

**IN MEMORIAM MIRCEA MUREȘAN**

**THE PROTECTION OF QUASI-POSSESSION IN SOUTH AFRICAN LAW<sup>1</sup>**

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**Abstract:** *The South African legal system is uncodified and from a comparative law perspective it is usually classified as a “mixed legal system”, meaning a mixture between Romano-Germanic law (in the form of Roman-Dutch law) and English common law.*

*Property law is deeply rooted in Roman and Roman-Dutch law and a sharp distinction is drawn between ownership and possession and the protection of these two institutions. This contribution focuses on the protection of quasi-possession namely the possession of rights. Only certain rights can be possessed in South African law. These are rights of use such as servitural rights and so-called incidents of possession (for example the access to water and electricity in terms of a contract such as a contract of letting and hiring).*

*There is only one possessory remedy in South African law, the mandament van spolie (spoliation order or actio spoli). This remedy originated in 9<sup>th</sup> century Canon Law and it protects possession against spoliation (the unlawful deprivation of possession of a thing or an alleged right). In accordance with the Roman, Canon law and Roman-Dutch tradition, when applying the mandament the court is not supposed to investigate the merits of the case (the actual rights of the parties). The Court only establishes whether there was possession of the alleged right (the exercise of actions usually associated with the right) and whether there was spoliation. Recently, however, the South African Supreme Court of Appeal started to focus on the actual rights (real or personal) of the parties involved. It is submitted that this approach is incorrect and that the same results could have been achieved if the Court had followed the traditional Roman and Roman-Dutch approach.*

**Key words:** *Quasi-possession, quasi-possession in South Africa law, possession of incorporeals, spoliation, possessory protection, possessory remedy, mandament van spolie, spoliation order, actio spoli, spoliatus ante omnia restituendus est*

## 1. Introduction

From a comparative law perspective, the South African legal system is usually classified as a “mixed legal system”. This indicates a mixture between civil law (Romano-Germanic law) in the form of Roman-Dutch law and English common law.<sup>2</sup> Unlike most civil law systems on the European continent, South African law is not codified which means that the law is to be found in various sources: primary sources such as legislation, case law and common law and secondary sources such as modern scholarly writings.<sup>3</sup> The South African constitution contains a bill of rights which recognises common law and it requires the courts to interpret and develop common law in such a way that it promotes the spirit, purport and objects of the bill of rights.<sup>4</sup>

Our common law in the form of Roman-Dutch law was transplanted to the Cape of Good Hope in 1652 when the East India Company (*Vereenigde Geoctroyeerde Oost-Indische Compagnie*, abbreviated VOC) established a refreshment station there. The exact meaning of “Roman-Dutch law” is not always clear. There exists a narrow approach that suggests that only the seventeenth- and eighteen-century institutional writers of the province of Holland are authoritative. Of the seven provinces of the Dutch Republic, Holland was the most prominent as the political and economic centre. However, there is also the wider approach that Roman-Dutch law developed during the reception of learned law since the 11<sup>th</sup> century in the whole of Western Europe and that it forms part of the Roman-Canon *ius commune* of the continent. Although the narrow approach is supported by a judgment of the Appellate Division of 1949,<sup>5</sup> the courts generally follow the wider approach.<sup>6</sup>

There are several areas of South African law that are strongly influenced by the English common law, especially in the field of procedural law and commercial or mercantile law.<sup>7</sup> However as far as property law is concerned, of which the law of possession forms part, the basis is Roman-Dutch with very strong roots in Roman law.<sup>8</sup> General possessory theory such as the concept of possession itself (that it consists of a physical element, the *corpus*, and the mental element, the *animus*) and issues relating to the acquisition, retention and loss of possession, as well as the functioning of possessory protection, is fundamentally based on Roman law. However, the possessory remedy as such, which protects possession, has its origins in canon law: the *mandament van spolie* or spoliation order.<sup>9</sup> When applying the *mandament van spolie* our courts have followed the wide approach to common law and relied not only on Dutch authors such as Van der Linden, Willem de Groot, and Wassenaar but also on Italian authors such as Menochius and Maranta and German authors such as Leyser and Savigny.<sup>10</sup>

In South African property law a clear distinction is drawn between possession and ownership. Ownership is seen as a real right (full title) in respect of a thing, in fact it is the strongest real right providing the owner with the fullest entitlements with regard to the thing and it is protected by an action, the *rei vindicatio*. Possession is in the first place a factual relationship of control over a thing, but whether it is also a real right concerns an age-old debate which still remains clouded in confusion.<sup>11</sup>

However, this contribution focuses on the protection of quasi-possession by the *mandament van spolie*, which is the only possessory remedy in the true sense of the word in South African law and which functions quite differently from remedies protecting rights in general, such as the *rei vindicatio*. The purpose of the *mandament van spolie* is to restore possession that was lost as a result of spoliation. It is unique in that when the court applies the remedy in order to solve a possessory dispute, it does not concern itself with the merits of the case, as it does not consider the rights of the parties. It only tries to establish whether there was possession (or quasi-possession) and whether it was spoliated (in other words, whether the possessor was unlawfully dispossessed).<sup>12</sup>

Possession in the ordinary sense of the word denotes factual control of a corporeal thing. Quasi-possession in South African law refers to the possession of rights.<sup>13</sup> Now, here we are immediately confronted by two questions: What kinds of rights are worthy of protection by

the *mandament van spolie* and, secondly, how does one possess a right? With regard to the first question it has been stated by the Supreme Court of Appeal that:

[T]he *mandament van spolie* does not have a “catch-all function” to protect the *quasi-possessio* of all kinds of rights irrespective of their nature... [it is not the appropriate remedy] where contractual rights are in dispute or specific performance of contractual obligations is claimed... The right held in *quasi-possessio* must be a “gebruiksreg” [right of use] or an incident of the possession or control of the property.<sup>14</sup>

With regard of the second question it is accepted that ‘[t]he *quasi-possessio* consists in the actual exercise of an alleged right’.<sup>15</sup>

In the case of *Telkom SA Ltd v Xsinet (Pty) Ltd*<sup>16</sup> the court made the following observation:

Originally, the *mandament* only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The *mandament* was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right had ‘quasi-possession’ of it, when he has exercised such rights. Many theoretical and methodological objections can be raised against this construct, *inter alia*, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of “quasi-possession” has passed into our law. This is all firmly established.

In practice the cases before the courts relating to our topic often concern servitural 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 servitural right), or because of 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*.

In recent times this has become a very complicated and confusing matter in South African law because the courts have started to focus on the rights of the parties in possessory cases like these.<sup>17</sup> A historical background is necessary to fully understand the issue.

## 2. Historical background

### 2.1 Possessory remedies and procedure

Roman law provides us with no definition of possession. Paul,<sup>18</sup> following Labeo, merely points out that the term *possessio* is derived from ‘seat’ or ‘position’. However, Ulpian<sup>19</sup> states that possession has nothing in common with ownership. This is quite a sweeping statement,<sup>20</sup> but the difference between ownership and possession is clearly illustrated by the protection of possession by means of the possessory remedies and the procedural aspects thereof. Special remedies, the *interdicta*, were created by the praetor to protect possession as

such. There were three authentic possessory interdicts, the *interdicta uti possidetis, utrobi* and *unde vi*.<sup>21</sup> The *interdictum undi vi* can be considered as the earliest root of the *mandament van spolie* because it only concerned the restoration of possession (lost by means of violence). The remedy was not available in cases of mere disturbances of possession.<sup>22</sup>

The reasoning behind the Roman approach to the protection of possession is explained by the remark of the emperor Marcus Aurelius<sup>23</sup> that violence (*vis*) not only implies physical violence, but that it is also present when someone dispossesses another without the intervention of the legal process. It concerns the situation where someone who professes to be entitled to the possession of a thing takes the law into his own hands (acts as his own judge)<sup>24</sup> by disturbing or dispossessing the possessor. Procedurally, therefore, a distinction was made between the preceding possessory suit (*iudicium possessorium*) and the subsequent petitory suit (*iudicium petitorium*). Possession must first be restored. During the possessory suit, when the possessory remedy is applied, the judge does not consider the merits of the case and the rights of the parties. He merely deals with the *de facto* issue of possession and the disturbance or deprivation thereof. The unsuccessful party in the possessory suit can thereafter enforce his rights in the petitory suit. The successful party of the possessory suit would then be the defendant, who might in the end lose his possession. In this sense, the possessory remedy sometimes provides only temporary relief. During the petitory suit other remedies such as actions (for example the *rei vindicatio*) are instituted and the plaintiff had to prove his title, what we nowadays refer to as rights. In the case of the *rei vindicatio*, for instance, the plaintiff had to prove ownership and that he was entitled to the possession because the defendant's possession was unlawful.<sup>25</sup>

The possessory remedies of Roman law were received into Western European law since the late eleventh century, but during the reception period before the codification movement in Europe, several other possessory remedies came into existence.<sup>26</sup>

In Roman-Dutch law three possessory remedies were in use during the seventeenth and eighteenth centuries. They were the *mandament van complainte*, the *mandament van mainteue* and the *mandament van spolie*. These remedies were received in the Netherlands from France.<sup>27</sup> The *mandament van spolie* emerged in Canon law with the creation of the so called '*condictio ex canone redintegrandi*' in the glosses of the *Decretum Gratiani*.<sup>28</sup> In later centuries this remedy was also received into secular law as the remedy of *réintégrand*e in France<sup>29</sup> and as the *actio spolii* in Germany.<sup>30</sup> As far as the application of the possessory remedies in general is concerned, the Roman doctrine of the separation of the possessory and petitory suits was received in the law of civil procedure in Canon law and in the European *ius commune*. The underlying principle of the *mandament van spolie* was *spoliatus ante omnia restituendus est*: the spoliated person must be reinstated in possession before anything else (before an evaluation of the merits of the dispute) because the spoliator took the law into his own hands.<sup>31</sup>

## 2.2 The possession of incorporeals

It is generally accepted that in Roman law only corporeals were initially regarded as things (*res*) in the eyes of the law and capable of possession, but at an early stage,

presumably during the late Republican period, the existence of incorporeal things were recognized.<sup>32</sup> Gaius, in his *Institutiones*<sup>33</sup> provides us with his tripartite division of law into things, persons and actions. He then distinguishes between corporeal things (*res corporales*) and incorporeal things (*res incorporales*).<sup>34</sup> The same approach was followed by Justinian in the *Corpus Iuris Civilis*.<sup>35</sup> Both also mention that the interdicts protect possession and quasi-possession.<sup>36</sup> Corporeal things are things that can be touched. Incorporeals are things that exist merely in law, such as a usufruct and obligations,<sup>37</sup> what we today regard as examples of real and personal rights. Thomas refers to this abstraction that rights can function as things or objects as 'a laudable feat of abstraction and rationalisation'.<sup>38</sup> Whereas Ulpian merely suggests that the *interdictum uti possidetis* should be extended to usufructuaries,<sup>39</sup> he states it as a fact that usufructuaries are protected by the *interdictum unde vi* and refers to their relationship in respect of the thing as *quasi possessio*.<sup>40</sup>

The Roman doctrine of the *quasi possessio* of incorporeal things was eventually received into Canon law and the *ius commune*. In Canon law the possessory protection of *quasi possessio* (also referred to as *possessio iuris*) was extended far beyond the scope of usufruct.<sup>41</sup> Our Roman-Dutch authors such as Hugo de Groot,<sup>42</sup> Dionysius van der Keessel,<sup>43</sup> Johannes Voet,<sup>44</sup> Simon van Leeuwen<sup>45</sup> and Ulric Huber<sup>46</sup> were similarly acquainted with the notion of incorporeals and the possessory protection thereof. For instance, to prevent a person from exercising a servituted right was regarded as spoliatio and in such a case the *mandament van spolie* could be applied for.<sup>47</sup>

### 3. South African Law

#### 3.1 *The mandament van spolie as only possessory remedy*

In the late nineteenth and early twentieth century there were a few cases concerning the restitution of possession where the court seemed to apply the *mandament van complainte*, but also mentioned spoliatio and the maxim *spoliatus ante omnia restituendus est* at the same time. However, these decisions are extremely vague and confusing as it is not clear exactly which possessory remedy was applied.<sup>48</sup> By now it has, however, been settled that the *mandament van spolie* is the only Roman-Dutch *mandament* that has survived and that *complainte* and *maintenue* have fallen into desuetude. Hahlo and Kahn<sup>49</sup> remark as follows: 'It is remarkable that it is this remedy (*mandament van spolie*) which was not much used in Roman-Dutch law, has become the basis of the protection of possession in modern law.'

As far as the origin of the modern *mandament van spolie* is concerned, Curlewis J in *Muller v Muller*<sup>50</sup> made the following observation: 'Now it is quite clear that, though our spoliatio order has its roots in Roman law, it is really derived from Canon law... We have to do then with the Canon law and with a *mandament van spolie* as obtained in the old Dutch courts...'

English law has never been applied in respect of the *mandament van spolie*.<sup>51</sup>

Possession can also be protected by other remedies, such as interdicts and delictual actions,<sup>52</sup> but these cannot be considered as possessory remedies in the true

sense of the word, because in such cases the rights of the parties have to be proved. The *mandament van spolie* is the only true possessory remedy in South African law where the applicant only needs to prove that he was in possession and that he was despoiled (unlawfully dispossessed).<sup>53</sup> The court does not concern itself with the merits of the case, as explained above. True possessory remedies for mere disturbance of or interference with possession, as had existed in our common law are unknown in South African law.<sup>54</sup> In such cases the parties must resort to an interdict.

The *mandament* is therefore a unique and, maybe for some, a peculiar remedy of South African law. When applying the *mandament van spolie*, the courts have mentioned that the purpose of the principle *spoliatus ante omnia restituendus est* is to prevent people from taking the law into their own hands. This led A.J. van der Walt in the 1980s to regard the *mandament van spolie* not as a possessory remedy, but rather as to a general remedy that protects the public order against disturbances of the peace. It is for this reason, according to him, that the *mandament van spolie*, apart from its other peculiarities, also protects quasi-possession.<sup>55</sup>

## **3.2 Quasi-possession**

### **3.2.1 Introduction**

Notwithstanding the long civil law tradition of the recognition of incorporeal things and the quasi-possession thereof, it does not always sit comfortably within the realm of “property law” or the “law of things” as this area of law is sometimes referred to. Although early South African authors recognized quasi-possession,<sup>56</sup> its recognition suffered a setback with the reception of the theories of the German Pandectists during the nineteen-fifties, as evidenced in the works of WA Joubert,<sup>57</sup> CG van der Merwe<sup>58</sup> and JC Sonnekus.<sup>59</sup> Their approach is to limit the law of things (property law) to corporeals.<sup>60</sup> Various reasons are furnished for this approach, amongst others that private-law rights are distinguished with regard to their objects and that to recognise rights as objects would confuse the distinction between real rights (with corporeals as objects) and personal rights (such as contractual rights with performances, which are incorporeal as objects).<sup>61</sup> However, the fact that rights (incorporeals) can function as the objects of real rights is recognised in South African case law and legislation.<sup>62</sup> The reason for this is obviously that such rights have a monetary value.<sup>63</sup> Malan remarked that wealth today is more and more incorporated in incorporeals which can be regarded as the *res mancipi* of the modern world.<sup>64</sup> The South African constitution also does not confine property to corporeal things.<sup>65</sup>

### **3.2.2 Protection of quasi possession by the mandament van spolie**

The South African courts have a long tradition of protecting quasi-possession by means of the *mandament van spolie*.<sup>66</sup> As already pointed out,<sup>67</sup> although quasi-possession concerns the possession of rights, the *mandament van spolie* does not have a catch-all function to protect the so-called quasi-possession of all rights. In earlier case law and

authorities cited there a superficial reading might suggest that a wide approach is followed in this regard. For instance, in *Nienaber v Stuckey*<sup>68</sup> the court referred to the *locus classicus*, *Nino Bonino v De Lange*, where the court remarked that 'spoliation is any illicit deprivation... of a legal right'. The Court also cited the Dutch author, Wassenaar, who states that the spoliation remedy is available in the case of deprivation of 'eenige gerechtigheden' (all rights). However, this is not correct.

Of particular importance here is the fact that specific performance of a personal right (contractual right) cannot be enforced with the *mandament van spolie*. For instance, where a lessor refuses to deliver the object of the lease to the lessee, the *mandament* is not the appropriate remedy to enforce the lease. The lessee should have recourse to the contractual remedy. In such a case it is also clear that the lessee did not have possession in the first place. A seller, likewise, cannot force the buyer to pay the outstanding amount of the price with the *mandament*.<sup>69</sup>

As mentioned above,<sup>70</sup> the rights that are protected basically are rights of use of a corporeal thing. These can be what is referred to as "servituted rights" such as a right of way or a right to draw water, or it can incorporate so-called "incidents of possession" where someone who is in possession of premises also has access to services such as electricity, water supply and telecommunication. It is important to note that the use can either exist in terms of a professed real right (such as a servitude), or a contractual (personal) right such as a lease.

There needs to be a close connection between the use and the possession of a corporeal thing. In *Shoprite Checkers Ltd v Pangbourne Properties Ltd*<sup>71</sup> the applicant, a supermarket, leased premises from the respondent, a shopping centre. There was an open parking area which could be used by customers of all the tenants, but was under the exclusive control of the lessor. The lessor started building operations for new shops and an extended parking area, which interfered with the use of the parking area by the applicant's employees and customers. The court refused an application for a *mandament van spolie* and remarked as follows:

The mere fact that the applicant might or might not have had a right, derived from contract which it entered into with the respondent, to make use of the parking area, did not in my view, amount to a "possession" as envisaged in the authorities, of such designated area for the purposes of establishing an entitlement to the *mandament van spolie*.<sup>72</sup>

During spoliation proceedings where the possession of corporeals is protected, the applicant only has to prove that he or she was in possession of the thing and that he or she was unlawfully dispossessed (spoliated). This was explained as follows in *Kramer v Trustees Coloured Vigilance Council Grassy Park*:<sup>73</sup>

It is trite law that in order to obtain a spoliation order two allegations must be made and proved, namely (a) that applicant was in peaceful and undisturbed possession of the property and (b) that respondent deprived him of the possession forcibly or wrongfully against his consent.

The same approach is followed in respect of the protection of quasi-possession of incorporeals as explained by Hefer JA in the *locus classicus* in this regard, *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*<sup>74</sup> where he stated that possession and spoliation of

the alleged right must be proved. In the case of a servitude, possession lies in the use of the servitude over some time and that this replaces the physical possession of a corporeal. It concerns the exercise of actions that are usually associated with the particular rights.<sup>75</sup> In certain cases before *Bon Quelle* the applicant was required to prove the existence of the professed right in order to succeed with the *mandament van spolie*.<sup>76</sup> This was the approach in Canon law before the thirteenth century, but it was rejected in *Bon Quelle* as it would imply that the court must adjudicate upon the merits of the case, namely upon the rights of the parties, which is contrary to general possessory theory.<sup>77</sup> It was explained in subsequent cases in the following way: '[T]he *status quo* that the *spoliatus* desired to restore by means of the *mandament van spolie* was the factual exercise of the servitude and not the servitude itself',<sup>78</sup> and also: 'Although it might appear illogical that the servitude does not have to be proved, it is the *status quo* which has to be restored by the *mandament van spolie* until it is determined whether the servitude indeed exists...'<sup>79</sup> However, the author Sonnekus still maintains that the professed right must be proved to exist.<sup>80</sup>

The same uncomfortability or aversion that exists with regard to the recognition of incorporeals and its possessory protection within the area of property law as discussed above,<sup>81</sup> also presents itself in the works of some academics on the topic of the protection of quasi-possession by the *mandament van spolie*.<sup>82</sup> Sonnekus maintains that it is unacceptable from both an historical and a theoretical point of view, since only corporeals can be possessed. He considers the protection of incorporeals by means of the *mandament van spolie* as an extraordinary application of the remedy and is of the opinion that in cases where the so-called 'possession of rights' has in fact been protected, the possession concerned actually amounted to the possession of a corporeal thing.<sup>83</sup> Van der Walt also considers the protection of quasi-possession as peculiar, but ascribes this to the extended application of the *mandament* as a remedy to protect the public against self-help. He also maintains that in most cases it actually amounts to the protection of possession of a corporeal thing. He agrees that in the case of the protection of a servitude, it essentially concerns the interrupted and limited possession of the servient tenement, which is corporeal. Therefore, terminology such as "quasi possession of a right" clouds the issue, because it excludes the role of the corporeal thing. He concedes, however, that this solution is difficult to align with the protection of the use of water and electricity which are incidents of the possession of premises.<sup>84</sup> The view of Sonnekus that the possession of incorporeals is historically and theoretically unacceptable cannot be supported as it is historically incorrect. Furthermore, it is doubtful whether the possession of, for instance, the right of way over the servient tenement could ever constitute possession, whether interrupted or limited, of the road or land itself.

Similar doubts have also been raised in case law. In *Zulu v Minister of Works, KwaZulu and Others*<sup>85</sup> the court remarked: 'In truth the *mandament van spolie* is not concerned with the protection or restoration of *rights* at all. Its aim is to restore the factual possession of which the *spoliatus* has been unlawfully deprived.'

In *Microsure v Net 1 Applied Technologies SA*<sup>86</sup> the court remarked that '[a] number of well-meaning jurists appear to have encouraged the extension of the application of the *mandament van spolie* to instances of quasi-possession of incorporeals. That is undesirable and could possibly even be detrimental to economic and commercial activity.'

Such a view draws a line through the whole historical development since Roman times of the topic under discussion.

### **3.2.3 Focusing on the rights of the parties**

As pointed out above,<sup>87</sup> in the light of our common law the distinction between the possessory suit and the petitory suit in modern day South African law implies that the rights of the parties in the possessory suit are not under consideration.

Quasi-possession concerns the use, namely the exercise of actions usually associated with the professed or alleged rights. Unfortunate formulation in some judgements can create confusion, for instance where the court proclaims that the applicant was spoliated of a "right of possession" or that he or she was in "possession of an incorporeal right."<sup>88</sup> This suggests the existence of a *ius possidendi* (a right to possession), that has its origin in, for example either a real or a personal right.<sup>89</sup> This is probably the reason why, in some cases in the past, it was required to prove the existence of the right.<sup>90</sup> We now turn to the possessory protection of so-called "servitugal rights" and "incidents of possession", as examples of quasi-possession. It is not always possible to draw a sharp distinction between these two categories.

#### **3.2.3.1 Servitugal rights**

This is the oldest case of quasi-possession that originated in Roman law where usufruct was referred to as *quasi-possessio* and was protected by the possessory interdicts.<sup>91</sup>

Nowadays it mostly concerns disputes with regard to the right of way or access, or rights to water supply. In *Nienaber v Stuckey*<sup>92</sup> the applicant and respondent had an agreement (contract) that the applicant could plough and cultivate a part of the respondent's land. A dispute arose between the parties regarding the nature of the agreement (lease or not) and for how long the respondent had granted the right. After two years the respondent's manager, on instruction of the respondent, closed the gate that gave the applicant access to the land. The Appellate Division referred to the applicant's right as a 'servitugal right', found that he was in possession of the right and that he was despoiled.<sup>93</sup> The court refused to consider the rights of the parties originating from their contractual relationship.<sup>94</sup>

A similar case was *Van Wyk v Kleynhans*<sup>95</sup> where the applicant alleged that he had a right of way over the respondent's farm. However, a dispute existed between them regarding the use of the road. The respondent then closed the gate. The Court relied on *Nienaber*, did not consider the merits of the case and awarded the *mandament van spolie* on the principle of *spoliatus ante omnia restituendus est*.<sup>96</sup>

As regards the right to water supply one can turn to *Sebastian and Others v Malelane Irrigation Board*<sup>97</sup> as a point of departure. The appellants were riparian owners to a river from which they were supplied with water by a canal. They did not want to participate in a new expensive pumping scheme, but wished to continue with the *status quo*. The Court found that they were in possession of the use of the water and that they

were despoiled when the Irrigation Board removed the pipes leading from the canal.<sup>98</sup> The Court did not consider the dispute between the parties and granted the *mandament van spolie* because the respondent 'took the law into its own hands'.<sup>99</sup>

The *locus classicus* in respect of the protection of quasi-possession in general, the case of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*,<sup>100</sup> referred to above,<sup>101</sup> also concerned water. For decades the respondent used water from fountains on the farm owned by the appellant. There was a dispute between the parties as to whether a servitude actually had existed. However, the appellant cut off the water supply without recourse to the legal process. In the judgement the Court laid down several important principles with regard to the protection of quasi-possession: Relying on *Nienaber* it referred to these rights as 'servitudinal rights'; in these cases it is the right that is possessed (not a corporeal thing); the existence of the alleged right need not to be proved; and that quasi-possession lies in the actual use of the alleged right. It is submitted that the *Bon Quelle* judgement reflects the common law position correctly.

It is clear from the above cases that the *facta probanda* were possession (use or exercise) of the right and the occurrence of spoliation. But then things changed as the courts increasingly started to focus on the actual rights of the *spoliatus* and not the mere use or exercise of the alleged rights.

In *Zulu v Minister of Works, KwaZulu, and Others*<sup>102</sup> the applicant was a senior Zulu prince whose dwelling was some distance away from the royal compound. In terms of an arrangement with the provincial authorities he was permitted to draw surplus water for his own use, at no cost, from the pipeline that provided the royal compound with water. This carried on for about 20 years until the authorities terminated his water supply because the water consumption of the royal compound increased to such an extent that no more surplus water had remained. The applicant applied for a *mandament van spolie*, compelling the respondents to resume the supply of water to his house. The application was denied. There are many inconsistencies in the judgement, but one of the main problems is that the court considered the merits of the case and ruled that the applicant had no right to the water supply. Thirion J expressed himself as follows: 'According to the respondent the applicant does not have any right to be supplied with water by the KwaZulu Government nor do the respondents have authority or power to supply water to him...'<sup>103</sup> 'In my view therefore the KwaZulu Government exceeded its powers in supplying water free of charge to the applicant.'<sup>104</sup> The judgement was criticized by several authors,<sup>105</sup> except Sonnekus,<sup>106</sup> who is of the opinion that in the case of quasi-possession the existence of the right must be proved.<sup>107</sup>

In 2008, in the case of *Impala Water users Association v Lourens NO and Others*,<sup>108</sup> the Supreme Court of Appeal was seised with a case concerning water supply. The respondents were sugarcane farmers who were initially members of the Impala Irrigation Board under the Water Act 54 of 1956 and who automatically became members of the Impala Water Users Association under the National Water Act 36 of 1998. Under the 1956 Act they registered certain portions of land for irrigation. A dispute arose between the appellants and the respondents concerning the water charge raised by the appellants against its members for financing the construction of a dam. The appellants then terminated the water supply by

locking the sluices. The respondents applied for a *mandament van spolie* which was granted. The court *a quo* relied on *Bon Quelle* and followed the traditional approach. It found that the respondents had been in quasi-possession in that they exercised their rights without disturbance and that they were subsequently unlawfully deprived of it. On appeal, counsel for the appellants contended that respondents did not have servitural rights as in *Bon Quelle*, but that they were actually relying on personal rights originating from the contract between the appellant and each of the members concerned. This approach became very popular in spoliation cases since 2003 when the Supreme Court of Appeal refused an application for a *mandament van spolie* in the *Telkom*-case, discussed below,<sup>109</sup> because it found that the applicant was actually trying to apply the *mandament van spolie* to enforce specific performance of a personal (contractual) right. However, in *Impala* the Court distinguished the case from *Telkom* and ruled that the rights of the respondents were not merely personal rights, as they were registered rights in terms of the 1956 Act which were subsumed into rights under the 1998 Act. The use of water was accordingly an incident of possession of each farm.<sup>110</sup> The approach of the Court *a quo* is to be preferred. In the Supreme Court of Appeal too much emphasis was placed on the fact that the rights of the respondents were registered. What if they weren't? What if they were merely contractual? Surely one can obtain the right to use through a contract. The respondents were exercising their rights to use the water for many years. The applicants took the law into their own hands when they locked the sluices without settling the dispute regarding the water charge in court.

The difference to draw water, whether based on a professed servitural right or on a contract became crucial in the Supreme Court of Appeal in the case of *Firstrand Ltd t/a Merchant Bank and Another v Scholtz NO and Others*.<sup>111</sup> The respondents were farmers who drew water from the Blyde River Dam. As in *Impala*, above, under the 1956 Water Act they were members of the Irrigation Board and had their rights registered as servitudes. Under the 1998 Water Act they became members of the Blyde River Water Users Association. Initially the water was supplied by a canal system which became inefficient. The canal was replaced by a pipeline which was financed by the first appellant and managed by the second appellant the Blyde River Water Utility Co (Pty) Ltd. In January 2004 a contract was concluded between the respondents and the second appellant for water supply through the pipeline against payment. This contract expired on 31 December 2004. There was a disagreement between the parties regarding the fees for the following year 2005. On 31 December 2004 the second appellant cut off the water supply. On the next day the parties concluded an agreement for water supply pending an application by the respondents for a *mandament van spolie*. The Court *a quo* granted the application relying on *Impala*. It found that the rights were not merely contractual, that they were registered and therefore statutory in nature and therefore an incident of possession, thus quasi-possessory.<sup>112</sup> An appeal was lodged against the decision in which the Supreme Court of Appeal upheld the appeal. It drew a sharp distinction between the statutory rights and the contractual rights of the respondents. It considered the judgement in *Impala* as correct, but pointed out that in their affidavits in *Firstrand* the respondents did not rely on the exercise of their old registered statutory rights but on their 2004 and subsequent contractual rights, for which the *mandament* cannot be used for purposes of enforcement. The Court expressed itself as follows:<sup>113</sup>

The respondents' rights, whether they be described as statutory rights to water or rights to a water supply or as *quasi-possessio* of a water supply, may well be incidents of their possession or control of their properties. However, what the respondents were dispossessed of was not any of these rights but of an erstwhile contractual right that expired on 31 December 2004 against the appellants to convey their water entitlements. This right was and is no incident of the possession or control of their properties but a contractual right that came about long after the respondents became entitled to their statutory water rights. This conclusion is illustrated by the very contentions advanced by the respondents in their founding affidavit where they refer not only to the agreements entered into with the second appellant for the conveyance of water that expired on 31 December 2004 but also to water supply agreements they have concluded subsequently with the WUA and effective from 1 January 2005. The source of any rights the respondents may have had to the use of the pipeline is contract. They were deprived not of the *quasi-possessio* of their statutory water rights which they still have and may exercise in any manner they wish but of an expired contractual right for the conveyance of water through the pipeline.

It is regrettable that the respondents did not rely on their old rights, but that they applied for a *mandament van spolie* to enforce specific performance of a contractual right.

In *Impala* the Supreme Court of Appeal regarded rights of the water users as statutory rights and not as mere personal rights, and therefore their use was protected by the *mandament van spolie*. The *Impala* decision was confirmed in both the court *a quo* and the Supreme Court of Appeal in *Firststrand*.

In the most recent case, *City of Cape Town v Strumphor*<sup>114</sup> the Supreme Court of Appeal went a step further and elevated the statutory rights of water users to the constitutional level. The respondent in this case owned a caravan park for 37 years and had a contract with the city council for water supply. The city council then notified the respondent that he was in arrears of R182 000 for his water supply. The respondent's attorneys sent a letter to the council declaring a dispute. An employee of the council visited the property and found the water meter to be defective after which the council replaced the meter. The council then disconnected the water supply, without responding to the letter by respondent's attorneys. The respondent then applied for a *mandament van spolie*, maintaining that he was despoiled of his statutory rights in terms of the Water Services Act 108 of 1997. The council, amongst others, relied on the *Telkom* case<sup>115</sup> that the water was supplied in terms of a contract and that mere contractual rights cannot be enforced with the *mandament van spolie*. The *mandament* was, however, granted by the Magistrates' Court and confirmed by the full bench of the Cape High Court and the Supreme Court of Appeal. The Supreme Court of Appeal confirmed its decision in *Impala*.<sup>116</sup> It pointed out<sup>117</sup> that consumers living within a municipal area who wish to access water from a water service authority such as the City, have to conclude a water supply contract with that authority. Such a contract does not relegate the consumer's right to water to a mere personal right. The city or authority has a constitutional and statutory obligation to supply water to users such as the respondent. In terms of the Constitution<sup>118</sup> the right to water is a basic right which is given effect to by the provisions of the Water Services Act. This is a statutory right.<sup>119</sup> The Court thus distinguished the case under discussion from its decision in *Telkom*.<sup>120</sup>

Hence it seems that the current position with regard to the right to water supply is that where a user entered into a contract with a water supply authority in terms of applicable legislation, that right is a statutory and constitutional right and not a mere personal right, so that the decision in *Telkom* does not apply. The Supreme Court of Appeal was at pains to distinguish its judgments in *Impala* and *Strumpher* from its decision in *Telkom* (which it refers to as the *Xsinet*-case which was the matter in the court *a quo*).

But one can still ask whether the same result in *Impala* and *Strumpher* (*Firststrand* is an exceptional case because of the nature of the affidavits) could not have been achieved based on the principles relating to the possession of servitural rights laid down in *Bon-Quelle* without investigating the rights of the parties which basically concerns the property-contract law divide.

### 3.2.3.2 Incidents of possession

Another form of quasi-possession, distinguishable from the quasi-possession of servitural rights, manifested itself later in South African law. These so-called “incidents of possession” cases primarily concern cases where premises are occupied, that are provided with services such as water, electricity and telecommunication services. In these cases a dispute usually arises between the parties which leads to the one party terminating these services by taking the law into his own hands. These cases are based on the principles of quasi-possession as applied in the servitural rights cases, but on the other hand some of the jargon and outcomes in these cases had a definite influence on the servitural judgements.

The cases of *Naidoo v Moodley*<sup>121</sup> and *Froman v Herbmores Timber & Hardware*<sup>122</sup> were quite similar regarding the facts. Both cases concerned contracts of lease. In the *Naidoo* case the lessee was entitled to electricity services and in the *Froman* case the lessee was entitled to electricity and water. In light of ensuing disputes the lessor terminated the services. In *Naidoo* Eloff J coined the phrase “incident of occupation” when he referred to the use of the electricity. He pointed out that the lessee occupied the premises not only by being physically present there, but by using its appurtenances, including the electricity.<sup>123</sup> In *Froman* the Court did not use the term “incident of occupation”, but merely stated that ‘there is no reason why an incorporeal right of this nature should not form the subject of spoliation proceedings’.<sup>124</sup> In both cases it was argued by the opposition that the demand to reinstate the services was actually a claim based on contract and that the *mandament van spolie*, therefore, was not the appropriate remedy.<sup>125</sup> In both cases the court rejected this argument and granted the *mandament*. In *Naidoo* it was especially the *use* of the right that was emphasised as later confirmed in *Bon-Quelle*,<sup>126</sup> which ruled that the possession of the professed right lies in the use of the right. Sonnekus<sup>127</sup> maintains that it is unnecessary to work with the notion of possession of a right in cases such as *Naidoo* and *Froman*, because the exercise of the right is so closely connected to the corporeal thing that the loss of the right actually amounts to an interference with the possession of the thing itself. This approach was rejected by the Appellate Division in *Bon-Quelle*,<sup>128</sup> which pointed out that this will not always be the case.

The case of *Du Randt en ‘n Ander v Du Randt*<sup>129</sup> concerned telecommunication services. The parties were involved in divorce proceedings. The husband removed the

telephone from the communal dwelling. The court considered this as spoliation of quasi-possession and compared it to cases such as *Bon-Quelle*, *Naidoo* and *Froman*. It regarded the access to telecommunication services as an incident of occupation and ordered restoration by granting a *mandament van spolie*.<sup>130</sup>

*Xsinet (Pty) Ltd v Telkom SA LTD*<sup>131</sup> was quite a controversial case. The applicant (Xsinet) was an internet service provider. Telkom, who has an exclusive licence to provide public switched telecommunication services, supplied Xsinet with a bandwidth system, a telephone system and a connectivity service. Telkom alleged that Xsinet was indebted to it in a sum of money in respect of the connectivity service which Xsinet disputed. Telkom then disconnected the telephone and bandwidth systems. Xsinet maintained that Telkom disconnected the services without their consent and without seeking the resolution of the dispute between the parties by means of due legal process. It therefore sought restitution by applying for a *mandament van spolie*. Telkom maintained, amongst others, that in effect the applicant was seeking specific performance of a contractual obligation for which the *mandament* is not the appropriate remedy. The Court referred with approval to *Naidoo* where the argument that in substance it concerned a claim for specific performance of a contractual right under the guise of an application for a *mandament van spolie* was rejected.<sup>132</sup> The Court considered Telkom as a spoliator which interrupted the services supplied to the premises of which the applicant had occupation and control. The situation was analogous to the position in *Naidoo* and *Froman*. It stated that the bandwidth and telephone services constituted an incident of the applicant's possession and granted a *mandament*.<sup>133</sup>

In what can be considered as quite an unsatisfactory decision, the Supreme Court of Appeal overturned *Xsinet* in *Telkom SA Ltd v Xsinet (Pty) Ltd*.<sup>134</sup> In a very brief judgement the Court firstly ruled that although Xsinet used the services at its premises, it was not an incident of possession as the use of electricity and water may be incidents of occupation of residential premises.<sup>135</sup> Secondly it also did not consider Telkom to have interfered with Xsinet's possession of any of the mechanisms (modems and telephones) by which it was connected to the internet, because Telkom had not entered the premises in order to effect the disconnection.<sup>136</sup> Thirdly, it found that the order sought was essentially to compel specific performance of a contractual right, which has never been allowed under the *mandament van spolie*.<sup>137</sup> This decision created some confusion.

As regards the first point above, the Court does not explain why it is not an incident of possession such as the use of electricity and water. It conceded that *Xsinet* used the services as required in *Bon Quelle* to qualify as quasi-possession.<sup>138</sup> But it merely remarked that it would be artificial and illogical to conclude that Xsinet's use of the Telkom services established 'possession'.<sup>139</sup> But one fails to see how the use of electricity and, the use of services provided by Telkom differ. What influenced the Court's decision? Was it that we have been accustomed to the electricity and water services as quasi-possession for some time now in our case law concerning the *mandament van spolie* and that the internet services is a new and/or strange phenomenon? This approach of the Court is not easy to reconcile with its remark quoted above<sup>140</sup> that 'in the course of centuries of development, the law entered the world of metaphysics.' Or could it be that the case under discussion did not concern residential

premises, as pointed out by the Court?<sup>141</sup> Some authors have remarked that the protection of telephone and other communication services is now unsettled and unclear.<sup>142</sup> They also ask whether we should distinguish between essential services such as water and electricity supply and the supply of telecommunication services.<sup>143</sup> Are telecommunication services not essential in our modern society?

With regard to the second point above, that there was no dispossession because Telkom didn't enter the premises of Xsinet when it disconnected the services, Badenhorst, Pienaar and Mostert find the argument 'problematic'.<sup>144</sup> Surely it is. In *Naidoo*<sup>145</sup> and *Impala*<sup>146</sup> there was spoliation when electricity and water supply services were terminated without entering the premises.

With regard to the third point above, namely that what was actually sought by the respondents (Xsinet) was specific performance of a contractual right which is not allowed under the *mandament*, the following remarks can be made. In light of the *Telkom* judgement this argument subsequently became very popular. As was seen above, it was raised not only in the servituted cases of *Impala* and *Firstrand*,<sup>147</sup> but also in other subsequent cases.<sup>148</sup> Caution must, however, be applied here. It is trite law that one cannot claim specific performance of a contractual right with the *mandament van spolie*. However, one must appreciate the fact that one can obtain quasi-possession in terms of a contract and that such possession can be protected by the *mandament*. Hence, the *Telkom* decision does not imply that quasi-possession granted by contract can never be protected by the *mandament* and this is why, it is submitted, that the Supreme Court of Appeal struggled to distinguish or defend their decision in *Telkom* in cases such as *Impala* and *Firstrand* as discussed above.<sup>149</sup> In two recent cases, two important issues that featured in *Telkom* came to the fore: the fact that for quasi-possession to be protected by the *mandament van spolie* there needs to be a close link between the use of the right and the possession of a corporeal thing (usually the premises) and, secondly, that mere contractual rights cannot be enforced by the *mandament*.

The first case is *Microsure (Pty) Ltd and others v Net 1 Applied Technologies South Africa Ltd*.<sup>150</sup> The facts are briefly as follows: The government pays pension funds due to pension beneficiaries to the respondent. The applicants are merchants who enter into contracts with the respondent to utilise its computer system to facilitate access by beneficiaries to their funds. The respondent provides the appellants with a point-of-sale terminal, a biometric fingerprint scanner and a merchant card. The merchant card is important, because it gives the appellants access to respondents' computer system so as to give the beneficiaries access to their funds. For the card to work, the respondent must activate it. As usual, a dispute arose between the parties and the respondent de-activated the merchant cards. The appellants applied for a *mandament van spolie* to be reinstated in their rights (quasi-possession). Their application was dismissed on appeal. The Court found that there must be an element of possession and not merely possession of a card which only facilitates access to a computer server.<sup>151</sup> It compared the merchant card to a smartcard issued in respect of a digital satellite television decoder or a simcard in a cell phone.<sup>152</sup> Hence, it found that the appellants actually sought to achieve specific performance of a contractual obligation they were allegedly entitled to and facilitated by the merchant card.<sup>153</sup> The Court remarked

that the debate is really one for the law of contract, and not the law of property.<sup>154</sup> The Court also found that the facts of this case could not be distinguished from those in *Telkom*.<sup>155</sup> One can disagree with the latter finding. The decision in *Microsure* is correct, but on the facts it can be distinguished from *Telkom*. In *Telkom* there was much more of a real/physical connection between the use of the rights and the possession of a corporeal thing, the premises. Telkom also supplied Xsinet with modems, telephones and telephone lines. The merchant card in *Microsure* that granted it access to the computer system of the respondent did not provide a close enough link between the use of a right and a corporeal thing.

The second case is *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another*.<sup>156</sup> The applicant, a supermarket, had a written lease with the respondent, the owner of a shopping complex. The lease provided for certain extensions and renovations to the supermarket, amongst others a loading bay for 8-ton trucks and access for the trucks from a certain street entrance. As other shop owners started complaining about the trucks, the respondent built walls at the entrance which made it too narrow for the trucks to gain entry any more. Applicant then successfully applied for a *mandament van spolie* to have the walls removed. The respondent argued that the use of and access to the loading bay were not incidents of possession, but originated in a separate contractual right which cannot be enforced by the *mandament*. It relied on *Shopleft Checkers*.<sup>157</sup> However, the Court distinguished *Shopleft Checkers* by ruling that the use of the loading bay and the street entrance were so closely connected to the possession of the supermarket that it formed part and parcel of that possession.<sup>158</sup>

Earlier in this contribution it was remarked that the jargon in the abovementioned cases concerning “incidents of possession” also impacted on the “servitutaal” cases.<sup>159</sup> The term “incident of occupation/possession” was coined by Eloff J in the *Naidoo* case, but was used in subsequent cases such as *Impala* and the Court *a quo* in *Firststrand* where the Court argued that because the rights to draw water were registered in terms of the Act, they were incidents of possession.<sup>160</sup> In *Pinzon*<sup>161</sup> the Court also referred to the gate granting access to the land in *Nienaber v Stuckey*<sup>162</sup> as an incident of possession.

#### 4. Conclusion

The *mandament van spolie* protects not only the possession of corporeals, but also the possession of incorporeals in the form of rights that provide one with the entitlement to use a thing. These rights can either be real (servitutaal) rights, or personal (contractual) rights. It straddles the age-old divide between property law and the law of obligations, in this case specifically the law of contract. When protecting possession, the separation between the possessory and petitory suits is important. During the possessory suit the rights of the parties are not under investigation and when protecting quasi-possession the law was clearly laid down by the Appellate Division in *Bon Quelle*. It is settled law that one cannot claim specific performance of a contractual right with the *mandament van spolie*. The *Telkom* case that overturned the *Xsinet* case, it is submitted, was wrongly decided. This (might have) created the impression that contractual rights of use are generally not protected by the *mandament*. This seems to have influenced the Court in *Impala* and *Strumpher* which concerned access to water

supply. Had the Court applied the law as proclaimed in *Bon Quelle* in these two cases, the outcome would have been the same. However, the right to access to water is now considered as a statutory and, more specifically, a constitutional right. The legal position concerning rights to electricity and telecommunication services seems to be unsettled.

<sup>1</sup> This contribution was presented at a conference on “The Consequences of Possession” hosted by the Centre for Private Law of the University of Edinburgh, 12-13 Oct 2012. The conference proceedings, edited by Eric Descheemaeker will be published by Edinburg University Press under the title *The Consequences of Possession* and is due to appear in 2014. I express my sincere gratitude to professors Johan (University of Pretoria) and Susan (University of South Africa) Scott for their support and advice with the preparation of this contribution.

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<sup>2</sup> Reinhard Zimmermann and Daniel Visser “South African law as a mixed legal system” in Reinhard Zimmermann and Daniel Visser (eds.) *Southern Cross-Civil Law and Common Law in South Africa* (1996) 1-30. The authors remark (at 2) that ‘[t]o some extent of course, all the major legal systems of the Western world are mixed... [n]evertheless, the terms “mixed legal system” or “mixed jurisdiction” are usually reserved for a number of legal systems at the intersection, so to speak of civil law and common law.’ See also Reinhard Zimmerman “Double Cross Comparing Scots and South African Law” in Reinhard Zimmerman, Daniel Visser and Kenneth Read (eds.) *Mixed Legal Systems in Comparative Perspective – Property and Obligations in Scotland and South Africa* (2004) 1-4.

<sup>3</sup> See in general Zimmerman in *Mixed Legal Systems* (n.1) 4-6, 12-16; Hahlo H.R. and Kahn E. *The South African Legal System and its Background* (1968) 139-325.

<sup>4</sup> The Constitution of the Republic of South Africa 1996, sec. 8(3)(a) and sec. 39(2).

<sup>5</sup> *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A).

<sup>6</sup> Van Zyl D.H. *Geskiedenis van die Romeins-Hollandse Reg* (1979) 490-492; Eduard Fagan “Roman-Dutch Law in its South African Historical Context” in *Southern Cross* (n. 1) 33 *et seq.*

<sup>7</sup> Hahlo and Kahn *Legal System* (n. 2) 578-596; Zimmerman in *Mixed Legal Systems* (n. 1) 6.

<sup>8</sup> Ph.J. Thomas, C.G. van der Merwe and B.C. Stoop *Historical Foundations of South African Private Law* (2000) 133: ‘[I]t is simply not an exaggeration to state that Roman law of things constitutes the essence of the modern South African law of things’; Zimmerman in *Mixed Legal Systems* (n. 1) 6 with regard to South African law: ‘The law of property... have generally preserved their Roman-Dutch character.’ See also P.J. Badenhorst, Juanita M. Pienaar, Hanri Mostert *Silberberg and Schoeman’s The Law of Property* (2006) 6-7.

<sup>9</sup> Duard Kleyn “Possession” in *Southern Cross* (n. 1) 819-826, 835-844.

<sup>10</sup> See e.g. *Meyer v Glendinning* 1939 CPD 84; *Nienaber v Stuckey* 1946 AD 1049. See also Duard Kleyn “The Concept and the Protection of Possession” in Robert Feenstra and Reinhard Zimmermann (eds.) *Das römisch-holländische Recht-Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 546 who points to the very same approach followed by the Roman-Dutch authors.

<sup>11</sup> Badenhorst, Pienaar and Mostert, *Property* (n. 7) 91-95, 273-275; Kleyn in *Southern Cross* (n. 8) 832-835; Kleyn in *Das römisch-holländische Recht* (n. 9) 549-554.

<sup>12</sup> See par. 2 and par. 3 below.

<sup>13</sup> Badenhorst, Pienaar and Mostert *Property* (n. 7) 273.

<sup>14</sup> *Firststrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 at 510 par. 13.

<sup>15</sup> The *Firststrand* case above at 509 par. 12.

<sup>16</sup> 2003 (5) SA 314-315 par. 9.

<sup>17</sup> See par. 3 below.

<sup>18</sup> D 41.2.1. *pr.*

<sup>19</sup> D 41.2.12.1. See also D 41.2.17.1; D 41.2.52. *pr.*; D 43.17.1.2; D 44.2.14.3.

<sup>20</sup> Possession was often a requirement for the acquisition of ownership, for instance in the case of prescription, *traditio* and *occupatio*. It is also accepted that initially the two concepts were not distinguished from each other and that it was only later that ownership developed as a separate technical concept. See Westrup C.W. *Introduction to Early Roman Law* (1934-1954) 2 157; 3 233 *et seq.*; Max Kaser *Eigentum und Besitz im älteren römischen Recht* (1956) 6 *et seq.*

<sup>21</sup> See in this regard G 4.143-155. The purpose of the *interdictum quorum bonorum* and the *interdictum Salvianum* as discussed in G 4.144-147 were not to protect possession but to obtain possession by someone who has never had possession of the specific thing before. See also Max Kaser *Das römische Privatrecht I* (1971) 396-400.

<sup>22</sup> *Inst* 4.15.6; Max Kaser *Das römische Privatrecht II* (1975) 257-258.

<sup>23</sup> D 4.2.13.

<sup>24</sup> *'isque sibi ius in eam rem dixisse.'*

<sup>25</sup> D 41.2.35; D 43.17.1.3; C 8.1.3.

<sup>26</sup> See in general D.G. Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (unpublished doctoral thesis) (1986) 128-279; James Gordley and Ugo Mattei "Protecting Possession" 1996 *The American Journal of Comparative Law* 293 *et seq.*

<sup>27</sup> T.W. Price *The Possessory Remedies in Roman-Dutch Law* (1947) 10 *et seq.*; Kleyn in *Das römisch-holländische Recht* (n. 9) 557-559.

<sup>28</sup> The *condictio ex canone redintegranda* has its roots in the *exceptio solii* which was created by the unknown author of the *Decretales Pseudo-Isidorianae*, a ninth century source on Canon law. This source is one of the many medieval falsifications (*piae fraudes*): See R.C. Mortimer *Western Canon Law* (1953) 34 *et seq.* The *exceptio* provided a bishop who was unlawfully deprived of his seat (spoliated), a defence that allowed him to refuse to answer to any criminal charges against him until he has been reinstated in possession. The texts in the *Pseudo Isidoriana* dealing with the *exceptio spoli* are generally regarded as falsifications: C.G. Bruns *Das Recht des Besitzes im Mittelalter und in der Gegenwart* (1848) 137 *et seq.*; F.C. von Savigny *Das Recht des Besitzes* (1967 edition) 510 *et seq.* When Gratianus compiled the *Concordia discordantium canonum* (also known as the *Decretum Gratiani*) in the twelfth century, he incorporated the *exceptio spoli*. However, what is peculiar is the fact that he did not deal with the topic in one section (*causa*) as can be expected but in two different sections (*causae*), namely C(*ausa*) 2 q(*uaestio*) 2 and C 3 q 1. This led the glossators of the *Decretum* to distinguish between the two *causae*. For them C 2 q 2 concerns restoration of possession by means of the *exceptio* and C 3 q 1 deals with restoration of possession by means of an action. This action became known as the *condictio ex canone redintegranda*. See Bruns *Das Recht des Besitzes* above 168, and in general F. Ruffini *L'Actio Spolii* (1889).

<sup>29</sup> It was received into French customary law and was discussed in the *Coutume de Beauvaisis*, compiled by Philippe de Beaumanoir in the thirteenth century: See Bruns *Das Recht des Besitzes* (n. 27) 362; P. Viollot *Histoire du Droit Civil Francais* (1966 reprint) 631. See further J. Cujacius *Opera Omnia* (1758) *Commentaria ad X* 2 13, 2-4; R.J. Pothier *Countumes des Duché, Bailliage et Prévoté d'Orleans in Oeuvres Complètes* vol. 17 (1844) 3.22.40.

<sup>30</sup> A. Leyser *Meditationes ad Pandectas*, vol 7, (1778) *sp* 504.9; S. Stryk *Dissertationum Juridicarum Francofurtensium (Opera Omnia)* (1837-1842) 10.2.3. no. 51; Bruns *Das Recht des Besitzes* (n. 27) 390 *et seq.*; E. Meischer *Besitz und Besitzschutz* (1876) 168. Although Savigny *Das Recht des Besitzes* (n. 27) 513 rejected the *condictio*, the Pandectists did not follow suit and acknowledged the *actio spoli* as a remedy for the restitution of spoliated possession in practice: H. Dernburg *Pandecten* (1894) 1 par. 189.

<sup>31</sup> See e.g. the following Roman-Dutch authorities: J. Voet *Commentarius ad Pandectas* (1757) 43.17.7; P. Merula *Manier van Procederen in de Provintien van Hollandt, Zeelandt en West-Vrieslandt, belangende Civile Zaken* (1750) 4.37.2.8. W. van Alphen *Papegae ofte Formulier-Boeck* (1682-1683) 1.14.

- <sup>32</sup> Kaser *Privatrecht I* (n. 20) 140-141; H.F. Jolowicz and B. Nicholas *Historical Introduction to the Study of Roman Law* (1972) 412-414; J.A.C. Thomas *Textbook of Roman Law* (1976) 126; W.W. Buchland *A Text-Book of Roman Law from Augustus to Justinian* (1963) 196.
- <sup>33</sup> G 1.8.
- <sup>34</sup> G 2.12-14.
- <sup>35</sup> *Inst* 1.2.12; *Inst* 2.2. pr-2.
- <sup>36</sup> G 4.139; *Inst* 4.14. pr.
- <sup>37</sup> G 2.12-14; *Inst* 2.2. pr-2.
- <sup>38</sup> *Textbook* (n. 31) 126.
- <sup>39</sup> D 43.17.4.
- <sup>40</sup> D 43.16.3. 13-14; D 43.16.3. 16-17. See also the view of Paul in D 43.16.9.1. See in general Kaser *Privatrecht I* (n. 20) 390; Kaser *Privatrecht II* (n. 21) 256; Duard Kleyn "Dogmatiese probleme rakende die rol van die onstoflike sake in die sakereg" 1993 *De Jure* 6-7; Rian Cloete "Die historiese onderskeid tussen stoflike en onstoflike sake in die Suid-Afrikaanse sakereg: 'n Sinopsis" 2005 *De Jure* 295-304; Thomas *Textbook* (n. 31) 125-127.
- <sup>41</sup> X 2.13.8; X 2.13.13-14; Roffredus Beneventanus *Libelli Iuris Canonici pars sexta* in *Corpus Glossatorum Iuris Civilis* (1968) photographic reprint.
- <sup>42</sup> *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (2<sup>nd</sup> ed. by Dovring, Fischer, Meijers 1965) 2.1.9.
- <sup>43</sup> *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam* (with translation by Van Warmelo, Coertze, Gonin, Pait, 1981-1975) 2.1.9-10.
- <sup>44</sup> *Commentarius* (n. 30) 1.8.11.
- <sup>45</sup> *Censura Forensis Theoretico-Practica, id est Totius Iuris Civilis Romani, Usque Recepti, et Practici Methodica Collaio* (1741) 2.1.3.
- <sup>46</sup> *Hedendaegse Rechtsgeleertheit, Soo elders, als in Frieslandt gebruikelyk* (1742) 2.1.2-3.
- <sup>47</sup> P. Stockmans *Decisionum Curiae Brabantiae in Opera Omnia* (1686) 143 no 1; I van den Berg *Nederlands Advys-Boek*, part 4 (1698) 4.118; M.A. van Lamszweerde *Consultatien Advysen ende Advertissimenten van Rechten* vol. 1 (1776) 1.6.
- <sup>48</sup> *Curatoren van Pioneer Lodge NO 1 v Champion en Anderen* 1879 OFS 51; *De Villiers v Holloway* (1902) 12 CTR 566; *Bester v Grundling* 1917 TPD 492. See Kleyn in *Southern Cross* (n. 8) 836.
- <sup>49</sup> H.R. Hahlo and E. Kahn *The Union of South Africa - The Development of its Laws and Constitution* (1960) 576-577.
- <sup>50</sup> 1915 TPD 28 at 30-31.
- <sup>51</sup> See *Donges NO v Dadoo* 1950 (2) SA 321 (A) at 332: 'The remedy invoked was one which the Roman-Dutch Law provides and which is governed by Roman-Dutch principles. It would be futile to suggest that, since the prerogative is involved, those principles have been modified by rules of British constitutional law...' Also *Ntai and Others v Vereeniging Town Council and Another* 1953 (4) SA 579 (A) at 592H. 'During argument we were referred to certain English authorities, but they cannot assist us, since English law differs radically from our own on this subject.'
- <sup>52</sup> A.J. van der Walt and G.J. Pienaar *Introduction to the Law of Property* (2009) 196 *et seq.*; Francois du Bois *et al. Wille's Principles of South African Law* (2007) 453; Badenhorst, Pienaar and Mostert, *Property*, (n. 7) 308-312.
- <sup>53</sup> Badenhorst, Pienaar and Mostert, *Property* (n. 7) 287-288; Hanri Mostert *et al. The Principles of The Law of Property in South Africa* (2010) 83-86.
- <sup>54</sup> Badenhorst, Pienaar and Mostert *Property* (n. 7) 288.
- <sup>55</sup> Case discussion of *Naidoo v Moodley* 1982 (4) SA 82 (T) in 1983 *THRHR* 237 at 238-239; "Nog eens *Naidoo v Moodley* – 'n repliek" 1984 *THRHR* 429 AT 430, 435.

- <sup>56</sup> William Burge *Commentaries on the Civil Law and the Law of Holland* (1887) 136; Sir Andries Ferdinand Stockenstroem Maasdorp *The Institutes of Cape Law: Book II, The Law of Things* (1903) 14 *et seq*; Manfred Nathan *The common Law of South Africa*, vol I, *Persons and Property* (1913) 377; R.W. Lee *An Introduction to Roman-Dutch Law* (1915) 148.
- <sup>57</sup> *Grondslae van die Persoonlikheidsreg* (LLD thesis) (1950) esp. 119-121; “Die realiteit van die subjektiewe reg en die betekenis daarvan vir die privaatreg” 1958 *THRHR* 12-15, 98-115.
- <sup>58</sup> *Sakereg* 1<sup>st</sup> ed. (1979) 17-21, 2<sup>nd</sup> ed. (1989) 20-21, 24-25. See also C.G. van der Merwe “Things” in Joubert (ed.) *The Law of South Africa* vol 27 (2002) 160 par. 242.
- <sup>59</sup> *Sakereg Vonnisbundel* (1980) 54; “Mandament van spolie – kragtige remedie by kragonderbreking?” 1985 *TSAR* 331at 333-334; J.C. Sonnekus and J.L. Neels *Sakereg Vonnisbundel* (1994) 23-24.
- <sup>60</sup> Cloete 2005 *De Jure* (n. 39) 312-314; Badenhorst, Pienaar and Mostert, *Property* (n. 7) 13; George L. Gretton “Owning Rights and Things” 1997 *Stellenbosch Law Review* 176.
- <sup>61</sup> Badenhorst, Pienaar and Mostert, *Property* (n. 7) 14-19.
- <sup>62</sup> Badenhorst, Pienaar and Mostert, *Property* (n. 7) 15-16; Kleyn 1993 *De Jure* (n. 39) 5.
- <sup>63</sup> Susan Scott “Vorderingsregte as onliggaamlike sake – waarom nie?” 2010 *THRHR* 629 at 636.
- <sup>64</sup> Frans Malan “Oor inligting, rekenaar misbruik en die strafreg” 1989 *De Jure* 211 at 211-212.
- <sup>65</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (7) BCLR 702 (C); 2002 (4) SA 768 (C) par. 51; *Zondi v MEC for Traditional and Local Government Affairs* 2004 (5) BCLR 547 (N) at 536D-E; 2005 (3) SA 25 (N) at 34E; A.J. van der Walt *Constitutional Property Law* (2011) 111 *et seq*.
- <sup>66</sup> *Pretorius v Pretorius* 1927 TPD 178 at 180-181; *Nienaber v Stuckey* 1946 AD 1049 at 1055-1056; *Shapiro v South African Savings and Credit Bank* 1949 (4) SA 985 (W) at 991; *Sebastian v Malelane Irrigation Board* 1950 (2) SA 690 (T) at 694; *Painter v Strauss* 1951 (3) SA 307 (O) at 318F-H; *Stanhope Motors & Machinery Sales v Pretoria Light Aircraft Co (Pty) Ltd* (1951) 2 PH F79 (T); *Rooibokoord Sitrus (Edms) Bpk v Louw’s Creek Sitrus Koöperatiewe Maatskappy Bpk* 1964 (3) SA 601 (T) at 604D-E; *Deljon v Bloemkap Properties (Pty) Ltd* (1972) 2 PH A58 (C); *Adamson v Boshoff* 1975 (3) SA 221 (C) at 230A-B; *Beukes v Crous* 1975 (4) SA 215 (NC) at 218G; *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233E; *Bank van die Oranje-Vrystaat v Rossouw* 1984 (2) SA 644 (C) at 648D; *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 (3) SA 218 (C) at 221E; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A); *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 (3) SA 629 (C).
- <sup>67</sup> Par. 1 above.
- <sup>68</sup> 1946 AD 1049 at 1055.
- <sup>69</sup> See the following case law: *Stanhope Motors & Machinery Sales v Pretoria Light Aircraft Co (Pty) Ltd* (1951) 2 PH F79 (T); *Slabbert v Theodoulou and Another* 1952 (2) SA 667 (T); *Plaatjie and Another v Olivier NO and Others* 1993 (2) SA 156 (OPD) at 159J-160A; *Shoprite Chevkens Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (WLD) at 623D; *Firststrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 (SCA) at 510 B-D; *ATM Solutions (Pty) Ltd v Olkra Handelaars CC and Another* 2009 (4) SA 337 (SCA) par. 9-10; *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another* 2010 (1) SA 506 (ECG) par. 5. See also A.J. van der Walt and P. J. Sutherland “Dispossession of Incorporeals or Rights – Is the Mandament van Spolie the Appropriate Remedy?” 2003 *South African Mercantile Law Journal* 95 *et seq*.
- <sup>70</sup> Par. 1.
- <sup>71</sup> 1994 (1) SA 616 (WLD).
- <sup>72</sup> At 622 B. See also *Plaatjie and Others v Olivier NO and Others* 1993 (2) SA 156 (OPD) at 159 E-F; *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (NPD) par. 36. See also A.J. van der Walt “Die mandament van spolie en quasi-besit” 1989 *THRHR* 444 at 451.

- <sup>73</sup> 1948 (1) SA 748 (C) at 753. This has also been endorsed by the Appellate Division in *Yeko v Qana* 1973 (4) SA 735 (A) at 739E.
- <sup>74</sup> 1989 (1) SA 508 (A) at 514-515.
- <sup>75</sup> See also Van der Walt 1989 *THRHR* (n. 71) at 448.
- <sup>76</sup> *Pretorius v Pretorius* 1927 TPD 178; *Jansen v Maden* 1968 (1) SA 81 (GW); *Beukes v Crous* 1975 (4) SA 215 (NC).
- <sup>77</sup> For the position in canon law see glos ‘*et ab eo cognita*’ ad X 2.13.8: ‘[N]ec est simile hoc possessorium aliis possessoris de recuperanda possessione: quia ibi non est necesse probare de iure... Hic non sufficit sola possessio: quia possessio hic haberi non potest sine iure.’ See also *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A) at 513.
- <sup>78</sup> *Shoprite Chevkens Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (WLD) at 620D. See also *Xsinet (Pty) Ltd v Telkom SA* 2002 (3) SA 629 (CPD) at 637 E-G.
- <sup>79</sup> *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 (3) SA 254 (N) par. 44.
- <sup>80</sup> J.C. Sonnekus “Mandament van spolie en ongeregistreerde serwitute vir water” 2006 *TSAR* 392 at 400-402.
- <sup>81</sup> Par. 3.2.1.
- <sup>82</sup> See Kleyn in *Southern Cross* (n. 8) 831.
- <sup>83</sup> Sonnekus *Sakereg Vonnisbundel* (n. 58) 54; Sonnekus and Neels *Sakereg Vonnisbundel* (n. 58) 168 *et seq.*; Sonnekus 1985 *TSAR* (n. 58) 333 *et seq.*; “Besit van serwituutbevoeghede, mandament van spolie en logika” 1989 *TSAR* 429 at 430 *et seq.*
- <sup>84</sup> Van der Walt 1984 *THRHR* (n. 54) at 430, 435; 1989 *THRHR* (n. 71) 446 *et seq.*; Van der Walt and Pienaar *Introduction* (n. 51) 202.
- <sup>85</sup> 1992 (1) SA 181 at 187G.
- <sup>86</sup> 2010 (2) SA 59 par. 33.
- <sup>87</sup> Par. 1. 2.1 and 3.2.2.
- <sup>88</sup> See *Mans v Marais* 1932 CPD at 355 where the court remarked ‘There was, in my opinion an illicit deprivation by Mans of Marais’ right of possession’; *Petersen v Petersen* (1974) 1 PH B5 (R). See also *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another* 2010 (1) SA 506 (ECG) par. 5 ‘The mandament applies where a right to possess property is disputed and the possession of the property is disturbed without process of law.’ See Van der Walt 1989 *THRHR* (n. 71) 446-448.
- <sup>89</sup> Sonnekus and Neels *Sakereg Vonnisbundel* (n. 58) 169.
- <sup>90</sup> Par. 3.2.2 above; Van der Walt 1989 *THRHR* (n. 71) 448.
- <sup>91</sup> See par. 2.2 above.
- <sup>92</sup> 1946 AD 1049.
- <sup>93</sup> At 1056.
- <sup>94</sup> At 1053.
- <sup>95</sup> 1969 (1) SA 221 (GW).
- <sup>96</sup> At 223-224. See also with regard to the right of way *Buffelsfontein Gold Mining Co Ltd en ‘n ander v Bekker en Andere* 1961 (3) SA 381 (T); *Jansen v Madden* 1968 (1) SA 81 (GW).
- <sup>97</sup> 1950 (2) SA 690 (T).
- <sup>98</sup> At 693.
- <sup>99</sup> At 694. See also *Painter v Strauss* 1951 (3) SA 307 (O).
- <sup>100</sup> 1989 (1) SA 508 (A).
- <sup>101</sup> Par. 3.2.2.
- <sup>102</sup> 1992 (1) SA 181 (D).

- <sup>103</sup> At 184 B.  
<sup>104</sup> At 185 E.  
<sup>105</sup> Van der Walt and Pienaar *Introduction* (n. 51) 204-205; De Bois *et al. Wille's Principles* (n. 51) 458; Badenhorst, Pienaar and Mostert *Property* (n. 7) 297-298.  
<sup>106</sup> 2006 TSAR (n. 79) at 400-401.  
<sup>107</sup> See par. 3.2.2 above.  
<sup>108</sup> 2008 (2) SA 495 (SCA).  
<sup>109</sup> Par. 3.2.3.2 below.  
<sup>110</sup> Par. 18 and 19.  
<sup>111</sup> 2008 (2) SA 503 (SCA).  
<sup>112</sup> At 508-509.  
<sup>113</sup> At 112.  
<sup>114</sup> 2012 (4) SA 207 (SCA).  
<sup>115</sup> See par. 3.2.3.2 below.  
<sup>116</sup> Par. 10-11 of the judgement in n. 113 above.  
<sup>117</sup> Par. 9 of the judgement in n. 113 above.  
<sup>118</sup> The Constitution of South Africa 1996 sec. 27 (1) (b).  
<sup>119</sup> Par. 11 of the judgement in n. 113 above.  
<sup>120</sup> Par. 10 of the judgement in n. 113 above.  
<sup>121</sup> 1982 (4) SA 82 (T).  
<sup>122</sup> 1984 (3) SA 609 (W).  
<sup>123</sup> At 84 A-B.  
<sup>124</sup> A 610 H.  
<sup>125</sup> *Naidoo* at 84A; *Froman* at 610H.  
<sup>126</sup> See par. 3.2.4 above.  
<sup>127</sup> *Sakereg Vonnisbundel* (n. 58) 54; Sonnekus and Neels *Sakereg Vonnisbundel* (n. 58) 168.  
<sup>128</sup> 1989 (1) SA 508 (A) at 516 D-E.  
<sup>129</sup> 1995 (1) SA 401 (O).  
<sup>130</sup> At 405 B-E.  
<sup>131</sup> 2002 (3) SA 629 (C).  
<sup>132</sup> At 638 B-C.  
<sup>133</sup> At 639.  
<sup>134</sup> 2003 (5) SA 309 (SCA).  
<sup>135</sup> At 314 C.  
<sup>136</sup> At 314 E.  
<sup>137</sup> At 314 G.  
<sup>138</sup> At 315 D-G.  
<sup>139</sup> At 314 F.  
<sup>140</sup> See par. 1 above.  
<sup>141</sup> At 314 C.  
<sup>142</sup> Van der Walt and Pienaar *Introduction* (n. 51) 205; Du Bois *et al.; Wille's Principles* (n. 51) 459.  
<sup>143</sup> Du Bois *et al. Wille's Principles* 459.  
<sup>144</sup> *Property* (n. 7) 300.  
<sup>145</sup> 1982 (4) SA 82 (T) at 83H.  
<sup>146</sup> 2008 (2) SA 495 (SCA) at 499 I-J.

<sup>147</sup> Par. 3.2.4 above.

<sup>148</sup> *ATM Solutions (Pty) Ltd v Olkru Handelaars* 2008 (2) SA 345 (C) at 349 G; *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd* 2010 (2) SA 59 (N) at 67 E; *Pinzon Traders 8 (Pty) Ltd v Clublink (Pty) Ltd and Another* 2010 (1) SA 506 (ECG) at par. 7; *City of Cape Town v Stumpher* 2012 (4) SA 207 (SCA) par. 1.

<sup>149</sup> Par. 3.2.4 above.

<sup>150</sup> 2010 (2) SA 59 (N).

<sup>151</sup> At 69 A.

<sup>152</sup> At 66 F-G.

<sup>153</sup> At 67 E.

<sup>154</sup> *Ibid.*

<sup>155</sup> At 67 D.

<sup>156</sup> 2010 (1) SA 506 (ECG).

<sup>157</sup> Discussed in par. 3.2.2 above.

<sup>158</sup> At par. 6.

<sup>159</sup> Par. 3.2.3.2 above.

<sup>160</sup> Discussed in par. 3.2.3.1 above.

<sup>161</sup> 2010 (1) SA 506 (ECG) par. 7.

<sup>162</sup> Discussed in par. 3.2.3.1 above.