THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1225/2018

In the matter between:

ESKOM HOLDINGS SOC LIMITED **APPELLANT**

and

NOMAJAPAN MASINDA **RESPONDENT**

Neutral citation: *Eskom Holdings SOC Limited v Masinda* (1225/2018) [2019] ZASCA 98 (18 June 2019)

Coram: Leach, Wallis and Mocumie JJA and Mokgohloa and Weiner AJJA

Heard: 17 May 2019

Delivered: 18 June 2019

Summary: Spoliation – rights protectable by mandament van spolie – whether an electricity supply in itself an incident of possession of the property to which it is delivered or a mere personal right – whether such supply protectable by the mandament.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Jolwana AJ sitting as court of first instance):

1 The appeal is upheld, with costs.

2 The order of the court a quo is set aside, and substituted with the following:

'The application is dismissed, with costs.'

JUDGMENT

Leach JA (Wallis and Mocumie JJA and Mokgohloa and Weiner AJJA concurring)

[1] The issue we are called upon to decide in this appeal is whether the respondent (Ms Masinda) was entitled to a spoliation order when the appellant, Eskom Holdings SOC Limited (Eskom), disconnected the supply of electricity to immovable property she owns and possesses in Tsolo, Eastern Cape. The court a quo decided she was, and ordered that the electrical supply to her property be reconnected. The appeal against that order is with leave of this court.

[2] Eskom is a public company with its entire share capital held by the State.[1] It is the national generator and distributor of electricity and is licensed to provide electricity directly to customers in the area in which Ms Masinda's property is situated. Illegal electricity connections to Eskom's power grid, which by their very nature are fraught with peril, appear to have become a substantial problem in the area. Regarding itself obliged to take steps to avoid harm occurring due to dangerous and unauthorised connections to its grid, on 8 August 2017, Eskom sent a team made up of members from its various departments to hold an inspection in Tsolo. On doing so, various illegal connections to the Eskom grid were identified and then disconnected.

[3] One of the properties identified as having an illegal connection was that of Ms Masinda. The alleged defects in the supply installation on her property were unfortunately not set out in Eskom's papers with the clarity one would have expected. Rather it adopted a procedure, previously criticised by this court,[2] of adducing evidence by way of hearsay allegations in its main answering affidavit, supported by so-called 'confirmatory affidavits' by the witnesses who should have provided the necessary details, but who merely sought to confirm what had been said in the main affidavit 'in so far as reference [has been] made to me'. Despite this slovenly practice, it can be accepted that Eskom averred that the electrical supply installation included equipment of incorrect sizes, did not meet prescribed standards, had been erected by an unauthorised contractor, and constituted an immediate danger to the public.

[4] For this reason, the supply to Ms Masinda's property was disconnected. On doing so, certain Eskom officials approached Ms Masinda to ask her about

[1] Sections 2 and 3 of the Eskom Conversion Act 13 of 2001.
[2] See eg *Drift Supersand (Pty) Ltd v Mogale City Local Municipality & another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31.

her prepaid electricity meter and its connection to the national grid. Instead of providing the details requested, she began shouting at them, stating that she had applied for electricity and now that someone else had connected her, Eskom should not disconnect her. Ms Masinda denied these allegations, but as the matter is to be decided on the affidavits, they must be accepted for present purposes.

[5] Ms Masinda alleged in her replying affidavit that her meter and connection had been installed by a contractor whom she understood was Eskom's agent. This, according to Eskom, was inconsistent with what she had said at the time of the disconnection. It further alleged that it had quoted Ms Masinda for a 60 amp prepaid meter installation which she had not accepted. Whatever may have happened, it does appear that she was purchasing electricity which was then being drawn through a meter installed on her property. Unfortunately for her, according to Eskom, this was being done through an illegal and dangerous installation which led to her supply being disconnected.

[6] Ms Masinda was not prepared to take this lying down. By way of notice of motion dated 18 August 2017, but filed only on 1 September 2017, she launched urgent proceedings against Eskom in which she sought, *inter alia*, an order obliging it to forthwith restore the electricity supply to her home. In seeking this relief she relied, first, upon the mandament van spolie (commonly known as a spoliation application) and, secondly, upon an allegation that the decision to disconnect her electrical supply constituted administrative action as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In respect of the former she contended that Eskom's officials had unlawfully disconnected the supply of electricity without her consent 'and without recourse to due legal process'. In respect of the latter she sought to review the

respondent's action on the basis that it had been procedurally unfair or decided upon arbitrarily and capriciously in breach of the provisions of PAJA.

[7] Nothing really needs to be said in respect of the claim brought under PAJA. It was abandoned in the court a quo and not only was there no attempt to resurrect it in this court, but counsel for Ms Masinda specifically eschewed all reliance upon PAJA in attempting to support the order obtained below. The matter was therefore argued solely in respect of the spoliation, to which issue I now turn.

[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute'[3] as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief[4] pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in *Eskom v Nikelo*[5] is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.[6]

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[3] *Nino Bonino v De Lange* 1906 TS 120 at 122 confirmed by this court in *Bon Quelle (Pty) Ltd v Otavi Municipality* 1989 (1) SA 508 (A) at 511H-I (*Bon Quelle*).

[4] See eg D G Kleyn *Die Mandament Van Spolie In Die Suid-Afrikaanse Reg* LLD dissertation University of Pretoria (1986) at 300-301 and the cases there mentioned.

[5] *Eskom v Nikelo* [2018] ZAECMHC 48 (21 August 2018).

[6] *Bon Quelle* at 513H-I.

[9] As I have mentioned, Ms Masinda sought restoration of her electricity supply on two alternative bases. In respect of the first, the spoliation, an investigation into the merits of her claim to receive such a supply would ordinarily not be called for. In respect of the second, the review under PAJA, she was required to establish that she had such a right to electricity which had been unlawfully taken away from her. The two alternative claims are the very antithesis of each other. Possibly as a result of this, the matter appears to have morphed into an application in which Ms Masinda sought and obtained a permanent order from the court a quo requiring Eskom to restore an electricity supply to Ms Masinda.

[10] Presumably the court did not intend for such electrical supply to be restored by way of an installation that was unlawful and a danger to the public but rather one which complied with the necessary requirements of safety – something, according to Eskom, the original installation had lacked. In this respect its order was immediately problematic as it seemingly went beyond requiring the re-establishment of what there was before, whereas spoliation only requires the *status quo ante* to be restored.[7] (This was probably the product of the court a quo applying the principles of spoliation in circumstances where, effectively, final relief was being sought.) In *Tswelopele*[8] Cameron JA dealt with the nature of the mandament and said:[9]

'its object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function).'

[7] This may include doing more than simply restoring possession. It requires restoration of the property to its former state. See *Zinman v Miller* 1956 (3) SA 8 (T).

[8] *Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan Municipality & others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) affirmed in *Ngomane & others v City of Johannesburg* [2019] ZASCA paras 18-20. See also *Rikhotoso v Northcliff Ceramics* 1997 (1) SA 526 (W) at 535B-C.

[9] Paragraph 24. This may cast doubt on the grounds of the judgment, but not the result, in *Fredericks & another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

For that reason he had earlier in the judgment accepted that the mandament is a preliminary and provisional order.[10]

[11] The obvious difficulty standing in the way of relief being granted was that the supply that was sought to be restored was said to be unlawful and constituted a danger to the public. This notwithstanding, the respondent's counsel argued that, as in spoliation proceedings the legality or otherwise of an applicant's possession is not an issue to be decided, the supply had to be reconnected before any dispute as to its legality could be determined.

[12] Although it is correct that spoliation requires restoration of possession as a precursor to determining the existence of the parties' rights to the property dispossessed, there may well be circumstances in which a court will decline to issue a spoliation order. Thus in *Ngqukumba*,[11] a case involving the spoliation of a motor vehicle, the engine and chassis numbers of which had been altered, the Constitutional Court stated:[12]

'. . . in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the mandament van spolie might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that *may be possessed quite lawfully* makes all the difference . . . At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.'

[13] This dictum raises the possibility of a court refusing to order the return of property to a person who may not lawfully possess it, although to do so would require reconsideration of a line of authority in this court that has not hitherto

[10] Paragraph 23.
[11] *Ngqukumba v Minister of Safety and Security & others* [2014] ZACC 14; 2014 (2) SACR 325 (CC).
[12] Paragraph 15.

been questioned.[13] In any event, Eskom was undoubtedly under a common law duty to take steps to guard against its electrical supply constituting a hazard to the public (I leave out of the reckoning certain regulations, the applicability of which are in dispute)[14] and the fact that the electrical installation that was removed did not meet required specifications and constituted a public danger, might well be sufficient for a court to decline to issue a spoliation order. After all, directing it to restore the electricity connections that were removed would compel it to commit an illegality.[15] In the light of my view on this matter, however, no final decision on this aspect of the case need be taken as, for the reasons that follow, the appeal must succeed.

[14] It is necessary to undertake a more detailed examination of the principles applicable to the mandament. Although it originally protected only the physical possession of movable or immovable property, this court pointed out in *Telkom v Xsinet*[16] that in the course of scientific development it was extended to provide a remedy to protect so-called 'quasi-possession' of certain incorporeal rights, such as those of servitude.[17] But not all incorporeal rights may be the subject of spoliation. As was explained in *Firstrand v Scholtz*:[18]

'The mandament van spolie does not have a "catch-all function" to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of *quasi-possessio* of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right

[13] *Yeko v Qana* 1973 (4) SA 735 (A) at 739D-G; *Bon Quelle* fn 3 at 512A-B; *Ivanov v North West Gambling Board & others* [2012] ZASCA 92; 2012 (6) SA 67 9SCA) paras 23-25. But see *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (C).

[14] It is presumed to have been negligent if anyone suffers damage or injury caused by means of electricity generated, transmitted or distributed by it. See s 25 of the Electricity Regulation Act 4 of 2006 and *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E).

[15] Cf *Zulu v Minister of Works, KwaZulu Natal & others* 1992 (1) SA 181 (DC) at 190I-J.

[16] *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) para 9.

[17] See further *Bon Quelle* fn 3 at 514D-516E.

[18] *FirstRand Limited t/a Rand Merchant Bank & another v Scholtz NO & others* [2006] ZASCA 99; 2008 (2) SA 503 (SCA) para 13.

characterised to establish whether its *quasi-possessio* is deserving of protection by the mandament. Kleyn seeks to limit the rights concerned to "gebruiksregte" such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of "mere" personal rights (or their exercise) is not protected by the mandament. The right held in *quasi-possessio* must be a ["right of use"][19] or *an incident of the possession or control of the property.*'(Emphasis added.)

[15] Depending upon the circumstances, the supply of electricity or water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. That this is so is apparent from the decision of this court in *Impala Water v Lourens*[20] in which the respondents sought and obtained a spoliation order directing the appellant, a supplier of water, to restore the flow of water to reservoirs on their farms. There had been a dispute concerning the legality of certain water charges levied by the appellant and, although proceedings to recover these charges were pending, the appellant exercised its powers under the National Water Act 36 of 1998 to restrict the flow of water to the respondents by closing certain sluices. The respondents' rights to receive water were not mere personal rights but were linked to and registered in respect of certain portions of each of the respondents' farms that were dependent on the supply of the water. This court, in dismissing an appeal against an order that the appellant restore the flow, held that such rights were an incident of the possession of each farm, and that the mandament was therefore available.

[16] Importantly, it was clear from the facts in that case that the right to the supply flowed from the exercise of possession of the immovable property. Put somewhat differently, whoever was in lawful possession of the relevant portions

[19] The judgment used the Afrikaans word 'gebruiksreg'.
[20] *Impala Water Users Association v Lourens NO & others* 2008 (2) SA 495 (SCA); [2004] 2 All SA 476 (SCA).

of land was entitled to receive water from the appellant. This has not always been recognised in previous decisions in which the courts have at times seemed to regard the mere supply of water or electricity, without more, as constituting an incident of possession – see eg *Eskom v Nikelo*.[21] In *Naidoo v Moodley*[22] and *Froman v Herbmore Timber*[23] it appears that the electricity was cut off with a view to forcing the applicants to vacate immovable property, so that, as with *Nienaber v Stuckey* 1946 AD 1049, where the complaint was of interference with access to a property, it was the possession of that immovable property that was being protected. *Nisenbaum v Express,*[24] which is sometimes referred to as an instance of the spoliation of a water supply, was rather an order for specific performance of a lease.

[17] The decision in *Painter v Strauss*[25] was cited as authority for that proposition in these latter cases but, on closer scrutiny, it is not. It involved a farmer who, after having rented out land, revoked the authority he had given to his tenant 'to arrange with the Department of Irrigation for the supply of water to the land'. The precise nature of the right revoked does not appear from the judgment, although at first blush it appears to have been contractual – which, if it was, would not have been protected by the mandament. (Counsel for the landowner, however, appears to have conceded that the right was capable of spoliation.) In any event, whatever the nature of the right revoked may have been, the court appears to have regarded it, rightly or wrongly, as similar to that of a servitude. The latter is of course capable of being registered, and would clearly be an incident of the possession enjoyed by the holder of a dominant tenement.[26] If that was so, it is a far cry from a mere personal right extended by

[21] Footnote 5.
[22] *Naidoo v Moodley* 1982 (4) SA 82 (T) at 84A-E.
[23] *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) at 610G-611D.
[24] *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W).
[25] *Painter v Strauss* 1951 (3) SA 307 (O) at 318F-H.
[26] See the judgment in *Bon Quelle,* fn 3 above.

contract which in no way attaches to property. The decision is thus not authority, as appears to have been accepted by the subsequent decisions which referred to it, for the proposition that the mere supply of water or electricity to a property, in itself and without more, constitutes an incident of the possession of that property, protectable by the mandament.

[18] Furthermore, examination of recent decisions of this court shows the fallacy of such a proposition. Spoliation was granted in *Bon Quelle* not because of the mere existence of the supply of water, but because such supply had been received in the exercise of the rights of a servitude holder. And in *Impala Water v Lourens*,[27] which I have already mentioned, the mandament was available as the right to receive water was not a mere personal right.

[19] However, in the further decision already mentioned, *Firstrand v Scholtz*, it was held that the mandament was not available to enforce the re-establishment of a water supply. In that matter the first appellant had supplied water through a pipeline to several farmers within an irrigation area. The right to receive water through the pipeline was governed by agreements concluded with the farmers and was provided pursuant to payment of a fee for a period ending 31 December 2004. Because the parties were unable to agree on a fee payable thereafter, the appellants ceased to deliver water from 1 January 2005. The respondents, who owned properties that had been serviced by the pipeline, brought spoliation proceedings for restoration of the supply. They succeeded in the court of first instance but failed in an appeal to this court, which held that they had not been deprived of quasi-possession of any statutory water rights which they were entitled to exercise, but mere contractual rights relating to the use of the pipeline, which had expired.

[27] Footnote 12.

[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*,[28] 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.[29] 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'.[30]

[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.[31] 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

[28] *Telkom* fn 8.
[29] Paragraphs 12 and 13.
[30] Paragraph 14.
[31] *Zulu* at 186E-190G.

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.

[23] In the light of this conclusion, it is necessary to revert to the facts of the present case. It is common cause that what had been installed on Ms Masinda's property was a prepaid system using a meter box that someone had wired into Eskom's grid. This system was used in conjunction with a prepaid card in order to effect the supply. Electricity is purchased using the individual number of the meter which is reflected on the card. The receipt issued in respect of the transaction bears a coded number which, once typed into the meter, registers a credit in respect of the amount of electricity purchased. The supply of electricity to Ms Masinda's property was therefore dependent upon it being paid for in advance.

[24] In seeking restoration of her electricity supply, Ms Masinda's claim could hardly have been more terse. She said no more than that Eskom's officials had unlawfully disconnected the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a

spoliation order. In the light of what is set out above, this was both misplaced and insufficient to establish her right to such an order.

[25] In addition, there is the common cause fact that Ms Masinda purchased her electricity on credit through the prepaid system which I have described. In these circumstances, her right to receive what she had bought flowed not from the possession of her property, but was a personal right flowing from the sale. Similar to the case in *Xsinet*, her claim was essentially no more than one for specific performance (and to the limited extent of a supply worth no more than the unused credit still due after her last purchase). This personal, purely contractual right, cannot be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, for this reason too the claim ought to have been dismissed.

[26] This conclusion renders it unnecessary to decide the further ancillary issue, namely, whether Eskom was entitled to invoke the provisions of reg 7 of the Electrical Installation Regulations, 2009[32] in order to remove the installation on Ms Masinda's property. It was argued on her behalf that the regulations operated solely in an industrial and not a domestic environment. The full court in *Eskom v Nikelo* expressed its reservations as to their applicability in circumstances such as the present.[33] But as it is an issue unnecessary to decide, it is undesirable to comment further on the matter.

[27] For these reasons the following order will issue:

1 The appeal is upheld, with costs.

2 The order of the court a quo is set aside, and substituted with the following:

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[32] Occupational Health and Safety Act, 1993 Electrical Installation Regulations, GN R242, *GG* 1975, 6 March 2009.

[33] Paragraph 28.

‘The application is dismissed, with costs.’

L E Leach
Judge of Appeal

Appearances

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Instructed by:	L Jikela Attorneys, Mthatha
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