respondent. On the facts, there could never have been in this case unlawful spoliation following the disconnection of the valve supplying the applicant with water from Springbokpan. I further find that the applicant has failed to persuade me that the matter was in fact urgent and if it had to follow its normal course that the applicant will not be afforded substantial redress at a hearing in due course. It follows that the applicant has failed to make out a case to justify an order for final relief. It is on that basis that the application stands to fail.

[28] I am now left with the question of costs. There is no reason why costs should not follow the result.

[29] In the result, I make the following order:

2. The application is dismissed with costs which costs shall include counsel fees on Scale C of Rule 69(7).

**MAMOSEBO ADJP
NORTHERN CAPE DIVISION**

For the applicant:
Instructed by:

Adv N Jagga
Van de Wall Incorporated

For the respondents:

Adv CD Pienaar
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