NOT REPORTABLE

**REPUBLIC OF NAMIBIA**

**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

Case No: A264/2005

In the matter between:

**SOUTHERN ELECTRICITY COMPANY (PTY) LTD** **APPLICANT**

and

**THE MUNICIPAL COUNCIL OF KEETMANSHOOP** **FIRST RESPONDENT**

**THE ELECTRICITY CONTROL BOARD** **SECOND RESPONDENT**

**THE MINISTER OF MINES AND ENERGY** **THIRD RESPONDENT**

**THE MINISTER OF REGIONAL AND LOCAL**

**GOVERNMENT, HOUSING AND RURAL**

**DEVELOPMENT FOURTH RESPONDENT**

**Neutral citation:** *Southern Electricity Company (Pty) Ltd v Municipal Council of Keetmanshoop* (A264-2005) [2014] NAHCMD 39 (7 February 2014)

**Coram**: VAN NIEKERK J

**Heard**: 7 July 2006

**Delivered:** 7 February 2014

**Fly note:** Spoliation - Mandament van spolie – *In casu* applicant, in addition to mandament, claimed interdictory relief wider in ambit than interdict against threatened spoliation – If more than spoliatory relief is claimed Court may investigate respondent's defence on the underlying dispute - Parties entered into electricity management contract – Assumed to be joint business venture subject to Joint Business Venture Regulations – Contract concluded without prior approval of Minister as required by Regulations – Contract illegal and unenforceable because local authority council acted *ultra vires* – Application refused

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**ORDER**

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The application is dismissed with costs, such costs to include the costs of two instructed counsel.

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**JUDGMENT**

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VAN NIEKERK J:

Introduction

[1] The applicant is a Namibian company which entered into a 15 year electricity management contract ("EMC") with the first respondent on 23 August 2001. The first respondent terminated the contract on 30 August 2005 with immediate effect. It also notified the applicant that it would not be allowed to deal further with any of the first respondent's assets and requested the return of any assets handed over to the applicant in terms of the EMC. It is common cause that the applicant thereafter, with the assistance of the Police, effectively evicted the applicant from the electricity distribution network at the town of Keetmanshoop. The first respondent also notified operators of various outlets where the applicant had established electricity payment points for the convenience of consumers that the EMC was terminated.

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[2] After the applicant' demands for withdrawal of the termination were not met, the applicant launched an urgent application in which it sought a rule *nisi* calling upon the first respondent to show cause why –

> 'pending the outcome of the dispute resolution procedure agreed to by applicant and first respondent in the Electricity Management Contract entered into, alternatively, the review of first respondent's decision to terminate the Electricity Management Contract between applicant and first respondent, or alternative resolution of the dispute between applicant and first respondent, all or any of which to be initiated within 21 days from the date of the final order, first respondent should not be:
>
> 2.1 Ordered to adhere to the terms of the said Electricity Management Contract;
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> 2.2 Ordered to restore all the premises, infrastructure and equipment relating to electricity supply and distribution in Keetmanshoop to the possession of applicant;
>
> 2.3 Interdicted from in any way interfering with applicant's operations in terms of the said Electricity Management Contract;
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> 2.4 Ordered to fully cooperate in the proper management of the electricity supply and distribution to Keetmanshoop by applicant;
>
> 2.5 Ordered to pay the costs of this application on a scale as between attorney and client.
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> 3. The orders in terms of subparagraphs 2.1, 2.2, 2.3 and 2.4 hereof shall serve as an *interim interdict* with immediate effect pending the outcome of this application.

4. Further and/or alternative relief.'

[3] On 7 September 2005 Mtambanengwe AJ granted a rule *nisi* incorporating prayers 2.1 – 2.5 and also made an order in terms of prayer 3 of the notice of motion. The first respondent then opposed the matter. No relief is claimed against any of the other respondents and they also did not participate in the proceedings. On 7 July 2006 I heard arguments on whether the rule should be confirmed or discharged.

<u>The background to the application</u>

[4] The purpose of the EMC is described as being the appointment of the applicant as management and operations contractors for the first respondent' electricity network for a period of 15 years, during which period the applicant shall have sole and exclusive responsibility for the management, operation, administration and maintenance of the network and to regulate matters pertaining to the network.

[5] In terms of the EMC the applicant agreed to pay the first respondent a monthly royalty based on the amount of electricity sold to consumers. The parties were to agree annually on a rates increase, which would also increase the monthly royalty to be paid. The applicant's stance is that it is implied that the first respondent is obliged to take the necessary steps, i.e. promulgation of the increases in terms of the Local Authorities Act, 1992 (Act 23 of 1992), to enable the applicant to pass the tariff increases on to the consumers.

[6] The applicant is further responsible to pay the bulk electricity account to the bulk supplier and to collect payments from the consumers. The applicant is also responsible to pay for all equipment installed for the operation and maintenance of the network. The applicant shall remain the owner of all such installed equipment until the agreement terminates in terms of clause 5 thereof.

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[7] Clause 5 determines that the agreement shall terminate automatically upon expiry of the 15 year period, or by the applicant's cancellation of the agreement upon 1 year's written notice. Should the first respondent however cancel the agreement before the expiry period in the absence of a material breach by the applicant, it shall be liable for compensation of all demonstrable losses and damages on the applicant's part, including loss of income.

[8] In an addendum to the EMC the parties agreed to a secondment of certain employees of the first respondent to the applicant.

[9] In clause 3.3.2, read with a further addendum, the parties agreed that, in addition to the monthly royalty, the applicant would lend and advance to the first respondent a monthly sum of N$32,500-00 pending the implementation of an 'electrically related taxation' (which was expected to be implemented in future). Except for the first instalment advanced to the first respondent, this monthly loan would become repayable, plus agreed interest thereon, upon payment of the electrically related taxation to the first respondent. At the time this matter was heard, the total sum so lent and advanced to the first respondent was about N$1, 1 million.

[10] Although this is disputed by the first respondent, the applicant's case is that it had already invested about N$9 million to upgrade the network infrastructure and to establish a proper management system.

[11] The applicant states in its founding affidavit that the bulk supplier, Nampower, introduces proposed yearly electricity rate increases. These proposed increases can only be implemented after approval by the second respondent. After this the applicant and the first respondent consider the issue of reaching agreement on a tariff increase at which to sell electricity for the next year. Any such increase must also be approved by the second respondent. Once approved, notification of the

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increase must be published in the Government Gazette. Every annual rates increase gives rise to an increase in the royalty to be paid by the applicant.

[12] The applicant alleges that everything went well at first. The particular members of the first respondent who concluded the EMC agreed to yearly electricity tariff increases which were passed on to the consumer. However, during 2003 after the elections, the membership of the first respondent changed. The new council refused to agree to the annual increase in 2004 and 2005. This meant that the applicant had to absorb the increase in rates for the bulk supply of electricity, while it was not allowed to increase the tariff payable by the consumer. However, the first respondent based its royalty invoices on the increased bulk rate, which invoices the applicant paid. Meanwhile it became clear that the anticipated electrically related taxation would not be implemented. Eventually the applicant stopped paying the monthly loan amount. There is a dispute around the issue of how and at whose instance this occurred. During 2005 matters came to a head after the first respondent again refused to agree to an annual increase. In August 2005 the applicant invoked the dispute resolution provisions contained in the EMC and also informed the first respondent that it would be retaining the royalty payments pending the outcome of the dispute. On 30 August 2005 the first respondent terminated the EMC, relying, inter alia, on the applicant's violation of the EMC by failing to make the required payments.

[13] However, in an earlier letter dated 4 April 2005, the chief executive officer of the first respondent had informed the applicant that legal advice obtained from the Office of the Attorney-General suggested that the EMC is illegal and invalid due to non-compliance with the Tender Board Regulations for Local Authorities and that the loan agreement fell foul of the provisions of section 30(1)*(v)*(l) of the Local Authorities Act and was, as such also illegal and invalid. I pause to note here that the reference should have been to section 30(1)*(v)*(i) as there is no sub-paragraph (l). The

applicant was invited to discuss the matter with the first respondent, but the meeting never took place.

[14] In its answering affidavit the principal stance of the first respondent is that the EMC is invalid and unenforceable for the reasons cited in the previous paragraph, and also because there has been want of compliance with the Joint Business Venture Regulations of 5 March 2001 and the Commercialisation Regulations of 5 March 2001.

*Mandament van spolie*

[15] In their heads of argument counsel for the first respondent refer to the relief sought in prayer 2.2 of the notice of motion in the form of a *mandament van spolie.* They firstly submit that the applicant has not expressly averred sufficient facts in its papers to justify this form of relief. More particularly, the submission is that the applicant fails to expressly allege that it was in free and undisturbed possession of property and that it was unlawfully deprived by the first respondent of its possession. It is indeed trite that these are the essential allegations to be made to obtain spoliatory relief (*Uvhungu-Vhungu Farm Development CC v Minister of Agriculture, Water & Forestry* 2009 (1) NR 89 (HC) 92I-93B).

[16] I agree with counsel that the applicant does not make express allegations in this regard. The applicant mentions the fact that the first respondent terminated the EMC and to some of the reasons relied on by the first respondent. It refers to the latter of termination which is annexed to the founding affidavit, but does not expressly refer to any of its contents or incorporates same by reference into the founding affidavit. Later in the founding affidavit the applicant states that the termination was 'contrary to the agreement, arbitrary, with improper motive, *ultra vires* and in breach of article 18 of the Namibian Constitution.' In paragraph 37 of the founding affidavit the applicant states that the first respondent 'effectively evicted applicant from the

electricity distribution network in Keetmanshoop,' which is admitted in the answering papers.

[17] Counsel for the first respondent secondly submit in their heads of argument that the 'property' to which the alleged 'eviction' relates is not even identified. The applicant only refers to the 'electricity distribution network'. As such the relief claimed is vague and unenforceable for this reason.

[18] Thirdly, counsel refer to the scheme of relief sought by the applicant and point out that it includes interdictory relief associated with specific performance of a contractual arrangement. They refer to the legal position that where relief is sought by way of the *mandament*, it is not open to the opposing party to raise any defence which does not amount to a denial of the claimant's allegations. However, as the applicant in this case does not merely claim relief by way of the *mandament*, they submit that the Court may investigate the first respondent's allegations that the underlying agreement is illegal and unenforceable.

[19] In anticipation of the last argument during the hearing, Mr *Coleman,* who appeared for the applicant, first amended prayer 2.1 of the notice of motion and later expressly abandoned it. He also abandoned prayer 2.4. He also, in any event, conceded that the applicant does not have a basis on which to claim a special costs order and accordingly confined the prayer for costs to one on the ordinary scale.

[20] He submitted that the allegations for claiming spoliatory relief can be discerned on the papers. He referred to paragraph 13 of the founding affidavit in which it is alleged that the applicant took over the management of the Keetmanshoop electricity supply on 1 September 2001, that the system was outdated and that the applicant upgraded the infrastructure to establish a proper management system for the distribution of electricity to the resident of Keetmanshoop. Although applicant never made such express averments, he submitted that there is no dispute on the papers

that the applicant was in peaceful and undisturbed possession of the premises, infrastructure and equipment relating to electricity supply and distribution in Keetmanshoop. The terms of the relief claimed also describe what must be restored as 'the premises, infrastructure and equipment relating to electricity supply and distribution in Keetmanshoop'. The first respondent disputes the alleged extent of the upgrade and the money allegedly expended upon it, but does admit that the applicant indeed took over the management of the electricity supply and upgraded one of the main stations.

[21] Although the allegations, such as they are, are not entirely satisfactory and should have been made clearly and expressly, I think it may be accepted, in the context of this case that the applicant was indeed in peaceful and undisturbed possession of the premises, infrastructure and equipment relating to the electricity supply and distribution in Keetmanshoop.  I am also assuming, without deciding, that the property in question is sufficiently identified for purposes of this case.

[22] Mr *Coleman* relied on certain passages in the case of *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 (3) SA 629 (C) in an attempt to counter the first respondent's argument that the applicant is, in essence, seeking to compel specific performance under the EMC by way of an interdict under the guise of a *mandament van spolie*.  Mr *Cohrssen* submitted that the present case is distinguishable from the case relied on. In any event, I subsequently discovered that the latter case was reversed on appeal on the very issues on which Mr *Coleman* relies (see *Telkom SA Ltd v Xsinet* 2003 (5) SA 309 (SCA)).

[23] Mr *Coleman* also relied on *Xsinet a quo* as authority for the contention that the *mandament* is, in principle, available for property other than movables or immovables, for example incorporeals.  This is indeed the case, but it is irrelevant because, in the context of the present case, incorporeal rights are not in issue.

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[24] Returning to the third argument advanced on behalf of the first respondent, the following exposition in *Minister of Agriculture & Agricultural Development v Segopolo* 1992 (3) SA 967 (T) at 970F-971D is relevant:

> ‘Where an applicant establishes the requisites for a successful mandament van spolie, the respondent cannot raise a defence based on his alleged rights in the thing concerned. Such defence, if raised, is ignored and any counterclaim in respect thereof is dismissed without a consideration of the merits. See *Willowvale Estates CC and Another v Bryanmore Estates* Ltd 1990 (3) SA 954 (W). Counsel for the applicants ask for the dismissal of the counter-application on the basis of this rule. Counsel for the respondents answer with what I understand to be the following submissions: They argue that the founding affidavit reveals that the applicants' case is based not only on spoliation but that it is also of a vindicatory nature. This, it is contended, opens the door to respondents' canvassing the merits and once the merits have to be canvassed the mandament van spolie can no longer be invoked to effect a restoration of the *status quo ante*.
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> In support of these submissions counsel for the respondents referred me to Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 8th ed vol II at 419-20. At 419 the following passage appears:
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> > 'If, . . . instead of confining his claim to the restoration of possession the litigant includes in his summons an alternative claim for the value of the property despoiled from him, the proceedings are no longer a claim for a mandament but are a vindicatory action, in which the court will go into the question of ownership or right to possession, matters which are not dealt with in a spoliation application. Thus the defendant can in this instance put up a plea that he owns the property, whereas such a plea cannot be put up in answer to a claim for a mandament van spolie.’
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> The authors cite the following authorities in support of the main proposition contained in this passage: *Bester v Grundling* 1917 TPD 492, *Doli v Mamkele* 1926 EDL 269 and *Zinman v Miller* 1956 (3) SA 8 (T).

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It seems to me that the reason underlying the qualification to the general rule in regard to spoliation is that, if an applicant goes further than only to claim spoliatory relief, he in effect forces an investigation of the issues relevant to the further relief he claims. Once he does this, the respondent's defence in regard thereto has to be considered and, if such a defence furnishes justification for the respondent's possession, a court will not order restoration of the *status quo ante*. This view is borne out by the following passage from *Doli's* case at 271:

> '. . . (I)t would seem that where summons is taken out for the return of the spoliated article or its value, it cannot be held to be a mere application for the preliminary return of the article, pending such action as may be taken to vindicate the ownership thereof and the court will, if ownership is raised as a defence, go into the question of ownership, and . . . if the defendant satisfies the onus of establishing such ownership the court will not order the return of the article.'

Although perhaps not as clear, *Bester v Grundling* is, I think, consistent with the view I have expressed. In the *Zinman* case at 12B Rumpff J, as he then was, citing the *Bester* case said:

> 'The moment an applicant asks for the return of an article *or its value* he no longer claims a mandament van spolie but is relying on a vindicatory action.'

This passage cannot, I think, be understood literally. The learned Judge could not have intended to mean that the mere asking for more than spoliatory relief in an action or application disqualifies the applicant from invoking the mandament van spolie, since our law contains no such formalism. The passage must mean that, if an applicant asks for the extra relief and persists in it at Court, the Court has perforce to adjudicate upon the extra relief and the respondent's allegations in regard thereto, and the result of this may indicate that the applicant has no right to the thing of which he was despoiled, which in turn will deprive the applicant of his entitlement to the restoration of the *status quo ante*.'

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[25] I agree with counsel for the first respondent that the amendments to the notice of motion do not take the matter squarely into the realm of the *mandament van spolie* only. Prayer 2.3 asks that the first respondent be interdicted 'from in any way interfering with applicant's operations in terms of the said' EMC. This relief is wider in ambit than merely interdicting the first respondent from in future depriving the applicant of its peaceful and undisturbed possession of the premises, infrastructure and equipment relating to the electricity supply and distribution in Keetmanshoop. In other words, it consists of more than just an interdict against threatened spoliation (Cf *Segopolo supra* at 973D-F).

[26] In the circumstances I agree with the contention advanced on behalf of the first respondent that an investigation into the underlying issues of the dispute between the parties is competent and should be done in this matter. This includes the question whether the EMC is lawful and valid. Should this approach not be followed it may mean that the first respondent might be ordered to comply with an invalid and unenforceable contract.

<u>Is the EMC lawful and enforceable?</u>

[27] As set out in paragraphs [13] and [14] *supra,* the first respondent's stance is that the EMC is illegal and unenforceable on the grounds mentioned above.

[28] During argument it was conceded, properly so, by the applicant's counsel that the loan agreement contained in the EMC is contrary to the provisions of section 30(1)*(v)*(i) of the Local Authorities Act and therefore illegal, as the prior written approval of the fourth respondent, granted after consultation with the Minister of Finance, was not obtained for the loan.

[29] In the replying papers the applicant takes the stance that 'on a proper construction .... [the EMC] falls within the ambit of the Joint Business Venture Regulations published as Government Notice 40 of 2001 in the Government Gazette

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of 5 March 2001.' The applicant attaches a copy of the regulations, marked **"AZ27"**, for convenience. The deponent on behalf of the applicant states further: 'I am also advised that the exercise of these powers did not require first respondent to comply with the Tender Board Regulations for local authorities or obtain the approval of fourth respondent.'

[30] In his heads of argument and during oral argument Mr Coleman attempted to water down the applicant's stance somewhat. He stated that the applicant's response is that the Joint Business Venture Regulations are 'conceivably applicable' to the EMC. The first respondent's stance is that these Regulations are indeed applicable. I shall assume without deciding that the stance taken by both parties in the papers is correct and that the Joint Business Venture Regulations apply to the EMC. Regulation 2(1) permits a local authority to enter into a joint business venture with *inter alia* any company subject to the regulations themselves and the prior written approval of the fourth respondent subject to such conditions as he/she may impose. It is common cause that no such prior approval had been obtained from the fourth respondent.

[31] Section 30(1)*(aa)* of the Local Authorities Act states that a local authority council shall have the power to enter, subject to the regulations, into joint business ventures. Clearly the first respondent does not have the power to enter into such a venture without following regulation 2(1), which requires the fourth respondent's prior written approval. By entering into the EMC, the first respondent's has acted *ultra vires.* Depending on the intention of the legislature, the agreement may be illegal.

[32] The State has a vested interest in the manner in which local authority councils go about their business and in what kinds of joint ventures they become engaged. It is for these reasons that section 30(1)*(aa)* clearly places a limitation upon the first respondent's power to enter into joint business venture agreements by placing the exercise of such power under the regulatory powers of the fourth respondent. These

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powers include the power to make regulations. Clearly the fourth respondent regarded it as necessary to retain further powers of regulation over the actions of local authority councils by peremptorily requiring his prior written approval, subject to any conditions he may impose. If a local authority council is permitted to enter into such business ventures without the approval of the fourth respondent, the intention and object of the legislature will ultimately be defeated. The result is that agreements entered into without the necessary approval are clearly illegal.

[33] It was submitted on behalf of the applicant that the first respondent is estopped from relying on the illegality of the EMC. However, I agree with the submissions by counsel for the first respondent, namely that the first respondent cannot acquire powers they do not possess in law through the operation of estoppel, as this will undermine the principle of legality (see also Baxter, *Administrative Law*, pp400-404; Rabie, *The Law of Estoppel in South Africa*, p109). The EMC is clearly unenforceable.

[34] As a result of the above conclusions made, I do not deem it necessary to consider the further argument on behalf of the first respondent that the EMC is illegal and unenforceable for want of compliance with the Tender Board Regulations.

[35] The result is that the relief claimed in paragraph 2.2 and 2.3 of the notice of motion cannot be granted.

Restitution

[36] The applicant states in its replying affidavit that, should the Court find that the EMC is unlawful, it is advised that the Court will be asked to order restitution, alternatively to declare that the applicant is entitled to restitution. In this case, it continues, the applicant will be entitled to take everything that it installed in the Keetmanshoop electricity network as well as the motor vehicles, computers,

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software, tools and spares currently used to manage and maintain the system, as it is the property of the applicant. This relief is not sought in the notice of motion.

[37] Mr *Coleman* reminded the Court that the applicant spent N$9, 329,323 to upgrade the electrical system in Keetmanshoop and submitted that the first respondent will be enriched in at least this amount if the agreement is declared invalid. He requested the Court to order that the applicant be authorised to remove the items listed in annexures AZ26 and AZ30 to its replying affidavit and that the first respondent be ordered to repay the loan and the royalties it received in terms of the EMC.

[38] Mr *Cohrssen*, on the other hand, submitted that these proceedings are not the proper stage at which to consider any claim for restitution and that it is more appropriate to deal with this matter by way of action. He firstly pointed out that the investment of over N$9 million is disputed by the first respondent and that the applicant only gave some details of the alleged investment in reply. Annexures AZ26 and AZ30 were only introduced in reply. In countering an argument by Mr *Coleman* that the applicant could only deal with these matter in reply to allegations made in the answering affidavit, Mr *Cohrssen* submitted that the applicant should have claimed restitution in the notice of motion and have stated all the facts and given all the details in its founding affidavit because it had already been made aware in April 2005 by way of the first respondent's letter (annexure JS14) that the first respondent had been advised that the EMC was illegal and unenforceable. In any event, he further submitted, it is not known on the papers to what extent the applicant had already recouped some of its investment since the conclusion of the EMC.

[39] I agree with Mr *Cohrssen's* submissions on the issue of restitution and hold further that it would be advisable to deal with the repayment of the loan and royalties at that stage. It should be borne in mind that the applicant also reaped certain

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benefits under the agreement.  All these matters need to be considered on the basis of satisfactory evidence properly proved.

Order

[40] The result is then that the application is dismissed with costs, such costs to include the costs of two instructed counsel.

______(Signed on original)___________________

K van Niekerk

Judge

APPEARANCE

| | |
|---|---|
| For the applicant: | Adv G B Coleman |
| | Instr. by PF Koep & Co |
| For the first respondent: | Adv R D Cohrssen |
| | and with him, Adv D Obbes |
| | Instr. by Dr Weder, Kruger & Hartmann |