IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A302/2012

DATE: 11/3/2013

In the matter between:

A.C JANSE VAN RENSBURG	First appellant
A.C VAN RENSBURG N.O	Second appellant
E JANSE VAN RENSBURG N.O	Third appellant

and

JACOBUS KOTZE	Respondent

JUDGMENT

MAKHUBELE AJ

INTRODUCTION

1. On 22 August 2011, the Magistrate Bronkhorstspruit issued a rule nisi in terms of which the appellants (respondents in the court a quo) were, called upon to show cause on the return date why

1.1 the respondent's (applicant in the court a quo) possession and control of and on the premises known as Tabakskuurwoning,

portion 16 of the farm Onbekend 398, Gauteng Province that include water and electricity connection to his premises should not be restored.

1.2 costs at a scale between attorney and own client, including travelling time and costs should not be awarded.

2. The rule nisi served as interim interdict whereupon the appellants were prohibited from withholding water and electricity connection to the respondent pending finalization of the matter on the return date.

3. Respondent was authorized by the Magistrate to employ the services of a certified plumber and electrician to reconnect water and electricity to his premises if the appellants fail to fail or refuse to comply with the order to restore same by 16:00 on 22 August 2011.

4. The rule nisi was confirmed on 09 September 2011. The order of the Magistrate reads as follows:

" Die aansoeke on mandament van spolie word toegestaan soos versoek, met kostes op 'n prokureur klient skaal insluitende reistyd en reiskostes an advokaatsfooie volgens die parameter van die Pretoria Balie Raad"

5. In his reasons for judgment dated 30 September 2011, the magistrate confirmed his findings of fact and reasons given ex tempore during his judgment. He emphasized the following:

5.1 The spoliation action was common cause.

5.2 It was unlawful and should be restored.

5.3 Whether the restoration of possession created an illegality was irrelevant because even a thief can be spoliated. The appellants had a responsibility to install a legal connection.

5.4 The case of **Zulu v Minister of Works, Kwazulu and Others, 1992 (1) ALL SA 45 D is** not applicable because the cause of action for supply of water was ex lege whereas in this case it was contractual. Furthermore, the judgment was delivered before the constitutional rights became applicable.

The Magistrate also dismissed the application for review of the judgment[1] on the basis that he exercised his discretion objectively and justly. He also ruled that no irregularities took place and that the order was not illegal because the case concerned spoliation and questions of illegality are irrelevant.

[1] This did not form part of the record before us.

6. The appellants launched the present appeal during February 2012. An application for condonation for late filing of the appeal was only filed on 17 January 2013, a few weeks before the appeal was heard. Counsel for the respondent informed the court from the bar that the application for condonation was not opposed.

7. The grounds of appeal are:

7.1 The Magistrate made a mistake when he made a finding that the respondent was spoliated by the appellants. Respondent had no control or occupation of the water and electricity and could thus not be spoliated, alternatively, the dispute was contractual and not about control and occupation of a physical thing.

7.2 The magistrate made a mistake when he firstly (and correctly) made a finding that the *causa* of supply was contractual, and thereafter went on to decide the matter on the basis of spoliation.

7.3 The magistrate made a mistake by rejecting the appellant's three defenses, namely;

7.3.1 that legally there has been no dispossession;

7.3.2 that the dispossession was not unlawful;

7.3.3 that restoration of control and possession was illegal and contrary to statutory provisions.

7.4 The magistrate made a mistake by effectively ordering the appellants to never cut off the respondent's electrical connection regardless of whether he fulfils his monthly obligations or not.

7.5 The magistrate made a mistake by ordering costs on an attorney and own client scale, and including travelling costs and advocate's fees, whereas it was not justified , alternatively, too severe under the circumstances.

8. Other than the issue of costs, the oral argument centered on the question of the nature of the right that respondent sought to protect by the spoliation order. Appellants' counsel argued that it is a contractual right as the Magistrate has found. The respondent's counsel on the other hand argued that it was a (*"gebruiksregte"*) personal right that is to be distinguished from the contract to rent the dwelling. I must say that the respondent's contention in papers (which we accept is an incident of possession) is that this right is included in the "verblysreg".

9. The respondent did not pursue his objection with regard to the completeness of the record of appeal. Understandably so because the issues between the parties were ventilated in the founding, answering and replying affidavit. Although a transcript of the ex tempore judgment was not made available, the reasons for judgment are clear.

BACKGROUND

10. During 2007, the respondent and first appellant entered into a verbal agreement in terms of which the latter was granted a right of tenure (*verblyfsreg)* in respect of certain premises in the farm owned by the appellants. He contends that this right included use of water and electricity that was to be supplied by the appellants. He does not mention whether this was against payment of a sum of money or for free. However, he attached, amongst other things confirmatory affidavits filed in the eviction proceedings from which I appears that he was granted a perpetual right to stay free of charge. The appellants did not clarify is issue in their opposing papers.

11. Respondent states further that on 09 June 2011 appellants served him with summons issued out of this court under case number

28302/11. The appellants seek amongst other things, an order of eviction against the respondent. He filed a notice to defend whereupon the appellants filed an application for summary judgment. The application for summary judgment was not proceeded with. Appellants granted him leave to defend the action.

He still resides in the premises. We were informed from the bar that the parties are waiting a trial date for the eviction proceedings.

12. The urgent spoliation proceedings were launched some six months later, in August 2011. The grounds of urgency were amongst others that he did not have drinking , or bath water, ablution facilities and that he relied on a neighbour, Mr. Wagner for basic needs that require water. He also stated that he is an electronic mechanic and often bring work home after hours, something he is not able to do due to lack of electricity. He also mentioned that he would not be able to extinguish a fire in his house or in the veld nearby due to lack of water. He also required electricity to charge his cellphone battery and that without a cellphone his security is compromised because he cannot switch on the lights or make emergency calls.

13. The events leading to the cutting off water and electricity connection to respondent's premises are not in dispute.

Respondent states that this happened on 11 February 2011 whilst he was at work. He did not receive prior notice or warning.

14. In their opposing affidavit, the appellants admitted that the respondent was in possession and control of the premises, but deny that the use of electricity and water was part of the agreement to occupy the said premises.

Appellants did not offer any explanation of the nature of arrangement with regard to the use of water and electricity. His wife and another deponent whose affidavit is attached to their opposing papers contradict the explanation offered by first appellant.

15. First appellant admitted that he cut off the electricity connection to respondent's premises without notice, warning or allowing him an opportunity to make representations. It is contended that the water supply was not cut off, but that it automatically goes off when there is no electricity supply. Apparently the water comes from a borehole and is pumped by an electric pump.

16. The appellants (through the affidavit deposed by the first appellant) contend that the electricity supply was disconnected because the

connection was illegal and had become unsafe for the first appellant and his wife. Apparently, his wife experienced a "*geweldige elektriese skok"* whilst taking a bath sometime in the rainy season, September 2010.

16.1 They also experienced power outages but could not locate the cause of the problem. The first appellant, after investigations discovered that the problem *"le by die additionele Elekriesiteit koppeling van die Applicant".*

After disconnecting the cable, all electrical problems they had been experiencing came to an end. He removed the cable because according to him it was dangerous and illegal.

16.2 First appellant's wife, does not support his version and reasons for disconnecting the respondent's electricity supply. Engela Elizabeth Janse Van Rensburg deposed to an affidavit (not commissioned) [2] and confirmed the problems with regard to the power outages. She indicated further that her husband went to the respondent's premises on 30 January 2011. She overheard her husband's conversation with the respondent.

[2] Page 88 of the record

According to her, her husband gave the respondent a final warning to pay his arrears for electricity before 5 pm on 31 January, failing which the electricity supply would be disconnected. Respondent at the time owed R8921.95 for electricity.

17. Another uncommissioned affidavit deposed by an unnamed[3] "*vrou"* who describes herself as a trustee of the Albertus Janse Van Rensburg was also filed in support of the appellants' case.

The *"vrou"* stated that the Trust never bought electricity from Eskom, hence it could not supply it to respondent.

She also stated that water is pumped by electricity and as such it could not be supplied to respondent.

18. The respondent contends that first appellant switched off his electricity with a view to drive him out of the premises Although the first appellant denies this, I find the respondent's version more probable. It is supported by Mrs. Van Rensburg's version that her husband told him to his arrears before 5 pm on 31 January. Indeed the electricity was disconnected on 01st February.

[3] p.87 of the record

A further indication that the actions were intended to drive him out of the property is that eviction proceedings were also launched against the respondent some three months thereafter. This, in my view supports the respondent's version that the intention of cutting off the electricity supply was to drive him out of the property.

19. First appellant relies on Electricity Installations Regulations to justify his actions of cutting off the electricity supply to respondent's premises. He maintains that he has an obligation, as the person to whom the electricity was registered to disconnect the illegal connection because it was not safe.

This in my view also suggests that he took the law into his own hands because he believed he had a right to do so in terms of Electricity Installations Regulations issued by the Minister of Labour on 06 March 2009 by Notice No. 242 in Government Gazette Number 3195. He contends that the Eskom connection is in his name and he would be criminally liable if it were to be found that there are illegal connections in his premises. I reject this version.

20. Respondent filed a replying affidavit and raised objections with regard to the affidavits of first appellant's wife and the "vrou" as I have

indicated above. Another affidavit allegedly deposed by Mr. Wagner, his neighbour was not attached. The copy in the record only bears a police station stamp, but was not commissioned.

21. Respondent, in his replying affidavit disputed the applicability of the Electrical Regulations in as far as he was concerned.
He also challenged the respondents to produce their Eskom account and a certificate of compliance . He also denied that the electricity connection to his premises was illegal. He also denied that a "*verblysreg*" was a personal servitude and that it had to be registered.
I have already indicated that the transcribed record was not made available, as such we do not know how the objections were disposed. It does not make a difference in any event because the merits of the dispute are irrelevant in spoliation proceedings. The magistrate gave his reasons and it is clear that he made a finding that there was a contract between the parties.

22. The respondent maintains that the use of water and electricity was acquired at the same time when he was granted a right to use the premises during 2007. The first respondent does not state when he first noticed the alleged illegal connections.

Their residences appear to be close to each other Mrs. Van Rensburg could overhear a conversation between the respondent and the first appellant when he went to give him a final warning with regard to his arrears. I find it hard to believe that the first appellant was unaware of the electrical connection until he discovered it sometime in September 2010. Furthermore, the first appellant indicated in his opposing papers that the respondent used to do some electrical work for him in the property.

The most probable version is that the supply was cut off because the respondent was in arrears.

23. I am satisfied that the right to use water and electricity is included or part of the "*verblyfsreg"* and not a separable contract. The denials by the respondent in this regard do not raise a real, genuine or bona fide dispute of fact.[4]

[4] Room Hire Company (Pty) ltd v Jeppe Mansions (Pty) ltd 1949 (3) SA 1155 (T) at 1163-5

24. Respondent's right to the supply of water and electricity flows from the right to occupy the premises and as such it is an incident of the occupation.[5]

25. Respondent has attached confirmatory affidavits filed in the eviction application to support his contention that the right to occupy included free provision of electricity and water. In this regard, I am satisfied that the respondent has discharged his onus with regard to the nature of his right. Appellant's contention that the alleged illegal connection was discovered in September 2011, four years after respondent first occupied the premises is far-fetched.

25.1 I have already referred to the proximity of the houses / premises occupied by the first appellant and the respondent.

The version of the respondent that he has always had water and electricity supply is more probable and credible.[6]

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[5] See : Naidoo v Moodley 1982(4) SA 82 (T), Froneman v Herbmore Timber and Hardware (Pty) Ltd 1984 (3) SA 609 (W)
[6] Plascon Evans Paints v Van Riebeck Paints 1984 (3) SA 623 (A)

26. In their heads of argument, the appellants argue that the actions of disconnecting the electricity supply constitute counter spoliation because the connection was illegal.

This argument does not assist the appellants because there is no evidence to suggest that the alleged counter spoliation was done instantly. It is common cause that the applicant had been in possession since 2007 and the electricity was cut off in 2011. There is no evidence to suggest that the appellants were not aware of the electricity connection throughout these years.

27. It was further argued on behalf of the appellants that the remedy of spoliation should not have been granted because respondent instituted the proceedings after a six months delay.

This, in my view is not fatal.

In Jivan v National Housing Commission 1977 (3) SA 890 (W) at 892H–893C it was held that:

> *"In my view the remedy of a mandament of spolie, based on the maxim spoliatus ante omnia restituendus est, grew as a new and distinct concept of the Roman-Dutch law in South Africa over the last century and a quarter, and there is no authority to state categorically that the order cannot be sought if the applicant had*

allowed a year to elapse after the interruption of his possession occurred, nor could it be concluded that relief could not be refused on account of delay to an applicant who had not delayed for a full year to launch his application for a mandament of spolie.

In my view the Court has discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing of such application.
In exercising this discretion I think the bar imposed after one year in respect of the mandament consequential upon complaint is a guide to modern practice.

If an applicant delayed for more than a year before bringing his application for a mandament of spolie, there would have to be special considerations present to allow such applicant to proceed with his application, and conversely, if an application was brought within the period of one year after interruption of the possession, special circumstances would have to be present before relief could be refused merely on the ground of excessive delay.

In the present matter the delay of eight months before the petition was launched is not so gross, nor had it such self-defeating consequences, that, on this ground alone, relief should be refused to the applicant."

After referring to De Villiers v Holloway, (1902) 12 C.T.R 566 at p.569 the Court said the following at 893H:

"It is conceivable that the delay of an applicant to bring his petition either confirms or displays a state of mind in which the applicant acquiesced in the alleged disturbance of his possession, and, in such an event, I am satisfied that he would not be entitled to a mandament of spolie."

28 The respondent has been in occupation of the property and enjoying provision of water and electricity since 2007.

Appellants, in their version realized that there was an illegal connection of electricity in his premises (a fact I have already rejected) in September 2010 but waits until February 2011 to disconnect it.

Even after disconnecting the services, they waited until June 2011 to bring eviction proceedings against the respondent.

In my view, respondent was entitled to adopt a wait and see attitude because similarly, the appellants did not act instantly when they , in their own version realized that he was utilizing electricity illegally.

LEGAL PRINCIPLES OF *MANDAMENT VAN SPOLIE.*

29. The historical principles underlying mandament van spolie were laid down in the judgment of Innes CJ in Nino Bonino v De Lange[7] as follows:

> *"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute"*

30. The principles as enunciated in the historical case of Nino Bonino remain constant, however, the controversy that gives rise to differing view points in various judgments is the classification of the nature of the right that the remedy seeks to protect.

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[7] 1906 TS 120 at 122

In the Namibian appeal case of **Horst Kock t/a Ndovu Safari Lodge v R Walter t/a Mahangu Safari Lodge and Others**[8] , LANGA AJA examined historical and current authorities on the remedy of *mandament van spolie.*

Langa AJA summarized the various judgments as follows:

> *[4] The remedy has found recognition in the modern Namibian common law (Ruch v Van As 1996 NR 345 (HC) and it is trite that it is available to protect possession. (Kuiiri and another v Kandjoze and others 2007 (2) NR 749; Nino Bonino v De Lange 1906 TS 120; Nienaber v Stuckey 1946 AD 1049; Yeko v Qana 1973(4) SA 735 (A); Shoprite Checkers Ltd v Pangbourne Properties Ltd 1994(1) SA 616 (W)). What gives rise to controversy is the nature and ambit of the remedy. What is clear is that since it is a possessory remedy, it serves as a counter against spoliation. (Silberberg and Schoeman: The Law of Property, 5th edition at 287).*
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> *Its purpose is to provide robust and speedy relief where spoliation has occurred to restore the status quo ante because, as stated by Van Blerk JA in Yeko v Qana, 1973(4) SA 735 (A), of the "…fundamental principle that no man is allowed to take the law into his hands and no one is permitted to dispossess another forcibly or*

[8] SA 20/2009 [2010] NASC 12 (26 October 2010)

wrongfully and against his consent 'of the possession of property, whether movable or immovable' ...." In Shoprite Checkers Ltd v Pangbourne Properties 1994(1) SA 616 (W) Zulman J stated:

"It is trite that the purpose of the mandament van spolie is to protect possession without having first to embark upon an enquiry, for example, into the question of the ownership of the person dispossessed. Possession is an important juristic fact because it has legal consequences, one of which is that the party dispossessed is afforded the remedy of the mandament van spolie..."

[5] Does the protection of the mandament van spolie extend to incorporeals? In Nienaber v Stuckey 1946 AD at 1056 it was held that the possession of incorporeal rights is protected against spoliation and in Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi 1989 (1) 508 (A), the Appellate Division of South Africa held that the mandament van spolie is available for the restoration of lost possession in the form of quasi-possession which, in that case, consisted in the actual use of a right of servitude. I understand this to refer to the limited role of the mandament van spolie and to mean that although an incorporeal thing like a servitude was incapable of physical detention, it was indeed capable of being quasi-possessed by the actual use of the servitude. Hefer JA stated that, "[t]he status quo that the spoliatus desired to restore by means of the mandament van spolie was the factual exercise of the servitude, and not the servitude itself." What one extracts from these decisions, and others

such as Shoprite Checkers supra, Zulu v Minister of Works, KwaZulu and Others, 1992 (1) SA 181 (T) is that the true purpose of the mandament van spolie is not the protection and vindication of rights in general, but rather the restoration of the status quo ante where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of. Thus in Zulu, where the applicant had sought an order for the respondent to supply him with water, the Court held that the applicant had never had possession of the water and could not therefore found his claim on loss of physical possession. Mandament van spolie had no role there. As a concept or a form of relief, it is not concerned with the protection of rights "in the widest sense" but with the restoration of factual possession of a movable or an immovable. This extends to incorporeals such as the use of a servitudal right. It is the limited nature of the scope of the mandament van spolie that excludes, for instance, the right to performance of a contractual obligation from its operation. (See also Plaatjie and Another v Olivier NO and Others, 1993 (2) SA 156 (O) at 159F). These principles, with which I respectfully agree, were further clarified, specifically in relation to quasi-possession, in ATM Solutions (Pty) Ltd v Olkru Handelaars cc and Another, 2009 (4) SA 337 (SCA) at 340 - 341 where Lewis JA quoted with approval remarks by Malan AJA in the First Rand Ltd t/a Rand Merchant Bank and Another v Scholtz NO

and Others, 2008 (2) SA 503 (SCA) at p 510:

"... The cases where quasi-possession has been protected by a spoliation order have almost invariably dealt with rights to use property (for example, servitudes, or the purported exercise of servitudes ... or an incident of the possession or control of the property. The law in this regard was recently succinctly stated in First Rand Ltd v Scholtz (footnote omitted) where Malan AJA pointed out that - ... [t]he 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 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 specific obligations is claimed. Its purpose is the protection of quasi-possession of certain rights. It follows that the nature of the professed right, even if it indeed not be proved, must be determined or the right characterized to determine whether its quasi possession is deserving of protection by the mandament." (See also The Three Musketeers Properties (Pty) Ltd and Another v Ongopolo Mining and Processing Ltd and 2 Others (unreported) Supreme Court case SA 3 of 2007.

Finally, spoliation is committed also when a co-possessor unlawfully takes over exclusive control of the thing. (See Du Randt v Du Randt 1995 (1) SA 401 (O)"

31. Even assuming that there was a tenant and landlord relationship between the parties, appellants would not have been entitled to simply

switch off the water supply and cut off the electricity connection without affording the respondent an opportunity to make representations or at least give him a warning or notice. Of course the nature of the notice or warning would depend on the terms of the agreement. In the matter of City of Cape Town and Marcel Mouzakis Strumpher,[9] the appeal court held that spoliation proceedings were the correct remedy under the circumstances because the appellant had disconnected services not only in contravention of the respondent's constitutional rights to water, but also its own dispute resolution procedures.

32. The facts of this case are distinguishable from the cases which appellant seeks to rely on. In casu, the right to occupy the premises is linked to the provision of water and electricity, unlike in the First Rand Limited[10] case where the appeal court found that the respondents were disposed of a contractual right that had expired.

The Water Conveyance Agreements were separate from any other rights, statutory or otherwise that they had. These agreements were separate and entered into at intervals. The situation in that case would not be applicable or similar to most landlord and tenants agreements.

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[9] (104 / 2011) {2012} ZASCA 54 (30 March 2012).
[10] First Rand Limited t/a Rand Merchant Bank and Another v Blyde River Water Utility and Others 2008 (2) SA 503 (SCA) at paragraph 16.

33. I have already made a finding that the provision of water and electricity in this case is an incident of possession and occupation of the premises. As such, I do not agree with the appellants that respondent sought to enforce a contractual right by way of spoliation proceedings.

In the ATM Solutions [11]case, the appellant sought re-installation of its ATM machines, and by the nature of the relief sought, it is clear that this is a case of specific performance. The appeal court correctly held that an order of mandament van spolie was not the correct remedy.

WHETHER RESTORATION OF RESPONDENT'S POSSESSION PERPETUATES AN ILLEGALITY

34. Appellants contend that restoring respondent's possession would perpetuates commission of an offence by the first appellant because he is obliged by the Electricity Installation Regulations to ensure that there are no illegal connections and that the connections are safe. Failure to comply, so the argument goes, exposes him to criminal prosecution to which he may be fined or incarcerated in prison.

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[11] ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another 2009 (4) SA 337 (SCA).

In the matter of **Ivanov v North West Gambling Board**[12], the issue was, amongst others whether possession that was prohibited by statute, notably, the National Gambling Act should be restored by spoliation order.

The appeal court, per Mhlanta JA, held[13] that:

> *"the aim of spoliation is to prevent self-help. An applicant upon proof of two requirements is entitled to a mandament van spolie restoring the status quo ante. The first proof that the applicant was in possession of the spoliated thing. The cause for possession is irrelevant- that is why possession by a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant, as that would go to the merits of the dispute"*

The court referred to various old authorities, amongst others Bon Quelle (edms) BPK v Munisipaliteit van Otavi[14] wherein the following was stated:

> *"Die mandament van spolie is n' besitsremedie waarvan die beperkte en uitsluitlike funksie is om die herstel van status quo ante te bewerk-stellig (Oglodzinski v Oglodziski 1976 (4) SA 273 (D) op 274F-G) en daarom kom dit nie daarop aan dat die spoliator n'*

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[12] 2012 (6) SA 67
[13] Paragraph 19
[14] 1989 (1) SA 508 (A)

sterkter aanspraak op besit as die gespolieerde mag he nie of dat laasgenoemde inderdaad geen reg op besit het nie. Die beginsel is eenvoudig: spoliatus ante onmia restituendes est ongeag die partye se daadwerklike regte op besit"

OTHER DEFENCES RAISED

35. Appellants contend that the respondent was not in peaceful possession. Their argument is mainly based on the fact that the electrical supply was connected illegally. However, and as various authorities indicate, the cause of possession is irrelevant.

36. The next question is whether the dispossession was wrongful. It is abundantly clear from the evidence and appellants' own version that the first appellant believed that he had a right to disconnect the electricity supply because he was ultimately accountable to Eskom for any illegal connection in his property.
As I have already indicated above, the question of illegality is irrelevant.

37. The next issue for consideration is the finding by the magistrate that the respondent's cause of action was contractual.

The appellants contend that this finding was correct, however, the magistrate erred by granting a spoliation order because it amounts to ordering specific performance. This argument is self-destructive because on the other hand the appellants deny the existence of a contractual relationship for provision of water and electricity.

38. Although the magistrate has mischaracterized the cause of action, this does not detract from the fact that spoliation order was the correct remedy under the circumstances.

39. Appellant's counsel argued that there were dispute of facts with regard to the issue of the contract and that the Magistrate should have referred the matter for oral evidence. We were urged that the correct order to make under the circumstances is to refer the matter back for oral evidence in this regard.

This approach or such an order in my view would defeat he purpose of spoliation proceedings. Going into the disputes would obviously delay the proceedings. We were advised from the bar that the eviction proceedings are pending. This is where the merits of respondent's contentions that he was granted free access to water and lights will be examined. Theirs was an oral agreement, as such they will have an opportunity to prove the terms thereof.

40. I am satisfied that the respondent was entitled to an order of mandament van spolie.

I would accordingly dismiss the appeal; save to the extent set out hereunder with regard to costs in the court a quo.

COSTS

41. The last issue for consideration is costs. Appellant's counsel argued that even if the respondent were to succeed, costs should not follow the event because the Magistrate mischaracterized the nature of his right as contractual. It was argued further that the appellants were entitled to approach the court because the order is incorrect if the findings made by the magistrate (with regard to the nature of the respondent's rights) is correct.

I have already stated that the mischaracterization of the nature of the right is of no consequence because I have accepted the version of the respondent as more probable than that of the appellants. The appellants' case is founded on the opposing affidavit deposed by the first appellant. On his version, he cut off the electricity because it was illegal and not safe. His wife and another deponent introduced different versions. His wife came up with an allegation of arrear payments for electricity as the reason for cutting off the electricity.

The respondent alleged, and attached affidavits to the effect that he was entitled to free electricity and accommodation. The onus then shifted to the appellants to gainsay this.

Even on their own version, the respondent, in my view was entitled to prior notice and warning.

42. Appellants contend that there was no justification for the punitive cost order that included counsel's travel time and costs. In the alternative, it was argued, the cost order was harsh under the circumstances.

43. The respondent's counsel on the other hand argued that the cost order made by the Magistrate should not be disturbed because the appellants acted with mala fide when they cut off the electricity and water supply to respondent's premises. This was done to force him out of the property.

44. Although I have excused respondent's delay in launching the spoliation proceedings, I do not think that the punitive cost order was justified.

Appellants realized that they were wrong to take the law into their own hands, and although they did not restore the electricity voluntarily, they

instituted eviction proceedings to resolve the impasse between the parties. The spoliation proceedings were instituted two months after the eviction proceedings.

45. The magistrate did not give reasons for the punitive cost order or why counsel's travel time and costs should be borne by the appellants. There is nothing in the record to at least give us an indication of how the magistrate exercised his discretion with regard to costs.

46. For these reasons, I think the appeal in as far as the punitive cost order is concerned should succeed.

47. On the question of costs of this appeal, I do not think that appellants' success is sufficient enough for them to escape paying costs. For this reason, respondent is entitled to costs of appeal.

48. The order of the magistrate is substituted as follows:

> "*Die aansoeke om mandament van spolie word toegestaan soos versoek, met kostes op party en party skaal*"

49. In the premises, I make the following order:

49.1 Condonation for late filing of the appeal is hereby granted;

49.2 Save for the punitive cost order, the appeal is dismissed with costs.

MAKHUBELE AJ

Acting Judge

I agree

ALBERTS AJ

Acting Judge

APPEARANCES:

APPELLANTS:

Advocate Z Schoeman, instructed by Marius Coertze Attorneys.

RESPONDENT:

Advocate A Le R Stemmet, instructed by D S Goosen Attorneys.