INTRODUCTION

It is a settled law that if a landlord unlawfully deprives a tenant of electricity or water supply at a residential property, this constitutes spoliation, or unlawful dispossession. This unlawful dispossession can be protected by bringing an application to a Court for an order that the supply be restored immediately. The action under which this kind of protection is sought in Court, is referred to as the mandament van spolie (“the mandament”).

MANDAMENT VAN SPOLIE REQUIREMENTS

The mandament is a common law remedy and is thus available to any person who satisfies the criteria for the bringing of the mandament, regardless of whether a person’s residential lease provides otherwise. This is settled law. There are only three requirements that an applicant needs to prove in order for a Court to justify the granting of a mandament:

1. First is the unlawful dispossession of water or electricity to the property (or indeed any other form of possession of the property, such as physical access to it) by the defendant or respondent;
2. Second is that before the unlawful dispossession, the applicant was in peaceful and undisturbed possession of said supply; and
3. Third is that the applicant has no other remedy.

If the mandament is sought on an urgent basis very often the applicant will apply for interim protection in the form of an interim order (called a rule nisi) which will only operate temporarily until the parties have had the time to return to Court to fully ventilate the matter in the ordinary course. In the event that an applicant seeks an interim mandament then there is one additional requirement, which is that the applicant needs to prove that “the balance of convenience favors the applicant”.

4. Essentially what this means is that the applicant needs to explain to the Court why the
inconvenience caused to the defendant or respondent does not outweigh the benefit that will accrue to the applicant if the order is granted

CATCH-ALL-FUNCTION?

However, case law has indicated that the mandament does not have a ‘catch all function’ to protect contractual rights and is thus not the appropriate remedy through which to enforce contractual rights. This is because, as explained above, the mandament is a common law remedy and will always apply unless the law provides that it is possible for a party to contract out of the application of the mandament.

As explained above in relation to residential leases it is settled law that no matter what the provisions of the contract are it is not possible for a party to contract out of the application of the mandament. This is why the mandament will always apply in residential housing situations, regardless of what the provisions of the lease say. But does this apply to commercial leases where the considerations are significantly different?

COMMERCIAL LEASES

In a commercial lease the space is rented not to house the body and soul of a human being but simply to serve as a space from which a business is run. As the issue of human rights such as housing, water, and arguably the provision of electricity (as envisaged in the Constitution) does not apply because there is no human being who will be deprived of the right of access to housing or water if an eviction order is granted or the supply of electricity or water are terminated at the property.

Although it is settled law that juristic entities like companies do enjoy a certain measure of protection under the Constitution it has been made clear from our case law that juristic entities cannot enjoy the protection of certain rights which apply only to human beings. The right to access to housing and water thus cannot apply to a juristic entity (such as a company which would be the typical tenant in a commercial lease scenario). Does that mean that spoliation does not apply in commercial lease scenarios?
INCIDENT OF USE AND ENJOYMENT It is clear from case law that the mandament may not apply in relation to every kind of dispossession that a landlord may visit upon a tenant. For example, in the reported case of *Xsinet vs Telkom* the Supreme Court of Appeal held that the provision of bandwidth services to a particular property did not constitute an incident of the use and possession of that property and accordingly was not capable of protection by the mandament. So the question to be answered in any particular case, which must be decided on a case by case basis, is whether the service or thing that the landlord is depriving the tenant of, constitutes an incident of the use and possession of the property.

It is settled law that electricity and water when supplied to a residential property constitute incidents of the use and possession of that property. However, it is submitted that the same cannot be said for other services such as the provision of telephone services, broadband services, garden services, security services and even in certain instances the supply of water and electricity to a commercial rental property.

This is because commercial tenants (usually being juristic persons that are not subject to the rights to housing and water and arguably electricity as envisaged in the Constitution) do not suffer the same way that an individual would if those particular services were not supplied. In addition whether these services are supplied (and how and when and the extent to which they are supplied) ordinarily depends on the provisions of the lease agreement. The tenants contract to receive supply and to pay for it in a certain manner, and they should be bound to that agreement, in the absence of any other special reason that they should not be (such as where a constitutional right to receive the supply overrides the contractual obligation allowing disconnection of it for non-payment, as is the case in the residential setting).

It is submitted that the common law availability of the mandament van spolie should not be applied to commercial lease arrangements (to protect the supply of services to the property) because the mandament is not available to protect purely contractual rights, and the supply
received by the tenant – being a commercial entity and not a human being with constitutional rights to housing, water or electricity – is purely governed by the lease – a contract – and is not affected by human rights and constitutional considerations such as the right of access to housing, water and arguably electricity – in the way that affects residential lease arrangements.

**IMPORTANT PROVISIONS IN COMMERCIAL LEASES – FOR SPOLIATION PURPOSES**

If the lease agreement provides that municipal services can be terminated if the tenant does not pay amounts owed to the landlord, then it is submitted that the disconnection of supply in terms of the lease, and the supply of those services at all, are governed by the terms of that lease and not the common law principle of mandament van spolie.

It would thus follow that the mandament would not be available to a commercial tenant that has had its electricity or water supply disconnected in a commercial lease setting because the mandament cannot be used to protect purely contractual rights (for example to the supply of services) in a commercial lease for the reason explained above.

Further it is submitted that a business can continue to operate without water, albeit inconveniently for those who work there. A business can continue to operate without electricity (again albeit inconveniently) with the provision of natural light resources, battery operated equipment or even a generator. Because the supply of these services is not a human right, no right to receive the supply at common law or in constitutional law can be read into the contract where the wording of the contract does not provide for same, and it is thus submitted that in commercial leases the supply of services to a property do not constitute incidents of the use and enjoyment of the property. In the same way that the court found that the supply of broadband services to the property in the *Xsinet v Telkom* case referred to above was not an incident of the use and enjoyment of the business
premises in that case, it can be argued (and should be accepted) that the same applies to water and electricity.

WHAT IF WATER OR ELECTRICITY IS ESSENTIAL TO THE RUNNING OF THE BUSINESS?
The *Xsinet v Telkom* case is precedent for the fact that even where the service concerned was absolutely fundamental for the running of the a business, that this still does not necessarily render that service an incident of the use and enjoyment of the property. It was said in that case that just because a particular case is supplied to the property or at the property, this does not necessarily make it an incident of the use and enjoyment of the property.

The authors submit that this must necessarily be the case where the tenant has entered into an agreement that allows the landlord to terminate the supply of the services to the property if there has been non-payment of rental. As there are no constitutional or other common law grounds that make the supply of electricity and water services to a property a ‘right’ that the tenant can, in the absence of the lease, enforce, it is submitted that commercial tenants should not be entitled to use the mandament to obtain the continued supply of services (including electricity and water) to a commercial premises where they have not complied with the provisions of the lease relating to payment of rental and/or other amounts (including for water or electricity supply).

CONCLUSION
It is the authors’ submission that in commercial lease settings the mandament van spolie may not be available to an applicant in relation to the supply of services to the property (including electricity and water services). Each case, however, will have to be decided on a case by case basis, and the central inquiry by the Court in each instance would be whether the service
concerned constitutes an incident of the use and enjoyment of the property.

**THE AUTHOR’S DIFFERING OPINIONS ON THE ISSUE**

Chantelle Gladwin is of the opinion that a very important factor that the Court will be enjoined to take into account in such cases will be the provisions of the lease. If the provisions of the lease expressly provides that the services may be terminated if non-payment of amounts owed to the landlord occurs, this is a very good indication to the Court that the services are not an incident of the use and enjoyment of the property and that their termination should not be protected by the mandament purely to protect the tenant’s contractual rights (or lack thereof, as the case may be in instances where the lease has been terminated), because the mandament does not have a catch all function to protect all contractual rights. This is especially so in light of the *Xsine v Telkom* judgment which held that just because services are supplied to or at the property this does not mean that they constitute incident of the use and enjoyment of the property.

In the unreported case of *Joyce Ntombela and Another v Baramall (Pty) Ltd* (case number 07/13808 in the South Gauteng High Court on 4 July 2007) the court considered whether the mandament protected a commercial tenant from the disconnection of the electricity supply. The court held that the mandament cannot be used to protect purely contractual rights and because the mandament does not have a ‘catch all function’ the parties must be bound by the provisions of the agreement that they concluded, meaning that the landlord’s termination of the electricity supply in terms of the lease agreement was lawful.

This judgment was handed down by Maluleke J in the South Gauteng High Court in July 2007. The authors applaud the manner in which the court assessed and decided the issue, and respectfully submit that the judgment should have been marked for reporting (which it unfortunately did not), as it would establish precedent for the legal principle argued herein Ramon Pereira is of the opinion, however, that a Court will look to the case law which has affirmed that electricity and water are incidents of the use and

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*Schindlers Attorneys*
enjoyment of property and as such the mandament shall be applicable as the incidents of use and enjoyment are able to be possessed by the tenant regardless of whether they are residential or commercial tenants. This shall distinguish it from the Xsinet v Telkom case which did not deal with water or electricity.

In Mr Pereira’s opinion if the Court finds that the mandament is applicable then it would be precluded from considering the nature of the tenant as the underlying principle of the relief is that a member of society cannot take the law into their own hands regardless of who they are and whether that person may have had good reason to terminate supply.

CONCLUSION
A court will decide each matter on its own facts, and much will turn on whether the supply of the service concerned constitutes an incident of the use and enjoyment of the property. The provisions of the lease may be pivotal in making this determination, but ultimately, regardless of whether the court looks to the provisions of the lease or not in this regard, a court might still find that the mandement is applicable solely because the landlord cannot be allowed to take the law into his own hands and deprive the tenant of the supply, regardless of whether that tenant is a natural person living in the property, or a commercial entity running a business from it.

It is Chantelle’s view that the test for whether or not the mandement is applicable must be conducted first, by asking whether the service constitutes an incident of the use and enjoyment of the property, and if the court finds that this is not the case, Ramon’s argument (that the mandament must still apply because the landlord is still taking the law into its own hands) will not be relevant, but it remains to be seen whether courts will apply the test in this manner. Seeing that it is settled law at present that the mandament does apply to commercial leases, until this is challenged on the grounds above or other appropriate grounds, landlords will continue to have to obtain orders of court
before terminating service
supply.

***The authors welcome comments from interested
parties, and in particular, any party that has raised this argument in court
before***

Written by Chantelle Gladwin-Wood and Ramon Pereira

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