POSSESSION AND SPOLIATION

The rule against self-help

You've often heard the expression that "possession is nine tenths of the law". That's not just a saying. It is embodied in a fundamental rule of our common law expressed in the Latin maxim "*spoliatus ante omnia restituendus est*". The rough translation of that maxim is "*he who has been despoiled must receive restitution before anything else*".

In *Nino Bonino v De Lange* the Transvaal Supreme Court expressed this principle a little more expansively –

> "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 moveable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute."

The purpose behind the rule is that, although the law of property tells us who has the right to possess or use a thing, public order requires that, where there is disagreement about who has these rights, they must be enforced by due process of law, not down the barrel of a gun. No-one, even if the law is ultimately on his side, may take it upon himself to dispossess another of property without the possessor's consent, or due process of law.

One can easily see why this should be so. If people were permitted to resolve their own property disputes by just taking what they considered they had a right to take, then the strong would trample on the weak and those with potentially superior rights would find themselves at the mercy of those with superior strength. More

fundamentally, however, breaches of the peace would be commonplace, as there would be nothing to stop people from simply fighting out their entitlements to property using whatever physical force they could muster.

In order to discourage breaches of the peace, the common law provides a speedy and clear remedy to anyone who has been forcibly dispossessed of any property, irrespective of his rights to it.

The *Mandament van Spolie*

The *mandament van spolie* is the high-Dutch name given to proceedings to recover lost possession of a thing. In spoliation proceedings, all that need be established by the applicant (or "spoliatus") on a balance of probabilities is –

1. That he was in peaceful and undisturbed possession of a thing; and
2. That he was unlawfully deprived of that thing.

Upon establishing these two elements of the *mandament*, the property must be returned, even to a person who has no rights to it. Rights and remedies must be determined later, with due process of law. Famously, Voet remarked that even a thief can bring spoliation proceedings.

Ordinarily, open force is used to deprive a person of property (think of an illegal eviction, or a stick-up), but it need not be so. Any form of duress or unlawful interference with a person's will is enough to ground a spoliation application. This is because the remedy is meant to guard against any deprivation without consent, and consent, at common law, means free and voluntary cognition or action. Conversely if property is taken away in circumstances where someone is tricked or threatened into giving it up, a spoliation application can still be brought.

An example of this is given in a Magistrates' Court judgment I have placed on the website, which was given in the case of *Mokebe v January*. In that matter, although no force was used, the silent threat of force was enough to intimidate the respondent into leaving her home. She was subsequently able to successfully bring the *mandament* and return to her home.

While the consent needed to escape the *mandament* must be rich and fully informed, the "possession" protected by it is a sparse concept indeed. Mere factual possession (i.e. detention) coupled with the intent to secure some benefit for oneself is sufficient. It need **not** be possession with intent to hold as owner or pursuant to some other right of use or occupation (real or imagined). Take three examples –

1. I hold my car on a hire purchase agreement. I am not the owner, but I posses the car with the intent to hold all of the rights of ownership. I am obviously in possession.
2. I lend my car to you for two weeks because yours has broken down and I am going on holiday and won't need it. You are obviously in possession, because you hold my car, with the intent to procure some benefit for yourself.
3. I give you my car to pick my brother up from work and then ask you to drop it off with me at my office. Are you in possession? Probably not, unless, while driving back to my office, you change your mind and decide to go and do your shopping with it.

"Peaceful and undisturbed" possession also sometimes causes problems. What peaceful and undisturbed possession is usually depends on how long the possessor had held the thing without significant interference from others. In the case of an unlawfully occupied building, the High Court in **Mthimkulu v Mahomed**, has said

that a period of six weeks' occupation is sufficient to establish "peaceful and undisturbed" possession. However, depending on the circumstances, a matter of one or two days may be sufficient in the case of occupation of land or buildings.

Defences to the *Mandament*

Defences to the *Mandament* are few, and must be clearly established. They are usually depend on establishing that –

1. The applicant's possession was not peaceful and undisturbed ("counter-spoliation").
2. The applicant was not unlawfully deprived of possession ("the existence of consent, a court order or a statutory right").
3. The property no longer exists, or has been alienated, bona fide to a third party ("Impossibility"); or
4. There was no possession, because the object of the application is not the return of "property". This raises questions about quasi-possession of incorporeals, to which we will return below.

Counter-spoliation

In **Mthimkulu v Mahomed**, 235 people were violently evicted, without a court order, from a building in the centre of town. They brought urgent spoliation proceedings in the Johannesburg High Court. A single judge dismissed the application, on the basis that the residents had been counter-spoliated. The residents appealed to a full bench of that Court.

Counter-spoliation, the appeal court held, is a limited exception to the general rule against self-help. If, in the process of being dispossessed of a thing, the possessor

uses force to get it back, then he had "counter-spoliated" and **his** use of force will not be unlawful. Accordingly, a spoliation application directed to it will fail.

This is, in essence, a "snatch-back" principle. If you try to steal my wallet, and I immediately snatch it back, then you have not been spoliated. I simply stopped you from spoliating me. You were never in peaceful and undisturbed possession of the thing, and so you will not be able to bring the mandament.

If, on the other hand, you take my wallet, run home sit with it for three days, after which I walk into your house and beat you up until you give it back, then I have spoliated you.

Whether there is counter-spoliation depends on the facts of each case. It has been held than continuous defence of possession of a shop over several days constitutes a successful counter-spoliation. In **Mthimkulu**, the issue was never ultimately decided, but it is unlikely that counter-spoliation could have been demonstrated, in that there was no dispute that the 235 occupiers of the property had lived in the building for six weeks, undisturbed.

Lawfulness

As set out above, a person who freely and voluntarily gives a thing over to another is not spoliated. The transfer of possession is lawful, because of his consent.

A court order authorising an eviction is a good example. If a person is evicted from land or a building pursuant to a court order, even if force is used, there is no spoliation, because the eviction is authorised by law.

Statutory rights and powers raise more difficult issues. Forcibly taking away possession of a thing is lawful where authorised by a statute, but the statute must

specifically authorise the taking. So, for example, in **Rikhotso v Northcliff Ceramics** the Court considered the meaning of the (thankfully now repealed) Prevention of Illegal Squatting Act, which authorised a landowner, without a court order, to evict unlawful occupiers and "dismantle" any structures they may have built authorised the burning of shacks. The Court held that the Act had to be narrowly construed, because it was invasive of the common law rule against self-help, and Parliament is presumed not to oust common law principles unless legislation evinces a clear and unambiguous intention to do so. On the facts, the Court found that the "burning" as opposed to the mere "dismantling" of shacks was not permitted by statute, and so was unlawful.

Impossibility

If the property is destroyed, or alienated, in good faith, to a third party, then its restoration to the applicant is impossible. The *mandament* only requires the return of the actual property unlawfully taken away, not its reconstituted equivalent. In **Rikhotso** the High Court had to consider whether the *mandament* required a spoliator to rebuild shacks that it had destroyed by setting them on fire. The Court decided that provision of the reconstituted equivalents – i.e. new shacks identical to the ones destroyed – was not required by the mandament. Rather surprisingly, this limit on the mandament has been confirmed twice in more recent cases, where the courts have been asked to consider the remedy in light of constitutional values (see **Tswelopele** and **Schubart Park**).

Incorporeals

The *mandament* has also been extended beyond actual possession of physical property to "quasi-possession" of "incorporeal rights". These are rights to use

amenities closely associated with possession of property. Examples include the disconnection of water and electricity supplies to a building. Because the utilities supplied to the building are intimately connected to possession of it, the disconnection of those utilities will normally be considered a spoliation of an incident of possession of the building.

There are strict limits to this principle. These are illustrated in **Telkom v Xsinet** and **ATM Solutions v Olkru Handlaars**. In **Telkom**, Xsinet claimed that it has been spoliated of its telephone service, which it received at its corporate headquarters. Telkom disconnected its telephone lines by throwing a switch at its offices because Xsinet had not paid its bill. On appeal the SCA decided that Xsinet had not been spoliated because the telephony services were not incidents of its possession of the building and because no physical interference with its possession of was necessary in order to disconnect them.

In **ATM Solutions**, the appellant claimed that it had been spoliated of an ATM it had installed in a Kwikspar in Worcester. The Kwickspar owner had unplugged the ATM and replaced it with an ABSA ATM. The SCA decided that this was not a spoliation, because, although the ATM belonged to ATM solutions, it did not exercise physical control over the ATM at the time of the alleged spoliation, and what it really wanted was an order that the Kwikspar be required to continue using its ATM, rather than ABSA's – a remedy beyond the scope of the Mandament.

Constitutional Impact

Although, as stated above, property destroyed during the course of a spoliation cannot be recovered by the *mandament* our courts are developing new remedies for the destruction of property based on the Constitution. In **Tswelopele v City of**

Tshwane the SCA approved the decision in Rikhotso – that the *mandament* could not be used to force a spoliator to provide the reconstituted equivalent of dispossessed property – but nonetheless developed a similar remedy from the Constitution.

In **Tswelopele**, the police illegally evicted a group of informal settlers for Moreletta Park in Pretoria and destroyed their shacks. The SCA found that this obvious and egregious violation of section 26 of the Constitution by an organ of state required an effective remedy. That remedy was to order that the evictees get their shacks back as they were before the eviction. In that case the spoliator was an organ of state. Would it make any difference if the spoliator were a private person?