

Applying the *mandament van spolie* in the case of incorporeals: two recent examples from case law*

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1 Introduction

The *mandament van spolie* is a remedy available in South African law to protect possession of property.¹ The remedy is aimed at ensuring restoration of possession *ante omnia* in instances of unlawful dispossession. It is not specifically aimed at protecting rights with regard to property;² therefore it is generally accepted that courts should disregard the merits of the dispute when deciding whether the remedy should be granted.³ Considerations other than the remedy's two requirements are therefore irrelevant in the decision of whether the *mandament van spolie* is applicable.⁴

There are two requirements that need to be complied with in order for one to be successful with the *mandament van spolie*.⁵ Firstly, the *spoliatus* – the person who was dispossessed – must prove peaceful and undisturbed possession of property.⁶ In the case of incorporeals – where physical possession is not possible – the law recognises quasi-possession to fulfil the first requirement of the remedy.⁷ Van der

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¹ Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (1986 thesis Pretoria) 297-307; Van der Merwe *Sakereg* (1989) 129. For conflicting views of the true nature of the remedy, see Van der Walt 1983 *THRHR* 237 239-240; Van der Walt “Nog eens *Naidoo v Moodley* – ’n Repliek” 1984 *THRHR* 429 435 and De Waal 1984 *THRHR* 115 118. See also Sonnekus “Mandament van spolie – Kragtige remedie by kragonderbreking” 1985 *TSAR* 331 334.

² *Plaatjie v Olivier NO* 1993 2 SA 156 (O) 159: “The mandament van spolie is not concerned with the protection or restoration of rights at all. Its aim is to restore the factual position of what the *spoliatus* has been unlawfully deprived.” See also *Zulu v Minister of Works, KwaZulu* 1992 1 SA 181 (D) 187.

³ This is emphasised by the maxim of *spoliatus ante omnia restituendus est*, which forms the basis of the remedy. See Taitz “Spoliation proceedings and the ‘grubby-handed’ possessor” 1981 *SALJ* 36 40; Van der Merwe (n 1) 121 and Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* (2006) 290.

⁴ In *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA), the court confirmed that wrongfulness and illegality are irrelevant considerations in the question of whether a spoliation order should be granted or not. See also Taitz (n 3) 37 and 40-41; Van der Walt 1983 (n 1) 239; Kleyn “Die mandament van spolie as besitsremedie” 1986 *De Jure* 1 5-10.

⁵ *Nino Bonino v De Lange* 1906 TS 120; *Yeko v Qana* 1973 4 SA 735 (A) 739. See also Sonnekus 1978 *TSAR* 168 169-170, where Sonnekus asserts that there are in fact four requirements for the *mandament van spolie*. He also argues that the possibility of restoration must exist before the *mandament* can be ordered.

⁶ Kleyn (n 1) 362; Van der Merwe (n 1) 129 and Badenhorst, Pienaar and Mostert (n 3) 292.

⁷ See *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) 514, in which Hefer JA considers historical sources and case law in which the question concerning quasi-possession of a right came up. See also Van der Merwe (n 1) 122-123 (see specifically n 122); Badenhorst, Pienaar and Mostert (n 3) 296-300. For criticism of the *Bon Quelle* case, see Sonnekus “Watervoorsiening en die mandament van spolie – Die hoogste hof verstel die wissels” 2007 *TSAR* 145.

Merwe explains that the *spoliatus* does not have to prove that he/she actually had a right to possess in terms of the maxim *ante omnia restituendus est*, but simply that the right was actually possessed and that unlawful dispossession took place.⁸

Despite the above-mentioned (ostensible) clarity regarding the first requirement, courts have had difficulty in trying to establish what constitutes possession in the case of incorporeals. Consequently, the application of the possession requirement with incorporeals has not always been consistent and there seem to be conflicting judgments on the question of *what* is required in order for one to be successful with the *mandament van spolie* where incorporeals are purportedly spoliated.

The second requirement of the spoliation remedy is unlawful dispossession or spoliation. In *Nino Bonino v De Lange*,⁹ the court stressed that the spoliator must have dispossessed the *spoliatus* “forcibly or wrongfully and against his consent.”¹⁰ Therefore, unlawful dispossession may simply mean that no consent was given to dispossess, but it could also mean that the law (for instance, legislation or the common law) does not authorise the deprivation and it results in unlawful dispossession. It is especially in these latter instances that the application of the second requirement in the context of quasi-possession has been particularly interesting.

The aim of this article is to reflect on the current way in which the *mandament van spolie* is applied to incorporeals. This aim will be achieved by firstly setting out two recent cases in which the *mandament van spolie* was sought to restore possession of incorporeals. Thereafter, a discussion will follow where the requirement of possession as applied to incorporeals in the two respective cases is considered. Secondly, the application of the spoliation leg of the *mandament van spolie* enquiry is questioned, specifically in so far as it was applied differently in the two contexts, but based on the same rationale. The article concludes with some thoughts on whether these two decisions accurately reflect the law pertaining to quasi-possession in instances where the *mandament van spolie* is sought.

2 *The mandament van spolie in the case of incorporeals: two recent judgments*

2.1 *Van Rhyn NO v Fleurbaix Farm (Pty) Ltd*¹¹

Van Rhyn NO v Fleurbaix Farm (Pty) Ltd reinvigorated the debate concerning what needs to be proven for purposes of the *mandament van spolie* in the case of incorporeals, specifically where the right spoliated was allegedly a servitutory right. In *Van Rhyn* the respondent company and appellant trust were adjoining property owners. The properties were acquired at roughly the same time and both were purchased from the same company. There was a gravel road over the appellants’ property that already existed when the respective properties were acquired. The respondent alleged that its property was landlocked and the only way for it to access a public road was by using the gravel road over the appellants’ land.

At first, the respondent’s use of the gravel road was minimal as its property was initially undeveloped. However, with time, the use of the road became more

⁸ Van der Merwe (n 1) 123.

⁹ the *Nino Bonino* case (n 5).

¹⁰ the *Nino Bonino* case (n 5) 122.

¹¹ 2013 5 SA 521 (WCC). For a critical discussion of this decision, see Scott “*Via simpliciter* and spoliation” 2014 *TSAR* 151. Scott points out that the *Van Rhyn* case illustrates the fact that “the *mandament van spolie* is a remedy that has over time proved itself to possess the uncanny ability of causing confusion, in particular where it is applied to obtain redress in situations where there is an averment of spoliation of *quasi-possession*” 151.

frequent.¹² As a result of the appellants' intentions to effect certain improvements on their land, they decided to close the existing gravel road and advised the respondent that an alternative tarred road would be made available for its use. The appellants subsequently closed the said gravel road, which led to the application in the court *a quo* (and the appeal to the Western Cape high court) on the basis of the *mandament van spolie*.¹³ The alleged quasi-possession that the respondent sought to restore with the *mandament* was "its right of access via the established route".¹⁴

In terms of the first requirement for the spoliatio remedy – namely peaceful and undisturbed possession – the court reiterated that the remedy is in principle available in the case of incorporeals where *possession of a right* takes the place of physical possession of a thing.¹⁵ According to the court, if one claims restoration of quasi-possession of a right, the nature of the alleged right must be identified. Therefore, characterisation of the right must take place in order to determine whether it can be proven – or inferred from factual observations – that firstly, the right was used and therefore possessed, and secondly, whether dispossession had in fact taken place. Furthermore, the court stressed that to the extent that such identification or characterisation takes place, it is *not* necessary to determine whether the right actually exists in a legal technical sense; the enquiry should only include "identifying what it is, whether it be corporeal or incorporeal, that [it] was possessed by the applicant; for in order to show that one has been deprived of possession one has to be able to show *what it is* that one has been despoiled of".¹⁶

Regarding the spoliatio requirement, the court held that dispossession of a right would generally be established by the "taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned".¹⁷ Binns-Ward J reasoned that the alleged act of dispossession in the specific case was not unlawful because it was permitted by the common law.¹⁸ According to the court there could therefore not be unlawful dispossession, because the change in the route was permitted by the common law and the change did not result in an "infringement of or derogation from the right upon which it apparently relied".¹⁹ Consequently, the *mandament van spolie* was denied.²⁰

2.2 *City of Cape Town v Strümpher*²¹

In the judgment of *City of Cape Town v Strümpher* the difficulty in proving quasi-possession in the case of non-servitutory rights was illustrated in the context of water supply to premises. This judgment is an appeal against a decision of the Western Cape high court in which a spoliatio order for the reconnection of the water supply to the respondent's property was upheld. The city had supplied water to the respondent for 37 years before it notified the respondent that there were amounts

¹² For instance, the directors of the respondent company occasionally used the road for recreational purposes, like jogging.

¹³ the *Van Rhyn* case (n 11) par 6.

¹⁴ the *Van Rhyn* case (n 11) par 6.

¹⁵ the *Van Rhyn* case (n 11) par 7.

¹⁶ the *Van Rhyn* case (n 11) par 8 (own emphasis).

¹⁷ the *Van Rhyn* case (n 11) par 7.

¹⁸ the *Van Rhyn* case (n 11) par 24.

¹⁹ the *Van Rhyn* case (n 11) par 26.

²⁰ the *Van Rhyn* case (n 11) par 29.

²¹ 2012 4 SA 207 (SCA).

in arrears and that the respondent had two days within which to pay the amounts, otherwise his water supply would be disconnected.

The respondent disputed liability for the amounts in arrears because he argued that the water pipes and the water meter were faulty and possibly resulted in the excessive water bill. Nonetheless, the city proceeded to disconnect the water supply. The respondent applied to the Strand magistrate's court on the basis of the *mandament van spolie* and the remedy was granted. Similarly, the *mandament* was upheld in the Western Cape high court and the city was ordered to reconnect the water supply to the respondent's property. The City of Cape Town consequently appealed against this decision.

For purposes of the first requirement of the remedy, the city argued that the respondent's right to receive water was purely personal as it was based on the contract between itself and the respondent.²² Therefore, the City contended that the respondent's right to have water supplied to his property arose from contract.²³ Moreover, the city maintained, on the basis of *Telkom SA Ltd v Xsinet (Pty) Ltd*,²⁴ that the supply of water to the respondent arose as a result of contractual rights under the agreement, and it could therefore not satisfy the first requirement for the spoliatio remedy.²⁵

In the *Strümpher* case the court held that the mere fact that the right to receive water originated from contract did not make these rights merely personal; the rights were in fact public law rights that are underpinned by constitutional²⁶ and statutory provisions.²⁷ Therefore, the court concluded that the *mandament van spolie* was the appropriate remedy as far as the right to receive water is concerned, and the lower courts had been correct in granting the remedy in this context.²⁸

According to the court, the *mandament van spolie* can be used to reconnect water supply, if a water user has been deprived of a water service summarily by a water service authority.²⁹ The court also confirmed that the receiver's use of the water was an incident of the possession of the property.³⁰ Therefore, in principle the first requirement of the remedy was complied with.

The question relating to unlawful dispossession was whether the city was authorised to disconnect the respondent's water supply in terms of legislation.³¹ The respondent argued that the disconnection violated his statutory rights in terms of the Water Services Act,³² while the city's contention was that the disconnection was authorised and therefore lawful.³³ The city based its claim on the fact that the interference with the respondent's water supply was authorised in terms of the city's water by-law and its debt collection by-law, and it could therefore not be *unlawful* dispossession for purposes of the remedy's second requirement.³⁴

²² the *Strümpher* case (n 21) par 6.

²³ the *Strümpher* case (n 21) par 7.

²⁴ 2003 5 SA 309 (SCA).

²⁵ the *Strümpher* case (n 21) par 8.

²⁶ the *Strümpher* case (n 21) par 9.

²⁷ the *Strümpher* case (n 21) par 10.

²⁸ the *Strümpher* case (n 21) par 19.

²⁹ the *Strümpher* case (n 21) par 19.

³⁰ the *Strümpher* case (n 21) par 19. See also Van der Walt and Pienaar *Introduction to the Law of Property* (2009) 205.

³¹ the *Strümpher* case (n 21) par 6.

³² the *Strümpher* case (n 21) par 1.

³³ the *Strümpher* case (n 21) par 1.

³⁴ the *Strümpher* case (n 21) par 1, 6.

The court questioned whether the interference with the water supply was authorised in terms of the statutory provisions.³⁵ It highlighted that there were numerous provisions that the city in fact did not comply with when it was notified that a dispute had arisen about liability for the alleged amounts in arrears.³⁶ Therefore, the court found that there was insufficient justification for the disconnection of the respondent's water supply and the dispossession was held to be unlawful.³⁷ As a result, the supreme court of appeal reasoned that the "[i]nterference by the City with the respondent's access to the water supply was akin to deprivation of possession of property".³⁸ In the end, both requirements for the remedy were therefore complied with and the *mandament van spolie* was granted.

3 Discussion of the mandament van spolie in the case of incorporeals

3.1 Possession: identifying the nature of the right

The first interesting observation relating to both these decisions is that the respective courts placed considerable emphasis on determining the nature of the right before it can be determined whether the right was actually possessed. In this regard, the cases are similar.

The focus in the *Van Rhyn* case was on establishing (or identifying) the nature of the right in order to determine whether the alleged right could be "possessed" for the purposes of the spoliation remedy and whether it was spoliated when the original route was adjusted. This aspect of the decision is interesting if viewed from the perspective of earlier case law in which roughly the same set of facts were presented.³⁹ In fact, the court in the earlier decision of *Knox v Second Lifestyle Properties (Pty) Ltd*⁴⁰ held that the use of the road was sufficient to show the required possession for purposes of the first requirement of the remedy.⁴¹ Therefore, the court in the *Knox* case did not mention anything about identifying the nature of the right for purposes of the first requirement of the spoliation remedy.

The *Knox* case is an appeal against a court *a quo* decision in which an application for the *mandament van spolie* was denied on the basis that the appellants had alternative routes which they could use to access a main road. The second respondent and the first appellant in *Knox* were adjoining neighbours and the first appellant used a gravel road over the second respondent's property to access a road. However, the second respondent closed the road and the appellants applied for a spoliation order to restore quasi-possession. The appellants claimed that they were in peaceful and undisturbed possession of the road and that the closure of the road caused spoliation.⁴²

The court in the *Knox* case relied on the earlier decisions of *Nienaber v Stuckey*,⁴³ *Van Wyk v Kleynhans*⁴⁴ and *Willowvale Estates CC v Bryanmore Estates Ltd*⁴⁵ to

³⁵ the *Strümpher* case (n 21) par 12, 13.

³⁶ the *Strümpher* case (n 21) par 14, 15.

³⁷ the *Strümpher* case (n 21) par 18.

³⁸ the *Strümpher* case (n 21) par 19.

³⁹ The court in the *Van Rhyn* case expressly denied the respondent's claim that the previous cases were similar to the facts in the case. See the *Van Rhyn* case (n 11) par 13-14.

⁴⁰ 2012 ZAGPPHC 223 (11 Oct 2012) (unreported).

⁴¹ the *Knox* case (n 40) par 17.

⁴² the *Knox* case (n 40) par 4.

⁴³ 1946 AD 1049.

⁴⁴ 1969 1 SA 221 (GW).

⁴⁵ 1990 3 SA 954 (W).

conclude that use of the road was sufficient to satisfy the first requirement of the remedy in these cases. The provision of an alternative route was held to be irrelevant in *mandament van spolie* applications and the remedy was consequently granted in the *Knox* case.

It seems as though the difference between the earlier cases and the *Van Rhyn* decision is grounded in the fact that the respective courts took different considerations into account when it determined whether the remedy should be granted. The earlier decisions were not at all concerned with the identification of the nature of the right because it was held that – for purposes of the first requirement of the remedy – use of the road was sufficient to show the required possession.⁴⁶ Therefore, the focus was not so much on the *right enabling the use* of the road, but rather on the *actual use* of the road being exercised physically.

However, in the *Van Rhyn* case it was shown that if someone alleges that a servitude of right of way (or quasi-possession) was frustrated (or dispossessed), it is crucial that the claimant should *allege* “the existence of the servitude and the manner in which its exercise has [ostensibly] been frustrated by the respondent”.⁴⁷ Characterisation of the right, together with the exercise of the utility, is the combination that would have to be proven in order to be successful with the first requirement of the remedy in the case of quasi-possession of a servituted right. This would then form the subject matter of the alleged despoilment.⁴⁸

This reasoning is in line with the decision of *FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO*⁴⁹ in which the importance of characterising the right before the *mandament van spolie* can be granted was also emphasised.⁵⁰ In the *FirstRand* case, it was highlighted that it is crucial to identify the right allegedly despoiled, as the *mandament van spolie* does not necessarily protect *all* rights. It is clear that not all incorporeals, or rights, are *per se* subject to protection under the remedy.⁵¹ Therefore, with regard to servituted rights, there seems to be authority even before the *Van Rhyn* case that the nature of the right must be characterised – and the exercise thereof proven – in order to establish *quasi-possessio* that can be protected in terms of the remedy.⁵²

⁴⁶ the *Knox* case (n 40) par 17.

⁴⁷ the *Van Rhyn* case (n 11) par 8.

⁴⁸ the *Van Rhyn* case (n 11) par 9. Upon reflection, the court could probably have reached the same result with fewer uncertain turns. For one, the outcome could have been reached by simply questioning whether the respondent in fact had exercised the necessary possession (or quasi-possession) in order to be successful with the first requirement for the remedy.

⁴⁹ 2008 2 SA 503 (SCA).

⁵⁰ the *Van Rhyn* case (n 11) par 10.

⁵¹ See the *Zulu* case (n 2) 188. See also Van der Merwe and Pope “Property” in Du Bois (ed) *Wille’s Principles of South African Law* (2007) 458, where it is pointed out that personal rights *ex contractu* are not protected with the *mandament van spolie*. Interestingly, in Van der Walt and Sutherland “Dispossession of incorporeals or rights – Is the *mandament van spolie* the appropriate remedy?” 2003 *SA Merc LJ* 95, the authors argue that “[t]he limits of the *mandament* have to be pushed considerably for the unlawful removal of a name from the register of members of a company to be allowed to trigger the *mandament*” (102-103). Therefore, Van der Walt and Sutherland contend that “[i]t should be clear that granting a spoliation order in *Tigon [Ltd] v Bestyet Investments [(Pty) Ltd]* 2001 4 SA 634 (N)] involves a further extension of the *mandament van spolie* to a new area of application, one not at stake in the quasi possession cases” (108).

⁵² the *FirstRand* case (n 49) par 13. Characterisation of the right for purposes of the *mandament* as illustrated in *FirstRand Ltd t/a Rand Merchant Bank v Scholtz NO* – and emphasised in *Van Rhyn* – is also important because the nature of the right “can be material for determining whether the conduct complained about by the applicant for a *mandament van spolie* amounts to a spoliation”. See specifically the *Van Rhyn* case (n 11) par 10.

The nature of the right again dominated the enquiry into quasi-possession in *Strümpher*. The court relied in this regard on the case of *Impala Water Users Association v Lourens NO*⁵³ in which a spoliation order was obtained for the removing of locks and chains in order to restore the flow of water.

In *Impala* there was also a dispute concerning outstanding charges owing by the respondents. The Water Users Association exercised its power in terms of section 59(3) (b) of the National Water Act 36 of 1998 and restricted the flow of the respondent's water supply by locking the sluices. The court in the *Impala* case held that the personal rights, which originated in terms of the water supply contract, were subsumed into rights in terms of the National Water Act 108 of 1997.⁵⁴ Farlam JA stated:

"In my opinion, it is not correct to say that the rights in question were merely contractual. ... It is clear therefore that the rights to water which belonged to the individual respondents and the entities represented by the other respondents, in so far as they were replaced by or, perhaps more accurately put, subsumed into rights under the Act, cannot be described as mere personal rights resulting from contracts with the appellant."⁵⁵

Similarly, the court in the *Strümpher* case held that the respondent found himself in the same position as the respondents in the *Impala* case. Therefore, the water rights that the respondent had in the *Strümpher* case could simply not be regarded as purely contractual; the rights were rather akin to the rights that the *Impala* case respondents had. In other words, they were initially contractual rights that were later replaced with the rights in terms of the Water Services Act.

It seems as though the reason why the court considered the nature of the right in the *Strümpher* case was to establish whether that particular right can actually be restored with the *mandament van spolie*. This is important from the perspective that not all rights are necessarily subject to protection under the remedy,⁵⁶ and because of the authority of *Telkom SA Ltd v Xsinet (Pty) Ltd*,⁵⁷ which provides that the remedy cannot be used to claim specific performance of contracts.

In the *Telkom* case the court held that the *mandament van spolie* is not available where the supply of telecommunication systems in terms of a contract is disconnected,⁵⁸ because the remedy cannot be used to compel specific performance of a contractual right in order to resolve a contractual dispute.⁵⁹ Similarly, in *Zulu v Minister of Works, KwaZulu*⁶⁰ Thirion J remarked:

"If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense then supposedly rights such as the right to performance of a contractual obligation would have to be included – which would be to extend the remedy beyond its legitimate field of application and usefulness."⁶¹

Consequently, it was crucial in the *Strümpher* case to characterise the right in order to determine whether a right of this nature can enjoy protection under the *mandament van spolie*. However, it is questionable whether the court in the *Strümpher* case –

⁵³ 2008 2 SA 495 (SCA).

⁵⁴ the *Impala* case (n 53) par 18–19.

⁵⁵ the *Impala* case (n 53) par 18. See also Sonnekus (n 7) 145.

⁵⁶ the *Zulu* case (n 2) 188.

⁵⁷ the *Telkom* case (n 24).

⁵⁸ the *Telkom* case (n 24) par 14.

⁵⁹ the *Telkom* case (n 24) par 15.

⁶⁰ See the *Zulu* case (n 2).

⁶¹ the *Zulu* case (n 2) 188. See also Sonnekus "Spolie van waterverskaffing en die passiwiteitsbeginsel" 1992 *TSAR* 325.

in the process of identifying the nature of the right – added another category of incorporeals to the already existing class of rights that purportedly enjoy protection under the remedy.

On the basis of the *Strümpher* case it seems as though there is now a category of incorporeals that may have originated in terms of contract, but has subsequently taken on a public law / human rights dimension.⁶² This thought is interesting if one considers that before the *Strümpher* case a distinction was drawn between servitural and non-servitural rights in order to determine whether the right could be protected in terms of the spoliation remedy.⁶³ More specifically, with non-servitural rights, the test to determine whether the right enjoyed protection under the *mandament van spolie* was whether the right was an incident of possession of the corporeal property.⁶⁴ However, the court in the *Strümpher* case did not focus on the question of whether the right was incidental to possession of the corporeal property, but focused considerably on whether the right was simply contractual or not – in effect making the choice between the applicability of the remedy dependent on whether the right was a contractual right or a public law right. In the end, the classification of the right as a public law right (with a human rights dimension) brought the right into the realm of protection of the remedy, which classification of a contractual right would (possibly) not have done. On this basis, the *Strümpher* case creates the impression that the extent of application of the remedy to incorporeals is expanded.⁶⁵

In this regard, it may be relevant to take note of the arguments made in relation to the application of the *mandament van spolie* to incorporeals generally – and specifically in the case of the provision of water supply.⁶⁶ Sonnekus has been at the forefront of arguments against the application of the *mandament van spolie* outside of its conventional field of application.⁶⁷ He argues that the use of the *mandament van spolie* in the context of the provision of water constitutes a misuse of the remedy.⁶⁸ Moreover, it would be patently unjust, according to Sonnekus, to award the spoliation remedy in cases like *First Rand* and *Zulu*, because it potentially results in the unfortunate situation where a *spoliatus* is able to obtain unlimited extension (“onbegrensde verlenging”)⁶⁹ in respect of unlawful enjoyment of a right at the cost of the alleged spoliator – knowing full well that he has no right in terms of a contract to the provision of the service.⁷⁰

However, it should be noted in this regard that the remedy can never in principle give the *spoliatus unlimited extension* in respect of unlawful enjoyment of the

⁶² I am indebted to Juanita Pienaar for questioning (and ultimately shaping) my ideas in this regard.

⁶³ See s 3.2 below for a discussion of the distinction between the application of servitural and non-servitural rights in case law.

⁶⁴ the *Plaatjie* case (n 2); *Naidoo v Moodley* 1982 4 SA 82 (T) and *Froman v Herbmere Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W).

⁶⁵ See s 3.3 below in which it questioned whether this expansion of the application of the *mandament van spolie* was even necessary in light of the fact that legislation exists to regulate the supply of water in line with the constitution.

⁶⁶ Sonnekus (n 7) 145.

⁶⁷ See Sonnekus (n 7) 145; (n 61) 325 and (n 1) 331.

⁶⁸ Sonnekus (n 7) 145 153: “Hierdie uitspraak [die *First Rand*-saak] bevestig ook dat om in omstandighede soos die onderhawige, soos ook die geval in die *Le Riche*- of in die *Zulu*-saak sou wees, wél die mandament toe te staan patent onbillik sou wees. ... Daarvoor durf die mandament nie misbruik word nie.”

⁶⁹ Sonnekus (n 7) 145 153.

⁷⁰ Sonnekus (n 7) 145 153.

right.⁷¹ At best, the *mandament van spolie* can provide a temporary solution; it merely sets the scene for the subsequent determination of rights in relation to property.⁷² Therefore, assuming that it does set the platform for the dispute based on the merits, the *mandament* is in all likelihood not such a powerful remedy in cases where the *spoliatus* has no right, as is evident in *Zulu* and *First Rand*.

In light of the analysis in *Van Rhyn* and *Strümpher* questions may also arise in terms of the approach in the cases in so far as both courts examined the nature of the right before considering whether the right was possessed and whether unlawful dispossession had taken place. Incidentally, it may look as though the respective courts were considering the merits of dispute when they investigated the nature of the right purportedly spoliated. It should be noted though – in the context of servituted and non-servituted rights – that determining the nature of the right was only important in so far as it provided the starting point to determining whether the applicant in a particular case could prove that he/she had actually possessed the right.

The enquiry into the nature of the right ostensibly possessed cannot dominate the analysis in the sense that determination of the nature of the right becomes the end of the matter. Therefore, the decision of whether the remedy can be granted cannot solely be based on identifying the nature of the right. It should at all times be clear in spoliation proceedings that the enquiry into the nature of the right is important only for purposes of determining whether a right of that nature can enjoy protection in terms of the spoliation remedy; to question whether the right was actually possessed; and finally to establish whether the dispossession was in fact unlawful. In my view, if courts keep these aspects separate, it will not necessarily be problematic when consideration of the nature of the right is taken into account in these instances.

In other words, determining what right was allegedly spoliated is not the same as determining whether the *spoliatus* actually had a right to possess. However, if this distinction is not made clear, courts may run the risk of placing too much emphasis on whether an applicant had a right to receive water as illustrated in the case of *Zulu v Minister of Works*,⁷³ rather than whether a right to water supply does enjoy protection under the remedy and can actually be possessed for purposes of the first requirement of the remedy. This observation is by no means novel; these warning flags have been raised before.⁷⁴ However, given the fact that the discussion of the nature of the right dominated the enquiry in both cases, it becomes important to highlight the distinction in light of the judgments. In so far as the nature of rights were disputed in both cases, that aspect first needed to be settled before it could be determined whether the right was actually possessed and whether dispossession had in fact taken place. These two aspects are discussed in the following sections.

⁷¹ See *Sonnekus* (n 7) 145 153, which *Sonnekus* calls the “onbegrensde verlenging van sy onregmatige genot ten koste van sy teenparty”.

⁷² *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) par 29. See also the *Bon Quelle* case (n 7) 513; *Kleyn* (n 1) 300-301, 395. Interestingly, in the *Van Wyk* case (n 44) 224A-B, where the court emphasised that the parties will essentially determine what nature the order will take. In so far as the court decides the *mandament van spolie* dispute, the order will be permanent if the parties cannot reach agreement after the order or if there is no subsequent judgment on the merits. Therefore, according to the court the parties decide what character the eventual *mandament van spolie* order will take.

⁷³ See the *Zulu* case (n 2). This point is criticised by *Sonnekus*, who argues that application of the *mandament van spolie* in *Zulu* is patently unjust. See *Sonnekus* (n 7) 153.

⁷⁴ *Sonnekus* (n 7) 145.

3.2 Possession: proving (actual) possession in the case of incorporeals

In my view, the requirement of quasi-possession was not adequately dealt with in the two cases. In order to illustrate this, I will first set out the way in which courts generally deal with the requirement of possession, specifically with regard to how quasi-possession is usually proven in the context of servituted and non-servituted rights. It will then be necessary to show how the respective courts in the *Van Rhyn* and *Strümpher* cases dealt with the requirement.

When the question generally arises whether quasi-possession can be proven for purposes of the *mandament van spolie*, a distinction is ordinarily drawn in case law⁷⁵ between spoliation of servituted rights and non-servituted rights. *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*⁷⁶ has often been cited as authority for the type of possession that is required in the case of servituted rights. The appellate division stressed that a servitude is not capable of being physically possessed in the same way as possession would apply in the context of corporeal things.⁷⁷ Quasi-possession of a servitude will be proven by indicating actual use (or *daadwerklike gebruik*) of the alleged servitude.⁷⁸ Therefore, an applicant alleging quasi-possession of a (servituted) right would have to prove that acts were performed that would have constituted the content of the servitude.⁷⁹ What is therefore required is proof of factual possession, rather than a right to possess.

Therefore, in the *Bon Quelle* case it was held that the *mandament van spolie* is indeed available to restore lost possession of the right and possession manifests in the actual use of the servitude. It is unnecessary in this regard to prove the definite existence of the right; the *status quo* must be restored before consideration into the actual existence of the right is made. The same line of reasoning was illustrated in the judgment of *Van Wyk v Kleynhans*,⁸⁰ where the court emphasised that restoration of quasi-possession of a right of way over the respondent's property had to take place before an investigation into the rights of the respective parties took place.⁸¹

In the *Van Wyk* case, the appellant claimed that he was in peaceful and undisturbed possession of the road before the respondent closed the road. The magistrate's court dismissed the application for the *mandament van spolie*. However, the appeal court overturned the decision on the basis that the magistrate had focused on the merits of the dispute when it considered whether there was a servitude agreement. Therefore, the *mandament van spolie* was granted on appeal and restoration of quasi-possession of the right was ordered. Similarly, in *Willowvale Estates CC v Bryanmore Estates Ltd*⁸² – which also concerned the alleged deprivation of quasi-possession of a right of way over the respondent's property – the court granted the *mandament van spolie* because “use of the road” constituted possession for purposes of the first requirement of the spoliation remedy and the locking of the gates amounted to spoliation.⁸³

⁷⁵ For examples, see the *Zulu* case (n 2); the *Bon Quelle* case (n 7); *Xsinet (Pty) Ltd v Telkom SA Ltd* 2002 3 SA 629 (C); the *Telkom* case (n 24); the *FirstRand* case (n 49); the *Impala* case (n 53) and *ATM Solutions (Pty) Ltd v Olkru Handelaars CC* 2009 4 SA 337 (SCA). See also Van der Merwe (n 1) 122-123; Badenhorst, Pienaar and Mostert (n 3) 296-300; Van der Merwe and Pope (n 51) 458 and Van der Walt and Pienaar (n 30) 204.

⁷⁶ (n 7).

⁷⁷ the *Bon Quelle* case (n 7) 514

⁷⁸ the *Bon Quelle* case (n 7) 514.

⁷⁹ Van der Merwe and Pope (n 51) 458.

⁸⁰ (n 44).

⁸¹ the *Van Wyk* case (n 44) 223-224.

⁸² (n 45).

⁸³ the *Willowvale* case (n 45) 956.

With non-servitutory rights, establishing possession has proven difficult in case law.⁸⁴ An applicant who alleges quasi-possession of non-servitutory rights (for instance rights that emanate from contracts) usually has to prove that rights flow from or are incidental to possession of the corporeal property.⁸⁵

Interestingly, in *Plaatjie v Olivier NO*⁸⁶ the court highlighted the distinction between the test for quasi-possession of servitutory rights and quasi-possession of non-servitutory rights.⁸⁷ In the *Plaatjie* case the applicant sought to restore the supply of water to six communal taps that were initially providing water to residents of an informal settlement in terms of an agreement. The taps did not form part of the applicants' property and was installed some distance from their homes – with the idea that many homes in the vicinity could utilise the service. The water supply to the taps was disconnected because the residents had allegedly fallen in arrears with their payments in respect of the water. The court in the *Plaatjie* case confirmed that in order to claim restoration of non-servitutory rights of having water supplied, the *spoliatus* would have to prove that the “*spoliator* had interrupted the water supply or the electricity supply to *the premises of which the spoliatus had occupation*, by interfering with the installation for the supply of the water or electricity to the premises”.⁸⁸

The applicants in the *Plaatjie* case were unable to prove that the installations formed part of the premises that they occupied. Therefore the water supply did not constitute an incident of their control of the corporeal thing. The court distinguished the facts in the *Plaatjie* case with that of the earlier decisions of *Naidoo v Moodley*⁸⁹ and *Froman v Herbmere Timber and Hardware (Pty) Ltd*.⁹⁰ In *Naidoo v Moodley*⁹¹ the appellant (as landlord) cut off the electricity supply of the respondent (the tenant). The court held that by cutting off the respondent's electricity supply, the appellant interfered with the respondent's occupation of the premises.⁹² Similarly, the respondent in *Froman v Herbmere Timber and Hardware (Pty) Ltd*⁹³ severed the water and electricity supply to the applicant's sectional title unit and the *mandament van spolie* was granted to restore the water and electricity supply. Therefore, in both these decisions, it was stressed that once it is determined what type of non-servitutory right is alleged in the particular case, that right must flow from or be incidental to possession of the corporeal property in order to satisfy the first requirement of the remedy.⁹⁴

In a similar vein – albeit in the context of telecommunication services – the court *a quo* in *Xsinet (Pty) Ltd v Telkom SA Ltd*⁹⁵ held that the use of bandwidth and telephone services constituted an incident of the applicant's possession and control of the premises occupied. Accordingly, the applicant was entitled to a spoliation

⁸⁴ the *Plaatjie* case (n 2); the *Naidoo* case (n 64) and the *Froman* case (n 64).

⁸⁵ the *Plaatjie* case (n 2); the *Naidoo* case (n 64) and the *Froman* case (n 64). See also Van der Merwe and Pope (n 51) 458, where Van der Merwe and Pope argue that if the right cannot be connected to corporeal property, it will invariably be a contractual right and can therefore not be protected with the *mandament van spolie*.

⁸⁶ (n 2).

⁸⁷ the *Plaatjie* case (n 2) 159-160.

⁸⁸ the *Plaatjie* case (n 2) 160 (emphasis added).

⁸⁹ (n 64).

⁹⁰ See Sonnekus (n 1) 331.

⁹¹ (n 64).

⁹² the *Naidoo* case (n 64) 84.

⁹³ (n 64).

⁹⁴ See Van der Merwe and Pope (n 51) 458.

⁹⁵ the *Telkom a quo* case (n 75).

order to restore possession of these services.⁹⁶ However, the court in *Telkom v Xsinet*⁹⁷ overturned the court *a quo* decision and Jones AJA reasoned that although Xsinet was using the telecommunication services at its premises, the use of these services could in fact not automatically be described as an incident of possession in the same way as water and electricity can in certain instances be defined as an incident of occupation of residential premises.⁹⁸

In respect of the question of whether the respondent actually possessed the right, the court in the *Strümpher* case simply mentioned that “[t]he respondent’s use of the water was an incident of possession of the property.”⁹⁹ This was done without any inquiry into whether that was in fact the case based on the particular facts; and without any reliance on previous case law in which it was contested whether the supply of water necessarily formed an incident of possession of corporeal property.¹⁰⁰

Similarly, in the *Van Rhyn* case the court paid little respect to the question of whether the respondent could in fact prove actions normally associated with the exercise of the right. As was confirmed in the *Bon Quelle* case, the *mandament van spolie* is indeed available to restore lost possession of a right.¹⁰¹ The possession in this regard manifests in the *actual use of the servitude*. Additionally, the possession must at the very least be stable.¹⁰² It is questionable whether the respondent in the *Van Rhyn* case exercised stable possession or actual use of the servitude sufficient enough to prove the first requirement for the *mandament*, especially since the directors of the respondent company only occasionally used the road for recreational purposes. In this regard, it is doubtful whether the right in question was actually possessed in such a way that it would be sufficient for purposes of the first requirement. However, the court neglected to engage in the enquiry of whether the first requirement was complied with, but chose rather to focus on the nature of the right and the question of whether the dispossession was unlawful. Therefore, both decisions essentially overlooked the question of whether the right was actually possessed for purposes of the first requirement of the remedy.

3.3 Spoliation: determining whether the right was unlawfully dispossessed

The application of the requirement of unlawful dispossession (or spoliation) was particularly interesting in the two judgments. The essence of the application of the requirement in both cases was that if the dispossession was permitted by law (either the common law or legislation) it would not be unlawful and therefore the *mandament* was not the appropriate remedy.

In the *Van Rhyn* case the court found that dispossession would be proven by showing that there was the “taking away of an externally demonstrable incidence, such as a use, arising from or bound up in the right concerned.”¹⁰³ Furthermore,

⁹⁶ the *Telkom a quo* case (n 75) 639.

⁹⁷ the *Telkom* case (n 24).

⁹⁸ the *Telkom* case (n 24) par 12.

⁹⁹ the *Strümpher* case (n 21) par 19.

¹⁰⁰ See Sonnekus (n 7) 151.

¹⁰¹ the *Bon Quelle* case (n 7) 514.

¹⁰² *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W). This idea of stability as a prerequisite for the type of possession necessary in order to be successful with the *mandament van spolie* was once again emphasised in *Marlboro Crisis Committee v City of Johannesburg* (29978/12) 2012 ZAGPJHC 187 (7 Sept 2012) (unreported) par 57-62.

¹⁰³ the *Van Rhyn* case (n 11) par 7.

the alleged act of dispossession in the specific case would not be unlawful if it was permitted by the common law.¹⁰⁴ The alleged servitude in the *Van Rhyn* case was characterised as a *via simpliciter* (or unspecified) right of way. The common law provides that when dealing with a *via simpliciter*, the owner of the dominant tenement has the right to choose the desired route.¹⁰⁵ The servient tenement owner in turn has the prerogative to alter the route, provided that the interests of the dominant tenement owner are adequately considered and no prejudice is caused by the alteration. The court stressed that the dispossession would only be unlawful in circumstances where the alternative route provided by the servient landowner was either prejudicial or unreasonable.¹⁰⁶ This was explained by the court as follows:

“Where, as in the current case, the right relied upon by the applicant for spoliatory relief has bound up in it by law a prerogative of the servient tenement holder to alter the route, the dominant tenement holder cannot be heard to say that it has been dispossessed of the right it enjoys when the servient tenement holder exercises that prerogative within the bounds of the applicable law. In such a case cognisable dispossession would be established only if the applicant showed that the servient tenement holder acted outside the bounds of its liberty to change the route by stipulating an alternative that was prejudicial.”¹⁰⁷

Having considered the evidence, the court concluded that the alternative route was adequate and without prejudice to the respondent.¹⁰⁸ Therefore, the respondent’s quasi-possession that it allegedly exercised in terms of a supposed servitude of right of way in respect of the gravel road was substantially the same as the quasi-possession that would be exercised in terms of a servitude of right of way with regard to the new (alternative) tarred road. According to the court there could therefore not be unlawful dispossession, because the change in the route was permitted by the common law and the change did not result in an “infringement of or derogation from the right upon which it apparently relied.”¹⁰⁹

In this regard, it should be noted that reliance on *Linvestment CC v Hammersley*¹¹⁰ as the justification for the view that the dispossession was lawful was both unnecessary and inappropriate in these circumstances. In the earlier decision of *Gardens Estate Ltd v Lewis*,¹¹¹ it was held that a defined (or specified) right of way could be altered only if both the owners of the dominant and the servient tenement reached consensus regarding the alteration. However, the court in the *Linvestment* case developed the common law and held that a specified right of way could be relocated against the will of the owner of the dominant tenement for policy reasons, provided that certain requirements were complied with.¹¹² Therefore, it was decided in the *Linvestment* case¹¹³ that a specified right of way could now be unilaterally altered (in other words without the consent of the owner of the dominant land) if the

¹⁰⁴ the *Van Rhyn* case (n 11) par 24.

¹⁰⁵ Voet *Commentarius ad Pandectas* 8 3 8. See also Van der Merwe (n 1) 482.

¹⁰⁶ the *Van Rhyn* case (n 11) par 23.

¹⁰⁷ the *Van Rhyn* case (n 11) par 24.

¹⁰⁸ the *Van Rhyn* case (n 11) par 25.

¹⁰⁹ the *Van Rhyn* case (n 11) par 26.

¹¹⁰ 2008 3 SA 283 (SCA).

¹¹¹ 1920 AD 144 150.

¹¹² the *Linvestment* case (n 110) par 31.

¹¹³ See also Kiewitz *Relocation of a Specified Servitude of Right of Way* (2010 thesis Stellenbosch), where Kiewitz discusses the *Linvestment* case (n 110) and sets out the constitutional implications of court orders that allow for unilateral relocation of a specified right of way without the consent of the servient tenement landowner.

requirements listed in the *Linvestment* case were taken into consideration before the alteration of the route.

This aspect was critical to the court's conclusion in the *Van Rhyn* case that the *mandament van spolie* could not be granted in these instances because changing a predetermined route was permissible in some instances and therefore did not always amount to spoliation. Although it is clear that the court was trying to use the development of the common law that occurred in *Linvestment* to prove that altering the route of an alleged servitude did not amount to spoliation, it failed to appreciate the distinction between the *Linvestment* specified servitude of right of way and the *Van Rhyn*'s purported *unspecified* servitude of right of way. Therefore, at the very least the comments pertaining to *Linvestment* – and the reliance on the decision – are arguably *obiter*.

Nonetheless, the same result could have been reached without reliance on the *Linvestment* case. This is because the alleged servitude in the *Van Rhyn* case was deemed to be characterised as a *via simpliciter* (or unspecified) right of way. Consequently, if the argument was going to be made that the alteration of the route was lawful and did not derogate from the right of way, those arguments could have been made on the basis of the general principles regulating unspecified servitudes of right of way and *not* by way of the common law development as enunciated in the *Linvestment* case.

Interestingly, the end result in the *Van Rhyn* case is different from earlier case law where the facts were similar as alluded to above.¹¹⁴ For instance, the provision of an alternative route was specifically rejected in previous case law as having no relevance in *mandament van spolie* applications,¹¹⁵ whereas it was pivotal in the analysis of whether the dispossession was unlawful in the *Van Rhyn* case.¹¹⁶

In the *Knox* case it was held that the provision of an alternative route did not make any difference in the question of whether the *mandament van spolie* can be granted.¹¹⁷ Therefore, with regard to the second requirement for the spoliation remedy, the court concluded in the *Knox* case that “[t]he use of an alternative route has no relevance to the exercise of peaceful and undisturbed possession of the thing”.¹¹⁸ For that reason, although the respondent in the *Van Rhyn* case relied on the *Knox* case to argue that there is authority for the fact that the existence of an alternative route is irrelevant in *mandament van spolie* applications, the court distinguished the two cases and the availability of an alternative route was critical in the one decision (*Van Rhyn*) and rejected in the other (*Knox*).

The question of unlawful dispossession was also at the centre of the outcome in the *Strümpher* case, because it was argued that the law (in the form of legislation) authorised the dispossession and consequently it was not unlawful. The court held that the city had failed to comply with section 4(3)(a) of the Water Services Act, which requires that the disconnection of water services should be fair and equitable. Moreover, the City also neglected to follow its own dispute resolution procedures, since the respondent had noted that he disputed liability for the amounts in arrears. It was confirmed that the dispute resolution procedures had specifically been put in place in order to ensure that whenever disconnection takes place, it

¹¹⁴ The court in the *Van Rhyn* case expressly denied the respondent's claim that the previous cases were similar to the facts in the case. See the *Van Rhyn* case (n 11) par 13-14.

¹¹⁵ the *Knox* case (n 40) par 20.

¹¹⁶ the *Van Rhyn* case (n 11) par 26.

¹¹⁷ the *Knox* case (n 40) par 20.

¹¹⁸ the *Knox* case (n 40) par 21.

complies with the standard of fairness and equity in terms of the Water Services Act. Consequently, the court found that there was insufficient justification for the disconnection of the respondent's water supply and the dispossession was found to be unlawful.¹¹⁹ Ultimately, the *Strümpher* case illustrates the fact that, as far as the second requirement of the *mandament van spolie* is concerned, if dispossession of incorporeals takes place in terms of legislation, the dispossession must take place within the ambit of the legislation in order to ensure that the deprivation does not result in spoliation.

The court's discussion pertaining to unlawful dispossession for purposes of the *mandament van spolie* raises an interesting question concerning the use of common law remedies in instances where legislation exists to give effect to constitutional rights.¹²⁰ This in turn begs the question of whether the use of the spoliation remedy in this context was the appropriate remedy to begin with. This question has become relevant in the constitutional dispensation where the possibility arises that more than one remedy deriving from different sources of law can be applicable at the same time.¹²¹ In the *Strümpher* case, the question becomes pertinent, because legislation exists that is supposed to regulate the relationship between the water service authority and the water user so as to adequately give effect to section 27(1) of the Constitution of the Republic of South Africa, 1996.

It is important to take into consideration that section 3(1) of the Water Services Act provides that everyone has a right of access to basic water supply. In this regard, section 3(1) of the act gives effect to the constitutional right to have access to sufficient water as encapsulated in section 27(1) of the constitution.¹²² Furthermore, it is clear that section 4(3)(a) of the Water Services Act requires that the limitation or discontinuation of water services must be fair and equitable.¹²³ It is meant to serve as the threshold requirement in the case where disconnection of water supply is concerned. Moreover, section 7 of the City's Credit Control and Debt Collection Policy additionally bolsters the threshold requirements of "fairness and equity" by providing dispute resolution procedures in the event that a water user (or debtor) declares a dispute.¹²⁴

On the basis of the above assessment, it is clear that the provisions aimed at ensuring that fair and equitable disconnections are effected were not followed in the *Strümpher* case and the dispute resolution procedures were disregarded as well. Therefore, the legislation and policies that were specifically put in place to ensure that the constitutional right is given effect to were disregarded and the respondent was forced to resort to the common law remedy of the *mandament van spolie* to give effect to his (public law) right to receive water.¹²⁵

In my view, it remains questionable whether the *mandament van spolie* is the appropriate remedy in this context. It is clear that the remedy is increasingly being

¹¹⁹ the *Strümpher* case (n 21) par 18.

¹²⁰ Boggenpoel "Does method really matter: reconsidering the role of common law remedies in the eviction paradigm" 2014 *Stell LR* 72.

¹²¹ Boggenpoel (n 120) 72-98. See also Boggenpoel and Pienaar "The continued relevance of the mandament van spolie: recent developments relating to dispossession and eviction" 2013 *De Jure* 998.

¹²² See s 27(1)(b), 27(2) and 152(1)(b) of the constitution.

¹²³ the *Strümpher* case (n 21) par 14.

¹²⁴ the *Strümpher* case (n 21) par 14-15.

¹²⁵ the *Strümpher* case (n 21) par 19. This was the same problem that was highlighted in the context of eviction. See Boggenpoel and Pienaar (n 121) 998.

used outside of its conventional field of application.¹²⁶ The warning of Sonnekus that the *mandament van spolie* is not a catch-all remedy to protect all kinds of rights may therefore be warranted in this specific context. I would argue that one should be careful to employ the *mandament* in this situation before determining the extent to which the legislation was aimed at replacing the common law or regulating the field.¹²⁷ It should in principle be impermissible to employ common law remedies if there are procedures (and remedies) in the legislation aimed at adequately balancing the rights of the water service authority and the water user. In this particular case, it was clear that the legislation provided certain procedures in order to resolve disputes about amounts in arrears. However, the Water Services Act falls short as it does not provide a remedy to rectify the situation where its provisions are not followed. Therefore, the respondent would not have been able to rely on the legislation to provide a remedy in this case. In the meantime, the question (possibly) remains whether it should still be acceptable to fall back on the common law to find an appropriate remedy to obtain restoration; or whether direct reliance on the constitution should be permitted in order to obtain a constitutional remedy in terms of section 38,¹²⁸ which may perhaps also result in restoration of the supply of water. In so far as the Water Services Act does fall short in the sense that it does not provide an adequate remedy, the ideal would be to amend the Water Services Act to either provide stricter penalties in the case of non-compliance with the provisions of the act or to provide for (speedy) restoration of possession in cases where procedures were not followed to ensure that the disconnection was fair and equitable. In the absence of such amendments, it would perhaps be wise to keep open the possibility of using common law remedies¹²⁹ in this context, until the lacunae in the legislation are filled. In this regard, it is suggested that falling back on the existing common law as the residuary source of law is more desirable than developing new constitutional remedies, which would seemingly run parallel to the extant common law ones.¹³⁰

4 Conclusion

It is clear that the spoliation remedy has increased in use in modern South African law. Although the remedy is only temporary in nature, it is nonetheless attractive, because it is speedy and restores possession before all else is decided upon. The remedy is also broad enough to allow for restoration of incorporeals – which adds to its alluring nature. Two cases were used to illustrate the way in which the remedy is currently applied in the context of incorporeals. The *Van Rhyn* case dealt with the claim for repossession of a servitural right of way, whereas the *Strümpher* case concerned a claim for restoration of a non-servitural right of water supply.

¹²⁶ See for instance Boggenpoel and Pienaar (n 121) 998.

¹²⁷ Boggenpoel (n 120) 89-96. See also see Van der Walt *Property and Constitution* (2012) 35-39. See also Van der Walt “Normative pluralism and anarchy: reflections on the 2007 term” 2008:1 *Constitutional Court Review* 77-128 and Klare “Legal subsidiarity & constitutional rights: a reply to AJ van der Walt” 2008:1 *Constitutional Court Review* 129 134.

¹²⁸ “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant *appropriate relief*, including a declaration of rights.” See s 38 of the constitution.

¹²⁹ Sonnekus provides an interesting option as an alternative to the use of the *mandament* in this situation. He suggests that the *mandamus* in this context would be more appropriate. See Sonnekus (n 7) 145 153.

¹³⁰ Boggenpoel (n 120) and Van der Walt (n 127 (2008)) 77-128.

The goal of this contribution was to question whether either of these two decisions can be faulted for providing an inaccurate reflection of the law as it pertains to quasi-possession of incorporeals. In order to achieve this goal, an analysis was provided of the respective cases, which included a brief description of the facts and a synopsis of the way the respective court's came to their particular conclusions. Thereafter, it was questioned whether the decisions can be criticised for further complicating the law pertaining to quasi-possession for purposes of the *mandament van spolie*.

It is argued that both judgments provided an unorthodox approach to the application of the *mandament van spolie* to incorporeals. In so far as both decisions focused on determining the nature of the right, it was asserted that it needs to be established whether the right is capable of being protected in terms of the remedy – and to that extent, the decisions cannot be faulted. However, it was pointed out that the enquiry into the nature of the right can only be important in so far as it provides the starting point to determining whether the applicant in a particular case could prove that he/she had actually possessed the right.

Regarding the question of whether the right can be protected with the *mandament van spolie* on the basis of its particular nature, the *Strümpher* case seems to stand out as perhaps creating the impression that there is a new category of incorporeals that purportedly enjoys protection under the remedy. In this regard, the court in the *Strümpher* case was much less concerned with the right as an incident of possession of the corporeal property to determine whether the *mandament van spolie* was applicable. It focused on the fact that the right was not simply contractual but rather had a public law element, which seems to have brought the right under the protection of the *mandament van spolie*.

Both decisions were problematic in so far as the respective courts failed to adequately engage with the question of whether the right had actually been possessed before any interference had taken place. In the *Van Rhyn* case it may have had an impact on the decision, because it was not at all evident that the respondent would have been able to prove that actions were performed, which constituted the content of the servitude – in line with the *Bon Quelle* case. In the *Strümpher* case, the court (in its concluding remarks) simply alluded to the fact that the respondent's use of the water supply constituted an incident of the use of the property: the measure highlighted in the *Plaatjie* case as the determinative factor in showing possession of non-servitutorial rights.

In my opinion, both judgments were interesting and similar in respect of the requirement of unlawful dispossession. Both decisions illustrate that if the law (albeit the common law or legislation) permits the dispossession, it will not be unlawful for purposes of the second requirement of the remedy. Especially as far as this requirement is concerned, it is contended that both decisions raise interesting questions about the application of the requirement when the common law and legislation authorises the deprivation. The *Van Rhyn* case provided a thought-provoking analysis of an instance where the common law may be used to prove that the dispossession was in accordance with common-law rules; whereas the *Strümpher* case raises the interesting discussion about the applicability of the *mandament van spolie* where legislation sanctions the deprivation. In the latter case, questions were raised about the applicability of the remedy in the specific context. It was argued that where legislation exists, the remedies in terms of the legislation should first be exhausted before common-law remedies are resorted to. Only in the absence of appropriate remedies in the legislation should resort to common-law remedies arguably be acceptable.

In the end, it seems as though the *mandament van spolie* may actually have ventured outside of its conventional field of application and provided novel ideas in so far as the remedy is applied to incorporeals. It is argued in this article that it is important to reflect on what these approaches mean to the law regulating quasi-possession of incorporeals. In this regard, it may be necessary to take heed of the remark made by Scott with reference to the *Van Rhyn* case:

“[I]t is suggested that this judgment be prescribed to students of property law as an illustration of how an apparently simple set of facts, involving seemingly easily applicable rules, can prove to be very complex and difficult to resolve. It can also serve as an example of an instance where it would have been wiser for a litigant such as the respondent (the original applicant) to have kept the broader picture in mind, instead of becoming fixated upon a course of action that could at most have brought mere temporary relief.”¹³¹

I would argue that the same remarks can be made in relation to the *Strümpher* decision.

SAMEVATTING

TOEPASSING VAN DIE *MANDAMENT VAN SPOLIE* OP ONLIGGAAMLIKE SAKE: TWEE ONLANGSE VOORBEELDE UIT REGSPRAAK

Hierdie artikel neem kwasi-besit van onliggaamlike sake, vir sover dit met die *mandament van spolie* beskerm kan word, in oënskou. Twee onlangse hofuitsprake word vir die doel geanaliseer. In die *Strümpher*-saak was die *mandament van spolie* ter sprake in verband met die herstel van watertoevoer, terwyl die *Van Rhyn*-saak betrekking het op die maatskappelijke herstel van 'n reg van weg.

Die analise toon dat in beide hierdie uitsprake taamlike onortodokse benaderings gevolg is. Ten opsigte van die hof se fokus op die aard van die reg, word in die artikel aangevoer dat dit noodsaaklik is om eers vas te stel of die betrokke reg hoegenaamd beskerming ingevolge die remedie geniet. Dit lyk egter of die hof in die *Strümpher*-saak 'n nuwe kategorie van regte onder die beskerming van die *mandament van spolie* ingesluit het: waar bepaalde regte 'n publiekregtelike dimensie het, word dit klaarblyklik ook ingevolge die remedie beskerm. Dit is egter te betwyfel of die remedie hoegenaamd in hierdie omstandighede toepassing behoort te vind, veral gegewe die bestaan van wetgewing wat spesifiek hierdie deel van die reg reguleer. Waar wetgewing bestaan wat poog om 'n sekere deel van die reg te reguleer, behoort die remedies ingevolge die wetgewing eerste oorweeg te word voordat daar na remedies ingevolge die gemenerereg gekyk word. Indien daar egter nie voldoende beskerming in die wetgewing is nie, is die gemenerereg heel waarskynlik 'n meer gepaste opsie eerder as om nuwe (moontlik onsekere) grondwetlike remedies te skep.

Die artikel wys verder daarop dat beide beslissings problematies is vir sover daar nagelaat is om te bepaal of, volgens die eerste vereiste van die remedie, daar hoegenaamd kwasi-besit van die tersaaklike regte aanwesig was. Daarteenoor is albei beslissings besonder interessant omdat hulle aansienlike klem op die tweede vereiste van die remedie gelê het. Waar die besitsontneming deur wetgewing (soos in die *Strümpher*-saak) of deur die gemenerereg (soos in die *Van Rhyn*-saak) gemagtig is, voldoen dit volgens die regspraak nie aan die tweede vereiste nie, want die ontneming is nie onregmatig nie.

Hierdie onlangse beslissings toon oortuigend aan dat ontwikkeling op die gebied van onliggaamlike sake en die toepassing van die *mandament van spolie* deurlopend plaasvind. Dit is egter van deurslaggewende belang dat hierdie ontwikkeling deurentyd geanaliseer en heroorweeg word ten einde die volhoubaarheid en toepaslikheid daarvan te beoordeel.

¹³¹ Scott (n 11) 151 162.