REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEAL CASE NO: A5049/2019
COURT *A QUO* CASE NO: 22375/2019

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

19/2/20
DATE

SIGNATURE

ESKOM HOLDINGS SOC LIMITED Appellant

and

METCHEM STEELPOORT CC Respondent

JUDGMENT

BESTER AJ

[1] The appellant, Eskom Holdings SOC Limited (Eskom), appeals against an order in terms of which it had to forthwith restore electricity supply to premises occupied by the respondent, Metchem Steelpoort CC (Metchem), described

as Portion 10 of Goudmyn 337 KT, Block 2, Shop 13, Steelpoort, North West Province (the premises).

[2] The central issue on appeal is whether the mandament van spolie was available to Metchem. First, it is necessary to deal with two preliminary points raised by Metchem.

The complaint that no reasons were obtained for the order

[3] No reasons were furnished at the time of the granting of the order, which was obtained in urgent court. The exigencies of an urgent court often dictate that reasons for an order are not provided when the order is granted. Eskom did not apply for the Court's reasons in terms of uniform rule 49(1).

[4] Metchem argued that the failure to obtain the reasons rendered this appeal fatally flawed, because the parties and this Court are called upon to speculate as to the findings of the Court of first instance.

[5] Eskom did not proffer an explanation for not applying for the reasons. It argued that its application for leave to appeal made it clear that it assumed that the Court agreed with the arguments presented by Metchem, which Eskom challenged in some detail in that application. The Court of first instance granted leave to appeal to the full Court, without addressing the issue of the reasons for the order. From this, Eskom submitted, it could be concluded that

Eskom's assumptions were correct. Thus, according to Eskom, it does not matter that reasons were not requested.

[6] In *Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg*[1] the Supreme Court of Appeal reiterated what was said in *Administrator, Cape v Ntshwaqela*[2], that an appeal lies only against the substantive order made by the court, and not against the reasons for the judgment. That does not render the reasons irrelevant or unimportant. In *Mphahlele v First National Bank*[3] the Constitutional Court explained:

> "There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decision. Then, to, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, to, that where a decision is subject to appeal it would be a violation of the constitutional right of access

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1 Atholl Developments (Pty) Ltd v Valuation Appeal Board for the City of Johannesburg [2015] JOL33081 (SCA) in [8].

2 Administrator, Cape and Another v Ntshwaqela and Others 1990 (1) SA 705 (A) at 714 I – 715 D.

3 Mphahlele v First National Bank of South Africa Ltd 1999 (3) BCLR 253 (CC) in [12].

> to courts if reasons for such a decision were to be withheld by a judicial officer."

[7] Eskom may have considered itself in a position to form a view of the advisability of an appeal, and to formulate grounds of appeal, without the benefit of reasons. This approach is discouraged. An appeal should generally not be pursued on assumptions. This matter was not so urgent that reasons could not be obtained before the application for leave to appeal was launched. It is proper, and expected of parties, to ensure that they are alive to the reasoning of the court for giving an order when pursuing an appeal against it, and to ensure that the appeal court has the benefit of the reasons.

[8] However, it does not follow that, because Eskom did not obtain the reasons of the Court *a quo*, this appeal is fatally flawed and ought to be dismissed for that reason alone. Although the absence of written reasons for the order is regrettable, this appeal can and should proceed in the absence thereof.

The complaint about an incomplete record

[9] Metchem pursued and obtained an order in terms of section 18 of the Supreme Courts Act[4], for the spoliation order to be executed pending this appeal. Eskom unsuccessfully appealed against that order. Some of the papers in that application and the appeal flowing therefrom were included in the

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4 Supreme Courts Act 10 of 2013.

record of this appeal. Metchem argued that the failure to include the full set of papers renders the appeal record incomplete and the appeal fatally flawed.

[10] The section 18 papers were not before the Court that granted the spoliation order, and no application to lead further evidence on appeal has been brought. The papers in the rule 18 application are not relevant to this appeal and serve only to burden the record. Rather than complaining of an incomplete record, Metchem ought to have been concerned about the inclusion of irrelevant matter. This preliminary point must fail as well.

A note on rule 49

[11] Eskom's notice of appeal included the full exposition of its reasons, as contained in its application for leave to appeal. In 2013 the requirement that the grounds of appeal must be included in the notice of appeal was deleted from rule 49. However, it remains a requirement for the application for leave to appeal. It is time that practitioners align their notices of appeal with the rule.

[12] Rule 49 provides that every notice of appeal and cross-appeal shall state the particular respect in which the variation of the judgment or order is sought. The latter aspect is often overlooked by practitioners, as was the case here. An appellant ought to expressly formulate the order it seeks on appeal in its notice of appeal.

The context of the appeal

[13] Metchem conducts metallurgical analysis and associated laboratory work from facilities situated at the premises. Eskom is a licensed electricity supplier. In November 2009 Metchem engaged the services of Eskom in terms of an agreement to supply electricity to the premises.

[14] Eskom initially issued monthly invoices to Metchem through the lessor of the premises, GrowthPoint, until around June 2014, reflecting usage of a few thousand rand per month.

[15] Sometime in the latter part of 2014 Eskom upgraded the power supply to the premises from the then available 100KvA to a 200KvA installation, partly to accommodate Metchem's increased needs, and partly to supply other tenants at the property. Metchem, as a consumer of around 100KvA, should have been classified as a small electricity consumer for purposes of determining the applicable rate at which it was to be charged for electricity. Mistakenly, Eskom listed it as a consumer of 200KvA, which made it a large electricity consumer and therefore entitled to a lower rate.

[16] Upon realising the mistake, Eskom adjusted the accounts to recover the shortfall and started charging Metchem at the higher rate for small consumers. This led to very high amounts being claimed by Eskom from Metchem. However, it seemed that Eskom was unable to properly reconcile

the charges. The fact that some of the electricity consumption from the same installation had been enjoyed by other tenants added to the difficulties experienced. Metchem insisted that the accounts be reconciled properly and remained dissatisfied with Eskom's efforts.

[17] As a result, the parties became embroiled in a protracted dispute, which has still not been resolved. This led Eskom to terminate the supply of electricity to the premises, apparently not for the first time. Consequently, the application for the spoliation order was launched in late June 2019.

[18] Eskom opposed the application on several grounds. It contended that Metchem had not met the requirements for the mandament van spolie, and denied that the termination was unlawful. It further contended that Metchem is in fact seeking a final interdict, to which it was not entitled, and that it had in any event not made out a case for even an interim interdict.

[19] Eskom also pointed out that it was obliged to collect monies due and owing to it in terms of section 51(1)(c) of the Public Finance Management Act[5] ("the PFMA"), and that it was empowered by section 21(5)(b) and (c) of the Eskom Conversion Act[6] to disconnect the supply of electricity where a customer had failed to honour an agreement for the supply of electricity or where the

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5 1 of 1999.

6 13 of 2001. In the application Eskom referred to section 22 instead of section 21. This obvious error was corrected on appeal.

customer has contravened the payment terms, as it contended had happened in this case.

The mandament van spolie

[20] Eskom essentially raised two arguments on appeal. It contended that the mandament van spolie was not available to Mechem, because it was not in quasi-possession of the electricity supply, and further argued that final relief was granted, whereas the mandament van spolie is a remedy by which the status *quo ante* is restored as a preliminary to an inquiry or an investigation into the merits of the dispute between the parties.

[21] Metchem countered that it was entitled to rely on the mandament van spolie 'on the basis of quasi-possession in its capacity as tenant as interim relief pending final determination of the existing dispute between the parties'.

[22] The mandament van spolie 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 that is in the possession of another, without the latter's consent.[7] In the course of scientific development the original ambit of protecting physical possession of moveable and immovable

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7 Nino Bonino v De Lange 1906 TS 120 at 122.

property was extended to provide a remedy for the protection of what is referred to as 'quasi possession' of certain incorporeal rights.[8]

[23] However, in *Firstrand v Scholtz*[9] the Supreme Court of Appeal pointed out that the mandament had not become a catch-all remedy to protect 'quasi-possession' of all kinds of rights, irrespective of their nature. The right held in *quasi possessio* must be a right of use or an incident of the possession or control of property.

[24] In *Eskom v Masinda*[10] the Supreme Court of Appeal analysed these developments in the application of the mandament van spolie, specifically in order to decide whether Ms Masinda had *quasi possessio* of the electricity supplied to her property. It is not necessary to repeat that clear analysis here. It suffices to refer to the court's summary of the legal position:[11]

> "As was pointed out in Zulu, the occupier of immovable property usually has the benefit of a host of services rendered at the property.[12] 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 rights to receive it are 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

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8 Telkom SA Limited v Xsinet (Pty) Ltd 2003 (5) SA 309 (SCA) in [9].

9 Firstrand Limited t/a Rand Merchant Bank and Another v Scholtz NO and Others 2008 (2) SA 503 (SCA) in [13].

10 Eskom Holdings SOC Limited v Masinda 2019 (5) SA 386 (SCA).

11 Masinda *supra* in [22].

12 Zulu v Minister of Works, KwaZulu, and Others 1992 (1) SA 181 in (D) at 186 E – 190 G.

> vests in the person in possession of the property as an incident of their possession. Rights bestowed by a 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 has having been wrongly decided."

[25] Thus, a personal right that flows from a contractual nexus between the parties, is insufficient for the application of the mandament, because the order would be directing specific performance of obligations and not restore possession of property.

Metchem's case for spoliation

[26] On appeal Metchem accepted that it had to establish a right to the supply of electricity as an incident of its occupation (possession) of the premises before the Court *a quo*. Mr Klopper submitted on behalf of Metchem that it had *quasi possessio* in its capacity as a tenant. Mr Klopper argued that the agreement with Eskom, to supply electricity to the premises, was 'through' GrowthPoint. As a result, the supply of electricity was an incident of it being a tenant of the property and therefore Metchem had *quasi possessio* of the supply.

[27] Although the legal basis for the argument was not explored by Mr Klopper, it assumedly relied on the cases where spoliation orders were granted after the termination of the supply of electricity to a rented property by the landlord. However, as shown in *Masinda*[13], in those cases that were correctly decided, it was the actual possession of the property that was protected with a spoliation order where, on the facts of the matter, the service was terminated as an interference of the use of the property, in order to force a party to leave a property. The mere termination of a service provided in terms of a contract does not allow of itself for the application of the mandament.

[28] Mr Klopper was unable to give content to the supposed mechanism by which the agreement between Metchem and Eskom involved GrowthPoint. In any event, there is no factual basis on the papers for the argument. This can be illustrated with reference to Metchem's own affidavits.

[29] In the founding affidavit, Metchem's managing member stated that

> "... [t]he applicant engaged the services of the Respondent during November 2009 in terms of an agreement entered into by and between the parties for the supply of electricity by the Respondent to the applicant at its aforementioned laboratory facility."

[30] The only involvement by GrowthPoint is explained in the following terms:

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[13] Masinda *supra* in [16].

> "Initially the applicant received a monthly invoice/account issued by the respondent for the supply of electricity (account number 5624520301) through the applicant's landlord, GrowthPoint and effected payment of such monthly accounts as and when same fell due, up until approximately June 2014."

[31] Metchem attached what it termed *"a typical monthly account during the aforementioned relevant period"*, namely for February 2014, to indicate the average monthly power usage. This invoice was addressed to Metchem by Eskom, with no reference to GrowthPoint.

[32] In the replying affidavit Metchem's managing member stated:

> "However, it is clear from the relief sought in this application and the undisputed averments contained in the founding affidavit, that the Respondent spoliated the Applicant of its undisturbed use of electricity supply, in terms of an existing agreement between the parties, in circumstances where the Applicant declared a *bona fide* material dispute with the Respondent relating to, *inter alia*, the Respondent's failure, alternatively, inability to produce monthly statements reflecting the monthly use of such electricity by the Applicant for payment, on a regular basis, in accordance with the provisions of the existing agreement between the parties."

[33] She continued elsewhere in the replying affidavit:

> "Premised on the common cause facts summarised herein above, it is respectfully submitted that:
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> - An agreement existed between the parties in terms of which the applicant enjoyed power supply by the respondent to the applicant

during the relevant period, October 2014 up and until June 2019, same of which constituted peaceful and undisturbed possession;

- That a material, *bona fide* dispute existed between the parties in respect of the calculation of the applicant's monthly use of such power and the amount due and payable in accordance with the provisions of the agreement."

[34] There can be no doubt that Metchem launched the application under the mistaken impression that spoliation is available to it as a remedy in circumstances where Eskom supplied electricity in terms of a contract between the parties.

[35] The fact that electricity is supplied to a consumer at a physical location, does not render it an incidence of possession of that physical property. After all, any movable corporeal property that is to be delivered to a consumer in terms of a contract, will be delivered at a physical location. Logically it cannot be said that receipt of the item at that place equates to receipt thereof being an incident of possession or control of that place, just because it was delivered there. Similarly, the motive for receiving electricity, to be able to conduct your affairs at a particular property, also does not render it an incident of possession of the property.

[36] On its own evidence Metchem's use of electricity was pursuant to a personal right, flowing from a contract with Eskom. The mandament was not available to it.

[37] In the circumstances it is not necessary to consider the further arguments raised.

[38] There is no reason why costs should not follow the event.

Order

[39] In the result I would uphold the appeal and make and order in the following terms:

1. The appeal is upheld and the order of the Court of first instance is replaced with the following order:

"The application is dismissed with costs."

2. The respondent shall pay the costs of this appeal, including the costs of the application for leave to appeal.

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AA Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree.

DJF du Plessis
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree and it is so ordered.

ML Twala
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:	03 February 2020
Judgment:	19 February 2020

Appearances:

For the Appellant:	Advocate FJ Nalane
Instructed by:	Mogaswa and Associates Inc
For the Respondent:	Advocate JA Klopper
Instructed by:	WA Wessels Attorneys