REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2023-007015

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

……..……..... **27/02/2023……**
SIGNATURE **DATE**

In the matter between:

LATEOVITSA (PTY) LTD	**First Applicant**
TRANSCOM SERVICES (PTY) LTD	**Second Applicant**
MINX SHIPPING (PTY) LTD	**Third Applicant**
and	
EKURHULENI METROPOLITAN MUNICIPALITY	**First Respondent**
TLOTLEGO PROPERTY GROUP (PTY) LTD	**Second Respondent**

JUDGMENT

MANOIM J:

Introduction

[1] This an application brought by the sub-tenants of a property to get the local authority, the Ekurhuleni Metropolitan Municipality ("City"), to restore their supply of electricity. This at least is the essence of the relief sought although it is framed in various different prayers because the applicants seek to achieve the same result – restoration of the electric supply – but they rely on different legal bases to get there.

[2] In the first place they rely on spoliation. They thus seek the restoration of electricity as an element of possession they have been unlawfully deprived of. The second basis is a review of the decision of the City to cut their supply – in other words they rely on an administrative law remedy based on the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The third is to rely on another administrative law ground in an attempt to apply the facts the well-known *Joseph* case[1], to those of this case. In *Joseph* the Constitutional Court had ordered the City of Johannesburg to restore the supply of electricity to tenants of a building where they had paid their landlord who had not paid these amounts on to the City of Johannesburg which had then terminated supply to their building without giving them 14 days' notice.

[3] The City opposes the application on all these grounds and contends that its action in terminating the supply was lawful and in accordance with its by-laws and the case law on this issue. I heard the matter on 8 February 2023.Although the City challenged the application on the grounds of urgency, I consider the matter is urgent as the application concerns the supply of electricity to three businesses that operate from the same premises in a warehouse in Ekurhuleni.

The parties

[1] *Joseph and Others v City of Johannesburg and Others* 2010(4) SA 55 (CC).

[4] The applicants comprise three companies. The first applicant Lateovista has a lease with the second respondent Tlotlego Property Service Group (Pty) Ltd ("Tloltlego") to lease warehouse space at a property situated at 43 Houtbaai Street Elandshaven Extension 4 Germiston ("the property"). The first applicant in turn has subleases with the second and third applicants for warehouse space on the property. There is no contractual arrangement for the supply of electricity to the property between the applicants and the City, which is first respondent. Rather the contract for the supply is between the first respondent and the second respondent, Tlotlego. The Second Respondent is also the account holder of the rates, services and the local authority accounts relevant to the property with the First Respondent. To avoid the confusion of names I will from now on refer to Tlotlego as the Landlord and the first respondent as the City.

[5] The Landlord in turn in terms of its lease with the first applicant charges it for the electricity consumed on the property. The first applicant then charges the two other applicants in turn for their consumption. The applicants contend that when they are billed monthly for their electricity consumption by the Landlord, they pay the Landlord as billed, and are up to date with their payments. The three applicants make no distinction between their respective circumstances. For this reason, in this decision, I will refer to them collectively as the applicants.

[6] The applicants problem is that the Landlord has not paid the City for the electricity consumption on the property. The Landlord is engaged in a longstanding dispute with the City over the charges it has levied on the property. At present there is pending litigation. According to the applicants this dispute has been in existence prior to the applicants leasing the property in 2018. The applicants complain that their dilemma is that they are the victims of this dispute. They are not party to the litigation. They have paid for their electricity consumption, but the Landlord is not paying this over to the City.[2] The City in turn has refused the applicants proposal to bill them directly, until the outstanding balance, some R 4 million at present, has

[2] The City claims that the Landlord had made certain payments and then reversed them.

been paid. For the applicants this proposal is a non-starter. They cannot afford to pay this amount and then try to recover it from the Landlord. Hence the impasse and why they have come to court.

[7] Missing in this litigation despite being cited as the second respondent, is the Landlord. It has not opposed or supported the application or elected to abide by the outcome. The dispute is thus between the applicants and the City.

Events leading up to the application.

[8] It is common cause that on 6 September 2022 the City discontinued the supply of electricity to the property on the grounds of non-payment by the Landlord. I will refer to this as the first termination. Here is where the dispute of fact gets stranger. The applicants say the electricity was cut off for a period of 26 days after which it was restored on 3 October 2022. They can give no explanation of why this was so. According to the applicants the electricity was again terminated on 4 November. The applicants state that members of the City's department and its police attended on that day and engaged in a nasty altercation with the third applicant's security official who had protested their right to terminate. They say the supply was again reinstated on 14th November 2022. Again, there is no explanation of why this was the case.

[9] However, the City denies any knowledge of reinstating the electricity supply on 3 October nor terminating it again and later reinstating it again on 14 November.

[10] Then, and this is common cause, the electricity was again terminated on 23 January 2023 and the supply has remained cut off since then, hence this application. I will refer to this as the second termination. The City's version is that in January 2023 they were conducting a campaign to enforce payment in the City by defaulters. As part of the campaign its technical staff visited the property and discovered an illegal connection. The property was thus disconnected because of an illegal connection. A photograph accompanied the answering affidavit together

with a supporting affidavit from the technician who had seen the offending connection.

[11] In response in a supplementary affidavit accompanying their replying affidavit, the applicants have put up a version from an electrician who has inspected both the property and the photographs. In brief, his contention is that the connection shown in the photograph comes not from the switchbox on the property to which the applicants have access but from a nearby substation to which only the City has access. Therefore, the applicants contend in reply, if there is indeed an illegal connection it cannot be of their doing.

[12] Thus, to summarise the facts. It is common cause that the City terminated the electricity supply to the property on 6 September 2022 and later again on 23 January 2023. The City denies any knowledge of any restoration of supply between these two dates. The City states on 23 January, the date of the second termination, the property was receiving a supply of electricity, but this was because of an illegal connection not a lawful supply by the City. As far as the City is concerned there should have been no supply to the property since it was terminated after the first termination with this background, I will now go on to consider the various bases which the applicants raise for their relief.

Spoliation

[13] The basis for the spoliation relief is this. On 23 January 2023 the applicants submit they were in peaceful possession of the supply of electricity when the City unlawfully deprived them of it. This is by no means the first time that parties whose electricity has been terminated by a public body have sought to rely on spoliation as a remedy. In the leading case of *Eskom Holdings SOC v Masinda,* the court looked at the right of a party whose electricity has been terminated to rely on spoliation for relief. The court stated:

> *" […] 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."* [3]

[14] More recently in *Makeshift 1190 (Pty) Ltd v Cilliers* [4] a full court in the Western Cape took a wider view of the remedy. That decision poses the possibility that what constitutes an incidental right might be wider than those mentioned in the passage above in *Masinda*. The court there gave as an example where a landlord might terminate supply to in an attempt to evict a tenant without following due process. But even on this extended view the applicants cannot claim an incidental right. The Landlord here is not attempting to evict them. The City has no commercial or legal interest in evicting them - it is not their landlord.

[15] Thus, the applicants are not vested with any right that is incidental to their possession as is understood in either the *Masinda* or *Makeshift* cases. Indeed, they do not even have a personal right against the City as they are not the

[3] 2019 (5) SA 386 SCA at paragraph 22.
[4] 3 All SA 234 (WCC) at paragraphs 33 to 37.

contracting party, the Landlord is. The law on this point is clear and needs no further elaboration. The applicants cannot rely on spoliation against the city terminating the supply of electricity to the property because of their Landlord's outstanding bill.

Administrative law remedy.

[16] Mr Wentzel who appeared for the applicants argued that the decision of the City to terminate electricity to the property was reviewable under PAJA on two grounds. First, it was procedurally unfair because the City failed to notify the applicants that it was terminating the supply on 23 January 2023.

[17] The next argument was that the City did not act rationally and hence the action was reviewable on this ground. The basis for the rationality attack was that in January 2023 the City, on its own version had visited the property as part of a campaign against non-paying users and then having come to the property decided to rely on an illegal connection. Thus, it is argued the pretext for arriving to terminate and the post termination rationale given, are inconsistent, and hence the City acted irrationally.

[18] But both grounds for termination; for non-payment and for having an illegal connection, are a basis for the City to terminate its services. The fact that they may have arrived to terminate for reason and A and then found reason B to terminate existed as well, does not make the actions irrational. A non-paying customer may also at the same time have an illegal connection. The City is entitled to act in respect of the illegal connection once found even if its pretext for arriving was originally informed by non-payment.

[19] The City's by-laws make it clear that it has the power to disconnect the supply of electricity in these circumstance. The relevant by-law states:

> *"When an installation has been illegally reconnected on a consumer's premises after having been previously legally disconnected by the Council or where Council's equipment has been tampered with to prevent full registration of consumption by the meter the electricity shall be physically removed from those premises and will only be reinstalled upon payment of the applicable fee, as prescribed in the tariff charges."*

[20] On the facts before me I have to accept the City's version that there was an illegal connection to the property. The illegal connection had followed upon a previously legal disconnection. The best the applicants can contend for in the replying supplementary affidavit is to dispute whether the illegal connection was at the point of supply on the property or a nearby transformer. On either version the supply was unlawful, and had been since the supply was terminated in September 2022. The City denies ever resuming supply and the applicants are not able to explain why on two occasions since the first termination electricity was restored. Applying *Plascon- Evans* rule I must accept the City's' version that on 23rd January there was an illegal supply of electricity to the property and that the City was entitled to terminate the supply in accordance with its by-laws.

[21] Moreover, as the City has argued, the law is clear on the point that a party who receives an illegal supply of electricity is not entitled to rely on PAJA. This is clearly explained by the SCA in the case of *Eskom Holdings Soc Ltd v Sidoyi*

> *"If Eskom was correct in saying that the supply of electricity to Mr Sidoyi's house was via an unlawful connection using electrical apparatus that had been unlawfully erected and installed, it was difficult to see how the removal of that apparatus, which would have the effect of terminating the supply, could constitute administrative action as defined in PAJA. The reason was that the definition of administrative action in s 1 of PAJA requires that the action in question 'adversely affect the rights' of the person bringing the proceedings. If the means of receiving a supply of electricity is an unlawful*

connection to the electricity network there is no right or legitimate expectation to receive that supply of electricity."[5]

[22] This then disposes of the administrative law remedy. The applicants had no right to invoke PAJA in circumstances where the City terminated an unlawful supply. I now turn to the question as to whether there remains an administrative law remedy for tenants of a non-paying landlords based on the *Joseph* case.

***Joseph*'s case**. [6]

[23] Finally, the applicants seek to argue that they are similarly situated to the tenants in the *Joseph* case who got relief on public interest grounds from the Constitutional court. Like the *Cooper* applicants they assert they are victims of a non-paying landlord who they have paid for their consumption.

[24] The *Cooper* case however did not involve an illegal connection. Rather it was limited to the issue of supply termination for non-payment when the tenants had not been given notice of termination by the City of Johannesburg. The facts are thus different from the present case.

[25] In the result the applicants have failed in their application. Costs must follow cause and the City is awarded costs. The City has also sought the costs pursuant to the employment of two counsel. This case had a lengthy record despite being dealt with by way of urgency and the applicants raised a number of issues including new ones in their replying papers. Consequently, I think the employment of two counsel by the City was justified.

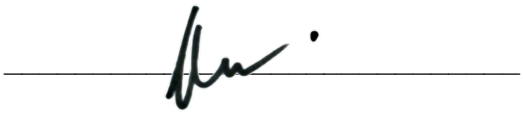
ORDER:-

[5] 2019 JDR 0963 (SCA) at paragraph 15.
[6] See footnote 1, supra.

[26] In the result the following order is made:

a. The application is dismissed;

b. The applicants, jointly and severally, the one paying the others to be absolved, are liable for the first respondent's cost including the costs consequent on the employment of two counsel.



N. MANOIM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION
JOHNANNESBURG

Date of hearing: 07 February 2023
Date of judgment: 27 February 2023

Appearances:

Counsel for the Applicants:	J H Wentzel
Instructed by.	Adv J H Wentzel Advocate with Trust Account
Counsel for the First Respondent:	X Mofokeng M O Mudimeli
Instructed by:	Galananzhele Sebela Attorneys Inc