**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

**CASE NO: A 248/22**

In the matter between:

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| **FRANCOIS TURNER** | **First Appellant** |
| **TURNER PLANT & HARVEST CC** | **Second Appellant** |

And

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| **NOBHAKE CHRISTINE NTINTELO** | **First Respondent** |
| **VICTOR MACINGWANE** | **Second Respondent** |

Heard: 17 February 2023

Delivered: 8 March 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII.

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**JUDGMENT**

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**LEKHULENI J *et* ADAMS AJ**

## 1. INTRODUCTION

[1] This is an appeal against a final spoliation order granted by the Hopefield Magistrates Court on 14 July 2022. On 04 February 2021, the respondents brought an *ex parte* application for a rule nisi. They sought an order directing the appellants to immediately restore the water and electricity supply to their house, which is situated at D[...] farm in Hopefieldt. An interim order was granted calling upon the appellants to show cause on 08 April 2021 why the rule nisi should not be made final. On the return date, 8 April 2021, the first appellant ("Mr Turner") appeared in court, and the respondents were in default. Mr Turner informed the court that he intended to apply for a postponement to file opposing papers to the application; however, since the respondents were not in attendance, he applied that the matter be removed from the roll and that the interim order must not be confirmed. As it happened, the court *a quo* struck the matter off the roll and ordered that the interim order is not confirmed.

[2] Pursuant to that, on 11 April 2022, the respondents brought an application in terms of rule 31(2)(a)(ii) of the Magistrate's Court rules in which they applied for the reinstatement of their application. Importantly, the respondents attached a draft order to their reinstatement application in which they sought an order reviving the interim order granted on 04 February 2021 and reinstating their application for hearing on 19 May 2022. On 14 April 2022, the court *a quo* granted the reinstatement application and revived the interim order. On 19 May 2021, the parties agreed to postpone the matter to 14 July 2021 for arguments. After hearing arguments on 19 July 2022, the magistrate confirmed the interim order in a concise and succinct judgment. It is this order that the appellants seek to assail in this court.

## 2. BACKGROUND FACTS

[3] The facts giving rise to this case can be summarised briefly as follows: The respondents started working on the D[...] farm 23 years ago when the previous owner of the farm Isaak Rust owned the farm. The farm was sold to Mr Turner six years ago. The respondents were employees of Mr Turner. On 04 August 2020, Mr Turner attended the respondents' house and informed them that they did not have to report for duty because there was no work for them. Mr Turner did not explain to the respondents the reasons thereof.

[4] On 10 August 2020, the respondents went to the Department of Labour in Vredenburg to lodge a complaint. A labour consultant tried to intervene to no avail. On 05 September 2020, Mr Turner gave the respondents retrenchment notices in terms of section 189 of the Labour Relations Act 66 of 1995 ('the LRA'). Consultation occurred on 14 September 2020, and the respondents' employment contract was terminated on 19 September 2020. The respondents aver that Mr Turner delivered the retrenchment notices and further informed them that their retrenchment package would not be paid out until the respondents vacated the farmhouse they occupied.

[5] The respondents aver that Mr Turner intensified his harassment to have them vacate the farm. He visited the respondents on 30 October 2020 and told them to vacate his house. On 31 October 2020, he revisited them and told them that they must leave his farm house. On 4 November 2020, Mr Turner arrived with the police at the respondents' house to evict the respondents' daughter. After the police ascertained that the respondents' daughter had stayed there all her life, they refused to get involved. They told Mr Turner that he must approach the court for an eviction order. The respondents aver that Mr Turner became rude and threatened to lay criminal charges against them and to cut off their house's water and electricity supply. On the same day, at 18h00, the respondents noted that their water and electricity supply was cut off.

[6] On 5 November 2020, Mr Turner came to the farm. At that time, the second respondent was standing at the electricity box when Mr Turner arrived. Mr Turner told the second respondent that he was wasting his time looking at the electricity box because he (Mr Turner) had cut off the water and electricity supply. He informed them that all they needed to do was to vacate the farm.

[7] The respondents averred that the cutting off their water and electricity supply to their house violated their human rights, especially the right to water. In particular, the respondents asserted that since Mr Turner disconnected their water and electricity supply, they have been suffering because it is a struggle to cook and make the bottle for their baby. Furthermore, they had to store the baby's medication in the

fridge of another farm worker who lived quite far from their house and had to go and fetch it every time it had to be administered to the baby.

[8] Meanwhile, Mr Turner avers that he is in charge of the day to day activities of the farm and responsible for the human resources of the second appellant. Mr Turner admits that he bought the farm from the previous owner, Mr Isaak Rust. He states that the respondents moved onto the farm in 1999. He vehemently denied the allegations of the respondents that he did not pay their severance packages as he attempted to evict them from the farm. Instead, he averred that there was a dispute regarding the calculation used for severance packages, and that the packages could only be paid once the dispute was resolved. Mr Turner denied that he harassed or tormented the respondents to vacate the farm. He further denied that he cut off the electricity and water supply into the respondents' house as alleged. Instead, on or about 4 November 2020, he noticed that they had no electricity. Upon inspection, it was discovered that a third party had stolen the copper cables which supply the houses with electricity. As a result, the pumps which supplied water to both houses burnt out, resulting in no water supply running to the houses.

[9] According to him, the person against whom the spoliation order should be brought is the person who stole the cables, not the appellants. Mr Turner contends that placing the burden on the appellants for purchasing and laying a new cable is irrational, as the responsibility of doing such falls with Eskom. He stated that he tried drilling a borehole to supply both houses with water. Unfortunately, the borehole drillers were unable to find usable water. He then installed a water tank near the respondents' house and filled it with water. The tap to the tank was repeatedly left open, allowing the water to gush across the garden. In his view, the respondents did this out of malice and to spite him.

[10] Mr Turner asserted that when the water was finished in the tank, the respondents demanded it be refilled. He averred that the respondents paid for water and electricity while working on the farm. Since their dismissal, the respondents insisted that they be provided with water and electricity for free and that this was not the position prior to the termination of their employment. He contends that it is illogical that he must now cover the water and electricity costs because the

respondents no longer want to pay for it. Furthermore, the respondents were provided with a gas bottle to cook. When the gas was finished, he refilled the bottle. Thereafter, he advised the respondents that henceforth, they had to pay for the refills, and the respondents refused. Mr Turner further averred that the respondents were given battery-operated lights and spare batteries in addition to the gas bottle. The spoliation application was made when the respondents no longer wanted to pay for additional water, gas refills, etc.

**3. GROUNDS OF APPEAL**

[11] The appellants' grounds of appeal can succinctly be summarised as follows:

11.1 That the court *a quo* misdirected itself in finding that the appellant had spoliated the respondents by damaging the water and electricity infrastructure. The appellants contend that the court *a quo* erred in failing to find that an unknown third party and not the appellants caused the occupiers to be deprived of their rights of use of water and electricity supply to their home.

11.2 That the court *a quo* misdirected itself in granting an order of specific performance to the effect that the appellants, the lessor of the respondents, were responsible for repairing the damaged infrastructure.

11.3 That the court *a quo* erred in reviving *mero motu* a rule nisi issued on 04 February 2021 in terms of rule 31(2)(a)(ii) of the Magistrates Court Rules.

11.4 That the amended rule 31(2) did not apply to the respondents' application for reinstatement and that the court *a quo* misdirected itself on a matter of law in granting the reinstatement order on 14 April 2022 in terms of the amended rule 31(2).

**4. SUBMISSIONS BY THE PARTIES**

[12] Mr Du Toit, who appeared on behalf of the appellants, submitted that the court *a quo* did not make a conclusive finding that Mr Turner damaged the electrical cables but merely postulated the same as a potential alternative version of events. Counsel submitted that there was a dispute of facts on who damaged the electrical cable. The respondents' founding papers contained no allegation that Mr Turner damaged the electrical and water infrastructure himself. To this end, counsel submitted that the court *a quo* misdirected itself on a factual finding by ruling that the appellants damaged the electrical and water infrastructure. Mr Du Toit further contended that Mr Turner denied that he damaged the infrastructure or disconnected the water and electrical supply to the respondents' house. Instead, the electrical cables were stolen by an unknown third party, and the pumps supplying water to the respondents' house had burnt out due to the lack of electricity.

[13] At the hearing of this appeal, Mr Du Toit raised a new ground of appeal predicated on a point of law. He submitted that the respondent's application commenced on 03 February 2020 and concluded on 08 April 2021, when the court struck off the matter from the roll due to the non-appearance of the respondents. Those proceedings, so the contention proceeded, happened before the amendment of Rule 31(2) of the Magistrates Court Rules on 17 December 2021. To this end, counsel submitted that the amended rule 31(2) did not apply to the respondents' application for reinstatement and that the magistrate misdirected himself on a matter of law in granting the reinstatement order on 14 April 2022 in terms of the amended rule 31.

[14] Mr Du Toit argued that a spoliation order is purely a possessory remedy that does not cover the enforcement of personal rights. Saliently, so the argument went, the court *a quo* impermissibly founded the spoliation order on specific performance of the appellants' contractual obligations to maintain the water and electric infrastructure of the leased house. It was also argued that the court *a quo* misdirected itself on a point of law by *mero motu* granting the revival of the discharged rule nisi, notwithstanding that there was no prayer in the notice of motion for the revival of the rule nisi and without considering the prejudice the said revival would cause to the appellants.

[15] Ms Adhikari, who appeared for the respondents, submitted that the respondents did not claim to have possessed the physical infrastructure to channel water and electricity to their home. Instead, they sought to restore their incorporeal electricity and water use rights. Ms Adhikari submitted that it was common cause that the respondents were in peaceful and undisturbed possession and that they were despoiled of their possession. The question is, who did it? Counsel submitted that on 04 November 2020, Mr Turner, in the presence of SAPS, tried to unlawfully evict the adult daughter of the respondents from the farm and when he was told by SAPS that he required a court order and that they would not assist him in his attempted unlawful eviction, he threatened to cut off the respondents' water and electricity supply.

[16] Later that same day, the respondents' water and electricity supply was in fact, terminated. The following day, 05 November 2020, Mr Turner told the second respondent that he had cut off the respondents' water and electricity. Ms Adhikari submitted that Mr Turner failed to respond to these damning allegations in his opposing affidavit, which is fatal to the opposition to the spoliation application.

[17] It was also submitted that Mr Turner should have explained how he restored the water and electricity supply to his house and why he could not do the same for the respondents. Ms Adhikari contended that the respondents were occupiers in terms of the Extension of Security of Tenure Act 62 of 1997 ('ESTA'). As such, they have a real right in land. Their use of water and electricity was incidental to their possession of the property. Counsel argued that the submission by the appellants' counsel that it was not competent for the magistrate's court to revive the rule nisi and further extend it was entirely misconceived as the interim order granted on 14 April 2022 was, in fact, a draft order which was attached as an annexure to the reinstatement application. Furthermore, when the application as well as the interim order were reinstated on 14 July 2022, the court *a quo* considered that application and granted the final order.

## 5. ISSUES FOR DETERMINATION

[18] The issues for determination in this matter are the following:

18.1 Whether or not the court *a quo* erred in finding that the appellant had spoliated the respondents by cutting off the water and electricity supply to their house despite an alleged dispute of fact on the papers?

18.2 Whether or not the court *a quo* granted an order of specific performance to the effect that the appellant, the lessor of the respondents, was responsible for repairing the damaged infrastructure.

18.3 Whether the court *a quo* was correct in considering the reinstatement application in terms of rule 31(2)(a)(ii) as amended on 17 December 2021?

18.4 Whether the court *a quo* erred in reviving the rule nisi issued on 04 February 2021 in terms of rule 31(2)(a)(ii) of the Magistrate's Court Rules.

## 6. THE APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[19] For convenience, we will discuss the issues in dispute sequentially.

***Whether or not the court a quo erred in granting the final order despite a dispute of facts on the papers.***

[20] It is well established that the *mandament van spolie* is an extraordinary and robust remedy that protects peaceful and undisturbed possession against unlawful spoliation. *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A). It is a speedy remedy that is designed to provide summary relief. Spoliation is the wrongful deprivation of another's right of possession. Spoliation orders ensure that no man takes the law into his own hands. *Mankowitz v Loewenthal* 1982 (3) SA 758 (A). If he does so, the court will summarily restore the status *quo ante* as a preliminary step to any investigation into the merits of the dispute. *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA).

[21] A court hearing a spoliation application does not concern itself with the parties' rights (whatever they may have done) before the spoliation took place. *Top*

*Assist 24 (Pty) Ltd T/A Form Work Construction v Cremer and Another* [2015] 4 AII SA 236 (WCC) (28 July 2015) para 33. It merely enquires whether there has been spoliation; if there has been, it restores the status quo ante. The sole requirements are that the dispossessed person had possession of a kind that warrants the protection accorded by the remedy and that he was unlawfully ousted. See *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (5) SA 61 (SCA) para 6; *Ivanov v North West Gambling Board* and Others 2012 (6) SA 67 (SCA) at 75 B – E. All that must be proved is the fact of prior possession and that the possessor was deprived of that possession unlawfully. The onus rests on the applicant to prove these two requirements. *Microsure (Pty) Ltd v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N) at 64E.

[22] Originally, the mandament only protected the physical possession of movable or immovable property. However, over the years and in the course of scientific development, it was extended to cover the so-called 'quasi-possession' of certain incorporeal rights, such as servitutal rights, and incidents of possession, such as electricity and water supply cases. See *Telkom SA Ltd v Xsinet (Pty) Ltd* (*supra*), para 9. But not all incorporeal rights may be the subject of spoliation. *Eskom Holdings SOC Ltd v Masinda* 2019 (5) SA 386 (SCA) para 14. For instance, the quasi-possession of purely personal rights or specific performance of contractual obligations do not enjoy protection under this possessory remedy.

[23] In *casu*, the court *a quo* found that the respondents possessed the incorporeal rights to the use of water and electricity. The court *a quo* also found that the respondents have been deprived of possession of the rights mentioned above. it is common cause that the respondents have occupied the D[...] farm since 1999; at the time, it was still owned by the previous owner, Mr Rust. It is not in dispute that the respondents were in peaceful and undisturbed possession of the right to use water and electricity at their home from their occupation until 4 November 2020, when their water and electricity supply was disconnected. The respondents aver that the appellants disconnected or cut off their house's water and electricity supply.

[24] Mr Turner, on the other hand, does not dispute that the respondents have been unlawfully deprived of the use of water and electricity at their house. However,

he denied that he was the one who disconnected or cut off the water and electricity supply to the respondents' house. In amplifying his denial, Mr Turner asserted that an unknown person was responsible for the spoliation. He contended that he would be prejudiced should he be ordered to pay the costs for the water and electricity for the respondents when that was not even the arrangement prior to the termination of the respondents' employment.

[25] As correctly pointed out by Ms Adhikari, the only relevant factual issue for determination is whether the appellants spoliated the respondents, and if so, whether the restoration of the respondents' rights is impossible. The respondents' application is predicated on the events that unfolded on 04 and 05 November 2020. The respondents averred that on 04 November 2020, Mr Turner arrived with the police to evict the respondents' daughter. The police told him they could not help him and that he must approach the courts for an eviction order. In the presence of the police, Mr Turner became rude and threatened to lay criminal charges against the respondents and to cut off the water and electricity supply to the respondents' house. On the same day, at 18h00, the respondents contend that their water and electricity supply was disconnected. The averments of the respondents were corroborated by Capt. Adams, who was present when the appellant visited the respondents. Capt. Adams confirmed that Mr Turner was rude and threatened to disconnect the electricity and water supply to the respondents' house.

[26] Notably, in paragraph 16 of the founding affidavit, the respondents contended that the following day, Mr Turner came to their house and told the second respondent, who was standing at the electricity box, that he was wasting his time by looking at the meter box because he (Mr Turner) had cut off the water and electricity supply and that the respondents needed to vacate the farm. Considerably, Mr Turner did not respond at all to these averments. The respondents' allegations on what transpired on 5 November 2020 stand uncontroverted. Mr Turner raised a bare denial in his opposing affidavit. He flagrantly failed to challenge Capt. Adams's version that on 4 November 2020, Mr Turner threatened to cut off the water and electricity supply to the respondents' compound.

[27] If these allegations were untrue, or if there was a credible and plausible explanation, we would have expected Mr Turner to have refuted them or placed such an explanation before the court. It was submitted that we should consider the affidavit of Mr Turner in totality and not on a piecemeal basis. We agree with this submission; however, we expect a party against whom a serious allegation is made in reply, and in respect of which an explanation is possible, to respond to that allegation and give a plausible explanation before the court in response thereto.

[28] What compounds and militates against Mr Turner's version is that these allegations, save for Capt. Adams' averments, were made in the respondents' founding affidavit. Mr Turner had ample time to respond to these allegations in the opposing affidavit. If it was an oversight, Mr Turner could have sought leave of the court on 19 May 2022, when the matter was postponed to 14 July 2022 for a hearing, to respond to these allegations. Furthermore, he could have sought the court's permission on 14 July 2022, when the matter was heard, for an opportunity to deal with these averments.

[29] He was legally represented by attorneys whom it can reasonably be accepted that they have the necessary grasp of the law. These allegations are pivotal to the respondent's case, and they called for a response. The appellants did not respond to them or request to be allowed to deal with these averments even after the replying affidavit was filed. On a conspectus of all the facts placed before us, the appellants' failure to respond to these averments, particularly to take issue with Capt. Adams's affidavit, is fatal to the appellants' opposition to the spoliation application. The argument that the deposition of Captain Adams does not meet the requirement of an affidavit as his name was not mentioned, but only his title, is neither here nor there. Mr Turner did not apply at the court *a quo* when the matter was heard to have that affidavit struck out. In our view, this argument was nothing but a desperate attempt to clutch at straws.

[30] Furthermore, as it will be demonstrated hereunder, the sequence of events from August 2020 until the disconnection of the water and electricity supply detailed in the founding affidavit tilts the probabilities in favour of the respondents that it was indeed Mr Turner who disconnected the water and electricity supply.

[31] Another critical aspect of the appellants' version deserves our comment and analysis. Mr Turner alleges that on 04 November 2020, he noticed that they had no electricity. Upon inspection, he discovered that the copper cables which supplied the houses (including his house) with electricity had been stolen. As a result, the pump that supplied water to both houses burnt out, resulting in no water supply running to the houses. The impression created is that the electrical cables and water pipes supply water and electricity to both houses. In their replying affidavit, the respondents averred that Mr Turner failed to explain how he restored the electricity supply to his house and why the same could not be done for the respondents. Notwithstanding, we were informed at the hearing of this appeal that water and electricity supply is connected at Mr Turner's house.

[32] Mr Turner contended that restoring the electricity supply to the respondents' compound is costly, which, in any event, is the responsibility of Eskom and not that of the appellants. In addition, he averred that for the duration of their employment, the respondents paid for water and electricity. Since their dismissal, they have demanded that they be provided water and electricity for free, which was different from the position prior to the termination of their employment services.

[33] This defence does not really stand up to scrutiny. The respondents' denied this contention. Their farmhouse occupation was tied up with their employment contract. Mr Turner's defence is at variance with the facts and the contract of employment that he had with the respondents. Crucially, paragraphs 8.2 and 9.3, respectively, of the said contract of employment explicitly state that the employee shall be entitled to free quality drinking water and free electricity. We were informed at the hearing of this appeal that Mr Tuner relies on this employment contract in the eviction application under case number 646/2021, currently pending before the Hopefield Magistrate's Court.

[34] From the aforementioned, it is abundantly clear that the opposition to the spoliation application was fundamentally flawed. Mr Turner concocted a fictitious dispute of facts that a third party stole the copper cables that supplied the houses with electricity. Evidently, this version is not supported by objective facts. In our view,

the defence Mr Turner raised that a third party cut off the water supply flies in the face of the overwhelming evidence of what he (Mr Turner) told the respondents on 4 November 2020, in the presence of Capt. Adams and the subsequent termination of the water and electricity supply later that evening at 18h00.

[35] This version of the appellants is openly at variance with the uncontroverted evidence of the second respondent that on 5 November 2020, Mr Turner informed the second respondent that he was wasting his time looking at the electricity box because he (Mr Turner) had cut off the water and electricity supply and that all they need to do was to vacate the farm. Furthermore, if the pumps burnt out, as the appellants wanted the court *a quo* to believe, the appellants did not indicate why these pumps could not be replaced. It is abundantly clear from these objective facts that Mr Turner used the disconnection of water and electricity supply to the respondents' house to exert pressure on them to vacate the farm.

[36] In our view, the magistrate's finding that Mr Turner did not want the respondents on the farm, is spot on and to the point. This finding cannot at all be faulted. The court *a quo* was correct in rejecting the appellant's defence on the papers, particularly that a third party cut off the water supply. In our opinion, the appellants raised a defence which, on the facts, was inherently improbable and ill-founded, so much so that the court *a quo* was correct in rejecting same on the papers without hearing oral evidence. Therefore, our conclusion on this point is that the court *a quo* was correct in its finding that the appellants despoiled the respondents of their incorporeal rights to the use of water and electricity. Such right of use was an incident of the possession or control of their house. We now turn to consider the second issue in dispute.

***Whether or not the court a quo granted an order of specific performance***

[37] The court *a quo* found that even if it is accepted that Mr Turner did not commit the act of spoliation, common sense dictates that because the property belongs to him, it remained his duty to maintain the property and to repair broken infrastructure. Pursuant to this finding, it was asserted that the court *a quo* granted the spoliation relief, at least in part, upon the respondents' personal rights flowing from the lease

agreement or other rights between the appellants and the respondents in respect of their house on the farm. Saliently, so the argument went, the court *a quo* founded the spoliation order on specific performance of the appellant's contractual obligation to maintain the water and electricity infrastructure of the leased house.

[38] As discussed above, the mandament remedy is not available for contractual disputes or specific performance matters. This remedy is not available where the right to receive is purely personal in nature. In *Eskom Holdings SOC Ltd v Masinda (supra)* para 22.

[39] In *casu,* nothing on the papers suggests a lease agreement between Mr Turner and the respondents or any other rights except for the employer and employee relationship. There is no evidence whatsoever indicating that the respondents paid monthly rental to the appellants. To the contrary, the appellants provided the respondents with complementary water and electricity according to their employment with Mr Turner and Mr Rust, the predecessor in title. The water and electricity supply was an incident of the respondents' occupation of the farm, which, in our view, enjoyed protection in terms of the spoliation remedy. Their retrenchment did not sanction or entitle Mr Turner to terminate their water and electricity use rights.

[40] Importantly, the respondents do not rely on the specific performance of contractual rights with the appellants. However, what is evident in their application is that they were farm workers who have been in the D[...] farm for the past two decades. They are protected by the Extension of Security of Tenure Act 62 of 1997 ("ESTA'). The nature of the rights enjoyed by respondents as occupiers for the purposes of ESTA are not personal rights or contractual rights but real rights in land. In *Dlamini and another v Joosten and Others* 2006 (3) SA 342 (SCA), the court found that the right of residence contained in section 6(1) of ESTA, creates a real right on land. The court noted that such a right is, in principle, registrable in a Deeds Registry because it constitutes a 'burden on the land' by reducing the owner's right of ownership and binds successors in title.

[41] The argument raised in the heads of argument that the court *a quo* misdirected itself in finding that Mr Turner, as a lessor of the house, is responsible

for repairing the damaged infrastructure is misplaced. In our view, the terse judgment of the court *a quo* must be read in context and not in bits. Although the court *a quo* did not specifically make it clear that it was dealing with a dispute of fact, from the reading of the entire judgment, it is abundantly clear that the court rejected the version of Mr Turner. The court *a quo* granted the spoliation order, quite correctly so in our view, on the basis that the appellants' version was ill-conceived.

[42] There can be no doubt that the court *a quo* was correct in finding that the respondents were despoiled of their rights to use water and electricity and hence the spoliation order against the appellants. In our view, this finding cannot be faulted. Crucially, Mr Turner no longer wanted the respondents on the farm. He followed due process to retrench them in terms of section 189 of the LRA. On 14 November 2020, he told the respondents, in Capt. Adams's presence, that he would cut off their water and electricity supply. That evening at 18h00, the water and electricity supply was disconnected from the respondents' compound. Subsequent to that, the appellants instituted eviction proceedings against the respondents to have them evicted from the farm. We were informed at the hearing of this appeal that those proceedings are pending in the lower court.

[43] A compendium of all the facts points to one direction only: that Mr Turner disconnected the water and electricity supply of the respondents to exert pressure on them to vacate the farm on their own. In *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC), the court observed that in our modern day, a supply of electricity and water to a residential property is a practical necessity for an occupant to the property as a dwelling. The court noted further 'that when such supply is terminated, the occupant experiences a significant disturbance in his occupation'. On the objective facts, it is inescapable to conclude that the disconnection of the water and electricity supply was intended to circumvent the provisions of ESTA.

[44] We find it disturbing that the respondents have been without water and electricity for over two years since the spoliation order was granted. What compounds their misery is that they have minor children living with them. They explained their struggle to cook and make a bottle for their baby. They also stated that they have to store the baby's medication in the fridge of another farm worker far

from their house and travel to fetch it every time it has to be administered to the child.

[45] Evidently, the termination of the water and electricity supply had a catastrophic effect on the respondents' lives. It violated their rights to inherent dignity and the right to water access as envisaged in sections 10 and 27, respectively, of the Bill of Rights. The appellants' failure to restore the water and electricity supply to the respondents' house is devastating and characterised by a flagrant disregard for their fundamental rights entrenched in the Constitution. See *Eskom Holding SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [(CCT 44/22) [2022] ZACC 44 (23 December 2022) at para 202.

[46] From the totality of the evidence before us, it is possible and within the appellants' reach to restore the water and electricity supply to the respondents' compound.

***Whether it was competent for the court a quo to revive the rule nisi mero motu,***

[47] Mr Du Toit contended that it was not competent for the court *a quo* to revive the rule nisi *mero motu* and further extend it because the respondents did not seek such relief in their reinstatement application. To this end, counsel submitted that the court misdirected itself.

[48] Interestingly, when the reinstatement application was made, the appellants were served with the papers and notified that the application would be heard on 14 April 2022. The appellants were aware of the hearing of the application and did not oppose it. Of significance, a draft order was attached to the notice of motion in which the respondents sought an order to reinstate the interim order. In that draft order, the respondents also sought an order for the appellants to immediately restore the electricity and water supply to the respondents' dwelling on the farm. The draft order also directed the appellants to file an answering affidavit, if any, to show cause why the interim order should not be made final. The draft order also enrolled the matter for hearing on 19 May 2022.

[49] In our view, the argument that the court *a quo* revived the rule nisi *mero motu* and extended it, is contrived and unsustainable. While it is correct that the respondents' application for reinstatement in terms of rule 31(2)(a)(ii) of the Magistrates Court rules did not ask for the rule nisi to be revived and extended, the court granted the order in terms of the draft order which was attached to the notice of motion. On the objective facts, the draft order formed part of the application. The appellants were aware or should have been aware that the respondents were applying for the reinstatement of the interim order. The reinstatement application and the draft order were served on the appellants on 11 April 2022.

[50] Importantly, the respondents did not only file a notice of reinstatement. They made an application which was supported by an affidavit setting out reasons for their non-appearance on 08 April 2021. The respondents' affidavit also explained their misery ever since the water and electricity supply was cut off from their compound. The appellants, deliberately chose not to oppose the application. Even after the order was granted, the appellants did not contest or challenge it. Instead, they filed opposing papers as directed by the reinstatement order. They participated in the hearing of the matter in terms of the draft order. The draft order regulated the conduct of further proceedings in the case. The appellants unequivocally acquiesced to the reinstatement order and by their conduct, conveyed an intention to be bound by it. They impliedly abided by the outcome of the court's decision and acted in terms of that order.

[51] In *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) para 3, the Supreme Court of Appeal observed that where, after judgment, a party unequivocally conveys an intention to be bound by the judgment, any right of appeal is abandoned. In our view, the appellants are barred under the doctrine of peremption from seeking to appeal against that order belatedly.

[52] In the notice of appeal, the appellants further contend that rule 31(2)(a)(ii) of the Magistrates Court rules is only applicable to instances where both the appellants and respondents in the court *a quo* failed to appear at court on the return date. The appellants' contention was that rule 31(2)(a)(ii) did not apply to the struck-down

application, as Mr Turner appeared in court alone on 08 April 2021. It was further submitted that rule 31(2)(a)(ii) only allows for the reinstatement of an application, and it cannot function to revive a lapsed rule nisi.

[53] In our view, the appellants are giving rule 31(2)(a)(ii) a narrow and restrictive interpretation. A matter that has been struck off the roll or postponed *sine die* may be reinstated by either party subject to the qualification in the rule that the other party must be given at least 10 days written notice of reinstatement. The rule is not limited to situations where both parties were absent when the matter was removed from the roll. Even in cases where one party was absent, as was the case in this matter, such a case may be reinstated in terms of rule 31(2).

[54] The appellants further argued that where a case has been struck off the roll, it cannot be revived in terms of a notice provided in rule 31(2)(a)(ii) of the Magistrates Court Rules. It is worth noting that, unlike the Uniform Rules, the Magistrates Court Act and the Rules do not make provision for the revival of a rule nisi which has been discharged due to the non-appearance of the applicant on the return date.

[55] In *Jojwana v The Regional Court Magistrate Mr Mene* 2019 (6) SA 524 (ECM) (decided before Rule 31 was amended), the court found that to the extent that there is no express provision in the rules for the striking of matters from the roll or removal of matters already set down for trial, rule 31 must be interpreted to have impliedly included removals and striking off. We share the same sentiments and approach in this matter. In our view, in addition to the reinstatement of cases envisaged in rule 31(2)(a)(ii), the rule must be interpreted to have impliedly envisaged the applications for the revival or reinstatement of lapsed interim orders when reinstatement applications are made.

[56] However, we recommend that the Rules Board for Courts of Law revisit rule 31 and consider incorporating the provisions of rule 27(4) of the Uniform Rules as a sub rule to rule 31. Rule 27(4) of the Uniform Rules provides that '[a]fter a rule *nisi* has been discharged by default of appearance by the applicant, the court or a judge may revive the rule and direct that the rule so revived need not be served again.' Such amendment, in our view, will clear all uncertainties on the revival of

lapsed interim orders in the Magistrates Court and will go a long way in increasing uniformity between the Rules of the High Court and the Magistrates Court.

***Whether the court a quo erred in applying the amended rule 31(2) to reinstate the respondents' application?***

[57] Mr Du Toit submitted that the respondents' spoliation application was commenced and concluded before the amendment of rule 31 of the Magistrates Court rules on 17 December 2021. He submitted that the respondents' application was brought on 3 February 2021 and concluded on 08 April 2021 when the matter was struck from the roll due to the non-appearance of the respondents. Accordingly, the court *a quo* erred when it reinstated the respondents' application in terms of the amended rule 31(2). According to the appellants, the reinstatement application ought to have been brought in terms of the old rule 31 and not on the amended rule.

[58] For the sake of completion, rule 31(2) before it was amended read as follows:

> "31(2) Where an adjournment or postponement is made sine die, any party may by delivery of notice of reinstatement set down the action, application or matter for further trial or hearing on a day generally or specially fixed by the registrar or clerk of the court, not earlier than 10 days after delivery of such notice."

[59] This rule was amended under Government Notice GN 1604 of 17 December 2021. It now provides as follows

> 31(2)*(a)*(i) Where an adjournment or postponement is made *sine die*, any party seeking to reinstate the action, application or matter shall file a notice of request for reinstatement of the action, application or matter for further trial or hearing.
>
> (ii) Where an action, application or a matter has been struck off the roll due to the non-appearance of the parties on the date of trial or hearing, the request

must be accompanied by an affidavit setting out the reasons for the non-appearance and for the reinstatement of the matter.

[60] It is trite that the rules that are in place at the date when an application is made govern the legal process. In *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another and related matters,* 2020 (1) SA 623 (GJ), the full court found that the amended Rule 32, dealing with summary judgment applications, did not apply retrospectively to pending summary judgment applications initiated before the amendment and that the unamended Rule 32 applied to such pending applications. This seminal judgment implies that the provisions of the amended rule govern applications brought under a rule after it has been amended. While pending applications must be dealt with in terms of the old rule.

[61] The same is true of this matter. When the reinstatement application was filed, rule 31(2) had already been amended. The amended rule regulated all applications instituted after the amendment, including the reinstatement application of the respondents. The reinstatement application was correctly instituted in terms of the amended rule.

[62] Considerably, the respondents' application was instituted on February 2020 when the interim order was granted. The matter was struck off the roll on 08 April 2020 when the respondents were in default. The submission that the respondents' application was concluded on 08 April 2020 when the matter was removed from the roll is not correct. It must be stressed that the application was not dismissed but was removed from the roll. The difference between striking a matter off the roll and dismissal is that in the case of dismissal, the matter is disposed of and can no longer be set down on the roll again. If the applicant wishes to proceed with the matter, he would have to start the matter *de novo*. While on the other hand, striking of a matter off the roll has nothing to do with the merits of the case. It is not aimed at terminating the proceedings but merely suspends the hearing thereof pending an application for reinstatement. *Skhosana and Others v Roos t/a Roos se Oord and Others* 2000 (4) SA 561 (LCC) at para 19.

[63] Therefore, the argument that the respondents should have brought their application in terms of the old rule 31(2)(a) is palpably mistaken, far-fetched, and falls to be rejected. On these considerations, it follows therefore, that the appeal must fail.

**ORDER**

[64] In the result, the following order is hereby granted:

64.1 The appeal is hereby dismissed.

64.2 The appellants are ordered to pay the costs hereof, including the costs of counsel.

64.3 The appellants are ordered to restore the water and electricity supply to the respondents within five days from date hereof.

**LEKHULENI JD**
**JUDGE OF THE HIGH COURT**
**ADAMS M**
**ACTING JUDGE OF THE HIGH COURT**

Appearances:

For the Appellants: Adv. Du Toit
Instructed by: Terblanche Attorneys

For the respondents: Adv Adhikari
Instructed by: JD Van der Merwe Attorneys