

Short notes on:

NON-PAYING TENANT PROBLEM? WANT TO DISCONNECT THE ELECTRICITY? BEWARE!

Introduction

It is often a frustrating situation dealing with poor-paying tenants. The practical results could include a bond that the owner needs to pay, but it is not receiving the agreed rental whilst municipal charges continue to mount.

It is often a consideration to disconnect electricity or water supply in this context.

But how is this done lawfully?

That is precisely what the court had to consider in *Wilrus Trading CC v Dey Street Properties (Pty) Ltd* 2021 JDR 0698 (GP).

In the said matter, two tenants conducted their business from a premise at the Shell filling station, Middel Street Motors, 256 Dey Street, Nieuw Muckleneuk, Pretoria, Gauteng ("the property"). The second occupies shop no. 4 on the property and conducts a laundromat. Accordingly, they launched an urgent court process against Dey Street Properties (Pty) Ltd (the "property owner") and its managing agents, Nonya Properties CC. In addition, against Ideal Pre-Paid (Pty) Ltd, the pre-paid metering service provider, in respect of the business premises situated on the property.

The applicants wanted an order compelling that the owner restores the tenant's peaceful and undisturbed possession of their respective business premises. More, in particular, an order that the owner restores the electricity supply to the premises by instructing the pre-paid metering service provider to cancel and rectify the negative and arrear balances loaded on the tenants' pre-paid electricity meters.

The Law

The tenants relied on the decision in *Eskom Holdings SOC Limited v Masinda* 2019 (5) SA 386 (SCA) ("Masinda ") where the court considered whether electricity supply in itself was an incident of possession of the property to which it is delivered or a mere personal right. This is important as a spoliation application fundamentally requires satisfying being or having been in possession.

Another case in point is the decision of *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC), which is essential in that it confirms the following principles:

(i) Certain rights may be the subject of quasi-possession, although incorporeal.

(ii) An incorporeal right (such as an alleged right to electricity) may, depend on the circumstances, be capable of protection under the mandament van spolie.

(iii) The enquiry should start with an investigation into the precise basis on which the right to electricity is characterised.

Whether an alleged right to electricity is a right of use or an "incident of the possession or control of the property" served by the electricity, if it is an incident of the possession, then the mandament van spolie is available.

(iv) Where electricity is interrupted, particular where the supply of electricity is considered a practical necessity for an occupant to use the property, the occupant will experience a "significant disturbance in his occupation".

(v) Where a landlord has cut off electricity to force the claimants to vacate the property, the court has held on the occasion that it was in the claimants' possession of the property.

The court held that the supply of electricity (at the instance of the first respondent) constituted material interference in possession of the property itself. Further, it held that it was difficult not to conclude that interference to the electricity supply materially interferes with their possession of the property.

Notwithstanding the contention of the owner (landlord) that the tenants' lease agreements have been cancelled, they remain in occupation. This fact, coupled with the electricity cut, leads to the irresistible inference that the first respondent effectively cut the electricity (by uploading the arrears on the pre-paid meter) to force the applicants to vacate and avoid having to follow due process to recover the alleged arrears.

Conclusion

In the case of non-paying or poor-paying tenants, it is crucial to notify the tenant(s) of their non-payment or poor performance. In many municipalities, the by-laws provide for the disconnection of services. However, that must happen appropriately and give the tenants notice of the intention to do so. Taking the law into your own hands is, therefore, ill-advised. Therefore, seeking assistance early on to screen tenants better and contracting accordingly would be more advisable and a better spend of time and money.

Contact us for all your commercial or property law needs and join our upcoming webinar on landlord-tenant issues on 24 October 2022 – <https://www.schoemanlaw.co.za/legal-masterclass-first-time-buyers-unpacking-the-legal-framework-of-landlord-tenant-and-evictions/>

