DEVELOPING THE LAW ON UNLAWFUL SQUATTING AND SPOLIATION*

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INTRODUCTION

The decision of the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation & 23 others v City of Tshwane Metropolitan Municipality & others* [2007] SCA 70 (RSA) (hereafter *Tswelopele*) is the outcome of a rather cynical illegal eviction of about one hundred persons from a piece of land in the Pretoria suburb of Garsfontein. During the eviction the building materials of the shacks inhabited by the occupiers were destroyed, together with some personal belongings. The eviction was carried out by officials of the Tshwane Metropolitan Municipality, the immigration control office of the Department of Home Affairs, the South African Police Services and the Garsfontein Community Policing Forum. The eviction took place without a court order and in direct violation of s 26(3) of the Constitution of the Republic of South Africa, 1996 and the applicable sections of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (see *Tswelopele* para 2). Despite earlier protestations and evasions, the relevant authorities subsequently admitted that their actions were unlawful and offered an unambiguous apology (para 8). The unlawfulness of the eviction was therefore eventually not in question.

The Supreme Court of Appeal (SCA) made it clear from the outset that it was determined somehow to rectify the situation. The court pointed out that

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the illegal eviction did not merely violate the constitutional and statutory warrant against unauthorized eviction, but also the occupiers' right to personal security, privacy, and property in their materials and belongings, and that it trampled upon their dignity, their feelings and their social standing (para 15). In expressing its disapproval of the authorities' illegal actions, the court compared the cynicism with which the authorities exploited the social and economic weakness of the occupiers with the 'exposure of the most vulnerable in society to police power and their vulnerability to its abuse' under apartheid (para 16). In view of all this, the court stated emphatically, 'cases such as this demand an effective remedy' to ensure that the changes heralded by the Constitution amount to more than mere rhetoric (para 17). The court was adamant that an effective remedy had to be identified or created for those applicants who had lost their de facto occupation of the demolished shacks and were not subsequently accommodated satisfactorily elsewhere. It was therefore clear from the start that the appeal was going to succeed — merely dismissing the application, as was done in the court a quo, was not enough to satisfy the court's sense of justice.

The main issue for decision was the correct remedy. Although they also invoked the procedural protections of PIE and ss 25 and 26(3) of the Constitution, the applicants initially couched their application in the form of an application for the mandament van spolie, asking for an order directing the relevant authorities to restore possession of the demolished shacks to the occupiers ante omnia (see para 4). The court a quo dismissed the application, following the decision in *Rikhotso v Northcliff Ceramics (Pty) Ltd* 1997 (1) SA 526 (W) in holding that restoration of possession was impossible because the relevant building materials had been destroyed (see para 6; on the decision in *Rikhotso* see A J van der Walt 'Squatting, spoliation orders and the new constitutional order' (1997) 60 *THRHR* 522). On appeal the SCA overturned the decision a quo and restored the applicants who had not been accommodated elsewhere to a position similar to what they had enjoyed before the eviction, despite the fact that a restoration order required the use of replacement materials.

HISTORICAL, SOCIAL AND CONSTITUTIONAL CONTEXT

The SCA was laudably clear and decisive in its refusal to countenance the illegal eviction and its determination to rectify the situation. Not giving a restoration order of some kind in this case would have undermined the efficacy and legal force of the anti-eviction provisions in s 26(3) of the Constitution and in the land-reform legislation. On this point the decision must be welcomed. The only issues for discussion in this note are the court's views on the correct remedy and the implications this decision has for the continuing debate about the Constitution-driven development of the common law.

The fact that the SCA decided to uphold the appeal and find a way to assist the applicants is hardly surprising. The Constitutional Court made it

abundantly clear in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 19–23 (hereafter *P E Municipality*) that conflicts between land ownership and unlawful squatting can no longer be terminated simply by mechanically allowing landowners to evict unlawful occupiers — in the residential context, ownership can no longer trump weaker occupation or housing interests in the same way it did before 1994. In the wake of apartheid, eviction has become a constitutional issue, and therefore conflicts between ownership of land and housing interests have to be resolved by establishing 'an appropriate constitutional relationship' (*P E Municipality* para 19) between the property rights in s 25 and the housing rights in s 26 or, stated differently, between respect for property rights and empathy for homelessness and land hunger. The constitutional injunction to balance the housing rights of even unlawful occupiers against the property rights of landowners applies even more strongly when the eviction was carried out from a position of state power and with cynical disregard for the constitutional and statutory requirements.

The decision in *P E Municipality* also established that the historical, social and constitutional context within which conflicts between landowners and unlawful occupiers appear is an important factor that needs to be considered when deciding eviction cases. It was said in that decision that the Constitution places new obligations on the courts to avoid a hierarchical view of property and housing rights and to balance and reconcile them in as just a manner as possible, taking into account all the interests involved and the circumstances of each case (para 23). Although *P E Municipality* made it clear that the new constitutional and statutory framework does not exclude the possibility of evicting even otherwise homeless and destitute persons, an important message from that decision is that the historical, social and political baggage of eviction must be considered very carefully when deciding eviction cases in future.

Given this historical and constitutional context and the fact that illegal evictions in this case also violated the occupiers' right to personal security, privacy and property in their materials and belongings and trampled upon their dignity, their feelings and their social standing, the court was clearly justified in coming to the assistance of the applicants. The SCA noted this would instil the required humility in the authorities who wield power over the weak and marginalized and could bring reassurance and hope for those who had been affected by the high-handedness of the authorities in the past (para 27). This is an apt description of the very essence and purpose of the new constitutional order and of the anti-eviction measures introduced as a direct response to the abuses of apartheid land law.

As a first step, the court considered several existing remedies such as an action for damages, criminal prosecution, an interdict, and accommodation of the evictees in 'the *Grootboom* emergency relief and housing queue' (para 18*(d)*) and found them all wanting; none would provide the specific group of applicants with effective relief that would be speedy and also effectively 'address the consequences of the breach of their rights' (para 19). The only

way to do that, the court stated, would be 'to vindicate the occupiers' salvage claim, and to require the respondents to recreate their shelters', even if only on a temporary basis (ibid). In other words, the best order would be to instruct the authorities to undo the damage done by their illegal action and to restore the applicants in temporary occupation of shelters similar to those that had been demolished. The court accordingly ordered the respondents to construct 'temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed, and which are capable of being dismantled, at the site at which their previous shelters were demolished', for those applicants who were unlawfully evicted and who still required replacement shelters (para 29).

The final question was how that result could best be explained in terms of existing law. More specifically, the question was whether the mandament van spolie was the best remedy by which to reach the desired outcome, namely a temporary restoration order. In one sense identification of the specific remedy is not so important because a constitutional remedy could be crafted to do the necessary, but in another sense it is important to consider the possibilities of using and developing a common-law remedy, as I will argue in the remainder of this note.

FINDING THE BEST REMEDY

The applicability of the mandament van spolie in this case raised three separate but related issues. The first question is whether the remedy is (historically and doctrinally) suitable in cases where restoration would necessarily imply use of replacement materials. If the answer to the first question is negative, the second question is whether the common-law remedy should be developed in terms of the Constitution to make such an order possible. If the answer is again negative, the third question is whether a constitutional remedy could be crafted to make the order possible. In the event, the court answered both the first and second question negatively and opted for the third possibility.

On the first point I argue, with reference to the doctrinal debate of the 1980s, that it is not entirely clear that the mandament van spolie should necessarily be unavailable simply because the original materials had been destroyed. My second point is that, even if it is accepted that the impossibility argument is conclusive and that the mandament was historically not available where replacement materials had to be used, there are sound reasons why the remedy should now be developed in terms of the Constitution to make it available in certain instances where restoration would imply the use of replacement materials. Thirdly, I argue that the creation of a completely new constitutional remedy in this case — the solution opted for by the SCA — was unnecessary and unfortunate.

Can the mandament be used?

It was pointed out in the court a quo and the earlier *Rikhotso* decision (supra) that the remedy relied on by the appellants, the mandament van spolie, was a

possessory remedy that could only be used to restore lost possession of spoliated things, because such an order would extend the remedy beyond its traditional limits of restoring possession. The court a quo accepted and followed this argument and therefore dismissed the application.

After considering the background of the mandament van spolie and case law on instances where the despoiled property was destroyed, the SCA decided that the doctrinal analysis in *Rikhotso* was 'undoubtedly correct' in that the object of the remedy was to restore 'physical control and enjoyment of specified property — not its reconstituted equivalent' (para 24). The mandament van spolie could therefore not be used to force a spoliator to restore the despoiled property if doing so would require using alternative materials. In coming to this conclusion the court referred to some of the case law and part of the academic debate of the 1980s on this issue, but its analysis is disappointingly brief for such an important and seemingly conclusive finding.

The core of the impossibility argument that was upheld in *Rikhotso* — and by extension in this case — concerns the nature of the remedy. (These arguments have been rehearsed more fully in Van der Walt op cit at 525.) In the 1980s Duard Kleyn 'Die mandament van spolie as besitsremedie' 1986 *De Jure* 1 quite correctly argued that the mandament van spolie is a possessory remedy, aimed at restoration of possession, and that possession could technically not be restored once the property had been destroyed. Hence, he argued, the remedy was not suited for occasions where replacement materials had to be used to effect restoration. As was pointed out in *Rikhotso*, this argument is not undermined by the commonly accepted view that the spoliation remedy can include an order to take steps to place the property in its former condition or to effect minor repairs or reinstallation, as appears from decisions such as *Zinman v Miller* 1956 (3) SA 8 (T) and *Vena v George Municipality* 1987 (4) SA 29 (C); 1989 (2) SA 263 (A). However, to employ the mandament van spolie in cases that require wholesale use of replacement materials to reconstruct the destroyed property would, so the argument went, run the risk of transforming the remedy into a 'general remedy against unlawfulness' (*Rikhotso* at 533I–J). The same points are still raised against use of the mandament when the property in question has been destroyed, but the common-law impossibility argument is not as strong as it seems.

Given the quite specific requirements that tie the remedy to situations where self-help involves spoliation of previously existing possession of tangible property, it is quite clear that the mandament is not (nor should it become) a general remedy to trump unlawful action (Van der Walt op cit at 525). To the extent that there was a debate about this point in the 1980s, it largely rested upon semantics and misunderstandings. Of course the 'peace-keeping' aspect of the remedy is important — it is what sets the mandament apart from other property remedies, because the mandament has only the one function, namely temporarily to restore possession for the sake of public peace or to discourage self-help. Other remedies also serve a peace-keeping function in the sense that they promote judicial rather than

self-help solutions to legal conflicts, but they do so in conjunction with their main purpose of simultaneously protecting or vindicating a particular right; a consideration that does not feature at all in the mandament van spolie. However, having said that, it clearly does not follow (and was never suggested) that the remedy should be expanded to become a general peace-keeping remedy — its requirements should always ensure that its peace-keeping function remains fixed in the sphere of dispossession. In the debate that the court refers to, the point was therefore not whether the mandament should become a general peace-keeping remedy but whether its particular peace-keeping function should inspire the courts to use the remedy to discourage spoliators who cynically destroy the dispossessed property in order to avoid a restoration order being given against them. Obviously this possibility would always require a policy call and in many instances it might not be feasible — when non-fungible property is destroyed the mandament clearly cannot be used because restoration has then really become impossible.

A suggestion made in the 1980s debate was that there might be some cases, especially those involving eviction from and cynical destruction of informal shacks in which people lived, where such a replacement order could be both workable and suitable, given the social and political context. The very fact that the SCA in *Tswelopele* decided that restoration was not only justified, but that replacement materials had to be used to make it possible, in fact illustrates and underlines the reasons why it was argued during the 1980s that such a course of action could, in a limited number of extraordinary cases, be morally and legally desirable, regardless of the technical limitations of the remedy.

In *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C) the Cape Provincial Division relied on exactly the same approach in concluding, without analysis of the doctrinal merits of the impossibility argument, that the mandament was indeed a suitable and the most sensible remedy for such an occasion. The facts in *Fredericks* were almost identical to those in *Tswelopele,* and the two courts voiced remarkably similar sentiments in condemning the state's high-handed actions. Both courts came to the same decision, holding that the state should restore the despoiled applicants' previous position. The only difference is the fact that neither s 26(3) of the Constitution nor PIE existed when *Fredericks* was decided; the Prevention of Illegal Squatting Act 52 of 1951 which regulated unlawful occupation of land and eviction at that stage placed far fewer and less onerous restrictions on the state in effecting forced removals. The court in *Fredericks* did not pay much attention to the question whether the remedy lent itself to restoration orders that would require use of replacement materials — the decision was subjected to doctrinal criticism for that reason — but instead focused on the result that it wanted to reach, namely restoration ante omnia. In a sense, considering the social and political context, one could perhaps say that *Fredericks* was a decidedly political decision because of this attitude, downplaying the doctrinal and historical considerations in order to ensure what the court regarded as the just outcome.

At a doctrinal level, the argument that the mandament is a possessory remedy that becomes redundant when the property is destroyed, because restoration cannot technically include use of replacement materials, is therefore not as simple as it may appear. The impossibility argument does have the force of logic, but the matter is more complex than it appears and there are aspects of it that deserve more analysis than was afforded in either *Rikhotso* (supra) or *Tswelopele*. (For a broader discussion see D G Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (unpublished LLD thesis, University of Pretoria, 1986) 308ff.) For the moment, the following brief remarks must stand in for a fuller discussion.

First, the historical, political and constitutional context within which this kind of eviction case is adjudicated nowadays surely demands a more rigorous and sceptical analysis and evaluation of the impossibility argument than was the case under apartheid land law. In the absence of such a rigorous and critical analysis it could well be asked whether the common-law tradition is not simply being allowed to uphold existing hierarchies of power and privilege, something that the courts now have to avoid according to *P E Municipality* (supra). At the very least, one would expect a discussion of the way in which the shacks were constructed and the nature of the materials used. A further point for critical analysis in view of the new constitutional context is the nature of the property. Surely the issues are different when dealing with non-fungible property such as oil paintings and Rolex watches and even luxury Tuscan villas, on the one hand, compared to informal shelters built from bits and pieces of wood, plastic sheeting and corrugated iron, on the other? It may well be argued that s 26 of the Constitution requires making this distinction and developing the common law accordingly.

In the end it depends rather on what one sees as the property that was unlawfully occupied and illegally despoiled in the first place. To use the words of Fox, what is at stake here is perhaps not primarily a property interest in the material object(s) but a home interest in the shelter that it provided (Lorna Fox *Conceptualising Home: Theories, Laws and Policies* (2007)). In the case of an informal shack (as opposed to the Tuscan villa) it is the shelter, the home, that was occupied and destroyed rather than the house, and for purposes of the shack dweller's home interest (as opposed to the owner of the Tuscan villa) the materials used in the original construction and in eventual restoration might well be irrelevant. At least in the case of rudimentary shelters constructed with basic, fungible materials it could be argued that the home character of the shelter is more important than its property character, which might in turn affect one's evaluation of the weight that should attach to the impossibility argument. Obviously this argument is not strong enough on its own simply to sweep counter-arguments from the table, but in the context it has enough force to deserve serious consideration before deciding that the remedy was simply not available for doctrinal reasons. In the new constitutional climate, political background and social context must carry some weight; doctrinal technicalities cannot predetermine the outcome. To insist on the historical and dogmatic force of the technical impossibility

argument in the specific instance of a home, an informal shack that can quickly, easily and cheaply be replaced using fungible and even used materials, smacks of sophistry.

The crucial point in Kleyn's historical explanation of the impossibility argument is that replacement is technically out of place in the application of a possessory remedy. Historically speaking, this observation is unquestionably correct. However, Kleyn's historical analysis of the characteristics of the mandament van spolie indicates that it is also a robust and extraordinary remedy that enables the courts to grant robust and speedy but temporary relief. Clearly these characteristics allow for an approach that could fit in with the idea that the remedy should, in certain extraordinary instances, be available even when restoration requires the use of replacement materials (Kleyn op cit 308ff). This would require a distinction between 'normal' instances, where stricter insistence on the possessory nature of the remedy would be self-evident (eg when non-fungible materials were used in the construction of the property) or justified (eg when use of replacement materials is possible but not really necessary or justified in the circumstances) and extraordinary cases, where there are strong reasons to justify a replacement order that would require the use of replacement materials. Indications of such an extraordinary instance would be the fact that the property was destroyed cynically in order to frustrate a restoration order, that the property was constructed of fungible materials which could be replaced easily and cheaply, and that such an order would further constitutional values and goals. In these extraordinary cases, expansive application of the remedy could link up very neatly with the injunction to promote the values and objectives of the Constitution. Kleyn's historical analysis further indicates that the remedy had a punitive character in Roman-Dutch law, which means that there are historical indications that the remedy was once and could again be used, in suitable cases, to enforce restoration by use of replacement materials. The fact that the court granted a restoration order in *Tswelopele* is in itself an indication that it considered this an extraordinary case in which a restoration order was justified. One might expect that even the vaguest indication of historical roots for giving such an order on the basis of the mandament would have been sufficient to justify a suitable application of the remedy. However, the SCA decided to follow *Rikhotso* (supra) and held that the mandament was historically not available in cases that required replacement materials to be used. Consequently, the court next had to decide whether the remedy could be developed to serve the required purpose.

Could the mandament be developed?

The appellants in *Tswelopele* argued that the respondents should be instructed to use replacement materials because they had cynically destroyed the original building materials during the demolition. In response to the argument that the mandament is not suitable in cases where replacement materials have to be used, the appellants argued that the mandament should be developed in line with the Constitution to afford them the relief they

sought, namely to have the responsible authorities rebuild their shacks with replacement materials.

The SCA agreed with the appellants' basic argument that a broader remedy should be developed under the Constitution: 'the Constitution preserves the common law, but requires the courts to synchronize it with the Bill of Rights', where necessary by either developing or scrapping common-law rules (para 20). This, the court noted, does not mean 'that every common law mechanism, institution or doctrine needs constitutional overhaul' or that a common-law remedy must always necessarily be used and adapted for constitutional purposes (ibid). On the contrary, so the court asserted, it may sometimes be better to leave the common law 'untouched' and 'craft a new constitutional remedy entirely' (ibid). In other words, the proposition that a remedy should be developed under the Constitution could mean either that the existing common-law remedy should be developed or adapted or that an entirely new constitutional remedy should be crafted while leaving the common-law tradition unchanged. By the same token, development of a remedy under the Constitution does not mean that the common law must necessarily be amended or adapted in every instance where the available common-law remedy falls short of current requirements.

On the whole this approach seems reasonable, perhaps with the qualifier that common-law institutions, rules or remedies should not be seen in isolation when making this decision. Instead, a court should consider the relevant rule, institution or remedy within its larger doctrinal, historical and social background before deciding whether a constitutional overhaul is necessary or whether it would be in order to leave the common law 'untouched'. More specifically, it seems necessary in every property case in which legal, social and economic hierarchy, marginalization, disadvantage and injustice are issues, even tangentially, to reconsider the whole structure of the relevant aspect of property law (in this case restoration of residential possession that was destroyed by unlawful action) in its historical and constitutional context so as to ensure that the approach selected for that particular decision does not entrench or continue past patterns of injustice and that it might contribute to the establishment and promotion of transformational and constitutional values and objectives. Property law played a large part in the history of colonial, postcolonial and apartheid South Africa, not in isolated little bits and pieces (such as apartheid legislation) but as a complete regime or structure that allowed, accommodated and eventually strengthened (whether intentionally or not) the injustices that were committed through apartheid land law, including forced removals. The entire property regime need not be overhauled or changed every time the common law requires adaptation or development, but the underlying structure of the property regime and its effect on the entrenchment of privilege and power embodied in property holdings does need to be reconsidered whenever the appropriateness of common-law remedies is at stake. Given the sentiments expressed so clearly and forcibly by the court, this was surely just such an occasion — eviction and forced removal of

marginalized people from informal shacks, combined with cynical destruction of the building materials, represent what may perhaps be described as an unwelcome repetition of the very core of apartheid land law. The court acknowledged this in pointing out the similarities between this case and apartheid evictions. Following that, one might expect that analysis of the need to develop the common law in this area would begin with a rigorous and critical reappraisal of the legal framework within which similar evictions (and legal resistance against them in as far as that was possible) featured in the apartheid era.

However, the SCA decided that this case did not require constitutional development of the mandament so as to allow the expanded order required, which would involve re-erecting the structures that were demolished, where necessary by using alternative building materials — 'I do not think that formulating an appropriate constitutional remedy in this case requires us to seize upon a common law analogy and force it to perform a constitutional function' (para 26). Instead, the court judged that this was a case where it would be better to leave the common law 'untouched' and 'craft a new constitutional remedy entirely' (para 20), a remedy that is 'special to the Constitution, whose engraftment on the mandament would constitute an unnecessary superfluity' (para 27). The respondents in the initial application were therefore ordered to rebuild the structures they had destroyed, using replacement materials where necessary, to provide temporary, habitable dwellings affording shelter, privacy and amenities at least equivalent to those that were destroyed, and capable of being dismantled and removed should the occupiers be evicted again.

It is worth repeating that the development of the common-law remedy the applicants argued for was not huge — the case required no more than a finding that a replacement order would be possible in the very limited circumstances where fungible and even used materials such as corrugated iron, sheets of plastic and bits of wood could be used easily, quickly and cheaply to rebuild an informal residential shack that was destroyed illegally. The finding could even be restricted to cases where the state was the respondent, since any wider finding would have been obiter in the circumstances. Even if one regards this as an expanded version of the original spoliation remedy, such an order would be justified under the constitutional obligation to develop the common law, and it would serve the purpose the court set out to reach, namely to instil the required humility in the authorities who wield power over the weak and marginalized, and could bring reassurance and hope for those who had been affected by the high-handedness of the authorities in the past. Moreover, in *Fredericks* (supra) there is existing authority that could be used as a starting-point for such a mild but effective development of the common law. On the authority of *Fredericks* it could be argued that the required development had already been effected and that the finding in *Rikhotso* (supra) was unnecessarily restrictive. Instead, the SCA chose to rely on the conflicting authority of *Rikhotso* and to strike down the decision in *Fredericks*, while nonetheless giving an order that

reaches the same result as in *Fredericks* and the opposite of the result in *Rikhotso*. The only reason for this apparently contradictory result is the court's wish to uphold the purity of the common-law tradition by giving the restoration order under the auspices of the Constitution rather than the common law. How should we evaluate that choice?

Was it necessary to create a new constitutional remedy?

It is easy enough to argue that the court's choice not to develop the common law but to craft an entirely new constitutional remedy for the occasion at least reached the correct result and that the route by which it got there is not so very important. And in fact, the SCA cannot be faulted on the outcome of this case; indeed, it should be lauded for the clarity and determination with which it set out to do the right thing. However, I would like to argue that the route by which the court got there is not as unimportant as it might seem.

Development of the common law is arguably the one area in which the constitutional transformation of South African law still leaves the most to be done, particularly in property law. Many of the constitutional goals have been spelled out in legislation and in some cases the transformation process is developing along the inexorable path of interpretation and application of legislation — land reform is the most obvious example. However, precious little has been done about the development of the common law itself. It is also perhaps the one area in which the transformation process is least obvious and most controversial — one suspects that many lawyers would be at a loss to explain exactly why or how constitutional development of the common law of property should take place, if at all. Even if they are in full and wholehearted agreement with the general process of transformation of the law to promote constitutional goals, many property lawyers might prefer the process of transformation to take place in the broad arena of constitutional law, leaving the common law untouched and unaffected as far as possible. However, there are good reasons why this is not the best way to approach the relationship between property law and the new constitutional dispensation. In this regard my main criticism against the decision in *Tswelopele* is that the SCA missed a golden opportunity to steer the development of property law under the Constitution in a fruitful direction, which could simultaneously promote constitutional goals and help to reinforce the legitimacy and vibrancy of the common law.

The first argument is one of aesthetics. One of the most serious problems with apartheid land law was the pretence, broadly upheld over a long time, that apartheid was something separate from and outside of private law, and particularly property law. In other words, property lawyers washed their hands of apartheid on the basis of that old chestnut, the politics vs law dichotomy. Law (especially private law) was something that lawyers did, apartheid was something that politicians did, and the two had little or no point of contact; hence the general failure, especially in Afrikaans-language law faculties with a strong focus on the Roman-Dutch tradition in private law, to include apartheid law in the Property syllabus during the heyday of

the previous regime. Some law faculties might have covered aspects of apartheid land law in other areas of the curricula; very few did so within the Property Law syllabus. Now that we have come to recognize the folly of that approach, it does seem rather curious and unfortunate to argue, even in the mildest and most transformation-friendly way, that significant reforms of property law that directly serve to correct the lingering legacy of apartheid land law should also take place separately, outside of private law, in a nebulous constitutional sphere which would ostensibly leave private-law tradition untouched. In the absence of a convincing reason why the specific tradition — or private-law tradition in general — should remain untouched by constitutionally driven transformation, this line of argument leaves me dissatisfied. Can we really argue that there is an ideal or essential form for this or any other common-law remedy that remained innocent of the apartheid order under which it existed and functioned for decades, and that still deserves to be preserved — left untouched — by constitutionally driven development in the post-apartheid era? Or is the idea rather that the common law should be open to 'normal' development, according to its own internal logic, but left untouched by Constitution-driven development? The latter view is certainly held by some lawyers; I assume that it does not find favour in the courts. It certainly negates the notion that we now have just one system of law, developing under the auspices of the Constitution.

Apart from the aesthetic argument, I have another, more serious concern. Doctrinally pure as it might be, the *Tswelopele* decision fails to reflect the real and the potential transformative significance of decisions such as *Fredericks* (supra), where the embattled apartheid courts amazingly succeeded, albeit in fits and starts, in using what little means they had available, prior to the new constitutional era, to craft effective remedies for marginalized people who were cynically evicted from the shelter they had under apartheid legislation. Surely the judicial history embodied in *Fredericks* should, in its historical and political context, now be seen as a judicial triumph and not as an (arguably) doctrinal aberration or a (logical) mistake? And surely that tradition is something to be proud of in the new constitutional era; something to build on where possible rather than reject as a doctrinally unsound deviation (supposedly) from Roman-Dutch law (where the remedy was applied differently in any event)? Historically, the mandament van spolie has perhaps undergone more substantive and far-reaching changes and developments since its introduction in early South African law than the one that is required by the *Fredericks*-style argument about restoration using replacement materials. Contemporary historical research, based on the results already reached and set out by Kleyn, could be interesting. In my view, the court missed an opportunity in *Tswelopele* to celebrate the political and social bravery of decisions such as *Fredericks*, regardless of the (surely technical and perhaps even marginal) intellectual and doctrinal compromises that might be required in the process.

Finally, it should be said that the creation of a completely new constitutional remedy to reach the desired result in this case raises more

questions than it answers. What are the requirements for this remedy, and exactly when does it find application? How is this remedy different from the mandament van spolie? Does it come into play only when the mandament is unavailable because of destruction of the original materials to be restored? How far can the courts go in ordering restoration of spoliated possession by means of this remedy? Is it also available when non-fungible property has been destroyed? One of the strongest objections that was raised against doctrinal (as opposed to constitutional) development of the mandament van spolie to allow for restoration using replacement materials was that the remedy would not have any obvious limits. This objection must apply even more strongly with respect to the new constitutional remedy developed by the court in this case, without any indication of its limits or the considerations that could assist in determining its scope and effects.

One should recognize that the courts are in a difficult position in cases like this; they are vulnerable to criticism whether they develop the common law or not, and the choice is often an almost impossibly difficult one involving many considerations that fall far outside the narrow confines of doing justice by the parties in a particular case. Moreover, given the court's very clear and unambiguous position on the justice that had to be (and was) done in this case, one hesitates to be overly critical — this is a decision that I would rather embrace than reject.

However, having said that, and with real sympathy and respect for the position of the court, I personally still think that this decision represents an opportunity missed. All things considered it is probably not really so important, doctrinally speaking, whether the mandament van spolie can be used to force restoration of despoiled property even when replacement materials have to be employed. But in the historical and political context of evictions and arbitrary destruction of informal and precarious homes it might have been a good opportunity to celebrate the small judicial victories over apartheid injustice that have been recorded through use — and arguably judicial expansion — of this common-law remedy, thereby overcoming the uncomfortable, sharp division between common-law and constitutional remedies and replacing it with a very significant bond between the two, based on a shared concern for the rule of law and for social justice.