REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/38077

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: NO

20 JUNE 2023

In the matter between:

ESTHER KGWELE	First Applicant
WILLIAM THEMBA KHUMALO	Second Applicant
MEMORY MOYO	Third Applicant
MALULEKE SIBANDA	Fourth Applicant
TUMELANI NGWENYA	Fifth Applicant

and

SK ENTERPRISE	First Respondent

FRANK NDLOVU (CARETAKER) Second Respondent

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY Third Respondent

THE COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Fourth Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG Fifth Respondent

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email and by upload to CaseLines. The date and time for hand-down is deemed to be 16h00 on 20 June 2023.

JUDGMENT

OLIVIER, AJ:

1. This application came before me in opposed motion court. It relates to the validity of an agreement of lease, the disconnection of water and electricity, and related matters.

2. The applicants are residents of the property described as Cardiff Arms, situated at 20 Olivia Street, Berea Township, Johannesburg ("the property"). The first respondent, cited as SK Enterprise, is a close corporation. The second respondent is the caretaker of the property, Frank Ndlovu. The third respondent is the City of Johannesburg Metropolitan Municipality ("COJ"). The fourth and fifth respondents are the Commissioner of the Companies and Intellectual Property Commission, and the Registrar of Deeds, Johannesburg, respectively. No relief is sought against the fourth and fifth respondents. The first and second respondents oppose the application.

Background facts

3. The applicants launched this application in or around August 2021. The founding affidavit was deposed to by the first applicant, who is self-employed. The fourth applicant is an Uber driver. The remaining applicants are unemployed. The have deposed to confirmatory affidavits.

4. The first applicant and her late husband concluded an oral lease agreement in 1996 with one Mr Sithole, to rent a unit on the property in exchange for a sum of money to be paid monthly. Following the death of her husband in October 2009, the first applicant took over the lease. The first applicant alleges that the parties had agreed on rental of R 3 200 per month, including water, electricity and maintenance. The affidavit is silent on any other terms.

5. On the first and second respondents' version, the verbal lease agreement was renewed in 2012. The monthly rental was fixed at R 4 500, inclusive of water and electricity. The first respondent alleges additional terms: an annual escalation clause, which would appear not to have been enforced, although this is not absolutely clear from the papers; the premises may be used only for residential purposes and sub-letting is prohibited; the first respondent would be responsible for maintenance of the building exterior and common property; the tenants would be responsible for maintenance and upkeep of the interior of the units.

6. The second to fifth applicants claim to be residents. The first applicant state in the replying affidavit that each had concluded separate agreements with the first respondent at different times.
7. According to the applicants the second respondent, who is the caretaker, collects monthly rentals, is responsible for maintaining the building, and also disconnects water and electricity supply to tenants whenever there is a dispute.

8. The first respondent denies that the second respondent is responsible for maintenance and for disconnecting water and electricity in the event of a dispute. According to the first respondent, the supply of water and electricity is a matter between the first respondent and the third respondent, which does not involve the second respondent in his capacity as caretaker. It is admitted that the second respondent collects rental on behalf of the first respondent.

9. The applicants have not paid rent since January 2021. On 31 January 2021 they were served with their first notices to vacate the property. The applicants' attorneys then addressed a letter to the second respondent, advising him to desist from evicting the applicants and disconnecting their electricity and water supply without a court order. The applicants have to date refused to vacate the property.

10. The notices were signed by Joseline Mutangana, on behalf of the first respondent. She also deposed to the answering affidavit on behalf of the first and second respondents. Her role in the dispute is discussed below.

11. In 2019, the first respondent had reported the second and fifth applicants to the Housing Tribunal. The first respondent claims that the Tribunal had made a ruling against the applicants, but what is attached to the papers is a notification of a dispute, and a notice of mediation. Attached too are rental payment agreements with the second and fifth applicants respectively concluded in December 2018 and January 2019, to pay their arrears. However, they have not complied and remain in default.

12. On 10 February 2020 the first applicant was reported to the Housing Tribunal by the first respondent for non-payment of rent, unfair practices, sub-letting and overcrowding the dwelling. According to the first applicant, she attended a

hearing on 14 February 2020, but the first respondent was absent, resulting in the matter being postponed sine die. This is denied by the first respondent.

13. On 27 May 2021 the applicants launched an investigation into the authority of the first and second respondents to collect rentals. They were advised by a private investigation firm that the first respondent, which the applicant knew as SK Enterprise, is not the registered owner of the property, and not registered on the database of the fourth respondent as a corporate entity. (The author of this report has not deposed to a confirmatory affidavit.) According to the investigative report, the first respondent had no registered address or place of business. However, the first respondent attached to its affidavit the details of Soline K Properties CC (Reg No: 2007/185899/23), which trades as SK Enterprise. I accept that SK Enterprise is Soline K Properties CC.

14. The registered owner of the property is Mr Jean Baptiste Mutangana, who purchased the property from Cardiff Arms Park (Pty) Ltd (Reg No: 1954/002348/07) in May 1994. He is a member of the first respondent. Mr Mutangana has not been cited by the applicants in these proceedings.

15. The applicants seek extensive relief, which is set out in full in the notice of motion, as follows:

    1. Setting aside and declaring null and void ab initio the oral agreement entered into and between the Applicants and the First Respondent.
    2. Interdicting and restraining the First and Second Respondents from threatening and evicting the Applicant from Sectional Title Scheme known as Cardiff Arms (immovable property) situate at Erf 1413 Berea Township, situated at 20 Olivia Street, Berea Township, Johannesburg.
    3. That the First and Second Respondents be compelled to disclose details of all accounts and current statements reflecting the balances at present of the accounts held with any banking or financial institution within the Republic of South Africa.

4. To order the First and Second Respondents to pay immediately upon service of the order into the Third Respondent account the full amount outstanding in respect of rates and taxes due to the Third Respondent, which were collected by the First and Second Respondents from the Applicants and which they failed to pay over to the Third Respondent. Such amount is to be determined by Third Respondent at the date of the order.
5. Authorising the Third Respondent immediately upon service of the order to do the following activities without the consent and interference of the First and Second Respondents:
    a. To reconnect with immediate effect, the supply of water and electricity to the applicants units;
    b. To provide the applicants with the correct bank account details of the Third Respondent in order for them to make payment to the Third Respondent for payment of all services to be rendered by Third Respondent to the premises.
6. To order the Applicants to allow the registered owner of this authorised agents to gain access to the premises and do whatever he may deem fit as the owner of the property and to enter into lease agreement lease agreement with them.
7. The First Respondent to Third Respondent, as well as any party who opposes the granting of the relief being ordered, are to pay the costs of this application on an attorney and client scale.
8. Further and/or alternative relief

Prayer 1: Validity of the lease agreement and mandate of first respondent

16. The applicants challenge the validity of the lease agreement and the authority of the first and second respondents to conclude, amend or renew lease agreements in respect of the property. They pray that their agreements be set aside and declared null and void, on the basis that these had been negotiated ‘illegally’. They submit that the agreements are against public policy and the interests of justice, and that the balance of convenience favours them.

17. A contract of lease is essentially an undertaking by the lessor to give the lessee the use and enjoyment of the property, which use and enjoyment is temporary, in exchange for a sum of money paid by the tenant as rent. There is no requirement that the lease should be for a fixed period. The parties do not specifically deal with the duration of the lease in their papers, but it can safely be assumed that this is a periodic lease which continues until one party gives notice. The property that is let must be identified or identifiable; there is no dispute in this regard.

18. The first respondent alleges that all formalities were complied with. There is no written lease agreement, but this does not invalidate the lease; it is trite that there is no requirement that a lease should be in writing. However, a tenant may request that the terms of the lease should be reduced to writing;[1] there is no allegation by the applicants that they had made such a request.

19. The applicants aver that at all material times they were under the impression that the first respondent was the owner of the property, thus affording it the legal authority to conclude the lease agreement with them. They now contend that because the first respondent had not been the owner, the agreement is invalid. They argue that there is no proof of an express authorisation to act or enter into any lease agreement on behalf of the owner, or to collect monthly rentals, and the mere fact that the owner is a member of the first respondent does not authorise the first respondent to act on behalf of the owner without written authorisation. The applicants accuse the first and second respondents of 'hijacking' the building to collect monthly rentals.

20. The first respondent claims that it has the necessary mandate and authority to act as manager of the property, including the collection of rent, the day-to-day

[1] See Rental Housing Act 50 of 1999, s 5(2).

management of the property, amending rental agreements, the appointment and termination of a caretaker, and all other aspects related thereto.

21. The respondents rely on a special power of attorney (properly notarised) in favour of the Ms Mutangana to collect rentals and manage the day-to-day operations of the first applicant; an affidavit deposed to by the owner, specifically authorizing the first respondent to collect rental on his behalf; and a written resolution passed by the first respondent empowering Joseline Mutangana to collect rent on the owner's behalf. The date of the special resolution and power of attorney is 16 November 2021; the confirmatory affidavit was deposed to on 1 December 2021. The special power of attorney and the resolution contain ratification clauses, approving all actions taken by the agreement and any officer of the agent by virtue of these presents prior to the date of the special power of attorney. This would cover any previous renewal of the agreement, plus the collection of monthly rentals.

22. The applicants challenge the special power of attorney and the special resolution because the ID document of Josephine Mutangana is not attached to either document. They submit that the owner's confirmatory affidavit is silent on authorising employees from negotiating or concluding lease agreement.

23. I do not agree with the applicants' submissions. I take the view that the first respondent was properly mandated to conclude lease agreements on behalf of the owner, and to collect rentals. Any doubt is removed by the ratification clauses.
24. There is no real basis on which to challenge the mandate. It is doubtful that the applicants may validly challenge the agreement of mandate, considering that they are strangers to that agreement.[2]

[2] See *Letseng Diamonds Ltd v JCI Ltd & Others* 2009 (4) SA 58 (SCA) at para 21.

25. The doctrine of acquiescence is also at play here. The first applicant has occupied the property since 1997. The present owner had already become owner in 1994. There is nothing in the papers to suggest that there were any problems during the duration of the lease before the applicants stopped paying their rent; the validity of the agreement became an issue only once the applicants were given a notice of cancellation and eviction. There is no suggestion in the founding papers that there had been earlier attempts to evict the applicants from the property, or that the applicants had not been given undisturbed use and enjoyment. Certain allegations regarding lack of proper maintenance are made in the founding affidavit, but these are irrelevant for present purposes. Both parties had complied with the minimum requirements expected of a landlord and tenant. Therefore, the lease agreement remains valid.

26. It is necessary to remark that it is an unusual, if not poor, business practice to conclude agreements of this nature orally. One would expect a property management business to conclude written agreements with tenants which set out clearly the terms of the agreement, including rights, duties, duration, grounds for termination, and notice periods. This would be to the benefit of both landlord and tenant.

Prayer 3: Rendering of accounts

27. The applicants seek that the first and second respondents be compelled to disclose details of all accounts and current statements reflecting the balances of the accounts held by them with any banking or financial institution within the Republic of South Africa. The situation is akin to a claim for a statement of account.

28. In *Doyle v Fleet Motors PE (Pty)* Holmes JA laid down the fundamentals for such relief:[3]

> In the absence of Rules, the following general observations might be helpful: 1. The plaintiff should aver - (a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise; (b) any contractual terms or circumstances having a bearing on the account sought; (c) the defendant's failure to render an account."

29. In *Victor Products SA (Pty) Ltd v Lateulere Manufacturing (Pty) Ltd*, the court endorsed the approach in *Doyle*:[4]

> The right at common law to claim a statement of account is, of course, recognised in our law, provided the allegations in support thereof make it clear that the said claim is founded upon a fiduciary relationship between the parties or upon some statute or contract which has imposed upon the party sued the duty to give an account. Allegations which do no more than to indicate a debtor and creditor relationship would not justify a claim for a statement of account.

30. The applicants have not provided any basis for their entitlement to the accounts. Neither is specific reliance placed on the lease agreement (which the applicants are attempting to have set aside), nor do the applicants allege the existence of some fiduciary responsibility or statutory provision.

Prayer 4: Payment of rates and taxes due to COJ

[3] 1971(3) SA 760 (A) at 762 E.
[4] 1975(1) SA 961 (W) at 963B.

31. The applicants pray that the first and second respondents pay, immediately upon service of the order, into the COJ's account the full amount outstanding in respect of rates and taxes due to it, which were collected by the first and second respondents from the applicants and which they failed to pay over to the COJ. This amount is to be determined the COJ at the date of the order.

32. The applicants provide no legal or factual basis for their entitlement to this relief. There is a mere allegation that the respondents had failed to pay municipal accounts to the third respondent, but the applicants provide no supporting evidence. The first respondent has answered the allegation adequately by attaching to the answering papers a municipal account dated 9 September 2021, and proof of payment to the COJ dated 21 October 2021, indicating that the account was up to date at that time.

Prayer 6

33. The prayer reads as follows: 'To order the Applicants to allow the registered owner of this authorised agents to gain access to the premises and do whatever he may deem fit as the owner of the property and to enter into lease agreement lease agreement with them.' (sic)

34. This prayer is poorly worded and ambiguous. There are two parts to the relief: first, the applicants seek that they (the applicants) must allow the owner to gain access to the premises to allow him to do whatever he deems fit as the owner of the property. This amounts to their seeking an order against themselves.

35. The second part of the relief is ambiguously worded – do the applicants want this court to order the owner to conclude a new lease agreement with them, or are they seeking an order that *they* (the applicants) must conclude a lease agreement with the owner? The applicants claim that this relief would be to the

owner's advantage. I do not understand the reasoning behind the relief sought by the applicants.

36. The applicants face another obstacle should they seek relief against the owner specifically. The Constitutional Court stated in *Snyders & Others v De Jager* that "as a general rule, no Court may make an order against anyone without giving that person the opportunity to be heard."[5] And in *Economic Freedom Fighters & Others v Speaker of the National Assembly & Others* Binns-Ward J observed:[6]

> It is a fundamental principle of law that a court should not at the instance of any party grant an order whereby any other party's interests may be directly affected without formal judicial notice of the proceedings having first been given to such other party. This is so that all substantially and directly interested parties may be heard before the order is given, which is a matter of fairness. And also so that the order may be binding on all parties whose interests its terms should affect, and not just some of them, which is a matter of sound judicial policy.

37. A court order must be capable of enforcement to be effective. In *Gordon v Department of Health KwaZulu-Natal*, the Supreme Court of Appeal remarked as follows:[7]

> [I]f the order or 'judgment sought' cannot be sustained and carried into effect without necessarily prejudicing the interest of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.

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[5] [2016] ZACC 54 at para 9.
[6] [2015] ZAWCHC 184 at para 30.
[7] 2008(6) SA 522 (SCA) at para 9. See too *Insamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd; Dorbyl Light & General Engineering (Pty) Ltd v Insamcor (Pty) Ltd* 2007(4) SA 467 (SCA).

38. The applicants seek relief against the owner, but he has not been cited as a party. Mr. Jean Baptiste Mutangana has a direct and substantial interest in the outcome of the proceedings, particularly the relief sought in prayer 6. He should have been joined. Ordering the owner to enter into an agreement with the applicants without his being given an opportunity to be heard, would run counter to established law.

Prayers 2 and 5

39. I shall discuss prayers 2 and 5 together as they deal with eviction and the disconnection of the water and electricity supply, which are related.

40. In prayer 2, the applicants seek an interdict against the first and second respondents, interdicting and restraining them from threatening and evicting the applicants from the premises.

41. The requirements for a final interdict are well established: a clear right;[8] an injury or harm actually committed or reasonably apprehended;[9] and the absence of similar protection by any other ordinary remedy.[10]

42. The applicants submit that there is the threat of eviction and that they have already suffered harm by virtue of the disconnection of their electricity and water. The respondents argue simply that the applicants cannot benefit from their non-payment of rent. In other words, they cannot seek protection against eviction or disconnection under circumstances where they have not paid rent. The first and second respondents submit further that the applicants' interdictory

[8] See eg *Nienaber v Stuckey* 1946 AD 1049 1053-1054; *Bankorp Trust Bpk v Pienaar* [1993] 2 All SA 477 (A); 1993(4) SA 98 (AD) 109;
[9] See eg *Minister of Law & Order v Nordien* [1987] 2 All SA 164 (A); 1987(2) SA 894 (AD); *Janit v Motor Industry Fund Administrators (Pty) Ltd* [1995] 1 All SA 395 (A); 1995(4) SA 293 (AD) 305 G-J.
[10] See eg *Van der Merwe v Fourie* 1946 TPD 389.

relief is incompetent in law because it is aimed at precluding the owner from exercising his lawful rights, including the eviction of the applicants. The application for an interdict is premature, considering that no eviction proceedings have been initiated against the applicants.

43. I agree with the first and second respondents. I take the view that granting such an interdict against eviction would be premature. The formal process of eviction has not yet commenced. The applicants were served with letters of termination and eviction, giving them 30 days to vacate the property. Should the tenant refuse to vacate the property, as is the case here, the landlord should commence formal eviction proceedings. In the present case, the property is residential and in an urban area. The Prevention of Illegal Eviction From & Unlawful Occupation of Land Act No. 19 of 1998 is applicable. There is nothing in the papers indicating that such an application has yet been brought. If the interdict which the applicants seek were to be granted, it would have the effect of prohibiting the owner or his agent from lawfully instituting these eviction proceedings. The requirements for a final interdict have not been met in respect of prohibiting the first respondent from evicting the applicants.

44. In respect of threats, there is no specific factual basis provided, other than the letter of eviction and the disconnection of the electricity and water. In the replying affidavit, the first applicant alleges that on one occasion bouncers had attempted to evict them, requiring the intervention of SAPS. This is a fact that should have been recorded in the founding affidavit, not in the replying affidavit. Also, the applicants did not specifically argue the third requirement, namely the absence of an alternative remedy. In the result, the applicants are not entitled to this relief.

45. There are two parts to prayer 5: the applicants seek, first, an order that the COJ, without the consent and interference of the first and second respondents, reconnect the water and electricity supply to the applicants' units; and second,

that the applicants are given the ‘correct’ bank account details of the COJ to pay directly for municipal services.

46. I shall deal with the second part of prayer 5 first, which can be disposed of without much ado. The applicants have failed to lay any acceptable legal or factual basis for this relief. There is no existing relationship between the applicants and the third respondent. The applicants are also not parties to any agreement between the COJ and the first respondent/owner of the property. Electricity and water are included in the rent; it is not supplied directly to the applicants by the COJ. There is no evidence that the COJ had disrupted the supply.

47. In respect of the first part of prayer 5, the applicants seek that the water and electricity supply be restored by the third respondent without the consent and interference of the first and second respondents. They suggest that the first and second respondents had acted in a criminal manner by disconnecting the water and electricity supply.

48. The respondents do not deny that they had disconnected the water and electricity supply, but submit that this was not unlawful. The first respondent contends that the supply was disconnected to mitigate its damages in respect of the third respondent, considering the applicants’ default and refusal to pay the rental, which included payment for water and electricity consumption. Disconnection, therefore, was the direct result of the non-payment of rental.

49. Should a tenant not pay rent, the landlord has certain remedies at his disposal. However, these must be exercised in accordance with the law. Landlords are not entitled to take the law into their own hands.

50. In the present case water and electricity supply to the relevant units was disconnected without a court order.

51. In such cases, a tenant may approach the court for a restoration order in terms of the *mandament van spolie*. In *Zungu v Nilgra Flats CC*, Adams J explained spoliation orders as follows:[11]

> A spoliation order is available where a person has been deprived of his possession of movable or immovable property or his or her quasi – possession of an incorporeal. A fundamental principle in issue here is that nobody may take the law into their own hands. In order to preserve order and peace in society the court will summarily grant an order for restoration of the status quo where such deprivation has occurred, and it will do so without going into the merits of the dispute.

52. The *mandament van spolie*, therefore, is designed to restore possession to an occupier whose occupation has been disturbed or removed. Should the application be successful, the tenant's electricity and water supply should be reconnected.

53. In *Zungu* the court held that the applicants could not avail themselves of the *mandament van spolie*, because the right to electricity in that case was a personal right based in contract.

54. I take the view that in this case spoliation relief is available to the applicants. To my mind, the supply of electricity and water is not merely contractual, but an incident of the possession of the property. Disconnection then amounts to a deprivation of possession of the property itself.

55. I consider the case of *Naidoo v Moodley* to be relevant. In that case, a full court of the Transvaal Provincial Division granted a spoliation order where a lessee had failed to vacate the property on an agreed date and the lessor then cut off electricity supply to the lessee's apartment. That court held that the use of

[11] [2017] ZAGPJHC 417 at para 9.

electricity was an incident of occupation and that by cutting off the electricity, the lessor had substantially interfered with the lessee's occupation and had performed an act of spoliation.[12]

56. In *Niehaus v High Meadow Grove Body Corporate* Van der Linde J explained as follows:[13]

> [15] Apart from the *Fisher*-judgment, the two other judgments referred to above are binding on me and whether I agree with the conclusion reached, is accordingly neither here nor there. There is no doubt an argument along the following lines: spoliation relief seeks to protect the real right of possession. It does not matter whether the possession was obtained through prior private treaty or some other legal form such as an inheritance; the possessor has a real right enforceable against the world at large to protect his or her possession.
>
> [16] That real right is enforceable also against the possessor's contracting party, such as in a relationship of lessor and lessee, with which the possessor stands in a relationship defined by personal rights and not real rights. The lease agreement may provide that the lessor is entitled to refuse access to the property whether movable or immovable, should the lessee not pay the monthly rental. But despite the lessor having that personal right against the lessee, that right is not enforceable without access to a court, because possession is a real right, enforceable against the world at large, and the *mandament van spolie* protects that real right.
>
> [17] An extension to this principle became available in cases where the possessor enjoyed possession not of a movable or immovable, but of incorporeal right, such as a personal right to the supply of electricity, or the possession of electricity supply; and likewise the possession of water supply. The leading cases that have permitted that extension are fully explored by my colleague Adams, J in *Zungu v Nilgra Flats CC* (2017/44199) [2017] ZAGBJHC 417 (23 November 2017).

[12] 1982 (4) SA 82 (T).
[13] [2018] ZAGPJHC 712; 2020 (5) SA 197 (GJ).

> [18] My colleague there held that spoliation relief did not avail an applicant whose electricity supply was discontinued for failing to pay rental due in terms of the lease with the landlord. His Lordship stressed there that a spoliation order was not available if it was being used to enforce a merely personal right, such as a contractual right. His Lordship held that since the right of the tenant to electricity was purely contractual and had not been subsumed into any statutory or constitutional right enforceable against the lessor, he had a mere personal right and therefore spoliation relief was not available to him.
>
> [19] But there is an exception to the general principle articulated by my colleague. It applies in the case where the supply of electricity is an incident of the possession of immovable property. Then the discontinuance of electricity is a partial deprivation of possession of the immovable property itself.
>
> [20] Accordingly, where the incorporeal right, such as a right to the supply of electricity, is – as a matter of fact – an incident of the possession of immovable property, then the *mandament van spolie* will protect interference with such possession, as if it were (partial) interference with possession of the immovable property itself.

57. The only basis on which the first respondent defends its disconnection of the electricity and water supply, is the payment default by the applicants. No reliance, for example, is placed on the provisions of the Sectional Titles Management Act 8 of 2011, or its predecessor, the Sectional Titles Act 94 of 1986, even though the property is a sectional title development. The source of the right to disconnect is simply the exercise of ownership rights. This is insufficient justification.

58. By disconnecting the water and electricity supply to their units, the applicants were deprived of their possession and occupation of the property.

59. The applicants contend that their constitutional rights, particularly those in s 27(1)(b) of the Constitution, 1996 have been violated. The *mandament van spolie* is a common law remedy, but it is unquestionable that there are

constitutional considerations at play in cases involving the deprivation of water and electricity. In *Lion Ridge Body Corporate v Alexander; Lion Ridge Body Corporate v Morata; Lion Ridge Body Corporate v Mukona and Another*, Wilson J refers eloquently to the 'delicate web of constitutional' rights implicated in cases relating to disconnection of electricity and water:[14]

> [15] These are the right against arbitrary deprivation of property (section 25 (1) of the Constitution, 1996), the right to sufficient water (section 27 (1) (b) of the Constitution, 1996), the public law right to receive electricity from a municipality, even where the electricity is transmitted through an intermediary such as a landlord or a body corporate (see *Joseph v City of Johannesburg* **2010 (4) SA 55** (CC), para 47), and the right of access to adequate housing (section 26 of the Constitution, 1996).
>
> [16] Relief limiting these constitutional rights is plainly incompetent if it is not authorised by law. The form that law might take depends on the facts of a particular case.

60. The applicants find themselves in a dire position. They have no access to sufficient water and no electricity, which no doubt impacts on their human dignity and use of the property. Irrespective of the lawfulness or otherwise of the occupation, a landlord may not disconnect water and electricity without the intervention of a court. In the present case, the tenants have been disturbed in their possession, by virtue of the disconnection of the water and electricity. As I already said before, the access to water and electricity is part of their possession of the property.

61. The applicants seek relief against the third respondent in respect of the reconnection of the water and electricity. I do not see this as a barrier in granting relief against the first and second respondents. The notice of motion

[14] *Lion Ridge Body Corporate v Alexander; Lion Ridge Body Corporate v Morata; Lion Ridge Body Corporate v Mukona and Another* [2022] ZAGPJHC 713 (21 September 2022).

contains a prayer for further and alternative relief. All the issues relevant to the reconnection of water and electricity have been properly ventilated on the papers. The first and second respondents are properly before the court, and have had an opportunity to answer, which they have done. Furthermore, even though the applicants do not in their papers specify their application as one in terms of the *mandament van spolie*, the necessary allegations have been made for the relief to be granted. This, combined with the constitutional factors outlined above, leads me to conclude that they are entitled to have their electricity and water supply reconnected.

COSTS

62. It is trite that in awarding costs, a court has a discretion, which must be exercised judicially upon a consideration of all the facts, the circumstances of each case, weighing the issues in the case, the conduct of the parties and any other relevant circumstance. The discretion is wide, but not unlimited. As a rule of thumb, a successful party is entitled to their costs. A court should make an order that would be fair and just between the parties.[15]

63. Both parties have been partially successful. However, the order that I will grant ordering the restoration of water and electricity supply tilts the scale in favour of the applicants. The respondents had taken the law into their own hands, which is to be frowned upon. In similar cases, the landlord is often at the receiving end of an adverse costs order on an attorney and client scale. I do not consider a punitive order to be appropriate in this instance. I will order the first and second respondents to pay the costs of this application on a party and party scale.

[15] *Fripp v Gibbon & Co* 1913 AD 354 at 363.

I MAKE THE FOLLOWING ORDER:

1. The first and second respondents are ordered to restore access to water and electricity to each of the units occupied by the applicants, with immediate effect.

2. The first and second respondents to pay the costs of this application on a party and party scale.

M. Olivier
Acting Judge of the High Court
Gauteng Division, Johannesburg

Date of hearing: 30 November 2022

Date of Judgment: 20 June 2023

On behalf of Applicant:	K. J. Masutha
Instructed by:	Sithi &Thabela Attorneys
On behalf of 1st and 2nd Respondents:	J.C. Viljoen
Instructed by:	Burger Huyser Attorneys