REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: **2025-038460**

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

8 April 2025 _____
DATE SIGNATURE

In the matter between:

LATEOVISTA (PTY) LIMITED Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY First respondent

TLOTLEGO PROPERTY GROUP Second respondent

JUDGMENT

H A VAN DER MERWE, AJ:

[1] This is an urgent application in which the applicant seeks an order compelling the first respondent (the City) to restore the supply of electricity to an immovable property of which it is the occupier (the property).

[2] The applicant occupies the property pursuant to a lease agreement it concluded with the second respondent. Whether the lease agreement is still extant is in

dispute on the affidavits before me, but that is not an issue I am required to decide (the applicant does not seek any order against the second respondent).

[3] The applicant comes to court because the supply of electricity to the property was terminated by the City on 7 March 2025. The directors of the applicant were made aware of this fact on 11 March 2025. Given that supply of electricity was terminated on 7 March 2025 and given the unsurprising fact that the applicant's business will suffer harm if it does not have benefit of electricity, I am satisfied that this matter is sufficiently urgent to warrant its enrolment in the urgent court.

~~[4]~~ The applicant's landlord, the second respondent has had difficulty in making payment to the City for the supply of electricity that, through it, is supplied to the applicant. According to the City's answering affidavit, as at 2 February 2025, the second respondent owes the City in excess of R5 million for supplied electricity. The applicant's version is that it has been making payment for its own consumption of electricity to the second respondent, but, owing to its precarious financial position, the second respondent has not made payment to the City. The first respondent disputes the allegation that the applicant has been making payment for its own consumption, in full at least.

[5] When the City terminated the supply of electricity on an earlier occasion, the applicant brought an application similar to this one. That application came before Manoim J. Manoim J dismissed the application (in a judgement dated 27 February 2023) on the basis that, on the facts before him, the supply was effected via an illegal connection.

[6] It is alleged in the founding affidavit that Manoim J's judgement prompted the applicant to bring an *ex parte* application in the Germiston Magistrate's Court. Manoim J's judgement is an unlikely catalyst for the application in the Magistrate's Court, in that those proceedings were only initiated in 2024. Be that as it may, on 8 February 2024 an order was made in the *ex parte* application in the following terms:

> "1. [The City] and [the second respondent] are directed to show cause, if any, on the 16th day of April 2024 at 09h00, or so soon thereafter as

counsel may be heard, why an order in the terms below should not be made final;

2. [The City] is ordered to within 24 hours after service of this order on [the City], reinstate and restore the electrical supply to the [property]."

[7] That resulted in the City reconnecting the supply of electricity to the property on 4 March 2023, according to the answering affidavit. The year is an obvious slip of the pen and should be understood to be 2024. The rule nisi was extended, eventually to 12 March 2025.

[8] On 12 March 2025, the termination of the supply of the electricity was made known to Magistrate presiding over those proceedings. According to the founding affidavit, the Magistrate "*agreed* [that the City] *is indeed in contempt but that the Court cannot deal with it in that manner and the parties are advised to go to the appropriate forum*." Having been so advised, the applicant then issued this application.

[9] The notion that the order of 9 February 2024 compels the City to reconnect the supply of electricity underpins the applicant's based on contempt of court.

[10] Is should at once be clear that the City cannot be in contempt of the order dated 8 February 2024. A rule nisi, in and of itself, does not have interim operation. To enjoy interim operation, an order must make it so. All that the order of 8 February 2024 does, is to call on the City to advance reasons why an order for the reconnection of electricity should not be made. The applicant's case for contempt of court therefore is not well-founded. It seems that the City initially took it for granted that the order had interim operation, but the City's initial misconception of the effect of the order is not a source of rights for the applicant.

[11] The applicant's other cause of action in this application is the *mandament van spolie*. Whether the supply of electricity can be the subject matter of the *mandament* depends on whether it is an incidence of the occupation of a property. A useful analysis of the leading cases on this topic appears in Basson J's judgement in *Wilrus Trading CC and Another v Dey Street Properties (Pty) Ltd and Others* (1750/2021) [2021] ZAGPPHC 42 (9 February 2021):

"(vi) It therefore seems, according to *Makeshift*, [*Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC)] that the alleged right to electricity can fall into one of the following three categories:

"[32] The authorities discussed in Masinda [Eskom Holdings SOC Limited v Masinda 2019 (5) SA 386 (SCA)] can be divided into three categories:

(a) First, there are cases where the alleged right to a service (typically water) takes the form of an alleged servitude or alleged registered statutory right. ….. These are uncontentious cases of quasi-possession enjoying protection under the mandament.

(b) Second, there are the cases in which the alleged right to electricity or other service has been held to be 'purely personal in nature'. These cases, in which no servitude or similar right was alleged, include Masinda itself as well as Telkom SA Ltd v Xsinet (Pty) Ltd *2003 (5) SA 309 (SCA)* and Zulu v Minister of Works, KwaZulu-Natal, and Others 1992 (1) SA 181 (D). One may infer, from Leach JA's disapproval of the case, that Eskom v Nikelo should also be placed into this category. These cases do not involve quasi-possession enjoying protection under the mandament.

(c) Finally, there are cases such as Naidoo and Froman, which do not appear to have been disapproved in Masinda, where the alleged right to a supply of electricity was an alleged personal contractual right but where, nonetheless, the mandament's protection was held to be available.

[33] The potentially difficult question is whether a case should be placed into category (b) or (c)…."

(vii) Cases falling into category (c), are those where the alleged right to electricity is "*an adjunct to, or part of, the alleged right to occupy the property*". Category (c), would typically include those cases where the landlord has a direct interest in the possession of the property itself. Where the landlord cuts the electricity off, it would constitute not only an

interference with the alleged right to receive electricity, but would simultaneously interfere with the tenants right to undisturbed possession of the premises. The alleged right to electricity therefore forms part of the "*cluster of alleged rights making up the occupation to which he claims to be entitled.*"

(viii) The court in *Makeshift* points out that in cases that fall within category (c), the true grievance is therefore not so much the despoliation of an alleged right to electricity, but an act that materially and adversely impacts on the tenant's occupation:

> "[34] In the cases falling into category (c), by contrast, the alleged right to the service is an adjunct to, or part of, the alleged right to occupy the property. The same person (typically a landlord) who was allegedly obliged to allow the claimant to be in possession of the property was the party who was allegedly obliged to supply, or to allow a supply, of services such as electricity and water … In such cases the landlord has a direct interest in the possession of the property itself. The landlord's act in cutting off electricity and water is an act which interferes not only in the claimant's alleged right to receive those services but simultaneously interferes in the claimant's alleged right against the landlord to be in undisturbed possession of the premises with the amenities forming part of the alleged right of occupation. The claimant's alleged right to receive electricity and water is part of the cluster of alleged rights making up the occupation to which he claims to be entitled. And in such cases it may be difficult to avoid the conclusion that the landlord who has intentionally cut off the electricity and water is trying to eject the occupant without due legal process. In cases falling into category (b), by contrast, the supplier does not and could not have any such intention."" (footnotes omitted)

[12] On the facts before me, this case falls into what is referred to on Basson J's judgement as category (c). The City is not at all concerned with the applicant's occupation of the property, whether it remains in occupation or vacates, or whether it pays rent or not. As such, the *mandament van spolie* is not available to the applicant.

[13] That leaves the applicant's case for an interdict. The applicant has no contract with the City. There is a contract for the supply of electricity between the second respondent and the City, but as the applicant enjoys no rights in terms of that contract, it does not have a right to assert against the City. An interdict on common law grounds is therefore not available to it.

[14] It remains to consider the applicant's reliance on the judgment in *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC) ("*Joseph*"). In *Joseph* it was found that a tenant, in a position similar to that of the applicant, is entitled to procedural fairness, in terms of The Promotion of Administrative Justice Act 3 of 2000 (*PAJA*). Procedural fairness in this context is a matter of advance notice of the City's intention to terminate the supply of electricity, so as to allow the applicant an opportunity to either make representations on why the supply should not be terminated, or by exploring with the City an arrangement by which electricity could be supplied to it directly. It is however not so simple. Procedural fairness is a matter of the circumstances of each particular case. At the heart of procedural fairness lies not so much the formality of advance notice, but the opportunity to meaningfully engage with the City in an attempt to dissuade it from terminating the supply, or by convincing it to supply electricity to the applicant directly. The requirement of advance notice serves as a necessary adjunct to the right to make representations. The right to make representations is where the substance lies. The applicant's right to make representations to the City, in my view, has been met, as there has been engagements between the applicant and the City on the supply of electricity to the applicant, before the supply was terminated on 7 March 2025. For instance, in the applicant's attorneys' letter dated 9 April 2024, the installation of a separate meter for the applicant's own use of electricity was mooted, as well a settlement of the dispute between the applicant and the City.

[15] To now require of the City to give notice to the applicant, and then to receive the applicant's representations once again, would serve nothing but empty formalism. I am mindful of the applicant's precarious position, in that it is dependent on the second respondent making payment to the City for its own consumption of electricity, but, the applicant chose the second respondent as its

landlord. The risk that the second respondent would not make payment to the City and so imperil the applicant's supply of electricity, is a risk inherent in the applicant's selection of the second respondent as its landlord. The City has a constitutional obligation to supply electricity to everyone who happen to be within its area of responsibility. The City did not choose the second respondent. The applicant however did. When the second respondent failed to ensure that the supply of the electricity to the leased premises remained uninterrupted, the applicant had its contractual remedies against the second respondent, which included, depending on the circumstances, the termination of the lease agreement it concluded with the second respondent, with or without a claim for damages. In these circumstances, in fairness, it does not seem to me that the applicant was entitled to advance notice before the supply was terminated on 7 March 2025.

[16] I make the following order:

(a) The application is enrolled as an urgent application;

(b) The application is dismissed;

(c) The applicant is liable for the first respondent's costs.

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H A VAN DER MERWE

ACTING JUDGE OF THE HIGH COURT

Heard on: 2 April 2025

Delivered on: 8 April 2025

For the applicant: Adv T Moloi instructed by Mokgosi K Attorneys

For the first respondent: Adv Mofokeng instructed by Galananzhele Sebela Inc Attorneys