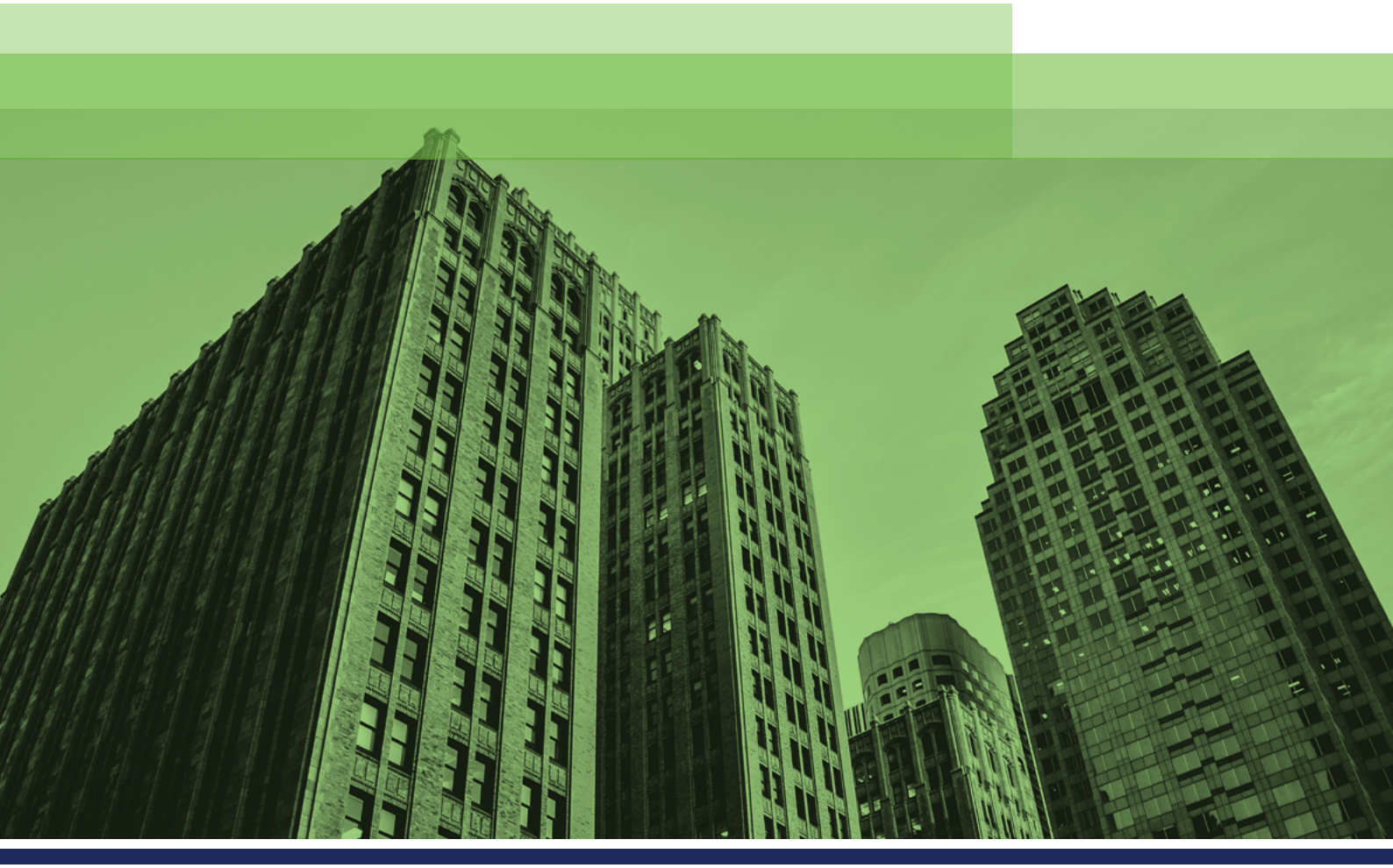
Van Rooyen v The Hillandale Homeowners Association

Case number: **1603/2014**
Judgment: **11 December 2014**
Moeng AJ



INTRODUCTION

[1] This is an application based on the mandament van spolie. The main issue to be decided is whether the respondent's conduct in limiting/refusing applicant to purchase pre-paid water and electricity vouchers is lawful. The applicant leases premises described as 15 Wildehond Street, Woodland Hills Wildlife Estate, Bloemfontein ("the leased premises") from the Sue Celken Family Trust ("the trust") pursuant to a written lease agreement concluded during November 2012. The said property is situated within the Woodland Hills Wildlife Estate, Bloemfontein ("the Estate"). The respondent ("the association") is a non-profit company incorporated under section 21 of the Companies Act 61 of 1973 and is responsible to govern, administer and manage the Estate. The main object of the company is said to promote, advance and protect the communal interests of its members.

[2] This is the return date of a rule nisi granted on 8 April 2014 by Naidoo J in the following terms:

> **1.** Condonation is granted to the applicant for non-compliance with the Rules of Court pertaining to form, process and service and that this application is heard as an urgent application in terms of the provisions of Uniform Rule 6(12)(1) read with (2);
>
> **2.** A rule nisi is issued, returnable on Thursday 8 May 2014 at 9:30 or as soon thereafter as the applicant's legal representative can be heard, calling upon the respondent to advance reasons, if any, why the following order should not be granted as a final order:
>
> > **2.1.** That the respondent be ordered, without delay, to restore the applicant's access to its internet site to be able to purchase prepaid water and electricity for use at the immovable premises situated at 15 Wildehond Street, Woodland Hills Wildlife Estate, Bloemfontein.
> >
> > **2.2.** That the respondent be ordered, without delay, to sell prepaid water and electricity to the applicant and to allow the applicant to purchase the same for use at the immovable premises situated at 15 Wildehond Street, Woodland Hills Wildlife Estate, Bloemfontein.
> >
> > **2.3.** That the respondent be prohibited and restrained from taking any steps, whether it be directly or indirectly, to prohibit or frustrate the applicant from purchasing prepaid water and electricity so as to be able to utilise the same at the immovable property situated at 15 Wildehond Street, Woodland Hills Wildlife Estate, Bloemfontein.
> >
> > **2.4.** That the respondent be interdicted and restrained, whether it be directly or indirectly, with interfering in any manner with the provision of and/or consumption by the applicant of water and electricity at the immovable property better known and described as 15 Wildehond Street, Woodland Hills Wildlife Estate, Bloemfontein.
> >
> > **2.5.** That the respondent pays the cost of this application on the scale as between attorney and client.

[3] The relief set out in prayers 2.1 to 2.4 operate as interim interdict with immediate legal operation until finalisation of this application.

BACKGROUND

[4] On 6 April 2004, the Estate was declared an approved township by proclamation in terms of section 14(1) of the Townships Ordinance of 1969. Some of the conditions of establishment of the township were that the township owner was responsible for the installation and maintenance of water and electricity reticulation to the township and had to make arrangements with the Mangaung Local Municipality (as it then was) and or the supplier of water and electricity in the area for such supply to the township. The respondent purchases water and electricity in bulk from the municipality and or CENTLEC (a company responsible for the supply of electricity) and in turn 'resells' same to the residents of the Estate.

[5] It is common cause according to the Articles of Association of the respondent that every owner of an erf shall be a member of the association upon registration of the erf into his/her name and shall remain a member until he/she ceases to own the erf. The Trustees may from time to time make rules, subject to the provisions of the Memorandum and Articles of Association and every member is bound by such rules or regulations.

[6] The rules further provide that no member shall let or part with the occupation of his residence, whether temporarily

or otherwise, unless the proposed occupier has agreed to be bound by all the provisions of the rules. Such an occupier shall at all times be bound by the rules. The Board also reserves the right to enforce the rules contained in the Manual for Community Participation and to use fines to enforce such rules. If the fines are not paid the right to take further steps is reserved including the right to collect penalties against the owner of an erf that is leased out. Any such amount which is due by a member by way of a levy or fine shall be a debt.

[7] Of paramount importance for our purposes, is that rule 13.11 of the Manual for Community Participation provide that 'no electricity shall be provided or sold to any occupier or owner of any erf in respect of which levy payments are outstanding for a period of 60 days or longer, until such time as all outstanding levy payments are paid in full'. A further critical provision is paragraph 10.3 of the water and electricity supply agreement which provides that 'vereistes vir die voorsiening van water of elektrisiteit of die voortgesette voorsiening daarvan mag insluit 'n vereiste dat alle heffings of ander betalings verskuldig aan die Vereeniging ten volle betaald is ….'.

[8] With regard to the aesthetical appearance of the estate, the rules provide that the collective pride in the Estate depends to a considerable extent on the contribution made by every owner in creating and maintaining a pleasing appearance of their property and thereby to the Estate as a whole. If the Approval Committee is of the opinion that the appearance of any piece of land or buildings or any structure on the land is unsightly, not properly maintained for the Estate in general or where it deviates from the requirements as set out in the Manual for Community Participation the board may notify the owner and request that the necessary measures be taken to address and solve the problem. If the owner, after having been given a reasonable period to address the problem, has not complied with the request, the board or manager may levy a monthly fine which may be recovered as per para [7] above.

THE FACTS

[9] Applicant avers that part of the element of possession and occupation of the property is the availability and the provision of water and electricity which is facilitated by the Estate by way of a pre-paid metering system. Pre-paid water and electricity vouchers can either be purchased directly from the Estate's administration office during office hours or by internet, 24 hours per day.

[10] During March 2014, applicant started experiencing problems with the respondent regarding his ability to purchase electricity. His internet site for the purchase of electricity was blocked and he was forced to purchase same from the administration offices of the respondent during office hours. Respondent's personnel however refused and/ or restricted the purchase of electricity to units that would last him for a few days. This was as a result of the failure of the trust (his lessor) to pay certain penalties/levies which were charged due to the trust's failure to adhere to aesthetical rules.

[11] He took this matter up with the trust and a letter of demand against the refusal to sell applicant electricity was directed to the respondent. On 7 April 2014, the respondent refused to sell to the applicant's mother any water and electricity. Applicant asserts that the refusal to sell him water and electricity is unlawful and infringes upon his constitutional rights to human dignity, equality, access to water and to the use of the property.

[12] He further avers that the respondent is acting contrary to the provisions of section 7(1) of the Electricity Regulation Act 4 of 2006 ("ERA") since it, without a license issued by the National Energy Regulator of South Africa ("NERSA"), buys and sells electricity as a commercial activity. Applicant contends that any provision in the respondent's constitution or rules that purports to give the respondent the power to terminate the supply of electricity contravenes the provisions of ERA as well as the provisions of schedule 4B of the Constitution of the Republic of South Africa. Mr. Snellenburg however indicated in his heads of argument that applicant will accept for purposes of the application that respondent is entitled to 'resell' electricity to residents in the Estate.

[13] Applicant further contends that respondent's conduct is contrary to the provision of section 24(5) of the Mangaung Metro Municipality (MLM) bylaws relating to electricity supply. Section 24(5) provides that the service provider selling pre-paid electricity to a consumer, may deduct a

percentage from the amount tendered to offset any amount that such a consumer is indebted to the service provider. The respondent, so the argument goes, cannot make the sale of electricity subject to less favourable conditions than if CENTLEC provided electricity to the end user.

[14] The respondent in turn raised two points in limine relating to misjoinder and non-joinder of the trust as owner of the property. Respondent contends that it is not the applicant's access to water and electricity that is limited but that of the trust as the respondent did not enter into an agreement with the applicant, but with the trust.

[15] Respondent admitted that it limited the sale of water and electricity to the applicant, but disputes that access thereto was denied. Deponent on behalf of the respondent contends that the limited sale was caused by the failure of the trust to adhere to the aesthetical rules relating to air conditioners. Fines were levied against the trust but it failed to pay same.

[16] The trust, as a member of the respondent, and the applicant as lessee, are bound by its rules. Applicant was the previous owner of the property concerned and it is contended that he is aware of the rules in issue. Rule 13.11 of the Manual for Community Participation provides that no electricity shall be provided or sold to any occupier or owner of any erf in respect of which levy payments are outstanding for a period of 60 days or longer, until such time as all outstanding levy payments are paid in full.

[17] On 15 February 2013, the trust, represented by one of its trustees, entered into a water and electricity provision agreement with the respondent. The provisions of rule 13.11 formed part of the agreement. Paragraph 10.3 of this agreement provides that "vereistes vir die voorsiening van water of elektrisiteit of die voortgesette voorsiening daarvan mag insluit 'n vereiste dat alle heffings of ander betalings verskuldig aan die Vereeniging ten volle betaald is ….".

[18] Respondent disputes that it buys and sells electricity as a commercial activity in contravention of the provisions of section 7(1) of ERA. It argues that CENTLEC sells electricity in bulk to the members of respondent and no profit is made out of the resale to different households. Respondent avers that it entered into a service agreement with the MLM and this agreement is as a consequence of the provisions of section 76 of the Systems Act 32 of 2000 which provides that a municipality may provide a municipal service in its area or a part of its area through a community based organisation or other non-governmental organisation legally competent to enter into such an agreement.

THE ISSUES

[19] The main issue that has to be determined is whether the respondent's conduct in limiting/refusing applicant to purchase pre-paid vouchers is lawful. Respondent raised two preliminary issues which I will address before dealing with the main issue. These related to whether applicant as lessee has locus standi to seek relief against the respondent and whether he merely has a personal right against respondent to provide him with water and electricity, thereby disqualifying him from obtaining a spoliation order.

ADJUDICATION OF THE ISSUES

- Does applicant have *locus standi*?

[20] Respondent argues that the contract for the provisioning of water and electricity was entered into between the trust as owner of the property and the respondent. Applicant's right to water and electricity, so the argument goes, is subordinate to the right of the trust thereto. It is therefore the trust, and not the applicant that has a right of recourse against the respondent. The respondent contends that the applicant has therefore failed to show that it has a clear right.

[21] The salient facts in casu are that the applicant is leasing the premises in question from the trust. It is the applicant and not the trust that consumes the water and electricity. The rules of the respondent relating to the provision of water and electricity are not only applicable to an owner with whom a contract has been entered into but is also applicable to occupiers who are not owners. In this regard, rule 13.11 of the Manual for Community Participation provides that no electricity shall be provided or sold to any occupier or owner of any erf in respect of which levy payments are outstanding for a period of 60 days or longer.

[22] The *mandament van spolie* is a possessory remedy. All that the *spoliatus* has to prove is possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully ousted. The main issue at hand relates to restoration of the applicant's right to be able to purchase prepaid water and electricity as well as his possession and use thereof. The contractual relationship between the respondent and the trust does not exclude the enjoyment of applicant's right to access water and electricity. I am satisfied from the facts that the applicant had been exercising rights to water and electricity without disturbance and that the exercise of those rights fell within the concept of *quasi-possessio*.

[23] The contract does not in my view disentitle the applicant to seek the relief. The fact that no direct contractual relationship exists between the applicant and the respondent is irrelevant. In *Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC)*, City Power after having disconnected the electricity supply to inhabitants of a block of flats with whom it had no contractual relationship, but had such a relationship with the owner of the building, contended that 'customer' as intended in the bylaw meant only persons that had a contractual relationship with a service provider, and that this limitation was justified by the city's debt-collection policy. City Power opposed the relief sought on the basis that they owed no duty of procedural fairness to the tenants, but only to the person they contracted with and not to the inhabitants of the block of flats. This argument was dismissed and the Court held that the fact that no direct contractual relationship existed between the local authority/service provider and consumers was irrelevant. I am satisfied that the applicant has a direct interest in the matter and can therefore approach the court for relief.

- Are applicant's rights capable of protection by spoliation proceedings?

[24] Mr. De Bruin for respondent contended in his heads of argument that applicant had to show that he had quasi possession, which is capable of protection by a spoliation order. He argued that at best for the applicant, he had a personal right against the respondent to sell him water and electricity subject to the conclusion of a contract. He argues that such a personal right is not protected by the mandament van spolie. He in this regard referred to *Bon Quelle (Edms) Bpk v Munisipalieit van Otavi 1989 (1) SA 508 (A); Telkom SA Ltd v XSINET (Pty) Ltd 2003 (5) SA 309 (SCA); ATM Solutions (Pty) Ltd v OLKRU Handelaars CC and Another 2009 (4) SA 337 (SCA) and Microsure (Pty) Ltd and Others v NET 1 Applied Technologies South Africa Ltd 2010 (2) SA 59 (N)*.

[25] The issue raised is therefore whether the applicant's right to access to water and electricity is a mere personal right resulting from a contractual relationship. It can be accepted that in terms of the contract between the trust and the respondent, water and electricity would be supplied to the trust or occupant subject to the conditions alluded to here above. It can further be accepted that the mandament van spolie cannot be utilised to enforce contractual rights. (See *Telkom SA Ltd v XSINET (Pty) Ltd; ATM Solutions (Pty) Ltd v OLKRU Handelaars CC and Another and Microsure (Pty) Ltd and Others v NET 1 Applied Technologies South Africa Ltd supra)*.

[26] Whether the mandament van spolie cannot be utilised to enforce contractual rights where the provision of water and electricity is concerned was however not dealt with in the matters referred to by Mr. De Bruin. These cases are therefore distinguishable from the facts in casu. The provision of water and electricity to citizens is governed by legislation. The National Water Act 36 of 1998 deals with the provision of water whereas the ERA deals with the provision of electricity.

[27] The rights of an occupier of a building to his water have long been protected by our courts by the mandament, irrespective of the contractual relationship between the parties. (See *Sebastian v Malelane Irrigation Board 1950(2) SA 690 (T) and Painter v Strauss 1951 (3) SA 307 (O).In Impala Water Users Association v Lourens NO and Others 2008 (2) SA 495 (SCA)* it was held that it is incorrect to say that the rights to water were merely contractual. These rights were not merely personal rights arising from a contract. Farlam JA held at para [18] that:

> "In my opinion, it is not correct to say that the rights in question were merely contractual. It will be recalled that the respondents or the entities they represent were all entitled to rights under the previous Water Act 54 of 1956, which rights were registered in terms of the schedule prepared under section 88 of that Act. These rights were

clearly not merely personal rights arising from a contract. The individual respondents and the entities represented by the other respondents all automatically, in terms of paragraph 7.2 a of the appellant's constitution, became founding members of the appellant. It is clear therefore that the rights to water which belonged to the individual respondents and the entities represented by the other respondents, in so far as they were replaced by or, perhaps more accurately put, subsumed into rights under the Act, cannot be described as mere personal rights resulting from contracts with the appellant. It follows that, on that ground alone, the Xsinet decision, on which the appellant's counsel relied, is not applicable.

[28] *In City of Cape Town v Strümpher 2012 (4) SA 207 (SCA)* at 210A–212E and 214A–F, a landowner used water supplied by the City of Cape Town. Following a dispute as to the landowner's water accounts, the municipality disconnected his water supply. The Supreme Court of Appeal held that, though a water consumer in the position of the landowner had to enter into a water-supply contract with the municipality, that did not make its rights to water merely personal rights arising from the agreement. The rights claimed by the landowner were also statutory rights under the Water Services Act 108 of 1997, and accordingly capable of being accorded protection by way of the mandament.

[29] The right to electricity supply, despite the contractual relationship between the parties, has likewise been protected by our courts through spoliation orders. (See *Naidoo v Moodley 1982(4) SA 82 (T). The Constitutional Court in Joseph and Others v City of Johannesburg and Others supra* held that the supply of electricity to inhabitants is done in fulfilment a constitutional and a statutory duty to provide basic municipal services to citizens. The argument that applicant merely had a personal right against the respondent to sell him water and electricity, subject to the conclusion of a contract, is therefore in my view misplaced. I am satisfied that applicant did not simply have a personal right against the respondent.

- Was the respondent's conduct in limiting/refusing applicant the right to purchase pre-paid vouchers lawful?

[30] Having concluded that the applicant's rights are capable of protection by spoliation proceedings, the question which should follow is whether the restriction of his rights to water and electricity was lawful. Respondent admittedly restricted applicant's ability to purchase such vouchers by having limited the number of units for his consumption. Applicant however contends that respondent refused to sell him any such vouchers. A dispute of fact therefore arose on this aspect. I do not find it necessary to decide on this factual dispute since the mere admission by respondent that it limited the number of water and electricity units for applicant's consumption, places such limitation squarely within the ambit of the mandament van spolie. A partial deprivation of possession is sufficient to warrant the grant of a spoliation order. (See *Van Rooyen en 'n Ander v Burger 1960(4) SA 356 (O) at 363 F-H*).

[31] The applicant contends that the respondent has no powers to restrict or limit the supply of water and electricity to enforce the payment of a penalty for non-compliance with aesthetical rules. He argues that any such purported power is in conflict with the MLM bylaws and the Systems Act 32 of 2000. It is contended that the provisions in the Manual for Community Participation and any subsequent agreement to limit such supply is unlawful and therefore void.

[32] Mr. Snellenburg referred to *Fisher v Body Corporate Misty Bay 2012 (4) SA 215 (GNP)* wherein the applicant was in arrears with his levy payments towards the respondent. His access disk into the Estate was resultantly deactivated and he was unable to gain access to the village complex. Respondent sought to justify the deactivation of his disc by referring to clauses 17.11 and 19 of the standard agreement, which read as follows:

'**17.11.** The trustees operating on behalf of Body Corporate reserve the right to disconnect and lock out electricity supply or perform any other action deemed necessary to any owner or tenant where the owner, family or the owner tenant, friends or domestic staff continue to disregard these Rules and continue to do so after receiving written notice in this regard.'

'**19.** The purpose of a levy is to pay for electricity, effluent, maintenance, employees, salaries, garden etc. Failure to pay these accounts by the Body Corporate simply results in suspension of a service for which all suffer'.

[33] Legodi J held at para [19] that the clauses referred to above made no reference to a 'rule of conduct' entitling the Body Corporate to suspend the access tags of any owner should the owner fail to make payment of the monthly levy, which levy is used to maintain the common property, nor was such reference made anywhere else in the agreement. He however went on to state that 'Even if there were, in my view, the respondent would not have been entitled to spoliation without due process of the law. In other words, it could not have taken the law into its own hands, as it did.

[34] The facts at hand differ from those in *Fisher v Body Corporate Misty Bay supra*. In casu, the Manual for Community Participation, upon which the respondents rely to justify their action, unambiguously provide that 'no electricity shall be provided or sold to any occupier or owner of any erf in respect of which levy payments are outstanding for a period of 60 days or longer, until such time as all outstanding levy payments are paid in full'. Paragraph 10.3 of the water and electricity supply agreement further provides that 'vereistes vir die voorsiening van water of elektrisiteit of die voortgesette voorsiening daarvan mag insluit 'n vereiste dat alle heffings of ander betalings verskuldig aan die Vereeniging ten volle betaald is ….'. As indicated, in Fisher v Body Corporate Misty Bay supra, the clauses relied upon by the respondent, made no reference to a 'rule of conduct' entitling the Body Corporate to suspend the access tags of any owner should the owner fail to make payment of the monthly levy which levy is used to maintain the common property, nor was such reference made anywhere else in the agreement. Legodi J was however of the view that even if there was such a provision, entitling the respondents to deactivate the access disc, the respondent would not have been entitled to spoliation without due process of the law. This remark was made obiter and for the reasons that will appear later herein, I am satisfied that the binding provisions of the Manual for Community Participation as well as the contract that was entered into between the trust and the respondent, did not entitle the applicant to a spoliation order.

[35] The respondent may deny that the act alleged was one of spoliation, or he may claim that it was legally justified. (See *Van Rooyen v Burger supra* at 358G–359B). Respondent justifies its conduct by reference to the provisions of rule 13.11 of its Manual for Community Participation and paragraph 10.3 of the agreement it concluded with the trust.

[36] Mr. Snellenburg argued that the respondent is still subject to the bylaws of the MLM and that the residents of the Estate are still entitled to expect the MLM to comply with its obligations. He contended that the municipality and no other entity has the right to determine within its area, the conditions on which electricity is supplied and circumstances under which it may be terminated or limited. Section 24(5) of the bylaws, he debated, provides that the service provider selling pre-paid electricity to a consumer, may deduct a percentage from the amount tendered to offset any amount that such a consumer is indebted to the service provider. By refusing to sell electricity to the applicant, respondent thereby acted contrary to this provision in the bylaws. He also reasoned that the respondent's conduct is contrary to the provisions of section 57(2) of the bylaws which provides that the tariffs or rates at which electricity is resold shall not be less favourable to the purchaser than those that would have been payable had the purchaser been supplied directly with electricity by the service provider.

[37] It is common cause that in terms of proclamation 16 of 2004, the Estate was declared a township in terms of section 14(1) of the Townships Ordinance of 1969 and authority was granted to respondent, as a company in terms of section 21 of the Companies Act, to govern the township. Its administration of the Estate should logically be in accordance with national and provincial legislation as provided for in the Constitution. The trust, by its ownership of the erf is a member of the respondent and is bound by its rules. The applicant, as occupant and lessee is likewise bound by the rules. The provisions of rule 13.11 of the Manual for Community Participation and paragraph 10.3 of the water and electricity provision agreement, falls squarely within the Constitution of the respondent and is therefore binding on both the trust and the applicant. One of the conditions of title agreed upon by the trust, and registered against the title of the property, were that the trust would be bound by the statutes and rules of the respondent. This position therefore differs from illegal clauses in lease agreements wherein a lessee consents to the termination of the supply of his water and electricity in case he is in arrears with his rent payments.

[38] The question is therefore whether a party can contractually agree to forfeit certain rights to his property. Mr. Snellenburg argued that an owner can waive a requirement of law which is there for his own benefit, but he cannot do so if the requirement is there for the public benefit. He in support of this contention referred to *Springs Town Council v MacDonalds; Springs Town Council v Badenhorst 1967 (3) SA 229 (W) at 235 and Strydom v Die Land en Landboubank van Suid-Afrika 1972 (1) SA 801 (A)*. He contended that having regard to the bylaws and the relevant legislation, the rights of the applicant are in the public interests.

[39] It is trite that parties are free to contract as they please. The law permits perfect freedom of contract. Parties are left to make their own agreements, and whatever the agreements are, the law will enforce them provided they contain nothing illegal or immoral or against public policy. In New Garden Cities Inc Association Not for *Gain v Adhikarie 1998 (3) SA 626 (CPD)* Rose-Innes J stated that a term in a contract of sale which restricts the use of properties in a township to residential purposes is in the interest of all property owners in the township. It ensures that the residential nature of the area is preserved, without interference by industry or businesses.

[40] The main object of the company in casu is said to promote, advance and protect the communal interests of its members. In an effort to protect the communal interests of owners, the aesthetical appearance of the estate appears to be of paramount importance. The rules provide that the collective pride in the Estate depends to a considerable extent on the contribution made by every owner in creating and maintaining a pleasing appearance of their property and thereby to the Estate as a whole. Any owner who fails to adhere to these rules is liable to pay fines as determined from time to time by the board. The main purpose of the fine is aimed at enforcement of this essential rule and in case the fine is unpaid, a termination of the sale of water and electricity vouchers after a period of sixty days.

[41] In achieving these objectives, the respondent and its members created a scheme where, by agreement, every property owner forfeited whatever right it might otherwise enjoy had such owner not been a member of the respondent, in exchange of the fulfilment of the objectives as stated here above. By becoming members of the respondent, owners thereby forfeited specified rights as contained in the Manual for Community Participation. (See *Vanilla Street Home Owners Association v Ismail and Another (A345/2013) [2014] ZAWCHC 25* (5 March 2014)

[42] The terms in the contract of sale which restricted the rights of owners is in the interests of all property owners in the township to protect their investment against unsightly features in their neighbourhood. The contention by Mr. Snellenburg that the provision in issue is not for the public benefit, in this regard the benefit of the owners of erven in the Estate is therefore misconstrued. The applicant as lessee and previous owner of the property in issue was well aware of these rules whilst he was an owner and later as lessee. He had the choice of not renting the property from the trust if he was of the view that the applicable rules are inconsistent with his rights. The provisions of the bylaws relating to the benefit that municipal pre-paid users enjoyed was already legislated and was at his disposal. He thereby had a choice, more so that he had also failed to adhere to the same aesthetical rule. I am satisfied that even if the provisions of Section 24(5) of the bylaws appear to be more beneficial to other pre-paid users, the trust and the applicant forfeited the right to only pay a percentage of the amount they owe to the service provider as provided for in the bylaws. The rules of the respondent have a different scheme of debt collection and the trust agreed to same.

[43] Some of the conditions of establishment of the township were that the township owner was responsible for the installation and maintenance of water and electricity reticulation to the township at its own expense. The municipality provides bulk electricity up to the borders of the Estate and the respondent is in turn responsible to distribute same to the different households. Extra charges are incurred by the respondent in distributing the electricity to residents. These extra charges include street lights, technical losses etc. These charges are included in the rate at which the electricity is then sold to the different households.

[44] The respondent, as a non-profit organisation, makes no profit out of this 'resale' but covers the costs of the distribution as indicated above. The losses that respondent incurs would in my view have been incurred by CENTLEC had it provided electricity directly to the different households in

the Estate and such losses would have been recouped one way or the other from the end user. I am therefore of the view that this is not contrary to the provisions of section 57(2) of the bylaws in that, when viewed in context, the 'resale' is not less favourable to the purchaser than it would have been had the purchaser been supplied directly with electricity by the service provider, as the service provider would also have had to recover these losses.

[45] I am satisfied that the trust's failure to adhere to the aesthetical rules triggered the imposition of penalties which remained unpaid. The rules and the contract entered into between the trust and the respondent, are binding on the applicant. The respondent was entitled or had the power to refuse to sell applicant prepaid water and electricity vouchers, or to limit the number of units to be sold to applicant. Respondent's conduct was therefore not unlawful as it acted within the rules and the agreement it entered into with the trust. The conduct of the respondent did therefore not amount to spoliation.

COSTS

[46] It remains only to consider the question of costs. In this regard the respondent, in the heads of argument asked that I order that the costs include the costs of two counsel. I believe that respondent's choice to employ two counsel was not unreasonable under the circumstances and was a 'wise and reasonable precaution'. Not only was I faced with an application that ran into 521 pages, but five sets of affidavits were filed. The application was of critical importance to the respondent in that the validity of its Memorandum and Articles of Association was attacked, and a decision in favour of applicant may have had an adverse effect on the enforcement of rules and may have also have had momentous financial implications for the respondent. The issues that sought determination were involved and warranted intense preparation. I am therefore satisfied that briefing of two counsel was warranted.

[47] I AM UNDER THE CIRCUMSTANCES SATISFIED THAT THE FOLLOWING ORDER BE MADE:

1. The rule nisi dated 8 April 2014 is discharged with costs, which costs are to include the costs of two counsel;

2. Applicant is further ordered to pay the costs occasioned by the extension of the rule nisi on 8 May 2014 and on 22 May 2014.

On behalf of the Applicant:	Adv. N Snellenburg
Instructed by:	Rossouws Attorneys BLOEMFONTEIN
On behalf of the respondents:	Adv. JP De Bruin SC & Adv. JG Gilliland
Instructed by:	Symington and De Kok BLOEMFONTEIN