IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A762/2013

DATE:12 September 2014

IN THE MATTER BETWEEN

CITY OF TSHWANE METROPOLITAN MUNICIPALITY **APPELLANT**

AND

DAKALO NNDWA **RESPONDENT**

JUDGMENT

KOLLAPEN J:

1. This is an appeal against the whole of the judgment and order granted by the learned Magistrate Ras on the 30th of August 2013 in the Magistrate's Court for the district of Pretoria when it confirmed the rule *nisi* granted on the 11th of December 2012 directing the respondent to restore the possession and control of the applicant to Flat [...] B[...], […] S[...] Street, S[...] ('the property') by restoring the electricity supply to the property.

2. For the sake of convenience the parties shall be referred to as they were in the court a *quo.*

CONDONATION

3. The applicant seeks an order condoning the late filing of the record of appeal in terms of Rule 51 of the Magistrate's Court Rules read with Rule 49(6) of the Uniform Rules of this Court. The applicant filed an affidavit by Ms Marike Pretorius, a candidate attorney in the employ of its attorneys, setting out in detail the reasons for the non-compliance with the time-periods stipulated in the Rules.

4. There was no opposition to the application for condonation and having been shown that good cause was shown for the delay, condonation was granted.

THE ORDER OF THE COURT *A QUO*

5. On the 11th of December 2012, Magistrate Ras issued a rule *nisi* directing the respondent to reconnect the electricity supply to the property by no later than 18H00 on the same day.

6. The respondent opposed the confirmation of the rule and filed an opposing affidavit to which the respondent replied.

7. The Court, after considering argument, confirmed the rule with costs on the 30th of August 2013 and that order is the subject of this appeal.

THE FACTS

8. The factual matrix relating to the dispute appears to be as follows:

8.1 The applicant, together with her family, took occupation of the property during July 2011 after concluding a lease with the owner, Mr H F Bosman. At the time there was an electrical supply to the property and the respondent applied to have an account opened in her name.

8.2 She was unable to do so as the stance of the applicant was *inter alia* that there was an amount exceeding R18 000-00 of arrears in respect of the property. It appears to not be in dispute that there was an arrear amount due in respect of consumption of electricity for the period before the applicant took occupation.

8.3 The applicant tried to resolve the matter through the owner but without success. She was also not able to secure an agreement for the supply of electricity to the property in her own name - to do that, she was advised, would require the consent of the owner of the property. It does not seem that she secured such consent. In any event it appears that even if she did secure such consent, she would not have been able to enter into an agreement with the respondent for the supply of electricity to the property. Counsel for the respondent, Mr Motepe, intimated during argument that it was not the policy of the respondent to enter into an agreement for the supply of electricity where there were arrear amounts due in respect of the property.

8.4 During December 2011 a final demand was delivered to the property claiming payment of the sum of about R2000-00. The applicant paid R1100-00 to the respondent and it appears that the threat

of disconnection dissipated and that the electricity supply to the property continued until at least November 2012.

8.5 During the period December 2011 to November 2012 the applicant made further visits to the offices of the respondent in an attempt to have an account opened in her name, all without success. She was advised that there were numerous accounts for electricity in respect of the property, all of which were in arrears.

8.6 On 27 November 2012 the electricity was disconnected and the applicant received a cut-off notice on the same day.

9. The respondent sought in its papers to rely on a notice of cancellation dated the 06th of November 2012, which in its view, constituted a pre-termination notice. The applicant denied receipt of such a notice and during argument, Mr Motepe conceded that such notice was not properly proved in the absence of an affidavit deposed to by the person who purported to deliver the notice. In any event the notice simply states that it was left 'in gate' with no indication where such a gate may be and whether it was a conspicuous place as is required by Section 115 of the Municipal Systems Act 32 of 2000.

10. The respondent initially also sought to rely on the notice of December 2011 as constituting a pre-termination notice. This reliance is misplaced in my view. Firstly, and despite the notice, electricity supply was not disconnected and continued for another eleven months. It would be inequitable to allow the respondent to rely on a December 2011 pre-termination notice for a disconnection that occurred in November 2012. In any event the respondent's own stance, its reliance for the disconnection is based on the notice of the 06th of November 2012. Mr Motepe accepted that the November 2012 notice would have superseded the December 2011 notice.

11. The stance of the respondent was that as at the 01st of July 2011, the electricity account in respect of the property was in the name of S L Ngoako and that this agreement was terminated on the 21st of September 2011.

12. Its position was that it could not open an account in the name of the respondent without the consent of the owner of the property and that absent such consent, no agreement for the supply of electricity was concluded with the respondent. In addition it took the view that given the amount of the arrears, no new agreement could be concluded unless the arrears were paid.

13.However it contends that even in the absence of such an agreement the respondent would remain liable for the cost of electricity she consumed.

14. Its stance was that the termination was lawful as a pre-termination notice was issued on the 06th of November2012 even though it conceded in argument the fatal defects with regard to proving this notice was properly delivered as envisaged in the Act.

15. In confirming the Rule, the Magistrate accepted that the *mandament van spolie* was in fact the appropriate remedy. He concluded that the supply of electricity was an incident of occupation and that the discontinuation of the electricity supply without notice was unlawful.

16. On appeal the applicant's stance is that:

16.1 The *mandament van spolie* was not the applicable remedy and the court erred in finding that the respondent was spoliated of her electricity;

16.2 The Court erred in finding that the applicant did not give adequate pretermination notice;

16.3 The Court erred in finding that the disconnection of the electricity supply to the property was unlawful.

17. Given that it was not seriously suggested proper pre-termination notice was given, the crisp issue for determination is thus whether, for the purpose of the *mandament van spolie,* it could be said that the applicant was spoliated of her use of electricity?

IS THE SUPPLY OF ELECTRICITY AN INCIDENT OF OCCUPATION?

18. In *NAIDOO v MOODLEY 1982 (4) SA 82 (TPD)* the Court found that the supply and use of electricity was an incident of possession of the premises enjoyed. In the facts relevant to the matter, the supply, use and payment for electricity was regulated by the agreement between the lessor and the lessee and accordingly the lessor's disconnection of the electricity supply constituted an act of spoliation as electricity was an incident of occupation of the premises.

19. I do not understand the *NAIDOO* case to be authority for the proposition that the use of electricity will always be an incident of occupation. That question has to be determined by the facts and circumstances of each case.

20. Indeed in *TELKOM SA LTD v XSINET (PTY) LTD 2003 (5) SA 309 (SCA)* the Court observed that the use of water or electricity installations may in certain circumstances 'be an incident of occupation of residential premises.

21. *In casu* the respondent obtained occupation and possession of the property from the owner in terms of a

lease agreement. That agreement provides that the respondent will be responsible to the relevant authorities for the payment of electricity and other services.

22. Accordingly the use of electricity, while contemplated in the lease agreement, was never an incident of occupation the respondent enjoyed *vis a vis* the owner of the property.

23. However could it be said, notwithstanding the lease agreement, that the supply and use of electricity had become an incident of occupation *vis a vis* the appellant? That determination must ultimately be shaped and informed by the particular factual circumstances that prevail in each matter where the determination is to be made.

24. *In casu* the following is relevant:

> 24.1 Despite the termination of the agreement to supply electricity to Mr S L Ngoako in September 2011, the respondent continued to supply electricity to the property for a further period of some fourteen months until November 2012;
>
> 24.2 During this period the respondent generated monthly accounts for the supply of electricity in respect of the property and directed them to 'Motani Respersoon';
>
> 24.3 Despite there being no agreement for the supply of electricity, the respondent's stance was that the consumer of such services would be liable for the amount of such services rendered;
>
> 24.4 During the period July 2011 until November 2012 the applicant attended the offices of the respondent on various occasions, informing it of her occupation of the property and her desire to open an account in her name.
>
> 24.5 It must be evident that the respondent, by virtue of its on-going supply of electricity to the property and its rendering of accounts in respect of such supply, would at the very least have been aware that the property was occupied and electricity was being consumed. Its officials indeed would have become aware of the identity of the applicant as occupier following her various visits to the offices of the respondent.

25. It must, in my view, follow that factually speaking, the supply of electricity to the property, which the respondent was aware of, having generated accounts for it, would have become an incident of the occupation of the property. It could hardly be said on behalf of the respondent, that in the absence of a formal agreement, the on-going and uninterrupted supply of electricity for some fourteen months had not rendered it an incident of occupation of the property. Even if the respondent was unaware of the identity of the applicant, it would

have at least have had to be aware that the occupant(s) of the property were using the electricity supply it continued to provide.

26. In my view the conclusion must follow that the supply of electricity to the property constituted an incident of occupation and its discontinuation would serve as the basis of the *mandament van spolie.*

27. In this regard I am mindful that local government must not be unduly impeded in its efforts to provide an efficient and sustainable service to individuals and communities. However in doing so it must act fairly and when it discontinues a *de facto* electricity supply without proper notice, it cannot be said that it acted fairly.

28. In the circumstances of the matter, the respondent was certainly entitled to seek payment, from the applicant, of the amount for the services that were rendered by virtue of Section 4 of its Electricity Supply By-Laws. It is not as if it was left without a remedy.

29. In the result the appeal must succeed

ORDER

30. I propose that the following order be made:

i. Condonation is granted in respect of the late filing of the record of appeal;

ii. The appeal is dismissed with costs.

N KOLLAPEN

JUDGE OF THE HIGH COURT

I AGREE,

A A LOUW

JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

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HEARD ON: 19 AUGUST 2014

FOR THE APPELLANT: ADV J A MOTEPE

INSTRUCTED BY: HUGO & NGWENYA INC (ref: Mr Hugo/MP/ZLR/TS381)

FOR THE RESPONDENT: ADV A Le R. STEMMET

INSTRUCTED BY: DANIËL S GOOSEN ATTORNEYS (ref: DS GOOSEN/DBQ241)