**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 24865/2018**

**DELETE WHICHEVER IS NOT APPLICABLE**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

24/10/2019
DATE

SIGNATURE

In the matter between:

| | |
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| **SUMMERHILL COLLEGE INTERNATIONAL** | Applicant |
| and | |
| **THE CITY OF JOHANNESBURG** | First Respondent |
| **MORSHEAD PROPERTY DEVELOPMENT CO** | Second Respondent |

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**JUDGMENT**

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**YACOOB J:**

INTRODUCTION AND FACTUAL BACKGROUND

1. The applicant brought an urgent application on 6 July 2018, for an order that the City of Johannesburg ("the City") restore, alternatively connect, the electricity supply to the property at 335 8th Road, Erand Agricultural Holdings X1, 1687, being Portion 103 of the Farm Witpoort.
2. The urgent court granted a rule *nisi*, which has been extended twice, until the hearing of this matter, ordering the City to restore the electricity to the property, and calling upon the City to show cause why the order should not be made final. I extended the rule to the date of judgment.
3. The applicant is described in the founding affidavit as "Sonia Joy Anderson-Morshead t/a Summer Hill College International". She is the principal of a college. The second respondent is the owner of the property on which the college is situated, and to which the she seeks the restoration or supply of electricity.The applicant leases the property from the second respondent.
4. The deponent to the founding affidavit is the applicant's husband, who is also a member of the second respondent and the financial manager of the applicant's business. It is not clear whether the applicant's husband is the sole member of the second respondent. According to the applicant, her husband has been in the property business for many years and "understands property" so that "it was logical that he would attend to the property side of the school and to do so he did so (*sic*) through a close corporation that was formed for that specific purpose, namely the second respondent".
5. In terms of the lease agreement between the applicant and the second respondent (although a current agreement is not annexed to the papers) the applicant is to pay the electricity and water costs for the property (which were

billed to the second respondent as owner) directly to the City. Mr Anderson-Morshead is the person who dealt with the transfer of the municipal account from the previous owner to the second respondent, which occurred in 2016.

6. In 2016 when the municipal account was transferred to the second respondent, it was recorded as being in arrears for an amount that Mr Anderson-Morshead refers to as "only R552 724". It appears that the arrears amount relates to the rates on the property. By June 2018, the arrears amount was reflected as R684 465.34.
7. In consequence, the City disconnected the electricity supply to the property on 25 June 2018.
8. Mr Anderson-Morshead contends that the City granted consent for the use of the property as an educational facility and that it should be rated on that basis, while it is being rated as a commercial property. He refers to an annexure FA9 as being the City's consent, but there is no FA9 annexed to the papers. According to the invoices attached to the papers the property is being rated as "agricultural business".
9. Mr Anderson-Morshead then went to the City's offices at Midrand and filled in an application for the supply of water and electricity in the name of the applicant's business. Interestingly, although the application form requires the identity numbers of the applicant for services and of the person representing the owner when a property is being leased, neither of these is provided. The only identity number on the form is that of the person listed as next of kin, whose name is not legible. Obviously no company registration number is provided for the applicant's business as it is not a juristic person.

10. The form also does not include Mr Anderson-Morshead's details as spouse of the applicant for services, perhaps because he has listed the applicant for services as the applicant's business. He is listed in the section for "owner/agent/caretaker for leased properties", again without providing his identity number.
11. Mr Anderson-Morshead alleges that he "concluded" an agreement for the supply of electricity, acting as a representative of the applicant. He alleges that an account number was allocated to the applicant and that proof of the agreement having been concluded is an inscription on annexure FAXX, the disconnection notice that was issued before the electricity was disconnected.
12. The account number alleged by Mr Anderson-Morshead is different to that inscribed as the "new account number" in the "For office use only" portion of the application form. No proof of the alleged account number is provided.
13. The inscription on annexure FAXX merely says that "the account is being change (*sic*) to Summerhill College International" and has the date 27/06/2019.
14. There is no indication on the application form that the application was approved, despite space being provided for that. In the section for the" owner/agent/caretaker", although Mr Anderson-Morshead has inserted his name and address, he has not signed it. This is significant because the signature requires the person signing to both warrant that there are no arrears owing for services or rates on the property, and to bind themselves together with the tenant for the new account.
15. Mr Anderson-Morshead alleges that he paid a deposit of R12 981.60, but annexes no proof of payment.
16. He then states that he was told that the second respondent had to pay off at least a substantial portion of the arrears before electricity would be reconnected. He

was told he could speak to a Mr Selby to "resolve the impasse". It is unclear whether Mr Selby was to provide the amount to be paid or to authorise the reconnection without payment. Mr Anderson-Morshead only managed to get hold of Mr Selby on 3 July 2018 when he was told the second respondent had to pay about R125 000 in order to get the electricity reconnected.

17. Instead of the second respondent paying the amount, this application was instituted on 4 July 2018, set down for Friday 6 July 2018. The applicant seeks a *mandament van spolie* (spoliation order), alternatively specific performance in terms of the alleged consumer agreement.

18. The City filed an answering affidavit in which it accuses the applicant of *mala fides*; simulated transactions; an abuse of corporate personality; an attempt to nullify the City's credit control and debt collection policies, and an attempt to obtain relief without any basis for that relief.

19. The City explains that before any new service agreement could be opened, the arrears debt on the property must be settled. A rates clearance certificate must be obtained in order to determine the clearance figure.

20. The deponent to the City's affidavit suggests that the purpose of Mr Anderson-Morshead's attempt to conclude a new service agreement with the City on the applicant's behalf is for the second respondent to avoid paying its debt to the City.

21. The City suggests also that the applicant has no right to claim anything from the first respondent while the second respondent is in default.

22. There are certain allegations in the answering affidavit which are clearly not relevant to this case. Those will have to be overlooked in view of the urgency with

which the answering affidavit was prepared. They appear to have been left in when a different affidavit was used as a template.

23. On 6 July 2019 the urgent court granted a rule *nisi* as set out above. The court also granted leave to both the applicant and the City to file supplementary affidavits. Only the applicant took advantage of this opportunity.

24. In her supplementary affidavit the applicant confirms that her husband has the authority to represent her, and sets out the purpose of the second respondent as set out above. She also makes the allegation that the second respondent and her business are completely separate because they have separate books and separate tax returns.

25. The applicant has not filed a reply to the City's answering affidavit.

THE APPLICANT'S ARGUMENT

26. At the hearing before me the applicant's counsel clarified that the applicant was claiming specific performance in terms of the new service agreement Mr Anderson-Morshead purportedly concluded on the applicant's behalf, alternatively a spoliation order.

27. It was submitted that, because the applicant had already obtained a rule *nisi*, the respondent had to show why the rule should not be made final. The City had filed no affidavit after the rule was granted to show why it should not be made final. It was submitted that the issue of collusion had been raised in the urgent court and has been dealt with.

28. Mr Shepstone for the applicant also submitted that, while specific performance is a discretionary remedy, there was no reason why it should not be granted.

29. He submitted that this case is different to that of *Rademan v Moqhaka Municipality*[1] because the applicant is not the person who has not paid the City what is allegedly due to it.

30. Finally, he submitted that, should the application not be successful, the applicant should be given some time before the City was permitted to disconnect the electricity again because the applicant was running a school.

THE CITY'S ARGUMENT

31. As far as the spoliation claim is concerned, Mr Nyangiwe for the City submitted that the applicant is only a tenant of the second respondent. The tenant has a claim only against the landlord. In support of this proposition he referred me to two judgments, *Telkom SA Ltd v XSINET (Pty) Ltd*[2] and *Tudor Hotel Brasserie & Bar (Pty) Ltd v Hencetrade 15 (Pty) Ltd.*[3]

32. According to Mr Nyangiwe the second respondent therefore had a duty to sort out its dispute with the first respondent to enable the electricity supply to be restored to its tenant. The question of reconnection of electricity to the second respondent does not arise before me because the second respondent has not claimed anything in these proceedings. He also submitted that the applicant's conduct, in going to attempt to open a new account, is inconsistent with a consumer who has been spoliated of their electricity supply.

33. The *Hencetrade* matter does not deal with spoliation at all, and in my view is not relevant to this case. The *Telkom* judgment does not support the contention that a spoliation claim by the applicant cannot lie against the City. However, it does

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[1] 2013 (4) SA 225 (CC)
[2] 2003 (5) SA 309 (SCA)
[3] (2017) ZASCA 111

confirm the rule that a personal, contractual right cannot be enforced under the spoliation order.

34. As far as specific performance is concerned, Mr Nyangiwe submitted that the opening of the new account was incomplete, as Mr Anderson-Morshead was told that at least R125 000 had to be paid towards the second respondent's arrears before reconnection would take place.

35. He submitted that the circumstances of the application for a new account were relevant, in that the disconnection was effected for purposes of collecting revenue, and the tenant then applied for a new account without anyone attempting to deal with the existing amount due. Any agreement that may have been concluded in the circumstances is therefore unreasonable. Nothing had changed since the second respondent entered into a consumer agreement with the City and there was no reason to now enter into a new agreement unless to circumvent the old one.

36. He submitted that there was no case for specific performance made out and that the applicant and second respondent ought to put forward all the facts so that the entire situation is ventilated before the courts and a decision can properly be made that is in the interests of justice.

THE ISSUES

37. The issues that arise from these facts and the argument at the hearing are as follows:

37.1. the effect of the rule *nisi* on the *onus*;

37.2. whether a new consumer agreement has been concluded between the applicant and the City;

37.3. if so, whether the applicant is entitled to specific performance;

37.4. if not, whether the applicant is entitled to a spoliation order;

37.5. what order would be just and equitable in the circumstances, and

37.6. costs.

*The effect of the Rule Nisi*

38. Mr Shepstone for the applicant suggests in his heads of argument that, since the applicant has obtained a rule *nisi* calling upon the City to show cause why the interim order restoring the electricity supply should not be made final, the City has an *onus* to overcome. He suggests also that the City is at a disadvantage in this regard because it failed to file a supplementary affidavit.

39. Mr Shepstone did not cite any authority for the proposition that the *onus* now lies on the City.

40. In order to obtain a rule *nisi*, an applicant only has to make out a *prima facie* case. Whether it has made out a case for final relief is determined on the return day.[4] The applicant must still make out its case on a balance of probabilities in order for the rule to be confirmed. There is no reverse *onus* on the City. The *onus* is the ordinary one in application proceedings.[5]

41. In this case the applicant seeks final relief, not interim relief, and must make out its case accordingly. The burden cast on the City is only to demonstrate to the court that the applicant has not done so, either by way of evidence on affidavit, or by way of legal submissions, as it would in opposing the application in the ordinary course.

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[4] *Ex parte Alexander and Others* 1956 (2) SA 608 (A) at 611C-E

[5] *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 676A-B.

42. The fact that the applicant has obtained a rule *nisi* in urgent court does not release it from the obligation to make out its case.

*Whether the applicant has established that it has concluded a service agreement with the first respondent and is entitled to an order for specific performance*

43. The City submitted that the applicant was not entitled to have concluded a service agreement with the City because the second respondent had not paid what it owed to the City, and the applicant's attempt to conclude a service agreement was an attempt to sidestep the debt owed by the second respondent to the City, and to negate the City's debt collection procedures and obligations.

44. In my view it is not necessary for me to make a finding on whether the applicant's application for a service agreement was an attempt to avoid the debt collection procedures of the City and whether the applicant was entitled to apply for services at all.

45. As a matter of fact, the applicant has not proved, on the papers, that a service agreement has been concluded. The application form annexed to the founding affidavit does not, in the relevant place, show that the application has been approved. The new account number reflected on the application form is not the one the applicant alleges was allocated to it. The application form requires a warranty that there are no arrears owing on the property, while that warranty has not been signed and the founding affidavit makes it clear the second respondent does not intend to pay the arrears.

46. The requirement that there be no arrears on the property before a new account is opened is consistent with the City's debt collection policy read with the provisions of the Local Government: Municipal Systems Act, 32 of 2000.

47. The contention that the arrears is on the rates on the property rather than the electricity does not help the applicant. As the Constitutional Court found in *Rademan* (above) it was permissible for a municipality to disconnect electricity to a property when the rates were in arrears.

48. In any event, the applicant did not rely on this contention in support of the existence of a contract. As far as the applicant is concerned, the mere filling in of the form amounts to the conclusion of a contract, despite the requirement on the form for a warranty regarding arrears, and despite Mr Anderson-Morshead having been informed that some payment towards the arrears would be required.

49. Even if the applicant had produced proof of payment of the alleged deposit of R12 981.60, this would not prove that a contract had been concluded. There are other requirements on the application form, even leaving aside the defects in the manner in which it had been filled in, which I have pointed out earlier.

50. The inscription on which Mr Anderson-Morshead relies as proof that a new agreement was concluded is no such thing. It merely records that the account "is being changed". It does not say that the application has been approved, or that the new account is operational, or that it in fact *has* been changed.

51. Taking all the relevant circumstances into account, there is no agreement between the applicant and the City which obliges the City to provide services to the applicant.

52. As a result, it is not necessary for me to consider whether an order for specific performance is appropriate.

*Spoliation*

53. In *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA), the SCA again confirmed that a spoliation order could not be used to achieve specific performance. In that case the respondent, Mrs Masinda, had an illegal connection, with a pre-paid meter, to Eskom's power grid. Eskom disconnected the supply on the basis that it was illegal.

54. Mrs Masinda then approached the urgent court for a spoliation order. The SCA confirmed that an applicant only has to prove possession in order to obtain relief, and not any other right. But, "what needs to be stressed is that the *mandament* provides for interim relief pending a final determination of the parties' rights, and only to that extent is it final."[6] It was emphasised also that a spoliation order "only requires the *status quo ante* to be restored" on an interim basis.[7]

55. The court went on to find that:

> 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.[8]

56. If the applicant has a contract with the City, then, it is not open to her to obtain a spoliation order. Having found that she does not have a contract, I must consider whether she is entitled to a spoliation order.

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[6] At [8]
[7] At [10]
[8] At [22]

57. As that SCA has set out, a spoliation order is only for interim relief, to preserve the *status quo ante* until the rights of the parties have been finally determined. In this case, that outcome was achieved by the rule *nisi* granted by the urgent court. The applicant seeks final relief. A spoliation order is therefore not available to the applicant in these circumstances.

*Appropriate order*

58. The applicant has failed to establish any right to a continued electricity supply. A service agreement has not been concluded between her and the City. She has not shown any other right to the supply of electricity.

59. The applicant's counsel submitted that it would be just and equitable, taking into account that the applicant runs a school on the property, to allow the applicant a period of time before the City is entitled to disconnect the electricity again, should there still be any arrears owing on the property, or any remaining unresolved dispute regarding the arrears.

60. The applicant has already had more than a year's grace in this regard. However I consider it appropriate that the protection granted to the applicant continue to the end of the school year.

*Costs*

61. The applicant has not been successful in these proceedings. There is no reason why costs should not follow the results.

CONCLUSION

62. In the circumstances I make the following order:

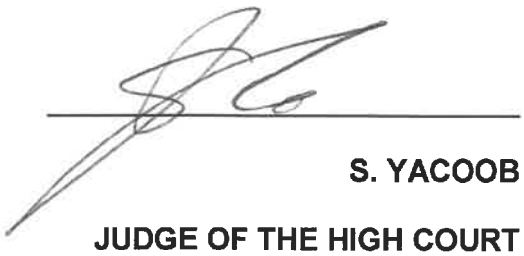
62.1. The rule *nisi* is discharged.

62.2. The application is dismissed.

62.3. The City is interdicted from disconnecting services to the property situated at 335 8th Road, Erand Agricultural Holdings X1, 1687, being Portion 103 of the Farm Witpoort ("the property"), should it still find it necessary to do so in pursuance of any arrears owing on the property, until the end of the 2019 school year.

62.4. The City is directed to give at least one calendar month's notice to the applicant and the second respondent before it takes any steps to disconnect services to the property in accordance with paragraph 61.3 above.

62.5. The applicant is to pay the costs of this application, including the costs of the urgent application.



**S. YACOOB**

**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances**

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|---|---|
| Counsel for applicants: | Mr R S Shepstone |
| Instructed by: | Adam Creswick Attorney |

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| Counsel for second respondent: | Mr L Nyangiwe |
| Instructed by: | Kunene Rampala Inc |
| | |
| Date of hearing: | 30 April 2019 |
| Date of judgment: | 24 October 2019 |