It was emphatically confirmed by the Supreme Court of Appeal in *Eskom Holdings SOC Ltd v Masinda* that the *mandament van spolie* ("the *mandament*") does not have a "catch-all" function and that it cannot operate as a remedy to restore possession of electricity/water supply to a property in a contractual dispute where the right to the supply of water/electricity at a property is a mere personal right and the possessor has been deprived of said supply. The SCA reiterated at paragraph 22 of the judgment that "spoliation should be refused where the right to receive it [the supply] is purely personal in nature".

This is nothing new. It was famously said in *Firstrand Ltd t/a Rand Merchant Bank and another v Scholtz NO and others* that:

"The *mandament van spolie* does not have a ‘catch-all function’ to protect the quasi possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the *mandament* is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of quasi possessio of certain rights."

This article challenges the conventional wisdom as to why, if at all, the *mandament* is (or ought to be) accepted by courts as protecting the right of a commercial tenant in a lease dispute to the continued supply of electricity/water at a commercial property or even argue that the *mandament* does not apply to the dispossession of the property itself, where such a right is a mere contractual right, with reference to the decisions of the SCA in *Masinda* and *Scholtz*.

**Extension of the Mandament: Quasi-Possession**

The Court in *Masinda* explains succinctly how the *mandament* was originally only available in relation to the possession of movables or immovables but that it was later extended in *Bon Quelle (Pty) Ltd v Otavi Municipality* to protect possession of incorporeals, through the "quasi-possessory rights".

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Duard Kleyn, in The Protection of Quasi-Possession in South African Law, explain that “quasi-possession” is the possession of rights. He explains as follows:

‘In practice the cases before the courts relating to our topic often concern servitutal disputes between parties or cases where water, electricity and telecommunication services were cut off by one of the parties who alleges either that the right does not exist (for example a servitutal right), or because a dispute concerning outstanding fees in terms of a contract relating to the provision of the abovementioned services. In such cases the dispossessed party (the spoliatus) applies for a mandament van spolie to seek immediate restoration of the possession of incorporeals (quasi-possession) before the dispute on the merits is settled, in other words restoration ante omnia.’

The supply of electricity, water, internet or other forms of telecommunication services are thus all examples of the quasi-possessio of a right.

“Mere” Personal Right

By “merely personal right”, it is meant that the right arises only from contract, and not from some other limited real right (such as a servitude) or statute (such as a right to receive water at a farm, in terms of the National Water Act 36 of 1998).

The Nature of the Right

It is trite that when a court is called upon to make a determination as to whether the requirements for the mandament have been satisfactorily plead and proven by an applicant, that whether the applicant (for the mandament) has a right to the supply of electricity/water at the property is not an investigation that the court ought to do at that time. This is because the mandament is not concerned with settling disputes related to whether there is a right to receive the supply at the property in those circumstances. It is aimed at restoring the status quo on an urgent or semi-urgent basis pending a determination of the rights to supply in the ordinary course. The SCA in *Masinda* summarizes the relevant legal principles succinctly at
para 8:

“The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent.

Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property ‘as a preliminary to any enquiry or investigation into the merits of the dispute’ as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant’s existing right to property, as opposed to their possession of it, in order to grant relief.”

The Court goes on to explain, however, that this does not mean that no examination of the nature of the right must take place by the court in an application where the mandament is invoked. The Court is enjoined to examine the nature of the right to determine whether the right is deserving of the protection of the mandament, because if it is not, relief based on the mandament cannot be granted. This was also explained clearly in the Scholtz case and confirmed by the SCA further at para 17 of Masinda where the court (with reference to the nature of the right in another case, Painter v Strauss) holds that, if the right concerned is merely contractual, it would not be protected by the mandament.

This is not to say that another form of appropriate relief (such as relief based on the contract) cannot be granted – only that when approaching a court for relief, where the right is merely contractual, the mandament is not the appropriate remedy and relief based on it should be refused.

Incident of Use and Possession of the Property

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We now turn to the requirement that for a right to be protected by the mandament, it must be one of the use and enjoyment (or possession) of the property. This appears, from the case law, not to be a separate requirement from the one that the right in question must not be a mere contractual right, but rather to be a test used to determine whether the right is merely personal in nature. Either way, whether it is a separate requirement or a test used to determine whether a right is merely personal in nature, it is clear that this test is utilized only in the case of quasi-possessio (for services such as electricity and water) and does not relate to actual possession of movables or immovables (such as in the case of a lessee refusing to vacate a property after the lease has been cancelled).

In Masinda the SCA explains that what is critical about this requirement is that the possessor must be in lawful possession of the property, in order for the supply to have been protected by the mandament. The SCA goes on to explain that in several prior cases the courts appear to have overlooked this (namely, that the property must have been lawfully possessed before the supply of electricity/water to the property can be protected by the mandament) and have (it is implied, incorrectly) found that the mere supply of water/electricity to a property was protected by the mandament purely because these services were consumed at the property. The SCA reiterates in several other paragraphs how the idea that the “mere supply of water and electricity to a property, in itself and without more, constitutes an incident of the possession of the property” is misplaced.

The SCA expressly concluded thus that:

‘the mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a
respondent is precluded from disproving the merits of the applicant’s claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.’

Application of the Law to Commercial Evictions

Based on the above, it is difficult to understand why our courts protect commercial tenants from being ‘locked out’, or removed from the premises, or from having their electricity or water shut off by the landlord, using the mandament. The commercial tenant has only contractual rights to the possession of the property, and/or to the supply of water/electricity at the property, and only has those rights for so long as the lease remains in place.

Once cancelled, Chantelle Gladwin-Wood is of the opinion that the commercial tenant has no right, statutory, servitutal or in terms of any other law to remain in the property or to the continued supply of electricity/water. As such, the mandament should not be available to such tenants as a remedy, because the rights that they rely on are merely personal in nature, and the mere existence of the supply of electricity/water at the property is not, on its own, sufficient to establish that the use of that service at the property is an incident of the possession of the property. In Chantelle Gladwin-Wood’s view then, the mandament should not be available to such tenants as a remedy to enforce their contractual rights, because its operation does not extend to cover this function in our law.

Chantelle argues that this is not to say that commercial tenants who are aggrieved by the actions of their landlord in locking them out, shutting of the utilities or dispossessing them of the property are empty, or that they cannot be enforced. To the contrary, the rights of such a commercial tenant to challenge the landlord’s conduct in law and have it declared unlawful remain intact, as does the mechanism through which such rights would be enforced – namely an urgent application to court. The only difference to the process is that the commercial
tenant would plead their case in terms of the rights that they have under the lease, and the
court would investigate the merits of such rights when determining whether they should be
restored to the property (or whether their utility supply should be restored), whereas under
the mandament the merits of the rights under the contract would not have been
investigated.

On the other hand, Anja van Wijk’s dissenting opinion is that due process (in the form of
obtaining an eviction order) needs to be followed before a commercial tenant can be
removed from the property (based on common law) and therefore that the commercial
tenant is entitled to approach the court with the mandament in order to be re-placed in
possession of the property once ‘locked-out’ by the landlord.

**Distinguishing the Legal Position in Relation to Residential Tenants**

The rights of a residential tenant are quite different, however, because a residential tenant
has the right not to be evicted from their home without a court order, which derives from the
Constitution (which is a statute) and to have the procedural rights during the eviction
application process set out in legislation. Residential tenants thus have stronger rights to
remain in possession of the property, and potentially (depending on whether the court finds
on a case by case basis that the supply of electricity/water to a residential property is an
incident of the possession of that property) stronger rights to resist the shut off of utilities to
that property, based on statutory rights to remain in that property until a court evicts them.
Their rights are thus clearly capable of protection by the mandament, whereas (at least in
Chantelle’s view) the rights of commercial tenants are arguably not.

**Conclusion**

To the extent that courts have, in the past, protected commercial tenants from having their
utilities shut off via the mandament, this was incorrect because such rights are mere
personal rights and are not capable of protection by the mandament. A commercial tenant
who finds himself locked out or without power is able to apply to court for an urgent order
that the possession of the property or power be restored, but arguably not in the terms of the *mandament* – in terms of the lease. The legal position though can be argued from both sides as outlined in the dissenting opinions expressed above. The above however, does not apply to residential tenants who are protected from being dispossessed of the property (and potentially from being dispossessed of their utility supply) by statute, and whose rights in this regard are thus potentially capable of being protected by the *mandament*.

*Written by Chantelle Gladwin-Wood and Anja van Wijk*