

## THREE SHADES OF SPOLIATION

### Wilrus Trading CC and Another v Dey Street Properties (Pty) Ltd and Others (1750/2021) [2021] ZAGPPHC 42 (9 February 2021)

*Spoliation is sometimes perceived as an odd remedy: how can the fact of possession of, for example, premises or access to electricity, be 'protected' by the law despite the fact that the person in possession is 'in the wrong'? The reason is that it is a fundamental principle of our law one may not take the law into your own hands, however wrong you may find the conduct of another. Therefore an interim solution becomes available to the person dispossessed, to restore things to the way they were, whereafter the merits of the dispute may be addressed. But what is possession? More than a mere contractual right to, for example, occupy premises pursuant to a lease, is required. This judgment explains the nuances with regards to possession in this context.*

The Judgment can be viewed [here](#).

## FACTS

Wilrus Trading CC ('Wilrus CC') conducts its business from premises situated at a Shell filling station in Pretoria, Gauteng. Salentias Travel and Hospitality CC ('Salentias CC') occupies shop no. 4 on the property and conducts it as a laundromat. Both tenants have been conducting businesses from the premises for several years: Wilrus CC for a period of some 23 years and Salentias CC since 2013.

Various disputes existed between the two tenants and the landlord and several court applications and actions have been instituted since 2016. The most recent litigation was a pending application, instituted by the landlord against Wilrus CC in respect of, amongst other things, alleged arrear electricity charges. The landlord claimed that the two tenants' failure to pay was causing it to face financial ruin.

That action was opposed.

During the first week of December 2020 a pre-paid electricity meter was installed, at the landlord's request, on the business premises. The two tenants stated that they welcomed the installation of the pre-paid electricity system due to the fact that it would limit further disputes between them and the landlord in relation to electricity charges. Shortly after installation, the two tenants loaded the first credit tokens on the pre-paid electricity meter and the pre-paid meter was credited accordingly. When the tenants however sought to reload their meters in January 2021, the meters did not record the credit purchased. It appeared that the landlord had instructed the electricity provider to load the arrears onto the two tenants' respective meters. Accordingly, any additional credits purchased by either of the tenants would first be allocated to the arrears and once the arrears had been settled, would be credited to their meters granting them electricity supply.

The two tenants then launched this spoliation application. (Spoliation refers to the unlawful deprivation of another's *possession*. The remedy for such deprivation is a spoliation order or, by another name, the *mandament van spolie*.) They disputed their indebtedness regarding arrear electricity and argued that the merits of the dispute in respect of any alleged arrears are, in any event, not relevant to the present application. Indeed, should the landlord believe that any amounts were due and owing by them, it should issue summons. They contended that the landlord acted unlawfully when it interrupted their peaceful and undisturbed possession of their business premises, specifically by restricting their access to electricity supply.

*(The spoliation remedy is based on the fundamental principle that no-one may take the law into his own hands. A person who has been dispossessed of property or a right, without due legal procedure, may apply to court to have*

possession restored. An applicant must prove: (i) actual undisturbed possession prior to being dispossessed; and (ii) that possession was deprived without following procedure or wrongfully, without consent. In other words, it must be shown that the person was in possession of the property or incorporeal right at the time of dispossession. Moreover, that possession was exercised without disturbance and that they were subsequently unlawfully deprived of it. The remedy is not a final determination of a party's rights: the spoliation remedy provides for interim relief pending determination of the actual dispute that exists between the parties.)

## HELD

### **Did the tenants have possession (or quasi possession) of the electricity supply?**

- The issue here was to determine whether the tenants had *quasi* possession of the electricity (“*quasi*” because the access to electricity is incorporeal), or whether the alleged right to the supply was purely personal. If the latter, it was not susceptible to spoliatory protection. On the other hand, if there was possession, or even if access was only an “incident of the possession or occupation of the property”, it would qualify for spoliatory protection.
- Our courts have distinguished the possible scenarios as follows: (i) where an occupier has separate contracts with a provider of the right of occupation (such as a landlord) and a provider of the service in question (perhaps the power utility); (ii) where the grantor of the right of occupation and the grantor of the right to the service were one and the same (a landlord, for instance). In such a case the landlord's interference with the right to the electrical supply would be an interference with the cluster of rights making up the right of occupation or possession of the premises concerned; (iii) where the occupier has a right to the use of the service, for example by way of a registered servitude.
- An occupier of immovable property usually has the benefit of a host of services rendered at the property. In the context of a disconnection of the supply of such a service, a spoliation application should be:
  - refused where the right to receive it is purely personal in nature. Rights that flow from a contractual relationship between the parties, are (generally) insufficient for a spoliation order because: (i) they are purely personal; and (ii) a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession.
  - allowed - a spoliation order will be allowed where the right vests in the person who is in possession of the property *as an incident of their possession*. (For example: rights bestowed by servitude, registration or statute can be protected by a spoliation order.)
- The question that arose for determination in the present matter was therefore the following: Was the supply of electricity here an incident of possession and thus qualifying for protection under spoliation proceedings, or is the alleged right to electricity purely personal in nature (arising from the lease agreement between the parties) and therefore not susceptible to spoliatory protection?
- The landlord claimed that the two tenants' right to electricity was purely personal in nature and accordingly spoliation should be refused. The landlord was liable to the City of Tshwane for the electricity bill, and the fact that the two tenants allegedly were in arrears, had a massive impact on its financial position. The tenants, on the other hand, argued that the right to access to electricity supply was an incident to the possession of the property from which they conduct their businesses. Without electricity, it was impossible for them to conduct their businesses. This the landlord disputed and alleged that the businesses operated on generators.

- On the facts it was clear that the interference on the supply of electricity (at the instance of the first respondent), constituted material interference of the possession of the property itself. The tenants conduct businesses (the one as a Shell filling station and the other a laundromat) and it is difficult not to come to the conclusion that an interference to the supply of electricity materially interferes with their possession of the property itself.

### CONCLUSION

The landlord was accordingly ordered to restore the access to the tenants' electricity supply in respect of their respective business premises.