

**THE DEVELOPMENT OF THE APPLICATION OF THE SPOLIATION REMEDY
WITH SPECIFIC REFERENCE TO THE PROTECTION OF *QUASI*-POSSESSION
OF WATER AND ELECTRICITY SUPPLY**

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DECLARATION

I, Moeketsi James Ndlovu, declare that the Master's research mini-dissertation that I herewith submit at the University of the Free State, is my independent work and that I have not previously submitted it for qualification at another institution of higher education.



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CHAPTER 1 : INTRODUCTION

1.1 HISTORICAL BACKGROUND

This mini-dissertation will focus on a unique remedy found in property law. The spoliation remedy (*mandament van spolie*) is defined as a robust and speedy remedy aimed at restoring the factual possession of property.¹ Its function is to restore possession that was lost as a result of unlawful self-help, such as the complete deprivation of possession or where there has been substantial interference with possession or the physical exercise of property that one has the intention to own.² Courts are not supposed to investigate the merits of the case because the rights of the parties are not taken into account.³ This means, in simple terms, that the merit for the possession of a thing should not play a role in the court restoring the *status quo ante*. The applicant should only prove that there was peaceful and undisturbed possession of a thing and that such possession was spoliated or unlawfully dispossessed.⁴ The other function of the spoliation remedy is to maintain peace and discourage persons from taking the law into their own hands.⁵ Therefore, the aim is to prevent anarchy.⁶

The application of this remedy was previously limited to the protection of possession of corporeal things. However, over time, especially due to the recognition of metaphysics by the law or the science of things beyond what is physical, the protection of possession was extended to incorporeals.⁷ Since then, its application has been

¹ Boggenpoel 2017:98.

² Kleyn 2013:2; Marais 2021b:216; Boggenpoel 2017:93 &103.

³ Boggenpoel 2017:97.

⁴ Kleyn 2013:2; Boggenpoel 2017:101. In *Ivanov v North West Gambling Board and Others*, the court defined spoliation as a wrongful deprivation of another's right to possession (*Ivanov v North West Gambling Board and Others* [2012] 4 All SA 1 (SCA):par 19.) In other words, spoliation would refer to any act that deprives a person his physical control of the property and the intention to derive benefits from the property, without his consent or court order.

⁵ *Nino Bonino v De Lange* 1906 TS 120 156; Marais 2021b:218.

⁶ Historically, the term anarchy was used to mean the secret plotting to overthrow the government/republic or the unleash of revolutionary violence. Today, it is often used to mean acting as one's own judge and executioner without reference to any legal document, manifesto, or *Constitution* (Nathan 2012:109-111). Thus, to preserve the rule of law and order, the law forbids acts of vigilantism and lawlessness by summarily restoring possession before an enquiry into the merits of the case.

⁷ *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 ZASCA 35:par 9. It is hard to ascribe one specific definition to metaphysics. However, for purposes of this study, the term metaphysics should be understood to mean what transcends the physical or the objective reality. This led to the recognition of incorporeal property as objects of property rights which now fall within the description of property protected by the property clause. See *Constitution*:sec. 25; Pienaar 2010:35; Kleyn 2013:5; Van der Walt 2011:98.

extensively contested and fraught with inconsistencies.⁸ It was held that because rights cannot be possessed, the holder of the right had a *quasi*-possession of the right when he exercised such rights.⁹ However, there was uncertainty in relation to which *quasi*-possession rights are protectable under the spoliation remedy. This confusion came about as a result of the court's judgment in *Nino Bonino v De Lange* that 'spoliation is any illicit deprivation of the rights of possession whether in regard to movable or immovable property or in regard to a legal right'.¹⁰ This judgment suggested that a wide approach should be followed in spoliation proceedings.¹¹ This confusion was cleared up in *Firststrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others (Firststrand)*, where the court held that the *quasi*-possession of rights protected by the spoliation remedy is the *gebruiksreg*, known as the right of use, and should be an incident of possession or control of the property.¹² These rights comprise servitural rights such as a right of way or an incident of possession where a person in possession of the property also has access to water and electricity.¹³

The *dictum* of the court in *Firststrand* brought forth significant consequences for the application of the spoliation remedy. For instance, while the traditional application of this remedy was that rights need not be proved, in the case of incorporeals, the nature of the professed right must, however, be determined to ascertain whether its use is deserving of protection under the spoliation remedy. This judgment underlined the critical difference between the application of the spoliation remedy to corporeals as compared to incorporeals – that is, when this remedy is applied to incorporeals, the merits of the case are investigated but not considered in the case of corporeals. From this, Freedman agrees with Sonnekus that the requirement of proving possession is substituted with having to prove the *quasi*-possession of the right or otherwise the existence of the right.¹⁴ This view, of course, finds no justification in common law. Yet,

⁸ Marais 2021b:220.

⁹ *Telkom SA Ltd v Xsinet (Pty) Ltd*:par. 9. *Quasi*-possession is a term used to refer to a real right or a personal right entitling the holder to some kind of use or control of the property. The law uses the notion of *quasi*-possession to recognise incorporeal objects that cannot be physically held or controlled, such as a servitural right or an incident of possession (Boggenpoel 2017:108; Muller *et al* 2019b:337-338; Muller *et al* 2019a:200).

¹⁰ *Nino Binino v De Lange*:par. 122. See also Van der Walt 2002:263 and Kleyn 2013:5.

¹¹ Kleyn 2013:5.

¹² *Firststrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 (2) SA 503 SCA:par. 13.

¹³ Kleyn 2013:5.

¹⁴ Freedman 2015:201; Sonnekus 2007:147.

its increased use in recent case law suggests a significant divide in how corporeal and incorporeal cases are handled in spoliation proceedings. The fact that the merits of the case are not investigated in spoliation proceedings seems only to be the view in the case of corporeals.

In *Kramer v Trustees Coloured Vigilance Council Grassy Park*, it was held that for a spoliation order to be granted, the applicant must prove peaceful and undisturbed possession of the property and unlawful deprivation of possession by the respondent.¹⁵ Although this case concerned the protection of possession in the case of corporeals, the court in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi (Bon Quelle)* adopted it in respect of the protection of *quasi*-possession of incorporeals.¹⁶ The court in *Bon Quelle* further rejected the practice of proving the existence of the alleged right in spoliation proceedings for suggesting that courts must investigate the merits of the case, which is contrary to the general possessory theory.¹⁷ Accordingly, it was held that the protection of *quasi*-possession lies in the actual use of the alleged right and that only possession and spoliation must be proved.¹⁸ Later case law confirmed this position by stating that the spoliation remedy functions to return the *status quo* and not the restoration of rights, but only possession or factual exercise of the right has to be proved in the spoliation proceedings.¹⁹

However, because the *quasi*-possession of rights, in particular the 'right of use'/*gebruiksregte* protected by spoliation, comprises both servituted rights and incidents of possession and can originate from either real rights or personal rights, a need arose to distinguish between the use of rights that exists in terms of professed real rights such as servitudes and those emanating from a contract in which personal rights were created.²⁰ In other words, out of fear that the spoliation remedy might replace a claim for specific performance, courts began to place more emphasis on the source of the professed right to determine whether its *quasi*-possession enjoys possessory protection. This is evident from the extensive scrutiny of the merits in *Makeshift 1190 (Pty) Ltd v Cilliers (Makeshift)* to ascertain whether the electricity

¹⁵ *Kramer v Trustees Coloured Vigilance Council Grassy Park* 1948 (1) PH:61.

¹⁶ Kley 2013:6.

¹⁷ Kley 2013:6.

¹⁸ Kley 2013:6, 8.

¹⁹ *Zulu v Minister of Works, KwaZulu and Others* 1992 (1) ALL SA 45 (D):50.

²⁰ Kley 2013:7; Marais 2021b:224.

supply was indeed incidental to the applicant's possession of the premises and from the remarks made in *Masinda* that the spoliation remedy does not protect the possession of mere personal rights - as a spoliation remedy would then amount to an order of specific performance.²¹

This position was again confirmed in *Blendrite (Pty) Ltd and Another v Moonisami and Another* when the court noted that for spoliation to be available, a distinction has to be drawn between the use of services incidental to the possession of immovable property and the mere use of services arising from a personal right.²² This is problematic because requiring proof of the alleged occupation right conflicts with the legal position that rights need not be proved for their *quasi*-possession to enjoy protection under the spoliation remedy.²³

Moreover, being that the *quasi*-possession of *gebruiksregte* can originate from either servitural rights or contractual rights (personal rights), and both involve performing acts associated with the right to the land. Marais finds it difficult to understand why persons who perform acts associated with the right to land can protect the *quasi*-possession of their rights with the spoliation remedy if such right is servitural in nature but fail to do so when such right is derived from a contract.²⁴ For this reason, he states that the investigation in spoliation proceedings should concentrate on whether the applicant performed acts associated with the right to land and not on what the source of the right is because the source of the right touches on the merits - and should be disregarded in spoliation proceedings.²⁵ Boggenpoel opines that the determination of the nature of the right to ascertain whether its *quasi*-possession enjoys protection under the spoliation remedy unavoidably touches on the merits of the dispute.²⁶ She states that this should only be a starting point in terms of which the applicant proves that he possessed the right, and not escalate into a fully-fledged investigation of the merits of the case.²⁷

²¹ *Eskom Holdings SOC Limited v Masinda*:par. 14. *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 24.

²² *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 (4) SA 61 (SCA):par.16. Kleyn 2013:10.

²³ Marais 2021a:102.

²⁴ Marais 2021b:225.

²⁵ Marais 2021b:225; Muller *et al* 2019b:342.

²⁶ Boggenpoel 2017:120.

²⁷ Boggenpoel 2017:120; Muller *et al* 2019b:342.

As such, it is argued that the assertion of the court in *Masinda*, 'that the *quasi*-possession of the electricity supply does not enjoy protection under the spoliation remedy if sourced from a contract,' contradicts the common law principle that the source of the right should be irrelevant in spoliation proceedings.²⁸ It is further suggested that this assertion limits the protective ambits of the spoliation remedy.²⁹ For instance, the 'incident of possession' requirement is no longer based on whether the applicant performed acts normally associated with the professed right on land.³⁰ This is in view of Rogers J's approach in *Makeshift*, that if the right is sourced in the contract, the applicant must also have an alleged agreement against the spoliator to occupy the premises, and it must be the landlord who severs the electricity supply.³¹ Otherwise, the electricity supply is not incidental to the possession of the premises and cannot be restored with the spoliation remedy.³² In other words, without an occupation right and the severance of electricity by the landlord, the *quasi*-possession of the electricity does not enjoy protection under the spoliation remedy.³³ This understanding frustrates and undermines persons outside the confines of this application as they would not effectively protect their possession, as would have been the case if they had access to spoliation remedy. Even if resort is had to other measures such as an interim relief, such measures are not as speedy and robust as the spoliation remedy and do not protect against unlawful dispossession.

This research will seek to determine the appropriate application of the spoliation remedy in the case of incorporeals, particularly the *quasi*-possession of electricity and water supply. This will be done by studying its development as applied in Roman-Dutch Law, its reception into South African Law, the recognition of *quasi*-possession, and its current application today as seen in case law.

1.2 RESEARCH PROBLEM

The spoliation remedy is a speedy and robust remedy used to protect the peaceful and undisturbed possession of a thing without reference to the merits of the case. It

²⁸ Marais 2021b:224, 232.

²⁹ Marais 2021b:224, 232.

³⁰ Marais 2021a:97; Marais 2021b:224.

³¹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 34.

³² Marais 2021a:97, 92.

³³ Marais 2021a:99.

preserves law and order by encouraging persons to approach the court for due legal process instead of taking the law into their own hands and resorting to unlawful self-help.³⁴ However, in recent years, especially with the development of metaphysics, the application of the spoliation remedy has been extended to apply to *quasi*-possession of property.³⁵ This position brings legal uncertainty with regard to the development of the application of the spoliation remedy. It is not clear, especially in the case of water and electricity supply, when and how the spoliation remedy will be applied.

For instance, while it is trite law that the *quasi*-possession of “*gebruiksregte*” enjoys protection under the spoliation remedy, the court in *Makeshift*, with reference to *Masinda*, held that the fact that electricity supply is used at residential premises does not automatically mean it is incidental to the possession of the property.³⁶ According to the court, the *quasi*-possession of the electricity supply enjoys protection under the spoliation remedy only in two instances, namely (i) when the alleged right is a servitude or a registered statutory right and (ii) in exceptional cases where the claimant is not *per se* complaining about the cutting off of water or electricity, but the adverse impact of such disconnection on his right to the possession of the premises.³⁷ The court observed that the difference between cases where the right to services is purely personal in nature and cases where the spoliation remedy is extended to protect the possession of the premises is that in the latter case, the alleged right to electricity supply is an incident of the right to occupation of the premises.³⁸ Given that the same may be said about cases where the right to water or electricity is purely personal, the court went on to explain that in cases such as *Masinda*, the spoliator has no interest in the possession of the land. Whereas in cases such as *Makeshift* or category (ii) above, the spoliator severs the supply to evict the *spoliatus* without following a due legal process.³⁹

Additionally, in *Lateovista (Pty) Ltd v Ekurhuleni Metropolitan Municipality*, the court held that the City did not intend to evict applicants by cutting off the electricity supply

³⁴ Constitution:sec. 1(c). See Marais 2021a:100.

³⁵ Boggenpoel 2017:108; Muller *et al* 2019b:337-338.

³⁶ *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 (5) SA 538 (WCC):par 25.

³⁷ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 24. See Marais 2021a:92.

³⁸ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 38.

³⁹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 33, 34, 37, 38.

and had no commercial or legal interest in evicting them.⁴⁰ It was further held that the applicants could not claim an incidental right as they did not even have a personal right against the City in terms of the contract because the contract was between the City and the landlord.⁴¹ The problem here is that when the City cuts off the electricity supply because the landlord is in arrears, the residents are left without recourse and are excluded from the benefits of instituting the spoliation remedy.

From the above, in cases such as *Masinda* and *Lateovista*, the courts appear to ignore the peacekeeping function of the spoliation remedy because of the limits set by the interpretation of an incident of possession requirement. This is apparent from the view that a spoliation remedy is not available if the person alleged to be responsible for providing services, for example, Eskom, First Rand, Telkom, and the Irrigation Board, was not the person who granted the alleged right to occupy premises to which the service was supplied and had no interest in the possession of the property.⁴² This interpretation implies that unless the spoliation remedy is developed to extend to cases where service providers commit acts of self-help by unlawfully discontinuing the supply of services without following the due legal process, then the spoliation remedy cannot fully serve its function of restoring peaceful and undisturbed possession, as well as the maintenance of law and order.

This mini-dissertation will investigate whether the extension of the spoliation remedy to instances where the spoliator is not the landlord or building owner is possible in terms of common law principles, case law, and constitutional values. This will ensure that the spoliation remedy in the context of *quasi*-possession is not only limited to severance by the landlord but also includes municipalities and Eskom in cases where the law was not properly followed.

1.3 MAIN RESEARCH QUESTION

1.3.1 How did the application of the spoliation remedy develop in the constitutional era with specific reference to the *quasi*-possession of water and electricity supply?

⁴⁰ *Lateovitsa (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Another* [2023] ZAGPJHC 163.

⁴¹ *Lateovitsa (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality and Another*:par. 14-15.

⁴² *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 33.

1.3.2 Subsidiary Research Questions

1.3.2.1 What is the essence of the spoliation remedy?

1.3.2.2 What is meant by *quasi*-possession of incorporeals, and how has the spoliation remedy protected it?

1.3.2.3 How did the application of the spoliation remedy pertaining to the use of electricity and water develop after the implementation of the *Constitution*?

1.4 RESEARCH METHODOLOGY

This research primarily employs qualitative literature. This means that it will be carried out through the analysis of literature comprising the study of case law, legislation, textbooks, academic articles, and legal doctrines on how the spoliation remedy has developed over time and how it is applied today. This research will further reflect on the influence of the *Constitution* on the spoliation remedy and contemporary arguments in relation to its scope and application. However, chapters three and four will embrace the analytical study of existing concepts on the *quasi*-possession of incorporeals, particularly the disconnection of water and electricity supply, to find a more flexible context to realise the social function of the law in the overall promotion of justice.

1.5 RATIONALE

This research will investigate the theoretical basis of the spoliation remedy as well as how it has developed, especially regarding the protection of the *quasi*-possession of incorporeals. This research aims to shed light on the application of the spoliation remedy with specific reference to the *quasi*-possession of water and electricity to bring more legal certainty in this area where case law does not provide it.

1.6 CHAPTER OUTLINE

This dissertation consists of five chapters, including the current chapter. Chapter two will discuss the historical overview of the spoliation remedy to determine its main function and underlying philosophy; whether it serves to uphold the rule of law by discouraging acts of self-help or to restore possession that was unlawfully dispossessed. This means that chapter two will investigate how the spoliation remedy was received into South African law and how the courts have contributed towards its development and present application.

Chapter three will discuss the development of the application of the spoliation remedy in the case of *quasi*-possession before the 1996 *Constitution*. It will narrow the scope of the spoliation remedy by focusing mainly on the concept of *quasi*-possession and how it was adopted into South African law. This chapter will further tackle what seems to be the major problem in *quasi*-possession cases - the determination of the peaceful and undisturbed element of control in the case of incorporeals as well as the kind of *quasi*-possession rights protectable under the spoliation remedy.

Chapter four will continue the theme set in chapter three but with a specific focus on the *quasi*-possession of water and electricity supply after the 1996 *Constitution*. This chapter will explore the implications of determining the nature of the use right to ensure that they are not derived from contract and further consider the influence of the *Constitution* on the application of the spoliation remedy as well as recent judgments on the *quasi*-possession of water and electricity supply.

Chapter five will conclude this research by providing recommendations on existing problems associated with applying the spoliation remedy to the *quasi*-possession of water and electricity supply.

CHAPTER 2 : A HISTORICAL OVERVIEW OF THE SPOLIATION REMEDY

2.1 INTRODUCTION

This chapter will focus on the historical background of the spoliation remedy. It is intended to investigate the underlying philosophy behind the spoliation remedy and its origins to determine whether its main purpose is to uphold the rule of law by prohibiting acts of self-help or to restore possession that was taken otherwise than in accordance with the law. This part of the research is important as it seeks to address the developing controversies regarding its primary function and to resolve complications in court proceedings arising from the failure to determine the true essence of the spoliation order. Firstly, it discusses what the term 'possession' means and then explains how the use of the spoliation remedy protects possession. Secondly, this chapter investigates how the spoliation remedy was received in South African law and how the South African courts have contributed to its development and present application.

2.2 POSSESSION

The first requirement of the spoliation remedy that needs to be proved is peaceful and undisturbed possession of a thing. It is therefore crucial to determine what is meant by possession. The term possession is derived from the Latin root *possessio*.⁴³ In legal terms, possession signifies the factual and mental dominion of a thing by a person, in the same way, slaves and members of the family were controlled by the *paterfamilias* in Roman law.⁴⁴ Today, the term possession is still defined and understood to constitute a factual physical situation and a mental state consisting of the factual

⁴³ Van der Merwe & De Waal 1993:49.

⁴⁴ Van der Merwe & De Waal 1993:49. Roman law viewed possession as a mere factual relationship between a person and a thing to which the law attaches significant legal consequences (Van der Merwe & De Waal 1993:50). Notwithstanding the fact that this view was much debated by old writers - with Grotius and Voet maintaining that possessors obtained a real right to the thing by merely being in possession, while Van der Linden and Huber rejected it - It nonetheless still finds relevance today in South African law (Thomas *et al* 2000:148; Van der Merwe & De Waal 1993:50). The favoured approach is that possession should rather be viewed as a supplementary to the law of property. It cannot be viewed as a right because it is an entitlement flowing from the right, which not only implies a real right. It is also important to note that only a lawful possessor has a right. An unlawful possession cannot entitle a person to a right. This adds to why the spoliation remedy only protects possession and not the right itself. Otherwise, the protection of the unlawful possessor would imply the existence of an unlawful right, which amounts to a contradiction in terms (Van der Merwe & De Waal 1993:50; Muller *et al* 2019b:310).

control of a thing coupled with the will to possess the thing.⁴⁵ The law further recognises the *quasi*-possession, which consists of an exercise of control over an incorporeal coupled with the intention to exert control.⁴⁶ The factual control of an incorporeal is exercised when a thing is utilised in accordance with the presumed legal right in regard to the thing.⁴⁷ In essence, possession consists of the objective physical element and the subjective mental element, which means that a possessor must exercise control of the body and mind.⁴⁸

In *G and D Refrigeration CC v JPR Mulder*, the applicant was employed by the respondent to perform general management services.⁴⁹ Following the respondent's financial constraints, a verbal agreement was reached between the applicant and respondent in terms of which the applicant would be given possession of a motor vehicle for his use and enjoyment as compensation for services rendered. However, when the applicant took the motor vehicle to panel beaters for repairs after a collision with a stray cow, the respondent took back the motor vehicle, alleging that the applicant was in breach of the verbal agreement.⁵⁰ The applicant launched a spoliation application arguing that the conduct of the respondent in uplifting the motor vehicle from panel beaters amounted to an act of spoliation.⁵¹ The respondent argued that the applicant lost possession of the motor vehicle when he took it for a panel beating.⁵²

The court had to determine whether the applicant was in peaceful and undisturbed possession at the time when he took the motor vehicle to panel beaters for repairs or whether the removal of a motor vehicle from panel beaters amounted to an unlawful deprivation of possession.⁵³ The court began by providing a brief analysis of old authorities and relevant case law on the notion of possession.⁵⁴ The court cited Badenhorst *et al* (*The Law of Property* 4th ed.), where possession was described as a 'compound of physical situation and mental state involving the physical control of a thing by a person and that person's mental attitude towards the thing', which

⁴⁵ Van der Merwe & De Waal 1993:49.

⁴⁶ Van der Merwe & De Waal 1993:50.

⁴⁷ Van der Merwe & De Waal 1993:50.

⁴⁸ Van der Merwe & De Waal 1993:53; Marais 2022:293 & 297.

⁴⁹ *G and D Refrigeration CC v Mulder* 2016 ZALMPPHC 16.

⁵⁰ *G and D Refrigeration CC v Mulder*: par. 3.

⁵¹ *G and D Refrigeration CC v Mulder*: par. 4.

⁵² *G and D Refrigeration CC v Mulder*: par. 5.

⁵³ *G and D Refrigeration CC v Mulder*: par. 7.

⁵⁴ *G and D Refrigeration CC v Mulder*: par. 8.

essentially means that physical control must be accompanied by a particular intention to constitute possession.⁵⁵

The court took the view that physical control should be interpreted in a wide sense and not be restricted to the conservative prerequisite of actual physical control. The court suggested the adoption of factual or legal possession in terms of which the mere intention to possess is sufficient to complement the factual possession.⁵⁶ Thus, according to the court, the applicant did not lose control over the motor vehicle when he took it to panel beaters for repairs because he did not have the intention to give up possession.⁵⁷ Accordingly, the respondent's submission that the applicant lost possession when he took the car to panel beaters was rejected and found untenable.⁵⁸ In the end, it was held that the respondent committed an act of spoliation in uplifting the motor vehicle from the panel beaters without the knowledge or consent of the applicant and without the intention to restore possession of the motor vehicle to the applicant.⁵⁹

As illustrated above, among the legal consequences arising from 'possession' is the protection of possession itself.⁶⁰ The historical reasons for the protection of possession began with the need to protect the possession of public land that was not held in private ownership and the need to prevent people from taking matters into their own hands – public policy reasons.⁶¹ The common remedies employed by the law to protect possession are an interdict, possessory actions, and spoliatory relief - also known as the *mandament van spolie*.⁶² This research will only focus on the spoliation remedy/*mandament van spolie*.

⁵⁵ *G and D Refrigeration CC v Mulder*: paras. 9 & 17; (Badenhost PJ, Pienaar JM, & Mostert H: 2003. *The Law of Property*. 4th edition. LexisNexis. Durban)

⁵⁶ *G and D Refrigeration CC v Mulder*: par. 21.

⁵⁷ *G and D Refrigeration CC v Mulder*: par. 22.

⁵⁸ *G and D Refrigeration CC v Mulder*: par. 28.

⁵⁹ *G and D Refrigeration CC v Mulder*: par. 24.

⁶⁰ Van der Merwe & De Waal 1993:51; Muller *et al* 2019b:310.

⁶¹ Thomas *et al* 2000:149-152. During the Roman Republic period (509 - 27 BC), the land was vested in the Roman public and persons who exercised possession over such lands were unable to resort to normal proprietary remedies when possession was lost.

⁶² Van der Merwe & De Waal 1993:51.

2.3 THE RECEPTION OF THE SPOLIATION REMEDY INTO SOUTH AFRICAN LAW

The South African modern law is based on the Roman-Dutch Law that was applied in Holland during the 16th, 17th, and 18th centuries.⁶³ This law found its way to South Africa in 1652 when Jan van Riebeeck settled in the Cape of Good Hope. The expression 'Roman-Dutch Law' was pioneered by Simon van Leeuwen, who employed it as the sub-title of his work entitled *Paratitula Juris Novissimi*, which was published in 1652.⁶⁴ When Roman law made its way to the Netherlands, it was not equally and completely received by all provinces – it was far-reaching in some provinces and less so in others. For this reason, references to Roman-Dutch law need not be understood to mean the law common to all of the Netherlands but one that was particularly peculiar to the province of Holland.⁶⁵

Roman-Dutch law recognised three possessory remedies, the *mandament van maintainue*, the *mandament van complainte*, and the *mandament van spolie* - derived from the Canon law *actio spolie*.⁶⁶ Only the *mandament van spolie* remained in South African law.⁶⁷

The *Mandament van maintainue* was almost always instituted in conjunction with the *mandament van immissie* - which was applied in cases where an heir sought possession of the deceased estate.⁶⁸ The *mandament van maintainue* was, in a sense, applied similarly to a prohibitory interdict in that threatened or actual disturbance with possession and any alike in the future could be restored, prevented, or indemnified.⁶⁹

The *mandament van spolie* was applied to restore possession. At the same time, the *mandament van complainte* invaded the province of both *maintenue* and *spolie* in that it was instituted to restore possession that had been deprived or to maintain possession against disturbances.⁷⁰

⁶³ Hahlo 1954-1955:725.

⁶⁴ Lee 1931:2.

⁶⁵ Lee 1931:5. Even where there was conflict between the law of separate provinces in the Netherlands, the South African courts were advised to and have generally followed the law of the province of Holland.

⁶⁶ Hahlo 1954-1955:727.

⁶⁷ Taitz 1981:37.

⁶⁸ Lee 1931:165.

⁶⁹ Lee 1931:166.

⁷⁰ Lee 1931:167.

The source of the spoliation remedy is the '*condictio ex canone redintegranda*' found in the glosses of the *Drecretum Gratiani*, which enabled a bishop expelled from his seat to be restored to his position before the merits of his expulsion are considered.⁷¹ This remedy initially took the form of *exceptio spolie*, then *condictio ex conone redintegrande*, and later *actio spoli*. It was finally termed *mandament van spolie* in Roman-Dutch Law.⁷²

In Roman-Dutch Law, this remedy was less developed and applied only seldom.⁷³ This is largely because the law of the time recognised other well-developed possessory remedies that were found convenient.⁷⁴ For instance, if there was any threat of disturbances with the property, the *maintenue* was instituted. This meant that the spoliation remedy could not be used until there was an actual loss of possession or actual disturbance of possession.⁷⁵ Over time, the two often-used remedies fell into disuse, and only the *mandament van spolie* remained.⁷⁶ However, the *mandament van spolie* was only ever truly developed by the South African courts.⁷⁷ This development is discussed in the following section under the requirements and scope for the spoliation remedy.

2.4. THE REQUIREMENTS AND SCOPE FOR THE SPOLIATION REMEDY

2.4.1 Requirements

The applicant only needs to show that (i) he was in peaceful and undisturbed possession of the thing and (ii) that he was unlawfully dispossessed or deprived of such possession, whether it is a movable or immovable thing.⁷⁸

2.4.1.1 Possession

First and foremost, the applicant must show that he had factual control of the thing and the intention to derive benefits. He does not need to prove exclusive control

⁷¹ Van der Merwe & De Waal 1993:66; Kleyn 2013:4.

⁷² Van der Merwe & De Waal 1993:66; Kleyn 2013:14.

⁷³ Harker 1988:193; Van der Merwe & De Waal 1993:66.

⁷⁴ Van der Merwe & De Waal 1993:66.

⁷⁵ Harker 1988:193; Van der Merwe & De Waal 1993:66.

⁷⁶ Van der Merwe & De Waal 1993:66; Taitz 1981:37; Kleyn 2013:4.

⁷⁷ Harker 1988:193.

⁷⁸ Hahlo 1954-1955:727; Van der Merwe & De Waal 1993:71; Muller *et al* 2019b:328.

because a thing can be possessed jointly, and more than one person can possess different parts of the thing.⁷⁹ Secondly, the applicant must show that an act of spoliation has been committed, i.e. that he has been illicitly deprived of possession of a thing.⁸⁰

In *Mbangi and Others v Dobsonville City Council*, the court provided a good explanation of what is meant by peaceful and undisturbed possession.⁸¹ In *casu*, the applicants had illegally occupied land belonging to the respondent. The respondent immediately took steps to remove them from his land. The court held that the applicants were not entitled to the spoliation remedy because they were not in undisturbed and peaceful possession of the land. It was further held that the justification for spoliation is wanting if the person complaining is still in the process of attempting to wrest or acquire possession from the respondent.⁸² This was confirmed in *Bantham and Others v City of Johannesburg and Others*, where the city argued that it could not have committed an act of spoliation since the shacks that it destroyed were incomplete, thereby, indicating that the applicants were not in peaceful and undisturbed possession of the land.⁸³ Even though the court found against the respondent, it nonetheless maintained that to obtain a spoliation order, the applicant must establish a sufficiently lengthy period of settled and undisputed possession of the thing.⁸⁴

According to the court, the peaceful and undisturbed possession requirement is designed to prevent the granting of the spoliation order from working injustices. This requirement is there to further policies designed to prevent self-help.⁸⁵ This means that possession in spoliation proceedings must be enclosed/settled/established and held without interference.⁸⁶ Otherwise, if courts were to award a spoliation order in favour of a complainant who is involved in the resisted process of trying to assert

⁷⁹ Van der Merwe & De Waal 1993:72; Muller *et al* 2019a:199.

⁸⁰ Van der Merwe & De Waal 1993:72.

⁸¹ *Mbangi and Others v Dobsonville City Council* [1991] 3 ALL SA 465 (W).

⁸² *Mbangi and Others v Dobsonville City Council*:471.

⁸³ *Bantham and Others v City of Johannesburg and Others* 2024 ZAGPJHC 706:par. 22.

⁸⁴ *Bantham and Others v City of Johannesburg and Others* 2024 ZAGPJHC 706:par. 27.

⁸⁵ *Mbangi and Others v Dobsonville City Council*:471.

⁸⁶ *Mbangi and Others v Dobsonville City Council*:472.

possession, the court would, in effect, be condoning the commission of self-help instead of preventing self-help.⁸⁷

Therefore, for possession to be qualified as 'peaceful and undisturbed', it must be stable and enduring, which means that the control and use of the thing must be sufficiently established to such an extent that the law attaches legal consequences thereto.⁸⁸

2.4.1.2 Spoliation

Originally, the applicant had to show that he was unlawfully deprived of his possession by an act of violence or stealth.⁸⁹ This requirement was watered down in the 18th century by the German jurist Leyser.⁹⁰ Today, it is widely accepted that an act of spoliation constitutes any form of disturbance with possession without the consent and against the will of the possessor.⁹¹ Consequently, a person who gains possession through trickery commits an act of spoliation; a messenger of the court who gains possession through an invalid writ of execution also commits an act of spoliation; even a state official who does not strictly adhere to statutory provisions, for example when evicting persons from certain premises also commits an act of spoliation.⁹²

⁸⁷ *Mbangi and Others v Dobsonville City Council*:471. To illustrate this point, the court supposes that if a housebreaker occupied a bed space at 09:00 and at 12:00 the owner immediately divests him from the bed space, then the granting of the spoliation order against the owner would only facilitate acts of self-help.

⁸⁸ *Muller et al* 2019a:199.

⁸⁹ Van der Merwe & De Waal 1993:72.

⁹⁰ Van der Merwe & De Waal 1993:72.

⁹¹ Van der Merwe & De Waal 1993:72.

⁹² Van der Merwe & De Waal 1993:72. This was highlighted by the court in the *City of Ekurhuleni Metropolitan v Tshepo Gugu Trading CC and Another* 2024 ZASCA 81, when the municipality dismantled and removed the respondent's billboard, which had been erected contrary to municipal by-laws. Wepener J found that this action constituted spoliation, as the respondent was unlawfully dispossessed of its possession without due process. However, the Supreme Court of Appeal had to determine whether the municipality took the law into its own hands when it dismantled and deprived the respondent of possession of the billboard. In responding to this question, the SCA examined the court order granted by Victor J in favour of the municipality. It was found that in terms of the court order, the respondent was required to submit a regularisation application in compliance with the by-laws and acknowledge that the installation of the billboard on the municipality site was unlawful. The order further indicated that non-compliance by the respondent would entitle the municipality to remove the billboard from its site. Due to the failure on the part of the respondent to comply with the terms of the court order, the SCA found that the municipality acted within the confines of the law and was justified in taking steps to dismantle the billboard (*City of Ekurhuleni Metropolitan v Tshepo Gugu Trading CC and Another* 2024 ZASCA 81: paras 10,17,23,24,30 and 39).

However, spoliation is not available in cases of lawful deprivation of possession.⁹³ This is often the case when the respondent produces proof of authorisation in the form of a court order or statutory provisions. In other words, an act of spoliation is not committed if a judgment debtor's possession is attached by a messenger of the court or a deputy sheriff acting upon authority vested in him by a court order or writ of execution. Similarly, the eviction of persons from premises and the confiscation of identity documents by public officials under statutory powers vested in them does not amount to an act of spoliation.⁹⁴ What is most significant is that the officials exercising such powers are expected to strictly adhere to the narrow limits as provided in the relevant statutory provisions.⁹⁵

2.4.1.3 Earlier cases dealing with the spoliation remedy.

Legal possession in South African law subsumes both the actual physical control of the thing and the intention to control or *animus possidendi*.⁹⁶ The scope of protection afforded by the spoliation remedy was, however, not limited to legal possession. It was extended to other forms of actual physical control that did not exactly constitute possession in its strict sense.⁹⁷

In *Nino Bonino v De Lange* and *Yeko v Qana*, the spoliation remedy was extended to the tenant.⁹⁸ In *Nino Bonino v De Lange*, the tenant/appellant entered into a lease agreement in terms of which the lessor was entitled, under certain circumstances, to terminate the lease agreement and prevent the lessee from entering the premises without recourse to court. A dispute arose regarding the alleged breach of the lease agreement, to which the lessor took the keys from the lessee and barricaded the premises. The trial court denied granting the appellant an order for spoliation.

⁹³ Van der Merwe & De Waal 1993:72.

⁹⁴ Van der Merwe & De Waal 1993:72.

⁹⁵ Van der Merwe & De Waal 1993:72. In *Potgieter v Du Plessis*, it was held that the fact that the respondent had called in the aid of the police was not enough to render his dispossession of the applicant lawful (*Potgieter v Du Plessis* [1978] 2 ALL SA 173 (NC):177).

⁹⁶ Hahlo 1954-1955:727.

⁹⁷ Hahlo 1954-1955:727.

⁹⁸ *Nino Bonino v De Lange*; *Yeko v Qana* [1973] 4 ALL SA 512(A).

On appeal, the court had to determine whether the lessor could indeed terminate the contract and barricade the premises. Noteworthy, the clause in the lease that allowed the lessor to terminate the lease reads as follows:

'Should the party of the other fail to pay the rent on the due date, and should the same remain unpaid for a term of six days thereafter or should he fail to pay any of the amounts due under and by virtue of this agreement or fail to carry out one or any of the terms and conditions herein contained, the party of the one part shall have the right to immediately cancel this agreement ... and to prevent the party of the other part from having access to the said premises, without recourse to law.'⁹⁹

Innes CJ noted that:

'It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the case'.¹⁰⁰

The respondent alleged that he acted as he did to prevent breaches of the law from taking place in the billiard room. The court refused this contention, arguing that had the respondent intended to stop the breaches of the law, he would have informed the police. The court maintained that the objective of the lessor was to take advantage of the clause in the lease – on his behalf and for his benefit.¹⁰¹ Innes CJ went on to state that a clause of such a nature purports to allow a party to take the law into his own hands, to do that which the law says only the court shall do, essentially making the lessor himself the judge of whether the breach of contract has been committed.¹⁰² It was held that such a contract is against public policy and should not be recognised.¹⁰³ Smith J concurred with the main judgment. He stated that this was a case of spoliation and that the agreement inserted in the clause was against public policy and need not be enforced.¹⁰⁴

In *Yeko v Qana*, the respondent claimed to have entered into an agreement of lease with the appellant, according to which he hired a shop building known as 'Eluxolweni' where he stored his goods and began trading. While in undisturbed possession of the physical building, the appellant locked the doors of the building together with the respondent's stock and cash taking that was inside the building.¹⁰⁵ The appellant

⁹⁹ *Nino Bonino v De Lange*:123.

¹⁰⁰ *Nino Bonino v De Lange*:122.

¹⁰¹ *Nino Bonino v De Lange*:123.

¹⁰² *Nino Bonino v De Lange*:124.

¹⁰³ *Nino Bonino v De Lange*:124.

¹⁰⁴ *Nino Bonino v De Lange*:125-126.

¹⁰⁵ *Yeko v Qana*:513.

denied having entered into a contract of lease with the respondent or that the respondent was ever in possession or in occupation of the premises other than for purposes of cleaning the building, which is what he was employed to do.¹⁰⁶ He, nonetheless, agreed that the building was locked by one of his employees under the instruction of his wife.¹⁰⁷

Initially, the commissioner's court refused to grant a spoliation order because the respondent had no licence to trade.¹⁰⁸ On appeal, this decision was reversed, and an order for restoration was granted subject to the respondent obtaining a permit to trade.¹⁰⁹ On a further appeal, the appellant alleged that there was no contract of lease between him and the respondent.¹¹⁰

The commissioner found that the respondent was a registered employee of the appellant and that he was in the building subject to the control of the appellant. Thus, the respondent could not have been in peaceful and undisturbed possession because he secretly and, without the knowledge of the appellant, brought his stock-in-trade to the building. As such, no act of interference was committed.¹¹¹

Van Blerk JA highlighted that the essence of the spoliation remedy is that possession must be established and that the applicant must prove that such possession was dispossessed wrongfully.¹¹² The court acknowledged that the respondent occupied the building to trade his stock for his benefit, which was sufficient to prove possession.¹¹³ It was further held that it is irrelevant whether the respondent occupied possession secretly or fraudulently because the fundamental principle of the spoliation remedy is that no person should take the law into his own hands.¹¹⁴

Moreover, it was held that while the court of first instance was correct to allow the appeal for granting an order restoring the *status quo ante*, it nonetheless erred in

¹⁰⁶ *Yeko v Qana*:514.

¹⁰⁷ *Yeko v Qana*:514.

¹⁰⁸ *Yeko v Qana*:513.

¹⁰⁹ *Yeko v Qana*; Van der Walt 2002:267.

¹¹⁰ Van der Walt 2002:267.

¹¹¹ *Yeko v Qana*:515.

¹¹² *Yeko v Qana*:516. The kind of possession expected of the applicant to prove is possession of a thing with the intention to derive benefits and not possession in the juridical sense.

¹¹³ *Yeko v Qana*:516.

¹¹⁴ *Yeko v Qana*:516. The court cited with approval the passage of Voet where he stated that 'the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber'.

adding a condition that the respondent had to attain a permit to continue with trade.¹¹⁵ The court made it abundantly clear that considerations of public policy need not be taken into account in spoliation proceedings, and that such considerations are dealt with in criminal proceedings.¹¹⁶

This judgment is most significant for its formulation of the requirements of the spoliation remedy. These requirements can be summarised as follows: (i) The applicant must have been in possession of the property with the intention to be an owner or to secure benefits for himself, and he must be deprived of his possession unlawfully; (ii) a thief or a robber is entitled to a spoliation order because it is irrelevant whether possession was acquired fraudulently or illegally, and that (iii) the merits of the case are not considered in spoliation proceedings.¹¹⁷ Although this case was decided in 1973, at least over half a century ago, the position as set out above remains the same except where fraudulent or unlawfully obtained possession can lead to health risks.¹¹⁸ The next part considers the procedure that is followed in spoliation proceedings and the scope of persons entitled to the spoliation remedy.

2.4.2 Procedure

In spoliation proceedings, a more cumbersome approach was put aside in favour of more expedient court proceedings, the motion procedure.¹¹⁹ This is because legal action would defeat the unique and expedient nature of the spoliation remedy, which is to restore the *status quo* before the merits of the case are considered.¹²⁰ During the spoliation proceedings, the applicant must prove on the balance of probabilities that he is entitled to an order.¹²¹ This order is not final and does not touch on the rights of the parties, it is only an order requiring the *status quo* to be restored in regard to the thing dispossessed.¹²² It, therefore, only offers an interim relief preliminary to the suit

¹¹⁵ *Yeko v Qana*:517.

¹¹⁶ *Yeko v Qana*:516, 517.

¹¹⁷ Van der Walt 2002:268-269.

¹¹⁸ *Eskom Holdings SOC Limited v Masinda*.

¹¹⁹ Van der Merwe & De Waal 1993:70; Muller *et al* 2019a:198.

¹²⁰ Van der Merwe & De Waal 1993:70.

¹²¹ Muller *et al* 2019b:328.

¹²² Van der Merwe & De Waal 1993:71. This position was set out and confirmed by the court in *Zulu v Minister of Works, KwaZulu*; where it was held that the reality of the spoliation remedy is that it is not concerned with the protection or restoration of rights - that its aim is the restoration of factual possession that was unlawfully despoiled.

on the merits.¹²³ If the applicant succeeds with the spoliation order his possession is restored at once.¹²⁴ However, if the parties do not litigate on the merits of the case following the order of the court, the *status quo* as ordered by the court will remain in place.¹²⁵

2.4.3 Scope

Traditionally, only possessors were entitled to spoliatory relief. A distinction was drawn between possessors and holders. Voet argued that this distinction was implausible because possessors and holders had the same mental element, namely the intention to derive benefit from a thing.¹²⁶ In South African law, it is accepted that exercising control over a thing with the intention to derive benefits entitles a person to a spoliation order.¹²⁷ On the contrary, exercising control over a thing primarily on behalf of another person and without the intention to derive benefits disqualifies a person from a spoliation order.¹²⁸ The South African courts have furthermore determined that persons entitled to a spoliation order include a *bona fide* possessor, a *mala fide* possessor, a thief, a trustee, a pledgee, a borrower, an agent, a precarist, a lessee, a depository, and a hire-purchaser.¹²⁹

This remedy is available when a person is unlawfully deprived of (i) actual possession (ii) *quasi*-possession, and or (iii) co-possession in respect of a thing held in joint possession.¹³⁰ The *spoliatus* don't need to be dispossessed of the whole thing.¹³¹ Partial deprivation or disturbance is enough to entitle him to protection under the spoliation remedy. For instance, in *Nienaber v Stuckey*, the appellant alleged that he rented a portion of a farm from the respondent for three years and had since been in peaceful possession of the land from the commencement of the lease until the respondent closed the only gate which allowed the appellant to gain access to the

¹²³ Muller *et al* 2019b:328.

¹²⁴ Muller *et al* 2019b:328.

¹²⁵ Muller *et al* 2019a:198.

¹²⁶ Van der Merwe & De Waal 1993:69.

¹²⁷ Van der Merwe & De Waal 1993:69.

¹²⁸ Van der Merwe & De Waal 1993:69.

¹²⁹ Van der Merwe & De Waal 1993:69.

¹³⁰ Van der Merwe & De Waal 1993:67; *Nino Bonino v De Lange*.

¹³¹ Van der Merwe & De Waal 1993:67.

land.¹³² The contract entered into by the appellant was of such a nature that he had a right to plough and cultivate a piece of land. The respondent was simultaneously entitled to exercise rights in the form of a lessor, given that it would not interfere with the appellant's right.¹³³

The court of first instance denied the appellant a spoliation order because the alleged contract entered into with the respondent did not entitle him to exclusive possession of the land.¹³⁴ In the court of appeal, Greenberg JA referred to *Burnham v Neumeyer*, where Bristowe J opined that an applicant seeking a spoliation order must not only make out a *prima facie* case but must prove that the thing alleged to have been spoliated was in his possession and that it was removed from his possession unlawfully or against his consent.¹³⁵

Greenberg JA further noted that the only authority referred to by the court of first instance in support of the view that the spoliation order can only be granted to a person exercising exclusive control of possession was the case of *Termby v Lippingwell*.¹³⁶ Greenberg JA disagreed with the court in *Termby*, thereby citing the judgment of Innes CJ in *Nino Bonino v De Lange*, where he stated that 'spoliation is any illicit deprivation of another of a right of possession... in regard to a legal right.'¹³⁷ According to Greenberg, the fact that Innes CJ explained the term 'spoliation' in a general sense, without any limitation or exception, meant that persons who hold possession need not exercise such possession exclusively for them to qualify for a spoliatory order.¹³⁸ Thus, a piece of land may constitute different rights vested in different persons, who are all entitled to the spoliation order. Accordingly, the court held that it was incorrect for the court of first instance to deny the appellant a spoliation order merely because he did not hold/exercise exclusive possession.¹³⁹

In *Shapiro v South African Savings and Credit Bank*, the applicant was a medical practitioner who had leased a suite of consulting rooms for 15 years from the previous

¹³² *Nienaber v Stuckey* 1946 AD 1049.

¹³³ *Nienaber v Stuckey*:1055. For example, while the land was not being used for cultivation, the respondent was entitled to its enjoyment and to oversee that the appellant does not exceed the rights conferred upon him.

¹³⁴ *Nienaber v Stuckey*:1054.

¹³⁵ *Nienaber v Stuckey*:1053-1054; *Burnham v Neumeyer* 1917 TPD 630:633.

¹³⁶ *Termby v Lippingwell* 1908 ORC 68:71.

¹³⁷ *Nino Bonino v De Lange*:122.

¹³⁸ *Nienaber v Stuckey*:1056.

¹³⁹ *Nienaber v Stuckey*:1056.

owner of the building. In terms of the lease agreement, the applicant was entitled to affix a nameplate at the entrance of the building per the specifications of the South African Medical Council. The respondents, as new owners of the building, resorted to removing the applicant's nameplate from the entrance of the building without his consent and against his will. They denied the existence of an agreement between the applicant and the previous owner of the building. They alleged that the documents handed over to them by the previous owner suggested nothing about the applicant's right to have his nameplate affixed at the entrance of the building.¹⁴⁰

The applicant maintained that he had a clear right to affix the nameplate in terms of the contract entered into with the original owner of the building and that the respondent acted wrongfully and unlawfully in removing the nameplate without his consent and against his will.¹⁴¹ He sought a spoliation order to have the respondent return the *status quo* by putting back the nameplate on the portion of the building entrance where it was before its removal.¹⁴² The court acknowledged that the applicant's application embodied all the essentials of spoliation, namely (i) that the applicant had the nameplate affixed for at least 15 years and (ii) that it was removed wrongfully and unlawfully without his consent.¹⁴³

Because the applicant was given a right by the original owner to have a nameplate affixed on the entrance wall of the building as part of the condition for his tenancy, the court referred to *Nienaber v Stucky*, where the court decided similar facts.¹⁴⁴ As already pointed out above, in *Nienaber v Stucky*, the applicant had a right to plough and cultivate a portion of the farm, in which the respondent was also entitled to other rights, such as grazing cattle over the farm provided that there was no interference with the applicant's right to cultivate the land. The court nonetheless granted the applicant a spoliatory order against the respondent for locking the gate, thereby denying the applicant entrance to the farm. It is believed that in the present case, the applicant had a much stronger case in comparison to the applicant in *Nienaber*

¹⁴⁰ *Shapiro v South African Savings and Credit Bank* [1949] 3 ALL SA 400 (W):403.

¹⁴¹ *Shapiro v South African Savings and Credit Bank*:402.

¹⁴² *Shapiro v South African Savings and Credit Bank*:403.

¹⁴³ *Shapiro v South African Savings and Credit Bank*:405.

¹⁴⁴ *Shapiro v South African Savings and Credit Bank*:405.

because here the applicant exercised exclusive control, which was not the case in *Nienaber*.¹⁴⁵

In addition, the spoliation remedy is also available where a person or persons in joint possession of a thing unlawfully assume exclusive control or exclude a co-possessor against his will. This means that a spoliation remedy can be granted against a partner in a partnership who took files, records, or assets held in joint possession. The same applies to spouses in relation to their matrimonial property.¹⁴⁶ For example, in *Rosenbuch v Rosenbuch and Another*, the parties were married out community of property. Following a matrimonial conflict, the wife left the matrimonial home with certain articles of the household. The husband claimed that he had exclusive control over articles removed by the wife.¹⁴⁷ Colman J found that each of the articles was jointly possessed by the spouses up to the time the wife removed them.¹⁴⁸ He concluded that a joint possessor who has been deprived of his share of possession is entitled to a spoliation remedy.¹⁴⁹ The wife was accordingly found guilty of having committed an act of spoliation.¹⁵⁰

The spoliation remedy is limited only to the dispossession of property. It cannot be used in relation to human beings.¹⁵¹ This position was confirmed in *Mopeli v Botha*, where it was held that taking a child away from a person who is entitled to the child's custody does not fall within the ambit of the spoliation remedy.¹⁵²

2.5 THE PURPOSE OF THE SPOLIATION REMEDY

The inception of the spoliation remedy is found in the early medieval Canon Law.¹⁵³ During this time, the spoliation remedy was applied solely to discourage people from taking the law into their own hands so that they could resort to a court of law for judicial determination.¹⁵⁴ The spoliator was required to restore possession together with

¹⁴⁵ *Shapiro v South African Savings and Credit Bank*:406.

¹⁴⁶ Van der Merwe & De Waal 1993:67.

¹⁴⁷ *Rosenbuch v Rosenbuch and Another* [1975] 1 ALL SA 181 (W):183.

¹⁴⁸ *Rosenbuch v Rosenbuch and Another*:183.

¹⁴⁹ *Rosenbuch v Rosenbuch and Another*:184.

¹⁵⁰ *Rosenbuch v Rosenbuch and Another*:186.

¹⁵¹ Muller *et al* 2019b:328.

¹⁵² Muller *et al* 2019b:328; *Mopeli v Botha* 1931 WLD 63:65, 63.

¹⁵³ Taitz 1981:36.

¹⁵⁴ Taitz 1981:36.

damages, interests, and costs.¹⁵⁵ In modern South African law, the majority view is that the purpose of the spoliation remedy is to restore possession that was unlawfully deprived.¹⁵⁶ This view was formulated by Gardiner JP in *Mans v Marias* when he described the spoliation remedy as a speedy and robust remedy designed to deter persons from taking the law into their own hands and to restore the *status quo ante*.¹⁵⁷

Van der Merwe, De Waal, Sonnekus, Harker, and Kleyn all argue that the historical origin and development of the spoliation remedy was to recover the loss of possession of property that was unlawfully dispossessed.¹⁵⁸ In particular, Van der Merwe and De Waal propound that the essence of the spoliation remedy is found in the maxim '*spoliatus ante omnia restituendus est*' – which means that a person must first be restored to his former possession before the merits of the case can be considered.¹⁵⁹

On the contrary, Hahlo argues that the primary purpose for the spoliation remedy is the maintenance of peace and order in terms of which the law prohibits people from taking matters into their own hands.¹⁶⁰ It is a recuperatory action in so far as it enables persons who were unlawfully deprived of possession to recover it.¹⁶¹ Blecher and Van der Walt concur with Hahlo in that the spoliation remedy is primarily concerned with upholding legal order and preventing persons from taking the law into their own hands.¹⁶² They furthermore believe that where restoration of the *status quo ante* is impossible, the court must make an alternative order.¹⁶³

¹⁵⁵ Taitz 1981:37.

¹⁵⁶ Muller *et al* 2019b:326; *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1996 (4) SA 524 (W):531.

¹⁵⁷ Taitz 1981:38; *Mans v Marais* 1932 CPD 352:356.

¹⁵⁸ Harker 1988:192.

¹⁵⁹ Van der Merwe & De Waal 1993:68. They do acknowledge that returning the *status quo* contributes to the overall maintenance of peace and public order by restraining people from taking the law into their own hands. They fail to see how peace could be achieved if persons asserting to have a claim over a thing were entitled to resort to self-help to gain possession of the thing.

¹⁶⁰ Hahlo 1954-1955:728.

¹⁶¹ Hahlo 1954-1955:729.

¹⁶² Harker 1988:191-192. Van der Walt went even further by stating that the spoliation remedy should instead be known as a remedy for the protection of public order and peace and not merely a possessory remedy Muller *et al* 2019b:326.

¹⁶³ Blecher further opines that a court must exercise its discretion to order payment equivalent to the spoliated person's interest in exercising possession until the legitimacy of his claim to possession is determined by the court of law. He bases his opinion on the writings of old writers, particularly those of Van der Linden where he indicated that in Roman-Dutch law the spoliated person would be allowed to claim possessory damages suffered due to unlawful disposition. On the contrary, Van der Walt contends that an award for damages is not appropriate in spoliation proceedings, rather, the court must after having considered all that renders the restoration of the *status quo* impossible, investigate whether an order of contempt of court would not be appropriate under said circumstances (Harker 1988:191-192).

Interestingly, both views find support in case law. On the one hand, in *Stocks Housing v Department of Education and Culture Services and Others*, Innes J confirmed the view that the spoliation remedy is a historically established possessory remedy.¹⁶⁴ On the other hand, the court in *Mbangi v Dobsonville City Council* observed that in spoliation proceedings, 'the court is not *per se* protecting possession, but that in the interest of protecting the society against self-help, the law regards an act of spoliation or the taking of matters into one's own hands as being a justiciable wrong.'¹⁶⁵

In *Ngqukumba v Minister of Safety and Security and Others*, the Constitutional Court appears to have engaged and perhaps impliedly settled the question of whether the spoliation remedy functions to protect possession or to combat breaches of the peace.¹⁶⁶ In *casu*, Madlanga J held that the underlying and most fundamental principle in spoliation proceedings is the philosophy that no person should resort to self-help to obtain or regain possession.¹⁶⁷ For him, the main purpose of the spoliation remedy is the preservation of law and order in terms of which persons are encouraged to approach a court of law for a due legal process, and restrained from taking matters into their own hands.¹⁶⁸ This is the true nature of the spoliation remedy, and its proper application is influenced by it.

In addition, asserting that the spoliation remedy is solely for the protection of possession conflicts with the idea of having to return possession to an unlawful despoiled possessor or a possessor whose possession is prohibited by statute.¹⁶⁹ For example, in *Parker v Mobil Oil of Southern Africa (Pty) Ltd*, Van der Heever J observed that while a thief or a robber is entitled to be restored possession, there are no written records of the court assisting an applicant who outright admits that he has no right to the possession that he seeks to be restored to him.¹⁷⁰ In *Coetzee v Coetzee*, Van der

¹⁶⁴ *Stocks Housing v Department of Education and Culture Services and Others* 1999 (4) SA 231 (C).

¹⁶⁵ *Mbangi v Dobsonville City Council*: 470. The court relied on a passage in the Digest stating that 'if private persons could right revenge themselves, the country would not be fit to live in'.

¹⁶⁶ Nkosi 2016:168.

¹⁶⁷ *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC):par. 10.

¹⁶⁸ *Ngqukumba v Minister of Safety and Security and Others*:par. 10.

¹⁶⁹ Nkosi 2016:168.

¹⁷⁰ *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 336 (NC):340. The applicant and respondent concluded two contract agreements in terms of which the applicant was responsible for servicing aircrafts and to ensure that quality control and refuelling procedures are carried out in accordance with the respondent's refuelling policy. The applicant ceased the supervision of both sites and elected two representatives to act on his behalf. The respondent cancelled both agreements and repossessed its equipment used to fuel planes. The respondent alleged that the aerodromes were left unattended and that on certain occasions, the stocks were not controlled, and

Heever again demonstrated some kind of uneasiness and distrust regarding the restoration of possession to an unlawful despoiled possessor.¹⁷¹ He stated that possession should not be restored if the applicant has no vestige of a reasonable or plausible claim.¹⁷²

Furthermore, the idea that the spoliation remedy is strictly possessory has made it easy for courts to deny the restoration of possession where the despoiled thing is destroyed.¹⁷³ Ordinarily, a distinction would be drawn between damaged things and things that have been destroyed.¹⁷⁴ In respect of damaged things, an unlawful dispossessor can be directed to repair or reassemble the damaged thing to its former state, given that repairs and reparations are reasonable, such as the re-erection of a fence or the reconnection of electric panels.¹⁷⁵ With regards to the destruction of a thing, the court in *Fredericks and Another v Stellenbosch Divisional Council* held that where the original thing is destroyed or could not be found, it must be replaced with one similar in size and quality.¹⁷⁶ This ruling suggested that the spoliation remedy can be applicable in a case where restoration required a substantial replacement of property.¹⁷⁷ In *Rikhotso v Northcliff Ceramics (Pty) Ltd*, the court rejected this development. It held that the spoliation remedy is only appropriate for the restoration of possession and not the reparation or the replacement of destroyed property.¹⁷⁸

pilots could fuel their own aircraft which is contrary to Mobil's fuelling policy. Failure to maintain proper quality control and refuelling standards constituted a breach of agreement. However, the applicant sought an order directing the respondent to return all equipment to operation sites. He based his claim on the fact that he was not informed about breaches or given an opportunity to rectify matters before the respondents could decide to cancel the contract agreement. He however admits that the representatives had limited knowledge of quality control and were therefore unable to properly supervise operations. In addition, the applicant's attorney conceded that the return of all equipment would be of no value to the applicant. It was thus found that the applicant intended to use the spoliation remedy to extort an advantage on bargaining for reinstatement with Mobil. The court refused to be part of the applicant's smack of extortion and pointed out that the fact that the restoration of equipment would be of no use to the applicant, but cause great inconvenience to Mobil, only militates against the grant of the spoliation remedy. The court referred to *Judelman v Colonial Government* where it was held that the rule that goods dispossessed against the will of the possessor must be restored forthwith, is not an absolute one. Accordingly, the court refused to grant the applicant an order directing the respondent to restore equipment (336-340).

¹⁷¹ *Coetzee v Coetzee* 1982 (1) SA 933 (C).

¹⁷² *Coetzee v Coetzee*:676.

¹⁷³ Nkosi 2016:169.

¹⁷⁴ Muller *et al* 2019a: 209.

¹⁷⁵ Muller *et al* 2019a: 209.

¹⁷⁶ *Fredericks and Another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) 117.

¹⁷⁷ Boggendoel 2017: 132.

¹⁷⁸ *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others*:533.

Nugent J highlighted that there is no possessory entitlement to be decided upon where property is destroyed.¹⁷⁹

This approach was later confirmed by the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others*, where the court dismissed the claim for a spoliation order on the basis that materials used to construct the building were destroyed and the restoration of possession could not be possible.¹⁸⁰ Cameron JA held that while the *mandament* prohibits breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and restoration of specified property – not its reconstituted equivalent.¹⁸¹ Though he declined the invitation to extend the common law remedy in terms of section 39(2) of the *Constitution* to allow for a spoliation order where the thing has been destroyed, he developed a special remedy in line with section 26(1) on the basis of the housing right in the *Constitution*, which in substance, and as pointed out by Brand, ‘did exactly as would have been the case had the spoliation remedy been used’ because in the end, the residents were allowed to return to the land from which they were unlawfully removed and the City was directed to rebuild informal houses.¹⁸²

In *Monteiro and Another v Diedricks*, the Supreme Court of Appeal was asked to determine whether the spoliation remedy is an appropriate remedy where a party is no longer in possession of the property.¹⁸³ In deciding this matter, the court considered the controversy of the proper interpretation of the principle of the spoliation remedy. The majority judgment held that despite the spoliation remedy serving to deter breaches of the law, the court could not, however, require a party to restore possession where compliance with the order is impossible.¹⁸⁴ Speaking for the minority judgment, Schippers JA pointed out that the spoliation remedy should apply in all cases of spoliation, whether the spoliator acquires possession for himself or another, as long as afterward it is possible to restore the *status quo ante*.¹⁸⁵ He argued that the aim of

¹⁷⁹ *Rikhotso v Northcliff Ceramics (Pty) Ltd and Others*:535.

¹⁸⁰ *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* 2007 (6) SA 511 (SCA).

¹⁸¹ *Tswelopele Non-profit organisation v City of Tshwane Metropolitan Municipality*:par.24.

¹⁸² Brand 2014:194.

¹⁸³ *Monteiro and Another v Diedricks* [2021] 2 All SA 405 (SCA).

¹⁸⁴ *Monteiro and Another v Diedricks*:paras. 27-33.

¹⁸⁵ *Monteiro and Another v Diedricks*:par 60.

the spoliation remedy is rooted in the rule of law and the preservation of legal order in terms of which persons are prevented from taking the law into their own hands.¹⁸⁶

However, as already indicated above, the majority view is that the spoliation remedy serves to protect stable property relations from unlawful dispossession.¹⁸⁷ This is due to the importance of stable property relations in the participation of legal traffic and commerce.¹⁸⁸ It is furthermore argued that the spoliation remedy should not be viewed as a general remedy aimed at protecting public peace and order because this view is overly broad – and it might as well be said that all remedies protect public order and peace through the prohibition of lawlessness as their ultimate objective.¹⁸⁹

2.6 CONCLUSION

The fundamental principle of the spoliation remedy is that no person should be allowed to take the law into his own hands. This remedy addresses the unlawfulness of self-help by restoring possession to the despoiled person. All that the despoiled person has to prove is a stable possession of a kind that was unlawfully ousted. Although there is no actual judicial authority concerning a thief or a robber, there is nonetheless a strong view from case law suggesting that it is irrelevant how a person came to possession. What seems to be a major point of concern is the difference in opinion among scholars on the primary purpose of the spoliation remedy. Most of the authors agree that the spoliation remedy is strictly a possessory remedy that functions to restore possession. In contrast, others maintain that it serves to protect peace and order by preventing acts of self-help. This difference has profound implications for the scope and application of this remedy. For instance, if it can be accepted that it serves

¹⁸⁶ *Monteiro and Another v Diedricks*:par 69.

¹⁸⁷ *Muller et al* 2019a:198. For instance, in *Shelving Man (Pty) Ltd v Dawood and Others*, the court awarded a spoliation relief in favour of an applicant whose business premises had been unlawfully despoiled. In *casu*, the respondents coerced the applicant's director (Mr Ashraf Yusuf Omar) into handing over the keys of the applicant's business premises. They sent six adults males, whose identity was unknown to Mr Omar, who confronted him and took him to a secluded private office where they aggressively asked him questions about the applicant's business operations and forced him to hand over the business to the respondents. The court was satisfied that the respondents acted wrongfully by resorting to self-help in harassing and intimidating the applicant's director to sign documents of transfer of business operations and premises against his consent and will. The court held that the essential characteristic of the spoliation remedy is the protection of possession and that no person should be allowed to take matters into his own hands to unlawfully dispossess another of possession of property (*Shelving Man (Pty) Ltd v Dawood and Others* 2015 (3) SA 243 (KZD):paras. 4,14,18).

¹⁸⁸ *Muller et al* 2019a:198.

¹⁸⁹ *Muller et al* 2019a:198.

to protect public order and peace, its extension would be welcomed in all instances of self-help, whether it be the landlord or other persons. These implications are discussed more extensively in chapter four. The following chapter considers the development and application of the spoliation remedy on *quasi*-possession.

CHAPTER 3 : THE DEVELOPMENT OF THE APPLICATION OF THE SPOLIATION REMEDY IN THE CASE OF *QUASI*-POSSESSION BEFORE THE CONSTITUTION

3.1 INTRODUCTION

This chapter narrows the scope of the spoliation remedy and focuses mainly on the concept of *quasi*-possession. It explores how this concept was adopted into South African law and investigates the challenges encountered by our courts since its adoption before the *Constitution*. This investigation is necessitated by the amount of confusion plaguing our courts over the application of the spoliation remedy in *quasi*-possession cases. This chapter attempts to clarify this confusion by providing a detailed analysis of the peaceful and undisturbed control element of *quasi*-possession of incorporeals and by further determining the kind of *quasi*-possessory rights protectable under the spoliation remedy.

3.2 *QUASI*-POSSESSION

In Roman Law, private law was divided into three categories, namely, the law of things, the law of persons, and the law of actions.¹⁹⁰ Private law recognised and classified everything other than persons and actions as ‘things’.¹⁹¹ The concept of things was widely interpreted to encompass everything that could form part of a person’s property, be the object of a right, and all that can be assessed in monetary value.¹⁹² Incorporeal objects were also regarded as things in the legal sense.¹⁹³

The recognition of incorporeals led to what is known as *quasi*-possession.¹⁹⁴ In the same way that possession could apply to things capable of actual physical ownership,

¹⁹⁰ Schoeman 1983:10.

¹⁹¹ Schoeman 1983:10.

¹⁹² Schoeman 1983:10,11.

¹⁹³ Symeonides 1984:130; Schoeman 1983:10. Things are divided into corporeals and incorporeals. Incorporeal things are intangibles that exist in law. Put differently, incorporeals are rights that are attached to corporeals such as land, i.e. servitudes (Zulueta 1946:69).

¹⁹⁴ Muller *et al* 2019a:200; Muller 2019:8. For instance, it would be difficult for the spoliation remedy to find application in the case of use rights. This is because their intangible nature would make it impossible for a person to physically hold possession or control the objects of their incorporeal rights.

quasi-possession could apply to rights in things.¹⁹⁵ In other words, possession implies the detention or enjoyment of a corporeal thing that a person holds or exercises control over for himself or on behalf of another person. In contrast, *quasi*-possession implies a similar exercise in relation to an incorporeal object or a real right such as a servitude. By analogy, the rules governing possession equally apply to the *quasi*-possession of incorporeals.¹⁹⁶

The concept of *quasi*-possession of incorporeals was known in Roman-Dutch law yet applied in a somewhat peculiar manner to spoliation.¹⁹⁷ In South African law, the judgment of the court in *Nino Bonino v De Lange* is cited as authority for the assertion that the *quasi*-possession of incorporeals is protected against spoliation.¹⁹⁸ This concept was adopted in South African law by Barry AJ in *Pretorius and Another v Pretorius*.¹⁹⁹ In his judgment, he cited with approval the text of Voet where, in extending the applicability of interdicts to incorporeals, he demonstrated that the physical fact of occupation is present in the servitudes of usufruct and use.²⁰⁰ As a consequence, this enabled him to extend interdicts to praedial servitudes such as a right of way because while a person cannot be said to be in actual physical possession thereof, he has in law the *quasi*-possession in the same way as in the case of usufruct.²⁰¹

Soon after the *Pretorius* judgment, the concept of *quasi*-possession was firmly grounded in South African law. It was furthermore accepted that the spoliation remedy equally applies to cases of *quasi*-possession of all incorporeal rights. This was confirmed in *Nienaber v Stuckey* when Greenberg JA held that the spoliation remedy is available to persons deprived of incorporeal rights.²⁰² In other words, the spoliation

¹⁹⁵ Snyder 1991-1992:1886; Muller *et al* 2019b:337-338. For instance, under early Roman Law, servitudes could not be procured by prescription because they were incorporeal in nature. However, because of the continued exercise of use allowed by the servitude, the law eventually recognised the exercise of use as a form of *quasi*-possession worthy of protection under the law of prescription. The user would be regarded as the holder of the servitude if the owner of the property was present for a period of 10 years or would be regarded as a servitude holder after 20 years if the owner was absent (Butler 1982:849).

¹⁹⁶ Snyder 1991-1992:1886.

¹⁹⁷ Van der Walt 1983:690; Van der Merwe & De Waal 1993:67.

¹⁹⁸ Van der Walt 1989:447. This is the case even though the court did not elaborate in detail what *quasi*-possession really entailed (Van der Walt 1989:447).

¹⁹⁹ *Pretorius and Another v Pretorius* 1927 TPD 178.

²⁰⁰ *Pretorius and Another v Pretorius*:180.

²⁰¹ *Pretorius and Another v Pretorius*: 180-181; Kleyn 2013:7.

²⁰² *Nienaber v Stuckey*:1055-1056.

remedy was also granted to protect the *quasi*-possession of incorporeal rights other than servituted rights.

For instance, in *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd*, the respondent was ordered to restore water to business premises leased by applicants.²⁰³ In this case, the applicants were business partners who had entered into a lease agreement with the respondent (a company that erects and lets buildings) to occupy the second floor of the building to conduct their business as clothing manufacturers.²⁰⁴ Later, the respondent intended to demolish the existing building and erect a modern business and factory premises. The respondent personally met with the applicants and gave them a notice to vacate the premises within one year from the date of notice.²⁰⁵

In anticipation of the evacuation of the premises, the respondent began with clearing operations for excavation while the applicants still had about seven months of tenancy. Regrettably, the excavation caused the ground to cave, almost resulting in the fire escape and the lavatory collapsing. Out of fear that the probable collapse might result in loss of life and bodily injury, the respondent was advised to demolish both the fire escape and the lavatory. As a result, the supply of water to the premises occupied by the applicants was negligently or unintentionally cut off, thereby causing great inconvenience to the applicant's manufacturing business and other personal uses.²⁰⁶

Following this, the applicants requested the restoration of the fire escape, the lavatories, and the water supply. In consideration of this matter, De Villiers J stated that:

'Where a landlord acts in a high-handed manner, removes a portion of the leased premises or breaks it down to build somewhere else, however difficult it may be and however expensive, the court might very well, in a case which would savour much more of spoliation than the present one, actually order the landlord to restore the building, and the court would put a very high standard on such performance as a mark of disapproval of the high-handed action of the landlord.'²⁰⁷

²⁰³ *Nisenbaum and Nisenbaum v Express buildings (Pty) Ltd* [1952] ALL SA 156 (W): 157. In *Painter v Strauss*, a year before this judgment, the court had already appreciated the fact that the spoliation remedy is competent to anyone deprived of an incorporeal right. It was held that the *spoliatus* withdrawal of the applicant's authority to arrange with the Department of Irrigation for the supply of water on land without the applicant's consent amounted to deprivation of the applicant's right to obtaining water for irrigation purposes (*Painter v Strauss* 1951 (3) SA 307 (O):318).

²⁰⁴ *Nisenbaum and Nisenbaum v Express buildings*:157.

²⁰⁵ *Nisenbaum and Nisenbaum v Express buildings*:157.

²⁰⁶ *Nisenbaum and Nisenbaum v Express buildings*:158.

²⁰⁷ *Nisenbaum and Nisenbaum v Express buildings*:158-160.

In light of the fact that the removal of the fire escape and the lavatories was based on grounds of safety and as a matter of urgency, it could not be said that there was a high-handed action on the part of the landlord.²⁰⁸ However, as far as the severance of water is concerned, the court ordered the respondent to restore water to the premises occupied by the applicants.²⁰⁹

3.3 THE PEACEFUL AND UNDISTURBED CONTROL ELEMENT OF *QUASI-POSSESSION OF INCORPOREALS*

It is clear from the previous discussion that the *quasi*-possession of incorporeals finds protection under the spoliation remedy. However, the fundamental problem with the protection of *quasi*-possession stems from having to prove the physical possession required in standard cases of the spoliation remedy.²¹⁰ This part of the research discusses the earliest cases where this problem was encountered.

In *Bennett Pringle (Pty) Ltd v Adelaide Municipality*, the applicant leased a building from the respondent to be used as an abattoir and a wholesale butchery.²¹¹ A dispute arose regarding the duration of the lease agreement.²¹² The applicant argued that the lease agreement did not expire and that he had been deprived of exercising his right as an abattoir.²¹³ The respondent opposed the applicant's claim for a spoliation order on the basis that before, during, or after the alleged expiry of the lease agreement, there was no change in the factual situation. Therefore, the applicant did not possess the premises or been deprived of possession.²¹⁴ He further submitted that:

‘despite the existence of the lease, the *de facto* position regarding possession at all times remained unaltered and in terminating the lease respondent did not take control to any greater extent than it has always had’.²¹⁵

²⁰⁸ *Nisenbuam and Nisenbuam v Express buildings*:160.

²⁰⁹ *Nisenbuam and Nisenbuam v Express buildings*:161.

²¹⁰ Muller *et al* 2019a:200; Scott 2014:151. This is problematic because the requirement of physical possession cannot be proved in cases of *quasi*-possession of incorporeals. Van der Walt states that the solution is to be found in the *dictum* that *spoliatus ante omnia restituendus est*, which means that since the applicant need not prove his right to possession, he only must prove factual possession (Van der Walt 1983:691).

²¹¹ *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E):231.

²¹² *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:232.

²¹³ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:232.

²¹⁴ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:233, 236.

²¹⁵ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:233.

It was also denied that the applicant operated the abattoir or rendered services as an abattoir operator.²¹⁶

In deciding this matter, Addleson J began by noting that the deprivation of possession and the *quasi*-possession of incorporeals is protected against spoliation.²¹⁷ He moved on to state that the spoliation remedy is available to any person enjoying the physical use of the thing, at least to the extent that he derives benefit from such use.²¹⁸ In *casu*, the applicant was licensed as an abattoir and responsible for maintaining the premises of the building.²¹⁹ The fact that he exercised physical control over the premises, irrespective of how very little or intermittingly physical, the exercise in itself indicated the existence of control that was transferred to him by the respondent through the lease agreement.²²⁰ Choosing to do less than necessary to use the premises as an abattoir did not mean he exercised no rights at all.²²¹

The court found that the determining factor is whether the conduct of the possessor indicates the exercise of a right or actions associated with the exercise of the right in question.²²² According to the court, the applicant performed acts indicative of control and occupation of the premises, which amounted to possession for purposes of the spoliation remedy.²²³

In *Ntshwagele and Others v Chairman, Western Cape Regional Services Council and Others*, the court overruled the earlier decision in *Jansen v Madden*. It confirmed the opposite approach in *Van Wyk v Kleynhans*.²²⁴

In *Jansen v Madden*, the respondent removed a gate that allowed the applicant a right of way by erecting a fence that obstructed the road. The applicant claimed that he had been using the road for an uninterrupted period of 6 years, implying that he was in possession of a right of way and was deprived thereof by the removal of the gate through which he used to drive his cattle to the nearest farm.²²⁵ The court referred to

²¹⁶ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:236.

²¹⁷ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:234.

²¹⁸ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:234.

²¹⁹ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:237.

²²⁰ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:237.

²²¹ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:238.

²²² *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:238.

²²³ *Bennett Pringle (Pty) Ltd v Adelaide Municipality*:238.

²²⁴ *Ntshwagele and Others v Chairman, Western Cape Regional Services Council and Others* 1988 (3) SA 218 (C):221.

²²⁵ *Jansen v Madden* [1968] 1 ALL SA 83 (GW):85.

the judgment of Greenberg JA in *Nienaber v Stuckey* where, after referring to *Nino Bonino v De Lange* and other authorities, stated that:

‘the fact that these authorities state generally, and without any limitation or exception, that the possession of incorporeal right is protected against spoliation means that the holders of such servituted rights as rights of way... are entitled to the relief against dispossession by spoliation’.²²⁶

The court understood this passage to imply that a servituted right finds protection against dispossession by spoliation and that the applicant must prove on a balance of probabilities that he is the holder of a servituted right or the alleged right.²²⁷

In *Van Wyk v Kleynhans*, the magistrate’s court relied on the approach in *Jansen v Madden* to hold that the appellant must prove on the balance of probabilities that he had a right of way over the respondent’s farm.²²⁸ This judgement was set aside, and it was held that the court should instead examine whether the control usually associated with exercising the right in question was exercised.²²⁹

In the present case (*Ntshwaqele and Others*), the applicants lived in shacks illegally erected in the Noordhoek area. When this area was put up for sale, the option-holders were authorised to take necessary measures to remove the applicants and others who occupied this area.²³⁰ Following this and several meetings held between various stakeholders, the respondents, with the assistance of the police, instigated the removal of the applicants to Khayelitsha Cape flats - and demolished the shacks.²³¹ The court held that in a case of *quasi*-possession of an incorporeal, it is sufficient for an applicant to show that he actually exercised occupation or use of the land in question.²³²

To summarise, the court in *Jansen* suggested that the *quasi*-possession protected by the spoliation remedy was the servituted right. While this judgment was a good starting point towards the recognition of the kind of *quasi*-possession protectable under the

²²⁶ *Jansen v Madden*:86-87.

²²⁷ *Jansen v Madden*:87; Boggenpoel 2017:107.

²²⁸ *Van Wyk v Kleynhans* [1969] 1 ALL SA 75 (GW):78.

²²⁹ *Van Wyk v Kleynhans*:78. Van der Walt states with approval that in *quasi*-possession cases the applicant is not required to prove his right to the incorporeal, but the actual or factual exercise of the right in question (Van der Walt 1983:691).

²³⁰ *Ntshwaqele and Others v Chairman, Western Cape Regional Services Council and Others*:218.

²³¹ *Ntshwaqele and Others v Chairman, Western Cape Regional Services Council and Others*:219.

²³² *Ntshwaqele and Others v Chairman, Western Cape Regional Services Council and Others*:222. It was agreed that the applicant need not prove the alleged right but must show that he exercised acts associated with possession of the alleged right.

spoliation remedy, it was rejected for suggesting that the applicant must prove that he is the holder of the alleged right in order to establish possession where *quasi*-possession is concerned.²³³ In *Bennett Pringle*, the court traced the applicant's *quasi*-possession of a right to physical acts and use of the thing. This approach was followed in *Nsthwagala and Others* where occupation and use of the physical thing was the point of departure to determining possession in incorporeal cases. Here, we see a slight development in relation to how the courts tackled the notion of *quasi*-possession in spoliation proceedings.

Thus far, the characterisation of the right and the exercise of acts emanating from the alleged right is what the applicant needs to prove to establish the first requirement, i.e. the peaceful and undisturbed control element where the *quasi*-possession of incorporeals is concerned.²³⁴ The following discussion narrows the scope of *quasi*-possession to determine exactly the kind of *quasi*-possession rights protected by the spoliation remedy.

3.3.1 The kind of *quasi*-possession rights protectable under the spoliation remedy

While the term *quasi*-possession concerns the possession of rights, it does not necessarily mean that the spoliation remedy protects the *quasi*-possession of all rights.²³⁵ A distinction is drawn between the spoliation of servituted rights and non-servituted rights.²³⁶ This discussion sets out how courts ordinarily prove possession when dealing with *quasi*-possession of incorporeals with reference to the distinction between servitudes and non-servituted rights.

²³³ *Van Wyk v Kleynhans*:78; *Ntshwaqele and Others v Chairman, Western Cape Regional Services Council and Others*:218, 221. It was made abundantly clear that proof of the alleged incorporeal right was not required when examining the possession requirement in cases of *quasi*-possession because it would frustrate the bases and purpose of the spoliation remedy.

²³⁴ Boggenpoel 2015:81.

²³⁵ Horn *et al* 2021:250; Muller *et al* 2019a:200; Kleyn 2013:5. The spoliation remedy was not designed to have a catch-all function to protect the incorporeal control of all rights, only a certain type of control is protected. Otherwise, if this protection was extended to all rights, the spoliation remedy would be used to enforce personal rights, which would break down the distinction between the law of contract and the law of property (Muller *et al* 2019a:200).

²³⁶ Boggenpoel 2015:85.

3.3.1.1 Servitotal rights

The judgement of the court in the case of *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* is frequently cited as the authority for the type of possession required to establish *quasi*-possession in the case of servitotal rights.²³⁷ The court held that the *quasi*-possession of the servitude is established by indicating the actual use of the servitude or the exercise of actions associated with the alleged servitotal right.²³⁸ In other words, the applicant is expected to prove factual possession.²³⁹

The facts of this case are as follows: In 1986, the appellant cut off the flow of water to the storage tank that was pumping water to the local town. The municipality approached the court for an order directing the appellant to restore the flow of water to the storage tank. The appellant argued that the respondent had to prove the existence of the servitude to succeed with the spoliation order.²⁴⁰ The court rejected this claim and held that the insistence on proving the existence of a servitude constitutes a deviation from accepted principles.²⁴¹ It was held that the actual use of the servitude takes the place of physical possession in standard cases.²⁴² It is stated that this approach is necessitated by the fact that an incorporeal thing is not susceptible or capable of being possessed physically in the same way that corporeal things are possessed.²⁴³ The court concluded that in such circumstances, it is not necessary to prove the existence of a servitude. The actual exercise of the alleged right suffices to render the applicant eligible for the spoliation order.²⁴⁴ In other words, the *status quo* or the restoration desired by the appellant was the factual exercise of the servitude and not the actual servitude.²⁴⁵

This case received significant attention from a variety of scholars. For one, Van der Walt commented with approval and reiterated that *quasi*-possession is thoroughly

²³⁷ Boggenpoel 2015:85; Van der Walt 1989:447; Muller *et al*:2019b:339.

²³⁸ Kleya 2013:6; Muller *et al* 2019b:339.

²³⁹ Boggenpoel 2015:85.

²⁴⁰ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A):512. The appellant based his claim on the decision of the court in *Jansen v Madden* where it was held that for a person to claim dispossession of the right, he must prove on the balance of probabilities that he is the holder of the alleged right (*Jansen v Madden*:87).

²⁴¹ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:513G. Such insistence is contrary to principles governing the spoliation remedy because it would require courts to investigate the merits of the case (Boggenpoel 2017:108).

²⁴² *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:514J; Zlotnick 1994:695.

²⁴³ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:514D, 514H.

²⁴⁴ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:516G.

²⁴⁵ *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W):621.

engrained in South African jurisprudence.²⁴⁶ His evaluation indicated that the protection afforded by courts is not necessarily the protection of the right. Rather, it is the maintenance of actual physical control in circumstances where the relevant control corresponds with or is associated with the existence of the alleged right in question.²⁴⁷ Zlotnick concurred with Van der Walt in stating that what receives protection is the factual exercise of the right and not the nature of the right.²⁴⁸ He further pointed out that if this is accepted, then there can be no justification for opposing the appropriateness of the spoliation remedy in *quasi*-possession cases, particularly the recovery of an incorporeal possession.²⁴⁹ Furthermore, Kleyn noted that the *Bon Quelle* judgment reflected the common law position and highlighted that *quasi*-possession lies in the actual use of the alleged right.²⁵⁰

3.3.1.2 Non-servitotal rights

In the case of non-servitotal rights, the applicant is required to prove that the alleged right is incidental to the possession of the corporeal property.²⁵¹ According to Kleyn, the 'incidents of possession' cases often arise in situations where the occupied premises are provided with water, electricity, and telecommunication services.²⁵² However, because of a dispute between parties, the respondent resorts to discontinuing these services, thereby taking matters into his own hands.²⁵³ Muller observes that in certain instances, the respondent terminates these services in an attempt to evict the *spoliatus* without a court order.²⁵⁴

In *Naidoo v Moodley*, the appellant entered into a lease agreement with the respondent in terms of which the respondent would occupy the first floor of a double-story residence. The agreement entitled the respondent to the use of electricity subject to a fixed amount of R20,00 per month for water and electricity consumption. In 1980,

²⁴⁶ Van der Walt 1989:446.

²⁴⁷ Van der Walt 1989:450; Zlotnick 1994:695.

²⁴⁸ Zlotnick 1994:696.

²⁴⁹ Zlotnick 1994:695.

²⁵⁰ Kleyn 2013:8.

²⁵¹ Boggendoel 2015:86. The authority for this statement is found in the locus classicus judgement of the court in *Naidoo v Moodley* and *Froman v Herbmere Timber and Hardware*.

²⁵² Kleyn 2013:10.

²⁵³ Kleyn 2013:10.

²⁵⁴ Muller 2019:8.

the respondent was given a notice of termination of the lease. When the respondent refused to vacate, the appellant resorted to cutting off the water and electricity supply to the portion of the house occupied by the respondent.²⁵⁵

The appellant argued that the respondent's use of electricity could only be claimed on a contractual basis. The appellant further claimed that the respondent was, in effect, claiming for specific performance of the contract under the guise of the *mandament van spolie*. Eloff J held that the use of the electricity was an incident of occupation which the respondent had because of his occupation of the first floor of the building. According to the court, the respondent occupied the building not only by being physically present but by using its appurtenances, including electrical installations and power. Therefore, the appellant's cutting of electricity constituted a substantial infringement or interference with the respondent's occupation of the premises, resulting in spoliation.²⁵⁶

In *Froman v Herbmores Timber and Hardware (Pty) Ltd*, the applicant purchased a house in Johannesburg with an occupational rental agreement in terms of which he would be liable to pay for the use of water and electricity on a specified due date.²⁵⁷ When the applicant breached the agreement, the respondent purported to cancel the contract and required the applicant to vacate the house. The applicant disputed breaching the agreement and subsequently declined to vacate the premises. The respondent then resorted to disconnecting the water and electricity supply to the applicant's unit. The applicant took the respondent to court arguing that the severance of the water and electricity supply by the respondent amounted to an act of spoliation.²⁵⁸

The court noted that the respondent's only purpose in cutting off water and electricity was to force the applicant to vacate the premises, which action amounted to a deprivation of the applicant's right to obtain water and electricity. Thus, it was held that there is no reason why an incorporeal right of this nature should not form the subject of spoliation proceedings.²⁵⁹ To reach this conclusion, the court referred to the judgment of De Villiers J in *Nisenbuam and Nisenbuam v Express Buildings (Pty) Ltd*,

²⁵⁵ *Naidoo v Moodley*:565.

²⁵⁶ *Naidoo v Moodley*:565. Boggenpoel 2017:114.

²⁵⁷ *Froman v Herbmores Timber and Hardware (Pty) Ltd*:291.

²⁵⁸ *Froman v Herbmores Timber and Hardware (Pty) Ltd*:291.

²⁵⁹ *Froman v Herbmores Timber and Hardware (Pty) Ltd*:292.

where an order for the restoration of water was made against the landlord.²⁶⁰ The court was convinced that the appellant took the law into his own hands in order to evict the applicant, which amounted to spoliation.²⁶¹

In both *Naidoo* and *Froman*, it was emphasised that in order to establish possession, the alleged non-servitutory right must be incidental to the possession of the corporeal property.²⁶² Moreover, interferences with the supply of services incidental to the occupation of the premises were found to constitute sufficient grounds for the spoliation relief. It is also important to note that in both cases, the court did not attach any significance to the right to use electricity or the right to receive water, i.e. neither judgment investigated the merits of the case.²⁶³

In *Zulu v Minister of Works, KwaZulu and Others*, the applicant resided at a private dwelling about one kilometre from the Royal Residence. When the then Department of Bantu Affairs constructed a spring to supply the Royal Residence with water, the applicant arranged with the authorities to connect his pipeline to the pipeline directing the flow of water to the Royal Residence. It was agreed that the applicant was allowed to draw water only when there was a surplus available.²⁶⁴ Accordingly, the applicant extended the pipeline to his private dwelling and continued to receive water free of charge until 1990, when the water supply to his private dwelling was interrupted without prior notice. The applicant applied for the spoliation remedy to be reinstated with the supply of water.²⁶⁵ The court denied the spoliation remedy on the basis that the respondent exceeded its powers by supplying water to the applicant. Therefore, an order directing the restoration of water to the applicant's premises would constitute an act of illegality.²⁶⁶

The court was heavily criticised for its decision because it was inferred from investigating the merits of the case, which is contrary to spoliation proceedings.²⁶⁷ For instance, Van der Walt acknowledged that the court was correct in stating that (i) what is proved is the actual performance of acts forming the exercise of a right, and (ii) the

²⁶⁰ *Nisenbuam and Nisenbuam v Express buildings (Pty) Ltd*:161.

²⁶¹ *Froman v Herbmere Timber and Hardware (Pty) Ltd*:292.

²⁶² Boggenpoel 2017:114.

²⁶³ Muller 2019:12-13.

²⁶⁴ *Zulu v Minister of Works, KwaZulu and Others*:186.

²⁶⁵ *Zulu v Minister of Works, KwaZulu and Others*:82-183.

²⁶⁶ *Zulu v Minister of Works, KwaZulu and Others*:86, 190.

²⁶⁷ Muller et al 2019b:339.

spoliation remedy is not concerned with the protection of rights, but the factual possession which the applicant is deprived, he nonetheless pointed out that the court did not apply these principles to the facts - which unfortunately led the court to repeatedly investigating the merits of the case.²⁶⁸ This is problematic for reasons that the court was misdirected in finding that the applicant's use of water was not an incident of possession of the property.²⁶⁹ It is suggested that the court should not have investigated the rights of the parties but should simply have determined whether there was proof of acts associated with the right to draw water.²⁷⁰ In other words, the applicant only had to show that he drew water from the pipeline over some time before it was cut off.²⁷¹

However, what bears significance in this discussion is the court's formulation of what the applicant ought to prove to establish possession of an incorporeal right.²⁷² In *Bon Quelle*, the court determined that the use or exercise of a right to a thing (servitude) replaces the actual physical possession or control of the thing.²⁷³ Van der Walt clarified this position by highlighting that what the court meant is that the applicant must prove the actual exercise of acts associated with the underlying entitlement of an alleged right.²⁷⁴ The court accepted that what is protected is the actual performance of acts which, if lawfully performed, constitutes the exercise of the right.²⁷⁵ In my view, this is a correct formulation concerning what the applicant ought to prove to qualify for the spoliation remedy in *quasi*-possession cases. This formulation accurately reflects the gradual progression of phrasing the legal position from somewhat vague phrases to what is more precise and elegantly enunciated.

In *Plaattjie and Another v Olivier NO and Others*, the case of a non-servitural right was once again dealt with when the court compared the difference between the test for *quasi*-possession of servitural rights and non-servitural rights.²⁷⁶ In *casu*, the respondents disconnected the supply of water to communal taps located in an informal

²⁶⁸ Van der Walt 2002:276.

²⁶⁹ Van der Walt 2002:278.

²⁷⁰ Van der Walt & Pienaar 2016:230.

²⁷¹ Had the court applied the spoliation principles to the facts correctly, the use of water by the applicant ought to have been decisive for awarding the spoliation relief.

²⁷² *Zulu v Minister of Works, KwaZulu and Others*:188.

²⁷³ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:514J.

²⁷⁴ Van der Walt 1989:451.

²⁷⁵ *Zulu v Minister of Works, KwaZulu and Others*:188.

²⁷⁶ *Plaattjie and Another v Olivier NO and Others* 1993(2) SA 156 (O):159-160. Boggenpoel 2017:113.

settlement where the applicants lived.²⁷⁷ The applicants instituted a claim for a spoliation order directing the respondents to restore the flow of water to the informal settlement.²⁷⁸ However, before the court could decide on this matter, it reiterated the already established principle that possession of an incorporeal right is protected against spoliation.²⁷⁹ According to this principle, what merits protection is the actual exercise or performance of lawful acts which constitute the exercise of the right.²⁸⁰

What stood out in this case was the subsequent determination of acts which constitute the exercise of a right.²⁸¹ The authority for possession of non-servitural as found in *Naidoo and Froman*, where the spoliator interrupted the flow of water or electricity supply to premises occupied by the applicant/appellant, is that (i) rights must be incidental to physical occupation of the property and that (ii) *quasi*-possession is established by the physical use of appurtenances to the occupation.²⁸² The court confirmed that in order to claim the restoration of water, the applicant must prove that the respondent interfered with or interrupted the flow of water to the premises occupied by the applicants. However, in the present case, the taps to which water was disconnected were situated on a stand distant from the stands possessed by applicants.²⁸³ Thus, the applicants were not in physical possession of water and, therefore, could not base their claim on loss of physical possession.²⁸⁴ In light thereof, the use of water did not constitute the use of servitural rights or an incident of their possession or control of the premises (the corporeal thing). Accordingly, it was held that it would not be competent to grant the spoliation order.²⁸⁵

In *Shoprite Checkers Ltd v Pangbourne Properties Ltd*, the applicant was denied spoliatory relief for a non-servitural right due to failure on its part to show that it was in

²⁷⁷ *Plaatjie and Another v Olivier NO and Others*:156.

²⁷⁸ *Plaatjie and Another v Olivier NO and Others*(O):156.

²⁷⁹ *Plaatjie and Another v Olivier NO and Others*:156.

²⁸⁰ *Plaatjie and Another v Olivier NO and Others*:157.

²⁸¹ *Plaatjie and Another v Olivier NO and Others*:160.

²⁸² *Plaatjie and Another v Olivier NO and Others*:161. According to Van der Merwe, the applicant must show that he was divested of a formally exercised utility by identifying the right entitling him to the exercise of that utility. He posits that it is the relationship between the right and the exercise connected with that alleged right which *prima facie* proves the possessory element required for a spoliation order (Van der Merwe 2014:617, 624).

²⁸³ *Plaatjie and Another v Olivier NO and Others*:159. The area where the taps were installed did not form part of the applicant's property.

²⁸⁴ *Plaatjie and Another v Olivier NO and Others*:160.

²⁸⁵ *Plaatjie and Another v Olivier NO and Others*:160.

possession of the designated area.²⁸⁶ In *casu*, the applicant entered into a lease agreement to operate a supermarket at a shopping centre owned by the respondent. The agreement referred to the parking area attached to the complex as the 'common area'. Applicant's customers and employees utilised this area for parking purposes.²⁸⁷ However, the respondent began construction works on the portion of the designated area to erect new shops and increase the number of parking spaces.²⁸⁸

The applicant approached the court for an order of spoliation directing the respondent to restore *ante omnia* the use of the portion of the parking area. The applicant alleged that the construction undertaken by the respondent substantially interfered with its business operations and deprived its employees and customers of free and undisturbed possession.²⁸⁹ The applicant further submitted that the 'common area' was incidental to its possession of the premises.²⁹⁰

The court held that even though the applicant may have had a right in terms of the lease agreement entered into with the respondent to make use of the parking area, it does not, however, amount to possession for purposes of the spoliation remedy.²⁹¹ In this regard, the court referred to Thirion J's judgment in *Zulu v Minister of Kwa-Zulu Natal*, where it was held that the '*mandament van spolie* is not concerned with the protection or restoration of a right at all. It aims to restore the factual possession of which the *spoliatus* has been deprived'.²⁹² The court held that the right to use property does not amount to possession of property.²⁹³ The applicant ought to have shown that it was in possession of the common area as envisaged in the authorities, instead of attempting to enforce rights which it alleged to have in terms of the contract under the guise of the spoliation remedy.²⁹⁴

²⁸⁶ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:624.

²⁸⁷ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:618.

²⁸⁸ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:619.

²⁸⁹ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:619.

²⁹⁰ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:620.

²⁹¹ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:623.

²⁹² *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:623. It was further highlighted that if the protection afforded by the spoliation remedy subsumes the exercise of rights in the widest sense, then rights such as performance of contractual obligations would also be included, which would extend this remedy beyond its legitimate scope of application and usefulness (624).

²⁹³ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:624.

²⁹⁴ *Shoprite Checkers Ltd v Pangbourne Properties Ltd*:623- 624.

3.4 CONCLUSION

Chapter three focused on the development of the application of the spoliation remedy in the case of *quasi*-possession before the *Constitution* came into operation. Firstly, it is found that incorporeal rights are susceptible to possession in the form of ‘*quasi*-possession’.²⁹⁵ Secondly, the concept of *quasi*-possession is historically justifiable in South African law and has been followed by the courts.²⁹⁶

Central to this part of the research is that in order to prove *quasi*-possession in spoliation proceedings, the applicant only needs to show the outward manifestation of the right through the exercise of acts that are usually associated with the right in question. The applicant need not prove the existence of the right or an entitlement to the right. In addition, only the *quasi*-possession of servitugal rights and non-servitugal rights finds protection under the spoliation remedy. On the one hand, servitugal rights are proved by indicating the actual use of the servitude or the exercise of actions associated with the alleged servitugal right. On the other hand, non-servitugal rights must be incidental to the occupation of the premises to establish possession.

Concerning non-servitugal rights, in *Naidoo and Froman*, the spoliation remedy was granted due to the spoliators attempt to evict the *spoliatus* without following the due legal process. In both courts, it was accepted that the applicants’ respective *quasi*-possession rights to water and electricity supply were incidents of occupation of the premises. However, the court’s failure in *Zulu v Minister of Works* to find the applicant’s *quasi*-possession right to water as constituting an incident of possession even though water was supplied to his premises, raises questions about the correct determination of an incident of possession requirement. Though it may be argued that the spoliator in *Zulu v Minister of Works* did not intend to evict the applicant, in my view, it is not enough that an ‘intent to evict’ should be the only determining factor as to whether the applicant/*spoliatus* had an incidental right to occupation of the premises. This argument is expanded on in chapter four under the discussion of ‘recent judgments.’ Chapter four studies the application of the spoliation remedy after the implementation of the 1996 *Constitution* and determines existing constitutional considerations on the protection of the *quasi*-possession of water and electricity supply.

²⁹⁵ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:514D.

²⁹⁶ *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*:515C-516C.

CHAPTER 4 : THE APPLICATION OF THE SPOLIATION REMEDY IN THE CASE OF *QUASI*-POSSESSION OF WATER AND ELECTRICITY SUPPLY AFTER THE IMPLEMENTATION OF THE CONSTITUTION

4.1 INTRODUCTION

The founding provision of the *Constitution* declares that the Republic of South Africa is a value-based society that often must interpret rules to give clear expressions to the values ingrained in the *Constitution*.²⁹⁷ Thus, chapter four studies the application of the spoliation remedy on *quasi*-possession cases after the 1996 *Constitution* came into operation. Firstly, this chapter will consider the position of incorporeal rights under the constitutional property clause to determine the propriety of *quasi*-possession within the constitutional context. Secondly, this chapter will consider the impact and influences of the *Constitution* on the application of *quasi*-possession cases of water and electricity supply.

4.2 THE CONSTITUTIONAL RECOGNITION OF INCORPOREAL RIGHTS

Incorporeal property rights are subjective rights such as real and personal servitudes in respect of immovable things that serve as objects of property rights.²⁹⁸ Before the constitutional era, incorporeal rights in the form of subjective rights were regarded as dogmatically unsound even though they were recognised as established components of property law principles.²⁹⁹ This was largely the result of the narrow interpretation of things as primarily corporeal.³⁰⁰ However, owing to the introduction of the property concept in terms of section 25 of the *Constitution* of 1996, this narrow interpretation was extended to include other forms of property.³⁰¹

Pienaar holds that there is no indication that the term property for purposes of section 25 is restricted to corporeal things.³⁰² In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*, the Constitutional Court suggested that it was judicially

²⁹⁷ *Constitution*:sec 1.

²⁹⁸ Pienaar 2010:33.

²⁹⁹ Pienaar 2010:35.

³⁰⁰ Pienaar 2010:35.

³⁰¹ Pienaar 2010:35-36.

³⁰² Pienaar 2010:36.

unwise to define property for purposes of section 25 comprehensively.³⁰³ Van der Walt also stressed that the interpretation of section 25 could accommodate the notion of dephysicalisation of property – a recognition that certain incorporeals have progressively become more important and valuable in the modern day to the extent that they ought to be protected and treated as property.³⁰⁴ Pienaar also champions the view that constitutional property as objects of property rights should include incorporeal property, as already accepted in private law, case law, and legislation.³⁰⁵

While it cannot be said that all incorporeal property interests are recognised as property in terms of section 25, there is a strong argument advocating for the constitutional recognition of incorporeal interests that have already been recognised as objects of property rights in private law. Van der Walt suggests that this proposition would subsume incorporeal immovable objects of registered limited real rights, intangible movable objects of limited real rights, and objects of protected intellectual property rights.³⁰⁶

4.3 *QUASI-POSSESSION CASES AFTER THE CONSTITUTION*

Chapter three investigated the origins of *quasi*-possession and its application under the spoliation remedy before the *Constitution* of 1996. This section studies the application of the spoliation remedy on *quasi*-possession cases after the *Constitution* came into operation. The focus of this research is limited to the spoliation of the *quasi*-possession of water and electricity supply. This is because acts of self-help often occur in cases where the supply of water and electricity is summarily terminated as opposed to other forms of property rights.³⁰⁷ Additionally, the water and electricity supply informs or realises a dignified and humane occupation of residential premises.³⁰⁸

³⁰³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC):par. 15.

³⁰⁴ Van der Walt 2011:93. He states that the dephysicalisation of property is an economic reality previously recognised in South African private law and must, therefore, not be ignored in constitutional law. He suggests that these rights can be recognised and protected by enquiring whether they have a constitutionally relevant value and whether such value came into force in accordance with applicable principles of the law (Van der Walt 2011:96).

³⁰⁵ Pienaar 2010:37.

³⁰⁶ Van der Walt 2011:96.

³⁰⁷ Freedman 2015:200.

³⁰⁸ Freedman 2015:200. This discussion will also consider specific constitutional arguments to clarify the constitutional position in respect of water and electricity supply. For instance, Muller argues that the electricity supply is a constitutive element of adequate housing as meant in section 26(1) of the

4.3.1 Statutory rights protectable under the spoliation remedy

Even though courts have tended to investigate the merits of a case, they have unanimously and consistently maintained that the spoliation remedy is not an appropriate remedy where contractual rights or specific performance of a contractual obligation is claimed.³⁰⁹ Therefore, as a rule, the spoliation remedy cannot be used to claim personal rights.³¹⁰ An exception to this rule only arises when a personal right to the supply of water or electricity is an incident of possession of the thing, such that an interference with the personal right essentially amounts to an interference with the thing.³¹¹ As a result, before the promulgation of the *Constitution of the Republic of South Africa*, 1996, only the *quasi*-possession of servituted rights and non-servituted rights found protection under the spoliation remedy.³¹² The applicant only had to prove factual possession or actual use in servituted cases and an incident of possession in non-servituted cases.³¹³ This position was changed due to the practice of determining the nature of the right to ensure that rights are not derived from contract.

While courts are correct to say that specific performance cannot be enforced under the guise of the spoliation remedy, such determination vicissitudes a contrary approach to normal principles of the spoliation remedy and causes confusion regarding the scope of rights protectable under the spoliation remedy.

For instance, in *Impala Water Users Association v Lourens NO and Others*, the *spoliatus* appealed against the decision of the High Court, where an order was made directing the restoration of the flow of water to farms owned by respondents. The respondents were formal members and water users under the Impala Water Irrigation Board. They had obtained registration for irrigation in terms of section 88 of the *Water Act* 54 of 1956, which was later repealed by the *National Water Act* 36 of 1998.³¹⁴

Constitution (Muller 2019:3-4). Therefore, according to Marais, the spoliation remedy indirectly protects the limitation of section 26(1), i.e., the right to adequate housing, by ordering the restoration of the electricity supply where it was disconnected through an unlawful act of self-help (Marais 2021b:98).

³⁰⁹ Freedman 2015:199; Muller *et al* 2019:201.

³¹⁰ *Telkom SA Ltd v Xsinet (Pty) Ltd*:par. 14; *Eskom Holdings SOC Limited v Masinda*:par. 22; Muller *et al* 2019a:201.

³¹¹ Freedman 2015:200.

³¹² Boggenpoel 2017:118; Muller *et al* 2019a:201-206.

³¹³ Boggenpoel 2017:118; Muller *et al* 2019a:201.

³¹⁴ *Impala Water Users Association v Lourens NO and Others*:paras 1-3.

When the Impala Irrigation Board (appellant) was declared a Water User Association under section 98(6)(a) of the *National Water Act* 36 of 1998, the respondents automatically became members under para 7.2a of its Constitution.³¹⁵ However, a dispute arose between the appellant and respondents regarding the legality of the water charge increase in connection with the cost of financing the construction of a dam. The appellant instituted a suit against respondents to recover alleged amounts of a dam-financing component from the water charge. This suit was still pending when the appellant exercised its powers in section 59(3)(b) of the *National Water Act* to restrict the flow of water to farms owned by respondents.³¹⁶

The respondents approached the court for an order of spoliation. They argued that the appellant had the *onus* to prove that its actions in interfering with the water supply fell strictly and squarely within the ambit of the authorising statute in section 59(3)(b).³¹⁷ They relied on the decision of the court in *George Municipality v Vena and Another*, where it was held that the *onus* lies with the dispossessor who has deprived another of possession without recourse to the law under the purported exercise of the statutory power to prove that his actions were in accordance with the relevant authorising statute.³¹⁸ The respondents pointed out that the appellant failed to discharge the *onus* that it can rely on section 59(3)(b) because, at the time of this proceedings, the suit to determine whether the unpaid portion of the water use charge is legally due was under review and the subject of a defended action between the appellant and respondents.³¹⁹

The appellant based its case on *Telkom SA Ltd v Xsinet (Pty) Ltd* to argue that the respondents' rights to draw water were not protectable under the spoliation remedy because they were personal in nature and originated from a contract.³²⁰ Therefore, the

³¹⁵ *Impala Water Users Association v Lourens NO and Others*:paras 1-3.

³¹⁶ *Impala Water Users Association v Lourens NO and Others*:par 6.

³¹⁷ *Impala Water Users Association v Lourens NO and Others*:par 9. Section 59(3)(b) stipulates that if the water use charge is not paid, the supply of water to the water user may be restricted or suspended until the charges have been paid. In terms of section 59(4), a water user must be given an opportunity to make representations within a reasonable period on any proposed restrictions or suspension before the restriction or suspension is imposed.

³¹⁸ *Impala Water Users Association v Lourens NO and Others*:par. 9.

³¹⁹ *Impala Water Users Association v Lourens NO and Others*:par. 9.

³²⁰ *Impala Water Users Association v Lourens NO and Others*:paras 10, 11. The Supreme Court of Appeal in *Telkom SA Ltd v Xsinet* created uncertainties regarding the application of the spoliation remedy in *quasi*-possession cases. The court investigated the merits of the case instead of determining the mere exercise or use of the alleged right. It distinguished between registered real rights and rights sourced in the constitution and legislation and rights that are purely contractual or

respondents, as members of the Water Users Association, acquired the privilege of receiving water in exchange for performing membership obligations, such as the payment of water charges raised by the appellant.³²¹ The court rejected this argument and held that the respondents' right to draw water was not personal or contractual. The court pointed out that the respondents were entitled to rights under the previous *Water Act* 54 of 1956, which were registered for irrigation under section 88 of the Act.³²² Moreover, the court held that rights flowing from statute cannot be described as personal rights originating from contract.³²³ Finally, the court agreed with the High Court's judgment that the respondents' *quasi*-possession right to draw water was spoliated and that section 59(3) could only be invoked when the water charge was legally payable.³²⁴

In *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*, the respondents were members of the Water User Association, previously known as the Blyde River Irrigation Board. The Association supplied water to respondents through a canal system, which later became inefficient and led to the construction of an irrigation network by means of a pipeline. An agreement was reached between the Association and FirstRand in terms of which the Association would oversee the construction of the pipeline as an agent for the partnership and lease completed works against periodic rental payments.³²⁵ However, the Association withdrew from the project, and FirstRand resolved to complete the project as the principal.³²⁶

FirstRand delegated the control and maintenance of the pipeline to Blyde River Water Utility Co Pty Ltd, its subsidiary company, and the second appellant.³²⁷ In January 2004, Blyde River Utility Co Pty Ltd agreed with respondents to convey water through the pipeline to their properties against a payment of a fee until 31 December 2004.³²⁸ When a dispute arose regarding a fee payable for the conveyance of water in 2005,

personal in nature. The court found that if a right is registered or originates in the constitution or legislation, its *quasi*-possession enjoys protection under the spoliation remedy. However, if a right originates from contract, its *quasi*-possession is not protectable under the spoliation remedy (Muller *et al* 2019a:202).

³²¹ *Impala Water Users Association v Lourens NO and Others*:par. 11.

³²² *Impala Water Users Association v Lourens NO and Others*:par. 18.

³²³ *Impala Water Users Association v Lourens NO and Others*:par. 18.

³²⁴ *Impala Water Users Association v Lourens NO and Others*:paras 21, 22.

³²⁵ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:paras 5, 6.

³²⁶ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 6.

³²⁷ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 2.

³²⁸ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 7.

the appellant terminated the flow of water to properties owned by respondents.³²⁹ The respondents alleged that their right to draw water originated in the repealed *Water Act* 54 of 1956, which rights were subsumed into rights under the *National Water Act* 36 of 1998.³³⁰ They argued that the right to draw water was a statutory right and an incident of their occupation and farming operations.³³¹

In the court *a quo*, Bertelsmann J relied on the decision of the court in *Impala Water Users Association* to hold that the respondents' right to draw water was an incident of their occupation of farms registered under the irrigation scheme and a *quasi*-possession right protectable under the spoliation remedy.³³²

The Supreme Court of Appeal summarised the position on *quasi*-possession of incorporeals as follows: The spoliation remedy protects the *quasi*-possession of certain rights and that the existence of the right need not be proved apart for the actual exercise of the right a '*gebruiksreg*' or an incident of possession or occupation of premises.³³³ To ensure that there are no overlaps between the law of contract and the law of property, it was held that even though the nature of the right need not be proved, it must, however, be determined or characterised to ascertain whether its *quasi*-possession is protectable under the spoliation remedy.³³⁴

The characterisation of the right to ascertain its protectability under the spoliation remedy was developed in *Tigon Ltd v Bestyet Investments (Pty) Ltd*, where the court, with reference to *Bon Quelle*, highlighted that an incorporeal right is capable of possession effectuated by an exercise of a right.³³⁵ The court in *Tigon* furthermore determined that to prove *quasi*-possession, a closer look needs to be taken at the right or rights enjoyed by the holder.³³⁶ Following this, the court in *FirstRand* referred to *Telkom v Xsinet*, where it was held that the spoliation remedy could not be used to enforce specific performance or rights derived from contractual obligations.³³⁷ The

³²⁹ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 7.

³³⁰ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 9.

³³¹ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 10.

³³² *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 11.

³³³ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:paras 12, 13.

³³⁴ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 13.

³³⁵ *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N):641.

³³⁶ *Tigon Ltd v Bestyet Investments (Pty) Ltd*:642. This implied an investigation into the merits of the case, which is oft stated throughout the mini-dissertation to constitute a deviation from the accepted principles on spoliation proceedings.

³³⁷ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 14.

court further distinguished between *Impala Water Users Association* and *FirstRand*.³³⁸ In contrast, it was held that the respondents in *FirstRand* were not dispossessed of statutory rights to draw water forming an incident of their possession or occupation of the farms but were rather deprived of a former contractual right for the conveyance of water through a pipeline, which expired on 31 December 2004.³³⁹

Therefore, on account of the characterisation of the right to determine its nature, the scope of *quasi*-possession rights protectable under the spoliation remedy was extended to include registered statutory rights.³⁴⁰ The following paragraphs expand on this development and study the impact that the characterisation of the right has on the application of the spoliation remedy in *quasi*-possession cases.

4.3.2 Rights Flowing from the Constitution

In addition to (i) servitural rights, (ii) registered statutory rights, and (iii) rights incidental to the occupation of a corporeal thing, the court in *City of Cape Town v Strumpher* included another category of rights flowing from the *Constitution*.³⁴¹ In this case, the court had to decide whether the disconnection of the municipal water supply constituted spoliation and whether the spoliation remedy was an appropriate remedy under the circumstances.³⁴²

The city supplied water to a caravan park operated by the respondent. When a dispute arose over the payment of the amount in arrears, the city decided to terminate the water supply to the respondent's properties. It argued that the respondent could not be granted a spoliation order because his right to water was purely personal.³⁴³ The Supreme Court of Appeal held that a water supply contract between the municipality and a water consumer does not make the consumer's right a personal right arising from the contract.³⁴⁴ The court also found that the respondent's right to water was a

³³⁸ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 15.

³³⁹ *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 16.

³⁴⁰ Marais 2021b:216; Kleyn 2013:9. This can be discerned from the judgment of the court in *Impala Water Users Association* and to some extent in *FirstRand (Impala Water Users Association v Lourens NO and Others*:par. 18; *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 16).

³⁴¹ *City of Cape Town v Strumpher* 2012 (4) SA 207 (SCA); Kleyn 2013:9; Freedman 2015:199; Marais 2021b:216. Boggenpoel 2017:116, 118; Muller et al 2019a:205.

³⁴² *City of Cape Town v Strumpher*:par. 6.

³⁴³ Van der Merwe & Pienaar 2012:729. *City of Cape Town v Strumpher*:paras 8-11.

³⁴⁴ *City of Cape Town v Strumpher*:par. 9.

statutory right under the *Water Services Act* 108 of 1997.³⁴⁵ According to the court, the contractual agreement between the city and the respondent did not discharge the city's constitutional and statutory obligation to supply water to the respondent.³⁴⁶

The court observed that the respondent was in a similar situation with the water users in the *Impala Water Users Association* case. The respondent's right to water was also subsumed into rights under the *Water Services Act* and could not be described as a mere personal right.³⁴⁷ Finally, the court concluded by stating that the respondent's right to water was not a personal right but a public law right, existing independently of any contractual relationship that the respondent had with the city.³⁴⁸

The Supreme Court of Appeal claimed that the respondent's right was also incidental to possession of the property.³⁴⁹ This claim is questionable because the court came to this conclusion without evaluating the facts of the case or referring to previous authorities to ascertain whether this was, in fact, the case.³⁵⁰ It would seem that the court was less concerned with whether the respondent's right to water was an incident of possession. Much of the court's attention was focused on the fact that the right was not merely contractual but a public law right.³⁵¹ Therefore, the characterisation of the respondent's right as a public law right appears to have justified its protection, thereby, once again, expanding the scope of *quasi-possession* rights protectable under the spoliation remedy.³⁵²

³⁴⁵ Van der Merwe & Pienaar 2012:729. *City of Cape Town v Strumpher*:par. 19.

³⁴⁶ Van der Merwe & Pienaar 2012:730. Section 27 of the *Constitution* placed an obligation on the state to achieve the progressive realisation of the right to basic water for everyone, supplemented by section 3(1) of the *Water Services Act* 108 of 1997 and section 152(1)(b) which gives effect to section 27(1)(b) of the *Constitution* (by mandating local governments and municipalities to deliver services to communities in a sustainable manner). In other words, the respondent's right to claim under the spoliation remedy was not only reliant on the agreement concluded with the city but was also founded on statutory and constitutional obligations. (Van der Merwe & Pienaar 2012:730; *City of Cape Town v Strumpher*:par. 9).

³⁴⁷ *City of Cape Town v Strumpher*:par. 11,&19.

³⁴⁸ *City of Cape Town v Strumpher*:par. 10 & 19.

³⁴⁹ *City of Cape Town v Strumpher*:par. 19.

³⁵⁰ Boggenpoel 2015:87.

³⁵¹ Boggenpoel 2015:97. It is argued that this view is incorrect because, in *quasi-possession* cases, the right must be a constituent of the control of a corporeal thing (Muller *et al* 2019a:205).

³⁵² Boggenpoel 2015:83; Boggenpoel 2017:118; Kleyn 2013:9; Muller *et al* 2019a:203-204. Holding that the respondent's right was a public law right and at the same time an incident of possession of the thing suggests that the spoliation remedy applies to constitutional and statutory rights in the same way it applies to real rights, and that it also applies to constitutional and statutory right in the same way it applies to personal rights that are an incident of possession of the property. According to Freedman, the extension of the spoliation remedy to include constitutional or registered statutory rights introduces an element of conceptual confusion into the application of the spoliation remedy in *quasi-possession* cases. He argues that this extension equates constitutional and statutory rights

It should be noted that the right of access to water is provided for in section 27(1)(b) of the *Constitution*, which justifies the human rights public law dimension.³⁵³ The same cannot be said with respect to the electricity supply because it is not sourced in the *Constitution*, albeit a vital municipal service which the state is often obligated to supply.³⁵⁴ This was addressed in *Darries and Others v City of Johannesburg and Others* and later confirmed by the Constitutional Court in *Rademan v Mqophaka Local Municipality and Others*.³⁵⁵

Muller, Marais, and Ngwenyama suggest that electricity supply should also be considered a public law right due to its usefulness in the present-day world.³⁵⁶ However, for a social norm to be regarded as a right, there must be a claimant and a person responsible for discharging the claim.³⁵⁷ In the *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others*, the government highlighted that it has no obligation to provide emergency power (electricity).³⁵⁸ The president of the Republic of South Africa further submitted that the national government has no constitutional obligation to supply electricity to the people of the republic.³⁵⁹ Similar submissions were debunked by the Constitutional Court in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*, where it was held that Eskom, as an organ of the state, is bound by the Bill of Rights and, therefore,

with real rights and subsequently equates them with personal rights that are an incident of the possession of a thing. He suggests that the spoliation remedy must either apply to constitutional and statutory rights as a rule or as an exception to the rule, that it should not apply in both ways. He further critiques this extension by submitting that it is not clear whether the extended application of the spoliation remedy will have any implications in practice. He fears that, because the real right to water and the constitutional or statutory right to water were use rights or 'gebruiksregte', then it can be argued that this case is authority for the principle that a person who has been dispossessed of a specific constitutional or statutory right entitling him to use rights, may as well claim the *quasi*-possession of that right using the spoliation remedy. Therefore, for him, it is not easily determinable which other constitutional rights fall into the category of use rights capable of being claimed by the spoliation remedy (Freedman 2015:203-204; *City of Cape Town v Strumpher*:paras 9-11, 19). Though his concerns are agreeable, this research is limited to the spoliation of water and electricity supply, which makes it impossible to delve into the matter in more detail.

³⁵³ *Constitution*:sec 27(1)(b).

³⁵⁴ *Joseph v City of Johannesburg*:par. 40; Muller 2019:5; Marais 2021b:230.

³⁵⁵ *Rademan v Mqophaka Local Municipality and Others* 2013 (4) SA 225 (CC):par 39. In *Darries and Others v City of Johannesburg and Others*, the court pointed out that 'there is no absolute right to electricity supply let alone a right to an uninterrupted supply of electricity where the municipal provider is not being paid and where the consumers are not indigent persons' (*Darries and Others v City of Johannesburg and Others* [2009] 3 All SA 277 (GSJ):par 39).

³⁵⁶ Muller 2019:2, 3; Marais 2021b:230; Boggenpoel *et al* 2021: 89-90.

³⁵⁷ Walker 2015:29-34; Senokoane 2024:23.

³⁵⁸ *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others* [2023] ZAGPPHC 280:par. 45.

³⁵⁹ *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others*:par. 36.

constitutionally obligated to provide electricity in terms of section 8(1) read with section 7(2) of the *Constitution*.³⁶⁰

Nonetheless, the court in *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others* held that load-shedding was a constitutional breach constituting an unjustified infringement of constitutionally protected rights, namely (i) the right to human dignity³⁶¹ (ii) the right to life³⁶² (iii) the right to freedom and security³⁶³ (iv) the right to an environment that is not harmful to health³⁶⁴ (v) the right of access to health care services³⁶⁵ (vi) the right of access to sufficient food and water³⁶⁶, and (vii) the right to basic education.³⁶⁷

It seems that courts have not thought it necessary to decide whether residents have a constitutional right to electricity supply.³⁶⁸ For instance, in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*, the court chose to focus on the violation of several other constitutionally protected rights that were infringed due to the substantial reduction of the electricity supply to residents.³⁶⁹ The court sought to reverse the violation of constitutional rights by deciding on the impermissibility of Eskom's conduct instead of deciding whether the residents have a constitutional right to the supply of electricity.³⁷⁰

Noteworthy, access to electricity is not a basic need for human survival. It is not even recognised as a constitutionally protected right in South African law. As such, the argument that electricity should be recognised as a public law right should not be acceptable. This argument is only tolerable on the basis that certain constitutionally protected rights necessitate the use of the electricity supply for them to be realised. It

³⁶⁰ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (4) SA 325 (CC):par. 108. It was further submitted that Eskom should likewise enable municipalities to discharge this obligation.

³⁶¹ *Constitution*:sec 10.

³⁶² *Constitution*:sec 11.

³⁶³ *Constitution*:sec 12.

³⁶⁴ *Constitution*:sec 24(a).

³⁶⁵ *Constitution*:sec 27(1)(a).

³⁶⁶ *Constitution*:sec 27(1)(b).

³⁶⁷ *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others*:par. 120. *Constitution*:sec 29(1)(a).

³⁶⁸ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*; *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others*.

³⁶⁹ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*:par. 190-191, 194.

³⁷⁰ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*:par. 195.

is not enough that this is the only basis upon which access to electricity can be considered as a public law right. Moreover, it is hard to imagine how the supply of electricity can constitute a public law right whilst at the same time being capable of acquisition in an open market based on supply and demand.

4.3.3 Recent judgments in *quasi-possession* cases involving water and electricity supply

In *Eskom Holdings SOC Limited v Masinda*, the appellant (Eskom) resolved to disconnect the supply of electricity to houses identified as having illegal electricity connections due to the risk to health and safety posed by such connections.³⁷¹ The respondent's house was identified as having illegal connections, which led to her electricity being disconnected.³⁷² The court of first instance ordered Eskom to restore the supply of electricity to the respondent's premises.³⁷³ Eskom appealed to the Supreme Court of Appeal to decide whether the respondent could rely on the spoliation remedy to restore electricity to her premises.³⁷⁴

The Supreme Court of Appeal pointed out that a merits of the case are not investigated in spoliation proceedings.³⁷⁵ In line with this principle, the counsel for the respondent argued that the respondent's electricity supply had to be reconnected before any disputes pertaining to its legality could be determined.³⁷⁶ However, the court belied this principle and held that the spoliation remedy could not be granted because the respondent's possession of the electricity supply was unlawful and constituted a danger to the public.³⁷⁷ It was held that directing the restoration of the electricity connections that were removed would amount to forcing Eskom to commit an act of illegality.³⁷⁸ Moreover, the court relied on the authority of the court in *FirstRand* to suggest that the nature of the right had to be determined to ascertain whether its *quasi-*

³⁷¹ *Eskom Holdings SOC Limited v Masinda*:paras 2-3.

³⁷² *Eskom Holdings SOC Limited v Masinda*:par. 3.

³⁷³ *Eskom Holdings SOC Limited v Masinda*:par. 9.

³⁷⁴ *Eskom Holdings SOC Limited v Masinda*:par. 9.

³⁷⁵ *Eskom Holdings SOC Limited v Masinda*:par. 9.

³⁷⁶ *Eskom Holdings SOC Limited v Masinda*:par. 11.

³⁷⁷ *Eskom Holdings SOC Limited v Masinda*:par. 11.

³⁷⁸ *Eskom Holdings SOC Limited v Masinda*:par. 13.

possession is protectable under the spoliation remedy because not all *quasi*-possession rights are protectable under this remedy.³⁷⁹

In this case, the court emphasised that the spoliation remedy should not be granted where the right to receive the supply of services is purely personal.³⁸⁰ This is because the mere existence of the supply of services is insufficient to establish a right constituting an incident of possession of the property.³⁸¹ According to the court, the nature of the right must vest in the person in possession of the property as an incident of his possession.³⁸² In other words, the investigation or an enquiry should seek to determine whether the nature of the right is bestowed by a servitude, registered in respect of land, or has its origin in legislation.³⁸³ The court found that the respondent's right to receive electricity was not an incident of possession of her property but a personal right arising from the contractual agreement for the sale of electricity on credit through the prepaid system.³⁸⁴ In addition, the court held that previous cases where the supply of electricity or water was in itself considered an incident of possession of the property were incorrectly decided.³⁸⁵

It bears repetition that as far as previous authorities are concerned, the spoliation remedy can be applicable where the supply of the service is an incident of possession but not where the supply of a service is personal. Although the judgments of both courts in *Masinda* and *FirstRand* contributed to the clarification that the spoliation remedy cannot be used to enforce a claim of specific performance of a contract, they do not assist in determining the circumstances under which an infringement of a right derived from the contract can receive protection under the spoliation remedy.³⁸⁶ Moreover, even though the court in *Impala Water Users Association* provided some clarity about when the *quasi*-possession of an incorporeal is also an incident of possession of the premises - when it held that 'the applicants' use of water was not merely personal but an incident of the use of the land', the position was still not

³⁷⁹ *Eskom Holdings SOC Limited v Masinda*:par. 14; *FirstRand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*:par. 13.

³⁸⁰ *Eskom Holdings SOC Limited v Masinda*:par. 22.

³⁸¹ *Eskom Holdings SOC Limited v Masinda*:par. 22.

³⁸² *Eskom Holdings SOC Limited v Masinda*:par. 22.

³⁸³ *Eskom Holdings SOC Limited v Masinda*:par. 22.

³⁸⁴ *Eskom Holdings SOC Limited v Masinda*:par. 25; Marais 2021b:219.

³⁸⁵ *Eskom Holdings SOC Limited v Masinda*:par. 22.

³⁸⁶ Horn et al 2021:252.

completely clear.³⁸⁷ There was a pressing need to differentiate between cases where the supply of a service forms part of an incident of possession on the one hand and cases where the use of the supply is merely personal and not an incident of possession of the premises.³⁸⁸

In the Western Cape Division of the High Court in *Makeshift 1190 (Pty) Ltd v Cilliers*, Rogers J commented on the position of the court in *Masinda* as follows: (i) He states that he understood Leach JA to mean that an alleged right to the supply of electricity should be a servitude or a registered statutory right for it to find protection under the spoliation remedy.³⁸⁹ He argued that between cases where the alleged right is a servitude or a registered statutory right and cases where the right is purely personal, there are also cases in which, despite the personal nature of the alleged right, the right is not purely personal but an incident of possession of the property.³⁹⁰ He further pointed out that Leach JA did not mean that cases such as *Naidoo* and *Froman* were incorrectly decided. Rather, he merely criticised the reasoning of previous cases insofar as it was held that the supply of electricity is, in itself, and without more, an incident of possession.³⁹¹ Otherwise, this would have contradicted the views of Van der Walt, De Waal, Sonnekus, and Kleyn, who all agreed that the spoliation remedy was correctly granted in the common law cases of *Naidoo* and *Froman*.³⁹²

In *Makeshift*, the appellant owned a farm that the respondent occupied as her home.³⁹³ The appellant permitted the respondent to use the electricity supplied by Eskom as an incident of her occupation of the farm.³⁹⁴ It appears from the facts that *Makeshift 1109 (Pty) Ltd*, a party to the electricity contract entered into with Eskom, installed solar panels that provided enough electricity to the farm.³⁹⁵ During this time, the store building that the respondent occupied was the only part of the farm which still received electricity supply from Eskom.³⁹⁶ Although the electricity bill to the 'store' was paid by

³⁸⁷ Horn *et al* 2021:252.

³⁸⁸ Horn *et al* 2021:252.

³⁸⁹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 30.

³⁹⁰ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 30. This is the view of the court in *FirstRand (Makeshift 1190 (Pty) Ltd v Cilliers*:par. 30).

³⁹¹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 31.

³⁹² *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 31.

³⁹³ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 4.

³⁹⁴ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 44.

³⁹⁵ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 8.

³⁹⁶ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 8, 9. The store's electricity bill was paid by the respondent's husband and not *Makeshift*.

the respondent's husband, Makeshift 1109 (Pty) Ltd decided to cancel its contract with Eskom, which consequently led to the termination of the electricity supply to the store – the only place that was still dependent on the supply of electricity.³⁹⁷ The installation of solar panels and the subsequent termination of the electricity contract with Eskom occurred following a strained relationship between the appellant and the respondent. This gave the impression that her connection to the electricity was disconnected to force her off the farm.³⁹⁸

The respondent launched an urgent *ex parte* spoliation application according to which Makeshift 1109 (Pty) Ltd was required to restore the supply of electricity to the store occupied by the respondent and prohibited from depriving the respondent of her possession or use of water and electricity supply without a court order.³⁹⁹

In the appeal to the Cape High Court, Makeshift 1109 (Pty) Ltd relied on the decision of the court in *Masinda* to argue that the respondent's possession of the electricity supply was not protectable under the spoliation remedy.⁴⁰⁰ Rogers J denied this contention, arguing that it is a 'mere' personal right to electricity supply that does not find protection under the spoliation remedy, which the court found in *Masinda*.⁴⁰¹ Following this, Rogers J noted that the difficulty lies in identifying the correct basis upon which the alleged right can be characterised as protectable. He states that according to the court in *FirstRand* and *Masinda*, one ought to enquire whether the alleged right is a mere personal right – not capable of finding protection under the spoliation remedy - or an incident of possession or a *gebruiksreg* protectable under this remedy.⁴⁰²

He differentiated between (a) cases where a service takes the form of a servitude or a registered statutory right, which enjoys protection under the spoliation remedy, (b) cases where the alleged right is purely personal, which do not enjoy protection under

³⁹⁷ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 9.

³⁹⁸ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 49.

³⁹⁹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 11.

⁴⁰⁰ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 20.

⁴⁰¹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 23. The court in *Masinda* was against the idea that 'a mere supply of water and electricity, without more, constitutes an incident of possession' (*Eskom Holdings SOC Limited v Masinda*:par. 16).

⁴⁰² *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 24.

the spoliation remedy, and (c) cases where the alleged right is derived from a personal contractual relationship but finds protection under the spoliation remedy.⁴⁰³

The court found that cases falling under category (b) are not protectable under the spoliation remedy because the person responsible for supplying services is not the person who conferred on the *spoliatus* the right to occupy the property to which the services were provided. According to the court, the supplier of services has no interest in the possession of the property.⁴⁰⁴ On the contrary, in category (c), the landlord is also the person responsible for providing services; he has a direct interest in the possession of the property, and his cutting of the electricity supply interferes with the tenant's right against the landlord to be in undisturbed and peaceful possession of the property.⁴⁰⁵

The difference between cases in categories (b) and (c) is whether the alleged right is an incident of possession or an adjunct to the alleged right that the *spoliatus* (tenant) has against the *spoliator* (landlord) to be in occupation of the premises. Therefore, if the right to a service is an incident of possession of the property, the alleged right is a *quasi*-possession protectable under the spoliation remedy.⁴⁰⁶ The court highlighted that:

'...to decide whether the cutting off of electricity is indeed an act of spoliation in relation to the property itself, it is necessary to focus on the nature of the alleged right to the supply of electricity, in order to satisfy oneself that the case falls into the category of (c) rather than category (b).'⁴⁰⁷

⁴⁰³ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 32.

⁴⁰⁴ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 33. This does not mean that service providers do not engage in acts of self-help. On the contrary, this research argues that the protection of *quasi*-possession of water and electricity supply should be extended to instances where service providers are also guilty of self-help even though they may not have an interest in the land.

⁴⁰⁵ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 34. The court in *Makeshift* referred to *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another*, where the court relied on *Shapiro v South African Savings and Credit Bank* to state that the right to occupy the premises comprise of the supply of electricity, water, and other services provided by the landlord. In *ATM Solutions*, the appellant did not occupy the premises or control the ATM machine without the corporation of the respondent. As such, the court found that the presence of the machine on the respondent's premises did not mean that the appellant had control over the premises or amount to an incident of possession of the property. (*ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* 2009 (4) SA 337 (SCA):paras 12, 13, 14).

⁴⁰⁶ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 38 & 41.

⁴⁰⁷ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 40.

Thus, for a particular case to be considered part of category (c), the *spoliatus* must demonstrate acts associated with the alleged right to be in possession of the premises.⁴⁰⁸

Accordingly, the court found that the supply of electricity was an incident of the *precarium* in terms of which the respondent occupied the store building on the farm.⁴⁰⁹ In other words, the occupation of the store building and the use of electrical appurtenances constituted an incident of possession and the *quasi*-possession of the alleged right to electricity supply.⁴¹⁰ This qualified the case under discussion in category (c) among the likes of *Naidoo* and *Froman*, in a sense that the disconnection of the electricity supply was intended to interfere with the undisturbed and peaceful possession of the premises, thereby forcing the respondent to vacate the premises.⁴¹¹ The court concluded that the supply of electricity to the store occupied by the respondent was an incident of possession and not a mere personal right. As such, the alleged right was found protectable under the spoliation remedy.⁴¹²

Rogers J set apart *Makeshift* from *Masinda* by introducing a different interpretation of an 'incident of possession'.⁴¹³ He stated that apart from the *quasi*-possession of rights bestowed by servitude or a registered statutory right, there is also another category of *quasi*-possession rights protectable under the spoliation remedy despite being personal in nature.⁴¹⁴ This is the *quasi*-possession of a right to the supply of services where the *spoliatus* is not *per se* dissatisfied with the disconnection of the electricity supply in itself but with the adverse impact that such disconnection has on his exercise of the occupation of the premises.⁴¹⁵ This is often the case when there is a direct interest in the possession of the property, such as when the person allowing the applicant to occupy the premises is the same person who provides services. Ordinarily, the termination of service will not only interfere with the *quasi*-possession of the supply but with the right to undisturbed and peaceful possession of the premises.⁴¹⁶ Here, the court seeks to protect the *spoliatus* against an act of self-help

⁴⁰⁸ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 41.

⁴⁰⁹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 49.

⁴¹⁰ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 41.

⁴¹¹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 49.

⁴¹² *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 50.

⁴¹³ Marais 2021b:91.

⁴¹⁴ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 29-30.

⁴¹⁵ Marais 2021b:93-94.

⁴¹⁶ Horn *et al* 2021:253.

on the part of the landlord because the landlord intends to constructively evict the *spoliatus* without following the due legal process.

This position was highlighted in *Eskom Holdings SOC Limited v Metchem Steelpoort CC*, where the court found that a spoliation remedy should be available where disturbances with the *quasi*-possession of the right to the supply of services are done to force a person to vacate the premises.⁴¹⁷ What this means is that if the person providing services is the same person causing disconnection of the services, then the spoliation remedy would be applied despite the contractual nature of the right.⁴¹⁸ In this case, Eskom appealed against the decision of the court of first instance where it was ordered to restore possession to premises occupied by the respondent. The respondent submitted that it had a *quasi*-possession of the electricity supply in its capacity as a tenant.⁴¹⁹ It neglected to explore the legal grounds of its argument. It relied rather on cases where the spoliation remedy was granted following the termination of the supply of electricity to leased properties by the landlord.⁴²⁰

The court made it clear that in cases relied upon by the respondent, the spoliation remedy was granted to protect the actual possession of the property because services were terminated to force the applicants to vacate the premises.⁴²¹ With reference to the facts in this case, the court held that the mere termination of a service provided in terms of a contract does not of itself invoke the spoliation remedy.⁴²² The fact that electricity is supplied at a specific physical address to enable a consumer to see to its affairs does not mean that the supply of electricity translates to an incident of possession of the physical property.⁴²³ The court was content that the respondent launched a spoliation application on the mistaken impression that the spoliation remedy was available where Eskom supplied electricity in terms of a contract.⁴²⁴ The court found that the respondent's use of the electricity supply was a personal right

⁴¹⁷ *Eskom Holdings SOC Limited v Metchem Steelpoort CC* 2020 ZAGPJHC 31:par 27.

⁴¹⁸ Horn *et al* 2021:254.

⁴¹⁹ *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 26.

⁴²⁰ *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 27.

⁴²¹ *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 27.

⁴²² *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 27.

⁴²³ *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 35.

⁴²⁴ *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 34.

flowing from the contract with Eskom and not capable of finding protection under the spoliation remedy.⁴²⁵

According to Horn *et al.*, the critical evaluation of these judgements does not necessarily limit the protective ambit of the spoliation remedy but rather clarifies its use and original format.⁴²⁶ The authors provide the following examples as further clarification:

- (i) Suppose A is a lessee of a property and enters into an agreement with the local municipality to provide electricity to the property. A will not be entitled to the restoration of the electricity by a spoliation remedy if he falls in arrears in respect of his account and the municipality terminates the supply because his right to receive electricity is contractual and not an incident of possession or use of the property.
- (ii) Where A leases a flat from B and his rental is inclusive of electricity and water usage. If he falls in arrears with his rental payment and B terminates his access to electricity and water. A would be entitled to a spoliation order directing B to restore access to water and electricity supply even though he is in a contractual relationship with B. This is because A's use of the electricity and water is incidental to the possession and right to use the flat.
- (iii) Where A leases a flat from B and his rent is inclusive of electricity and water usage, but B intends to terminate the lease agreement before its fixed term comes to an end because he suddenly needs the flat for other uses. A would be entitled to a spoliation order should B decide to terminate the water and electricity supply because he intends to constructively evict A from the flat.⁴²⁷

In essence, to prove 'an incident of possession' requirement, the *spoliatus* need not only demonstrate acts usually associated with the professed right to land but must also have an occupation right against the landlord.⁴²⁸ The immediate consequence of this finding is that electricity suppliers and persons who have no interest in the land

⁴²⁵ *Eskom Holdings SOC Limited v Metchem Steelpoort CC*:par 36.

⁴²⁶ Horn *et al* 2021: 255.

⁴²⁷ Horn *et al* 2021: 255.

⁴²⁸ Marais 2021a:97; Marais 2021b:224.

get a free pass to engage in acts of self-help if the right to electricity supply is sourced in a contract.⁴²⁹

In light of this interpretation, it would seem that the spoliation remedy was available only in the case of servitural rights, registered statutory rights, and in cases where the spoliator has an interest in the land. This research argues that it is not only persons with an interest in the land who are capable of committing acts of self-help. There are also instances where the spoliator is not the landlord or the building owner. This is part of the reason this research investigates whether the spoliation remedy can be extended to protect persons whose water and electricity supply were unlawfully despoiled by third parties and or essential service providers such as municipalities and or Eskom.⁴³⁰

For instance, while the court in *Vena and Another v George Municipality* did not exactly concern itself with the *quasi*-possession of water and electricity supply, it did, however, award a spoliation order against the council for its failure to follow due legal process. *In casu*, the respondent carried out demolitions in terms of section 3B(1)(a) of the Prevention of Illegal Squatting Act 52 of 1951, which empowered the landowner to demolish buildings erected on his property without his consent.⁴³¹ The court understood section 3B(1)(a) to apply only to buildings erected on land unlawfully occupied.⁴³²

⁴²⁹ Marais 2021b:229.

⁴³⁰ In the *City of Cape Town v Strümpher*, the court observed that a spoliation order should not be denied where the supplier of services summarily terminate services to users without complying with its own set procedural formalities (*City of Cape Town v Strümpher* par.19). Moreover, according to Ngwenyama, the fact that the possession of residential premises ordinarily subsumes the supply of water and electricity as a practical necessity for the use and enjoyment of the property which are either included in the rental amount or paid directly to local authorities, the municipality or landlord cannot therefore merely disconnect the supply of services without giving adequate notice to defaulting residents to remedy the breach. Though he speaks only on the position of tenants who fail to meet their payment obligations, he believes however that tenants would be competent to approach the court for a spoliation order where the municipality or landlord fails to follow correct procedures in terminating the supply of services (Boggenpoel *et al* 2021: 88-89).

⁴³¹ *Vena and Another v George Municipality* 1987(4) SA 29 (C). However, the amended section 3B(2) of the Act indicated that a notice of intention must be given before the demolition can be carried out. This amendment was introduced following the decision in *Fredricks and Another v Stellenbosch Divisional Council* 1977 (3) SA 133 (C) where the spoliation remedy was granted against the Stellenbosch Divisional Council for unlawfully demolishing the squatter houses without prior notice of 7 days.

⁴³² *Vena and Another v George Municipality* 1987(4) SA 29 (C):51G-H.

The evidence indicated that the applicants were registered in the respondent's records as tenants on the date the demolitions took place.⁴³³ This meant that both applicants had a right to land in the form of a lease, which entitled them to occupy the land.⁴³⁴ Moreover, the land in question was governed by Provincial Notice 198 of 2 March 1979, which, in terms of Regulation 11, required the council to provide occupants with seven days' notice to remedy the breach before carrying out any demolition of the property.⁴³⁵ It followed, therefore, that the respondent did not have any right to take the law into his own hands by demolishing the properties of the occupants.

Harker suggests that the application of the spoliation remedy as applied in *Vena* represents a powerful far-reaching remedy that should be welcomed in South African law.⁴³⁶ Van der Walt and Sutherland concretise this argument by stating that the spoliation remedy must find application in cases where water and electricity are disconnected.⁴³⁷ They fear that such disconnection could potentially trigger public violence. According to them, this extension could be justified in the same way as the servitude cases could be justified as a way to counter self-help and anarchy.⁴³⁸

Boggenpoel indicates that where the provisions of the Act were not followed and where the Act falls short of amendments rectifying or providing the appropriate remedy in such a situation, it would be correct to keep open the possibility of the spoliation remedy, at least until the *lacunae* in the Act is filled.⁴³⁹ Thus, the law must require strict adherence to all the prescribed procedures and formalities in the case of statutory provisions enabling deprivation to ensure that such deprivation does not amount to unlawful spoliation.⁴⁴⁰ This is in line with maintaining peace and discouraging persons from taking the law into their own hands.⁴⁴¹

⁴³³ *Vena and Another v George Municipality*:45D-F.

⁴³⁴ *Vena and Another v George Municipality*:43D-E.

⁴³⁵ Harker 1988:198.

⁴³⁶ Harker 1988:198.

⁴³⁷ The kind of disconnection envisioned by the authors is one where water and electricity is cut off as an indirect way of evicting occupants.

⁴³⁸ Van der Walt & Sutherland 2003:109. This opinion is also shared by Freedman 2015:200.

⁴³⁹ Boggenpoel 2016:78.

⁴⁴⁰ Boggenpoel 2017:23, 28. She stated this principle with reference to *The City of Cape Town v Strumpher* 2012 (4) SA 207 (SCA), where the City after having disconnected the water supply, was found to have ignored its own dispute resolution procedures. Par. 14 & 15. Muller 2019:13.

⁴⁴¹ *Nino Bonino v De Lange* :156; Marais 2021b:218. Additionally, Rens pointed out that the spoliation remedy should be extended to industries in which the state has historically provided services. He believed that this would check the powers of incumbent operators from taking the law into their own

The following case is an example of one of many instances where persons with no interest in the land commit an act of self-help, which only reinforces the need to extend the spoliation remedy outside of the confines of the courts' judgments in *Masinda* and *Makeshifts*.

In the Free State Division of the High Court, Bloemfontein in *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*, the court referred with approval to *Masinda* and *Makeshift* but failed to mention the category under which this case fell.⁴⁴² In *casu*, the respondent (Maluti-A-Phofung Municipality) disconnected the supply of electricity to various businesses in Harrismith. The respondent argued that in terms of its debt enforcement processes, it was entitled to terminate the supply of electricity to applicants' premises because of their historic debt relating to electricity consumption.⁴⁴³

In terms of the credit control measures contained in clause 7.6 of Credit Control and Debt Management Policy, clause 7.6.1 provided that a notice should be delivered to defaulting consumers stating that the account has not been paid on the due date and that failure to pay within seven days will result in services being restricted or disconnected.⁴⁴⁴ The applicants (business owners) argued that they were not in breach of their payment obligations and that the respondent terminated their electricity supply without following a fair administrative process.⁴⁴⁵ The respondent ignored disputes raised by the applicants and did not notify them about its intention to terminate the electricity supply.⁴⁴⁶

hands (Rens 2003:754). Muller *et al* agree with Rens in stating that spoliation of possession should not be disqualified even in cases where disconnection is effected by someone else or another institution (Muller *et al* 2019b:342).

⁴⁴² *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another* (567/2022) [2022] ZAFSHC 151. Categories (a), (b), and (c) as determined in *Makeshift*.

⁴⁴³ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 17.

⁴⁴⁴ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 21. Clause 8 made provision for dispute resolution processes, while clause 12 dealt with enquiries and appeals (*Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 22)

⁴⁴⁵ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 10.

⁴⁴⁶ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 21 & 22.

The respondent maintained that the applicants owed hundreds of thousands of rands in historic debts relating to electricity consumption.⁴⁴⁷ This claim was put forward without any formal amounts or invoices as proof of the historic debts accumulated by the applicants. Moreover, the account details for amounts allegedly due were generated by an unknown entity whose author and the correctness of the account details could not be verified.⁴⁴⁸ In addition, the computer printer outs relied upon by the respondent did not set out how the outstanding amounts were calculated because no invoices or breakdowns of the alleged outstanding amounts were provided.⁴⁴⁹ As a result, these amounts could not be trusted as the information from which they were generated was uncertain.⁴⁵⁰ The court held that the respondent failed to prove that its actions were lawful when it disconnected the electricity supply to the applicants' business operations.⁴⁵¹

The court cited *Makeshift* and held that the applicants' *quasi*-possession right to electricity supply was an incident of their possession, which enjoyed protection under the spoliation remedy.⁴⁵² The court submitted that applicants:

'.. have been in peaceful and undisturbed possession of the properties of which the right to electricity was an incident of possession and they have been unlawfully despoiled of their rights when the electricity supply was terminated. I therefore agree with the *dicta* in *Makeshift supra*. I repeat that the consumers' right to electricity is an incident of their right to occupation of the particular business premises and is therefore considered as the subject of *quasi*-possession. Spoliation of such *quasi*-possession is an act of spoliation in relation to the respective premises.'⁴⁵³

It was furthermore held that these findings are in accordance with the *dictum* in *Masinda* that 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

⁴⁴⁷ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 11.13.

⁴⁴⁸ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 11.14.

⁴⁴⁹ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 11, 19.

⁴⁵⁰ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 23.

⁴⁵¹ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 24.

⁴⁵² *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 26.

⁴⁵³ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 26.

possession.⁴⁵⁴ It should be recalled that in *Masinda*, the court did not pay much attention, if at all, to whether the respondent's *quasi*-possession of the electricity supply was an incident of possession. The court refused to grant the spoliation order because Eskom did not install the electrical installations and was not in compliance with the requirements of safety, which meant that the restoration of the electricity supply would be unlawful and pose a danger to the public.⁴⁵⁵ In the present case, the restoration could not have been unlawful.⁴⁵⁶

Nonetheless, this case does not seem to have been decided strictly in accordance with the judgment of the Supreme Court of Appeal in *Masinda* or in terms of the judgement of the High Court in *Makeshift*. According to both these cases, if the right is contractual, it does not enjoy protection under the spoliation remedy, except where the right is 'incidental to the occupation of the premises and the spoliator has an interest in the land'.⁴⁵⁷

On the one hand, had this case been decided according to *Masinda*, the spoliation remedy would have been denied because the applicants' claim to the *quasi*-possession of the electricity supply is personal and derived from contractual obligations with the municipality.⁴⁵⁸

On the other hand, had this case been decided according to *Makeshift*, it would have been classified or fell under category (b) cases because the municipality has no interest in the property or the business premises occupied by the applicants.⁴⁵⁹

Furthermore, seeing that with reference to the incident of possession requirement, Daffue J reiterated the views of Rogers J in *Makeshift* that for the *quasi*-possession of electricity to find protection under spoliation, the *spoliatus* must also have an alleged right against the spoliator to be in occupation of the premises, it becomes questionable how the court then concluded that the applicants in *Harrismith* were entitled to the

⁴⁵⁴ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 27.

⁴⁵⁵ *Eskom Holdings SOC Limited v Masinda*:par.11.

⁴⁵⁶ *Harrismith Intabazwe Tsiamé Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 26.

⁴⁵⁷ *Eskom Holdings SOC Limited v Masinda*:par. 22; *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 34.

⁴⁵⁸ *Eskom Holdings SOC Limited v Masinda*:par. 22.

⁴⁵⁹ *Makeshift 1190 (Pty) Ltd v Cilliers*:par. 34.

spoliation remedy - when the municipality had no interest in the land. The court opined that:

'In order to discern why the one case is actionable under the mandament while the other is not, it is necessary to identify the distinguishing feature. As I have said, the distinguishing feature appears to me to be whether or not the alleged right to electricity is an incident of, or an adjunct to, the alleged right which the claimant has against the spoliator to be in occupation of the premises. If the alleged right to electricity is an incident of the claimant's occupation of the premises in this sense, one can then justly conclude (a) that the alleged right to electricity is the subject of quasi-possession for purposes of the mandament; and (b) that a spoliation of the said quasi-possession is simultaneously an act of spoliation in relation to the premises themselves.'⁴⁶⁰

It cannot be said that the spoliation remedy was granted to protect the applicants' possession of the premises as in category (c) cases because the court made no attempt to profile or liken the applicants' electricity supply to an incident of possession which the applicants' have against the *spoliatus* (here being the municipality) to be in occupation of the premises. Therefore, in both scenarios, applicants should not have been granted the spoliation remedy.

However, the court took an interesting approach, one that is more agreeable and accurately reflects the arguments proposed in this research. That is, the dispossession of the *quasi*-possession of the electricity and water supply should not be disqualified where the disconnection is effected by someone other than the person with an interest in the land, and for the law to prerequisite strict adherence to all prescribed procedures and formalities contained in statutory provisions enabling deprivations. This is guaranteed to check the powers of industries that have historically maintained a monopoly over the provision of essential services from taking the law into their own hands, which is exactly what the court determined in finding that the applicants were indeed entitled to the spoliation remedy.

Nevertheless, the problem with this case is that the court relied on *Masinda* and *Makeshifts* but derived outcomes that were inconsistent with said authority. The justification of these outcomes remains unclear. For example, in *Van Kerken v Eskom Holdings SOC Limited and Another*, the court relied on the authority of this court and *Masinda* to deny the applicant a spoliation remedy.⁴⁶¹ In *Van Kerken*, the applicant intended to misuse the spoliation remedy by relying on the decision of this court

⁴⁶⁰ *Harrismith Intabazwe Tsime Residents Association (Pty) Ltd and Others v Maluti-A-Phofung Local Municipality and Another*:par. 38.

⁴⁶¹ *Van Kerken v Eskom Holdings SOC Limited and Another* 2024 ZAECKMHC 98:par. 19 and 26.

despite having received the notice of intention to disconnect the electricity supply due to non-payment.⁴⁶² Knowing full well that his electricity account was in arrears, he declined to act. He waited for Eskom to disconnect his electricity supply so that he could approach the court and claim that ‘in spoliation proceedings, the merits of the case are irrelevant’.⁴⁶³

While the court rightfully denied the applicant the spoliation remedy, the problem persisted in the following: The applicant was in a commercial contract for the supply of electricity with Eskom in a similar fashion to the applicants in *Harrismith*, except that in *Harrismith*, the applicants had declared disputes pertaining to their accounts and were not in breach of their payment obligations.⁴⁶⁴ In both cases, the alleged spoliator had no interest in the land, and the applicants had no rights of occupation against the spoliator. In view of this, it is uncertain on what basis the applicants in *Harrismith* were awarded the spoliation remedy and on what basis the applicant in *Van Kerken* was denied the spoliation remedy. Put differently, it is not clear how the *quasi*-possession of the right to electricity supply is an incident of the possession of the premises in *Harrismith* but not so in *Van Kerken*. It appears that our courts are still struggling to identify the conditions under which a *quasi*-possession right to the electricity supply can be considered an incident of the possession of the premises.

The analysis of these recent judgments indicates that there are still inconsistencies in the application of the spoliation remedy to the *quasi*-possession of water and electricity supply. The problem began with the interpretation of the incident of possession requirement as defined in *Makeshift* that the despoiled person must also have a right against the spoliator to be in the occupation of the property. Later cases confirmed this interpretation without actual adherence to it – *Harrismith* and *Van Kerken* serve as prime examples. Even though the outcomes of both courts cannot be faulted, there is a need to properly define the perimeters for the protection of *quasi*-possession in respect of water and electricity supply under the spoliation remedy.

⁴⁶² *Van Kerken v Eskom Holdings SOC Limited and Another*:par. 13.

⁴⁶³ *Van Kerken v Eskom Holdings SOC Limited and Another*:par. 17.

⁴⁶⁴ *Van Kerken v Eskom Holdings SOC Limited and Another*:par. 20.

4.4 CONCLUSION

Chapter four investigated the application of the spoliation remedy to the *quasi*-possession of water and electricity supply after the *Constitution of the Republic of South Africa*, 1996 came into operation. It is found that the characterisation of rights in spoliation proceedings became the impetus behind the extension of *quasi*-possession rights protectable under the spoliation remedy, which led to the inclusion of registered statutory rights and constitutional rights and the recurrence of existing inconsistencies in the application of the 'incident of possession' requirement. In addition, the extension of this remedy to constitutional rights caused uncertainties concerning the constitutional rights worthy of protection under the spoliation remedy and further ignited conversations about whether the right to electricity supply could also be considered a public law right for purposes of receiving protection under the spoliation remedy. On the authority of the court in *Harrismith*, it would seem that it is possible to extend the application of the spoliation remedy to instances where the spoliator is not the landlord or building owner. However, for this extension to go without question, there needs to be a new formulation of the interpretation of an incident of possession requirement. Chapter five will conclude by providing recommendations on how to address the inconsistencies resulting from 'an incident of possession requirement' and by addressing concerns regarding the influence of the *Constitution* on the application of the spoliation remedy to the *quasi*-possession of rights to water and electricity supply.

CHAPTER 5 : CONCLUSION

The application of the spoliation remedy to the *quasi*-possession of electricity and water supply has attracted much attention within the area of property law. This is largely due to recurring inconsistencies in how it is applied in the case of incorporeals. Determining the nature of the *quasi*-possession of the right to ascertain whether it is protectable under the spoliation remedy inadvertently resulted in courts focusing on the merits of the case. As a consequence, the application of the spoliation remedy was limited to registered statutory rights, servitudinal rights, and the exceptional circumstances where a personal or contractual right as an incident of possession is interfered with by the landowner. This limitation failed to address cases where interference with the possession of a thing is done by a person other than the landlord, namely a third party such as Eskom. This research investigated the development of the spoliation remedy, specifically in this area of the law, in an attempt to provide more clarity on the *quasi*-possession of water and electricity supply.

Chapter one highlighted the crux of the problem, which is the difference between the traditional application of the spoliation remedy to corporeal things and the extended application to the *quasi*-possession of incorporeals – where the nature of the alleged right is determined to ascertain whether its *quasi*-possession is protectable under the spoliation remedy. This determination prompted the investigation into the merits of the case, thereby contradicting the common law principles of the spoliation remedy and giving rise to legal uncertainties regarding the development and scope of its application. In light of the above, Chapter one indicated that this research aims to provide legal certainty by investigating the protection of the *quasi*-possession of water and electricity supply. More specifically, whether the extension of the spoliation remedy to instances where the spoliator is not the landlord or building owner is possible in terms of common law principles, case law, and constitutional values.

Chapter two investigated the historical background of the spoliation remedy to determine its fundamental basis and true essence. It first explained what is meant by possession and how possession began to receive protection through a variety of other remedies similar to the spoliation remedy. It is found that there is a difference of opinion regarding the true nature of the spoliation remedy. The majority view is that

the spoliation remedy serves to restore possession that was unlawfully deprived. On the contrary, the minority view observes that the purpose of the spoliation remedy is the maintenance of peace and order in terms of which the law discourages acts of self-help. The implication in practice takes the following form: On the one hand, the proponents of the majority view believe that the spoliation remedy should not be relied upon where the despoiled thing is destroyed.⁴⁶⁵ On the other hand, the proponents of the minority view - those who believe that the purpose of the spoliation remedy is to protect public order and peace – advocate that an alternative order can be made by a court where the despoiled thing is destroyed.⁴⁶⁶

The premise of this research is more agreeable with the minority view. For the spoliation remedy to be extended to instances where acts of self-help are committed by persons other than those with an interest in the land, it must be accepted that the spoliation remedy functions to preserve public peace and order by discouraging acts of self-help and not only as a remedy for the restoration of possession. This understanding will furthermore resolve the oppression arising from cases where property owners deprive occupants of their peaceful and undisturbed possession by utterly destroying their buildings, then relying on the defence of the impossibility of restoration. If, in these cases, courts can be allowed to make an alternative order, owners would be fearful of taking matters into their own hands and refrain from destroying property only to rely on the defence of impossibility or the fact that the property is destroyed. With this in mind, it will also be important to guard against converting the spoliation remedy into a different and wider remedy than one received in South African Law. Caution should be exercised to ensure that the implementation of said extension does not cause the remedy to lose its possessory function in favour of different objectives.⁴⁶⁷

Chapter three focused on the concept of *quasi*-possession and how it was adopted in South African law before the advent of the 1996 *Constitution*. It is found that the

⁴⁶⁵ Boggenpoel 2017: 132; Muller *et al* 2019a: 208-209. This was recently highlighted by the High Court in *JC Impellers Proprietary Limited v Erven 1[...] Wadeville Proprietary Limited*, in that the spoliation remedy is not available where property is destroyed because the underlying assumption behind the granting of the spoliation order is that property must exist and be competent for restoration (*JC Impellers Proprietary Limited v Erven 1[...] Wadeville Proprietary Limited* [2024] ZAGPJHC 1025: par 12).

⁴⁶⁶ Boggenpoel 2017: 136-137.

⁴⁶⁷ *Monteiro and Another v Diedricks* [2021] 2 All SA 405 (SCA): par 18.

concept of *quasi*-possession is historically justified in South African law. However, the major hassle experienced by our courts following the adoption of *quasi*-possession was the determination of the peaceful and undisturbed possession requirement. Initially, the applicant was required to prove on the balance of probabilities that he had a right to an incorporeal thing or that he was the holder of the alleged right in order to establish the peaceful and undisturbed requirement in *quasi*-possession cases. Later, it was determined that the applicant need not prove his right to an incorporeal thing in spoliation proceedings, but the actual or factual exercise of the right in question.⁴⁶⁸

Seeing that an incorporeal thing is incapable of being possessed physically in the same way that corporeal things are possessed, the element of physical possession in standard cases was replaced by actual use or '*gebruiksreg*' in *quasi*-possession cases.⁴⁶⁹ For instance, in respect of servitudes, the peaceful and undisturbed requirement is determined by indicating the actual use of a servitude or the exercise of acts associated with the alleged servitutorial right.⁴⁷⁰ Therefore, it is not necessary to prove the existence of a servitude. The actual exercise of the alleged right is sufficient for the court to grant the spoliation order to the applicant. Likewise, in the case of *quasi*-possession of non-servitutorial rights, the applicant had to prove that the alleged right is incidental to the possession of a corporeal thing.⁴⁷¹ It was, therefore, accepted that the *quasi*-possession lies in the actual use of the alleged right.

Chapter four studied the application of the spoliation remedy in *quasi*-possession cases after the 1996 *Constitution* came into operation. It is found that the practice of determining the nature of the right to ensure that these rights are not derived from contract precipitated the change in the application of the spoliation remedy and extended the scope of *quasi*-possession rights protectable under the spoliation remedy. For instance, before the promulgation of the 1996 *Constitution*, only the *quasi*-possession of servitutorial rights and non-servitutorial rights found protection under the spoliation remedy. However, thereafter, the spoliation remedy was extended to include statutory rights and rights flowing from the *Constitution*.⁴⁷² Owing to this extension, particularly of rights flowing from the *Constitution*, there has been a sudden

⁴⁶⁸ Refer to par. 3.3.

⁴⁶⁹ Refer to par. 3.3.1.1.

⁴⁷⁰ Refer to par. 3.3.1.1.

⁴⁷¹ Refer to par. 3.3.1.2.

⁴⁷² Refer to par. 4.3.1 & 4.3.2.

increase in the number of commentators arguing that the *quasi*-possession of electricity supply should be considered a constitutional right due to its usefulness in the present day.⁴⁷³ This argument cannot be accepted because there is no constitutional right to electricity supply.

Furthermore, our courts have so far refused to definitively determine whether residents have a constitutional right to electricity supply. At best, they focus on the violation of other constitutionally protected rights that are infringed due to the disconnection of the electricity supply to grant the spoliation relief. This indicates that notwithstanding the use of the *Constitution* as a medium to seek judicial protection for the right to access electricity, the common law remedy of spoliation is still very much at play as courts continue to employ it to restore the supply of electricity.

In addition, Chapter four illustrated how the characterisation of a right to determine whether its *quasi*-possession is protectable under the spoliation remedy created confusion regarding the correct formulation of the incident of possession requirement. This is evident in the discussion of recent judgments. The Supreme Court of Appeal determined that the spoliation remedy should not be granted where the right to receive the supply is purely personal because the mere existence of the supply of a service is insufficient to constitute an incident of possession of the property. The court held that the nature of the right must vest in the person in possession of the property as an incident of his possession.

In the subsequent High Court case, it was suggested that there are also cases where the nature of the alleged *quasi*-possession right is protectable despite being personal. The court pointed out that these are cases where the despoiled person is not necessarily dissatisfied with the termination of his alleged *quasi*-possession right to water or electricity supply but with the negative impact that such a termination has on his peaceful and undisturbed exercise of the occupation of the premises. Although the court based its reasoning on the practical necessity of electricity for the humane occupation of the premises, it was, however, not convinced that a contractual relationship of electricity in itself can constitute an incident of possession and control of the property. Therefore, it was determined that, in these cases, the *spoliatus* had to prove an incident of possession requirement by demonstrating acts that are usually

⁴⁷³ Refer to par. 4.3.2.

associated with the alleged right to land, such as the use of appurtenances and the right of occupation against the landlord/spoliator. Although the court in *Harrismith* appears to have addressed the said limitation by furthermore extending the scope of *quasi*-possession rights protectable under the spoliation remedy to instances where the spoliator has no interest in the land, it remains uncertain how the court determined the ‘incident of possession requirement’ by relying on previous authorities, yet at the same time, reaching a far antithetical conclusion than one found in the authorities relied on.

Additionally, a spoliation order that is granted on the basis that the *quasi*-possession of a right is incidental to the occupation of the premises is often awarded in cases where the *spoliatus* had a lease agreement over the premises or was allowed to use the premises for some other reason – it is hardly ever cases where the *spoliatus* claims ownership of the premises. *Masinda* was on the wrong end of this observation as the court rejected claims in connection to an incident of possession of the premises.⁴⁷⁴ Nonetheless, it is worth noting that scholars have restricted an incident of possession to the use of appurtenances on the land.⁴⁷⁵ There is no indication anywhere that it should be limited to tenants/occupants. Therefore, to guard against this limitation, it may perhaps be necessary for courts to disregard an incident of possession requirement and focus on whether the applicant performed acts associated with the exercise of the alleged right in question (land), just as in servitotal cases. In the same way it is not necessary to prove the existence of the servitude but the actual exercise of the alleged servitotal right; this can be adopted to non-servitotal rights if an incident of possession cannot be extended to include cases where the spoliator is not the landlord and / or where the *spoliatus* claims ownership of the premises.⁴⁷⁶

⁴⁷⁴ *Eskom Holdings SOC Limited v Masinda*:par 24.

⁴⁷⁵ Marais 2019a: 95-96.

⁴⁷⁶ This is in consonant with the views expressed by Marais who also argues that courts should only determine whether the applicant performed acts associated with the right on land (Marais 2021b:225). It must be emphasised that this argument is not for the protection of ownership of the premises but for the *quasi*-possession of the electricity and water supply to the premises.

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