

THE SOUTH AFRICAN LAW JOURNAL

VOL 142 PART 2

2025

FOUNDED 1884

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ISSN 0258-2503
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POSSESSORY PROTECTION UNDER THE MANDAMENT VAN SPOLIE FOR THE LESSEE AGAINST THE LESSOR IN A CASE INVOLVING THE REMOTE DEACTIVATION OF MOVABLES

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In Tenox Management Consulting Inc v Scania South Africa (Pty) Ltd [2022] ZAGPJHC 737, the lessee of trucks refused to return them to the lessor after the lessee committed a breach of contract. The lessor then remotely deactivated the trucks without a court order, as per its agreement with the lessee in the event of a breach. The lessee subsequently instituted the mandament van spolie ('mandament') against the lessor to restore the trucks to the lessee in an operational state. The court ruled in favour of the lessee by holding that the lessor's conduct amounted to unlawful spoliation. The decision raises several points worthy of investigation, namely: the type of 'possession' needed for the mandament (specifically whether the lessee has possession for purposes of this remedy); the legal-political function of possession (which concerns the rationale for possessory protection under the mandament); whether parties may agree that one could spoliates or dispossess the other (via remote deactivation) in an extra-judicial manner; whether the prohibition of co-possession applies in our law and whether it excludes the mandament as between lessees and lessors; the difference between lease and agency; and, finally, the intention needed for the mandament. A doctrinal and constitutional analysis reveals that the decision is, for the most part, to be welcomed.

Possessory protection – rule of law – access to court – public policy –
mandament van spolie

[†] BA LLB LLD (Stellenbosch). <https://www.orcid.org/0000-0003-2840-2653>. This article is partly based on a paper I delivered at the South African Property Law Teachers' Colloquium, held at the University of Cape Town from 2–3 November 2023, on a seminar I presented at the Radboud University, Nijmegen, on 19 June 2024, and on research I conducted as a visiting professor at the University of Groningen during 2024. I would like to thank the following persons for conversations which helped to shape my thoughts: Professors Juanita Pienaar, Reghard Brits, Vincent Sagaert, Warren Freedman, Jacques du Plessis, Steven Bartels, Bert van Schaick, Bram Akkermans, and Dr Harry Runia. Warren Freedman, Reghard Brits and Harry Runia deserve special mention, as they kindly commented on an earlier draft of the piece. Thanks also go to the anonymous peer reviewers, whose incisive feedback greatly helped to improve the piece. I am indebted to the law librarians at the University of the Witwatersrand, Johannesburg, and at the University of Johannesburg, namely Mmes Constance Sithole and Lizette van Zyl respectively, for their unwavering assistance in helping me to obtain key sources. I would like to express my gratitude to the NRF for funding that enabled me to conduct research for this article. Remaining errors are my own.

I INTRODUCTION

Kleyn describes the mandament van spolie ('mandament') as the only 'true' possessory remedy in South African law.¹ It is a speedy and robust remedy that requires the spoliator to restore possession to the spoliatus (or dispossessed party) before all else.² Such restoration flows from the maxim *spoliatus ante omnia restituendus est*.³

The spoliatus must prove that he had peaceful and undisturbed possession of a thing,⁴ and that the spoliator unlawfully spoliated him of such possession.⁵ Possession has a wide meaning for the mandament, and includes civil possession and most instances of holdership.⁶ Spoliation occurs when the spoliator completely deprives the spoliatus of possession and also if the spoliator prevents the spoliatus from using and enjoying the thing.⁷ Such conduct must be unlawful, which means it must be 'against [the spoliatus's] will and without recourse to the legal process'.⁸ The merits, such as who has a stronger right to possession, are irrelevant in spoliation proceedings.⁹

¹ Duard Kleyn 'Die mandament van spolie as besitsremedie' 1986 *De Jure* 1 at 1–2.

² C G van der Merwe *Sakereg* 2 ed (1989) 124; Kleyn op cit note 1 at 1; Gustav Muller, Reghard Brits, Juanita M Pienaar & Zsa-Zsa Boggenpoel *Silberberg and Schoeman's The Law of Property* 6 ed (2019) 331.

³ The spoliatus must be restored to the prior position.

⁴ The mandament protects possession of both movables and immovables. Yet, its scope regarding land occupied as a home has been greatly reduced by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See *City of Cape Town v Rudolph* 2004 (5) SA 39 (C).

⁵ Muller et al op cit note 2 at 326–7; Duard Godfried Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (unpublished LLD thesis, University of Pretoria, 1986) 297–307.

⁶ Van der Merwe op cit note 2 at 106; Kleyn *ibid* at 360. See further the discussion in part III(c)(ii) below.

⁷ Van der Merwe *ibid* at 130; Duard Kleyn 'Die betekenis van die begrip spolie' 1986 *De Jure* 279 at 283–4; Andries Johannes van der Walt *Die Ontwikkeling van Houerskap* (unpublished LLD thesis, Potchefstroom University for Christian Higher Education, 1985) at 695–6; Kleyn op cit note 5 at 379–80. The strongest indication that spoliation includes preventing the spoliatus from using and enjoying the thing is found in the decisions on quasi-possession, such as *Naidoo v Moodley* 1982 (4) SA 82 (T) and *Froman v Herbmere Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W). See Kleyn 1986 *De Jure* *ibid* at 284. See further *Ntshwagela v Chairman, Western Cape Regional Services Council* 1988 (3) SA 218 (C) at 227–8.

⁸ See Muller et al op cit note 2 at 335; C G van der Merwe 'Things' in W A Joubert (founding ed) *The Law of South Africa* vol 27 Second Reissue (2014) para 108; Duard Kleyn 'Possession' in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross — Civil Law and Common Law in South Africa* (1996) 842–3 and the sources they cite.

⁹ Van der Merwe op cit note 2 at 120; Kleyn op cit note 5 at 344–6; Van der Walt op cit note 7 at 662; *Nienaber v Stuckey* 1946 AD 1049 at 1053; *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 767G.

Although Roman-Dutch in origin, the mandament originates in Canon law, specifically the canon *Redintegranda* in the *Decretum Gratiani*.¹⁰ Its purpose is to discourage persons from taking the law into their own hands in the context of possessory disputes.¹¹ It protects the socio-legal order against breaches of the peace.¹² The only holders who, seemingly, do not yet enjoy protection under the mandament are employees (or servants) and quasi-employees (or quasi-servants).¹³ This is so despite the fact that many scholars think that the peacekeeping function of the remedy justifies extending it to all holders.¹⁴

The mandament recently featured in *Tenox Management Consulting Inc v Scania South Africa (Pty) Ltd*¹⁵ ('Scania'), where the lessee of trucks instituted the mandament against the lessor after the lessor remotely deactivated them whilst the trucks were still in the possession of the lessee. The case concerns a vexing question in our property law, namely whether a lessee unlawfully spoliates a lessor by retaining the leased thing after his right to possession (*ius possidendi*) fell away and, if so, whether the lessor is entitled to institute the mandament against the lessee.¹⁶ Sonnekus argues that the *Scania* court incorrectly granted the mandament to the lessee.¹⁷

¹⁰ Kleyn op cit note 1 at 4–5; Kleyn in Zimmermann & Visser (eds) op cit note 8 at 835; Van der Merwe op cit note 2 at 118; Muller et al op cit note 2 at 325–6; T W Price *The Possessory Remedies in Roman-Dutch Law* (1947) 55ff.

¹¹ *Curatoren van Pioneer Lodge No 1 v Champion* 1879 ORC 51 at 54; *Boompriet Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) at 353C–D; *Nino Bonino v De Lange* 1906 TS 120 at 122, 125; *Meyer v Glendinning* 1939 CPD 84 at 92; *Mans v Loxton Municipality* 1948 (1) SA 966 (C) at 977; *Yeko v Qana* 1973 (4) SA 735 (A) at 739. See also Van der Merwe op cit note 2 at 124; Kleyn op cit note 5 at 331–2, 351; E J Marais 'The South African possession theory revisited: A re-evaluation of the possession concept and possessory terminology' (2022) 85 *THRHR* 151 at 160; Price op cit note 10 at 55. This justification belongs to Friedrich Carl von Savigny *Von Savigny's Treatise on Possession* (2017, tr Sir Erskine Perry) 6.

¹² All sources *ibid*.

¹³ See Van der Merwe op cit note 2 at 111; Marais op cit note 11 at 161–2 and the sources they cite. For a contemporary case that held that the mandament is unavailable to employees see *Nel v Nieuwoudtville Rooibos (Pty) Ltd* (2010) 31 *ILJ* 1781 (WCC).

¹⁴ H J Delpont & N J J Olivier *Sakereg Vonnisbundel* 2 ed (1985) 98–9; Kleyn op cit note 5 at 350–1, 355, 369–72; A F W Middelberg 'Beskerming van die houerenskap in die Suid-Afrikaanse reg' (1954) 17 *THRHR* 268 at 270, 279; Muller et al op cit note 2 at 321 and note 118; Van der Walt op cit note 7 at 690–1, 718–20, 724; Marais op cit note 11 at 173ff. See contra A S Mathews 'The mental element in possession' (1962) 79 *SALJ* 179; J C Sonnekus & J L Neels *Sakereg Vonnisbundel* 2 ed (1994) 168.

¹⁵ [2022] ZAGPJHC 737.

¹⁶ Van der Walt op cit note 7 at 716; Van der Merwe op cit note 2 at 133; Muller et al op cit note 2 at 337; Kleyn op cit note 5 at 389; Van der Merwe op cit note 8 para 108.

¹⁷ J C Sonnekus 'Die internet of things en afstandbeheerde afskakel van toestelle — Kontrakteervryheid en ander geëgte regsbeginne by spolie, vergeet en/of verwar?' 2023 *TSAR* 96.

I use Van der Walt's methodology to evaluate the case. The single-system-of-law principle and the supremacy of the Constitution of the Republic of South Africa, 1996 form the point of departure when dealing with the common law.¹⁸ The second step entails using the subsidiarity principles to identify the applicable legal source.¹⁹ As much has been written on these principles, I concentrate only on elements necessary for my argument.²⁰ The present case is a possessory dispute in terms of the common law, which activates the second subsidiarity principle.²¹ The third step entails identifying the exact common-law position to see what 'outcome it prescribes for the case at hand'.²² Under the fourth step one ascertains whether the outcome, in terms of the common law, furthers the positive features that the Constitution requires of all law.²³ For present purposes these characteristics include the rule of law — a constitutional value²⁴ — and the right of access to courts.²⁵ Should the common law be open to more than one interpretation, then one must choose the construction that best promotes the mentioned characteristics.²⁶

The article consists of four parts. After this introduction, I briefly set out the facts and ratio decidendi of the *Scania* case in part II. In part III, I summarise Sonnekus's criticism of the case and analyse the decision, and his argument, in terms of Van der Walt's methodology. Part IV sets out my conclusions.

¹⁸ A J van der Walt *The Law of Servitudes* (2016) 38.

¹⁹ Ibid at 39–40.

²⁰ See for instance A J van der Walt *Property and Constitution* (2012); A J van der Walt 'Normative pluralism and anarchy: Reflections on the 2007 Term' (2008) 1 *Constitutional Court Review* 77.

²¹ Van der Walt *Property and Constitution* ibid at 36–7ff.

²² Van der Walt op cit note 18 at 41. See also E J Marais 'Protecting quasi-possession of electricity supply with the mandament van spolie — Has the Supreme Court of Appeal switched off this possibility?' (2021) 32 *Stellenbosch LR* 215 at 227–32; E J Marais 'The increasing difficulty of protecting quasi-possession of incorporeals with the mandament van spolie' 2021 *De Jure* 91 at 99–100; Warren Freedman 'A supervening lack of utility and the judicial shift towards ex post controls in South African servitude law' in Gustav Muller, Reghard Brits, Bradley Slade & Jeannie van Wyk (eds) *Transformative Property Law — Festschrift in Honour of AJ van der Walt* (2018) 487–90.

²³ Van der Walt op cit note 18 at 41.

²⁴ Section 1(c) of the Constitution.

²⁵ Section 34 of the Constitution.

²⁶ Van der Walt op cit note 18 at 41. The approach followed in the pre-constitutional era, should the common-law sources be in conflict, was to 'choose the view which seems most consonant with reason, equity and modern notions of justice and utility': see H R Hahlo & Ellison Kahn *The South African Legal System and its Background* (1968) 580, who cite *Tjollo Ateljees (Eins) Bpk v Small* 1949 (1) SA 856 (A) at 874.

II THE FACTS AND RATIO DECIDENDI IN *SCANIA*

In *Scania*, the respondent agreed to rent five trucks to the applicant for twelve months for a certain monthly amount.²⁷ The agreement was later extended. The contract expressly stipulated that the respondent could, in the event of a breach, cancel the contract and repossess the trucks (without a court order) by remotely disabling them via a deactivating device that was built into the trucks.²⁸

A dispute arose regarding payment of the rental amount. The respondent subsequently cancelled the contract.²⁹ Thereafter, the applicant booked two trucks into a dealership in Middelburg for service, and another one at a dealership in Bethal.³⁰ The applicant retained control of the remaining two trucks. The Bethal dealership handed the one truck back to the applicant.³¹ However, the respondent instructed the Middelburg dealership not to return the two trucks to the applicant.³² The respondent subsequently removed these two trucks from that dealership without the applicant's permission.³³

The respondent subsequently deactivated the three remaining trucks in the applicant's control, which resulted in their coming to a standstill next to the road.³⁴ The respondent's staff later recovered them.³⁵ The applicant, who disputed that the contract was validly cancelled, sought the restoration of its possession of all five trucks through the mandament.³⁶

The court assumed, without deciding, that the contract was validly cancelled.³⁷ It held that the only requirements for the mandament are whether the spoliatus had possession of the thing and whether the spoliator committed unlawful spoliation.³⁸ Ownership is not a defence against the mandament.³⁹ A contracting party may also not aver that the contract allows the party to dispossess the other party extra-judicially.⁴⁰

Swanepoel AJ ruled that the applicant had retained possession of the two trucks even after handing them over to the Middelburg dealer.⁴¹

²⁷ *Scania* supra note 15 paras 2.1–2.2.

²⁸ Ibid paras 3 and 12.

²⁹ Ibid paras 2.2–2.3.

³⁰ Ibid para 2.4.

³¹ Ibid.

³² Ibid para 2.5.

³³ Ibid paras 7 and 11.

³⁴ Ibid paras 2.6 and 12.

³⁵ Ibid para 12.

³⁶ Ibid para 3.

³⁷ Ibid.

³⁸ Ibid paras 4–5.

³⁹ Ibid para 5.

⁴⁰ Ibid, citing *Wicomb v Rosen* 1936 CPD 502.

⁴¹ Ibid paras 8–11.

He found that the respondent had spoliated the applicant of its possession of these two trucks when the respondent removed them from the dealer.⁴²

The respondent argued that it was entitled to deactivate the remaining three trucks in the applicant's possession remotely in terms of the lease contract.⁴³ The court, citing *Wicomb v Rosen*⁴⁴ ('*Wicomb*'), held that 'a term in a contract which allows a party to unilaterally remove a thing from the other contracting party is void'.⁴⁵ The reason is that such a unilateral act amounts to self-help.⁴⁶ The respondent should have obtained a court order for the return of the trucks instead of spoliating the applicant in an extra-judicial manner.⁴⁷ Swanepoel AJ granted the mandament to the applicant and ordered the respondent to return all five trucks and their keys, with their operating systems activated, to the applicant.⁴⁸

III EVALUATION

(a) *The setting*

Scania confirms that agreements permitting one party to dispossess another in an extra-judicial way are void, as per the locus classicus, *Nino Bonino v De Lange*⁴⁹ ('*Nino Bonino*'). Although Swanepoel AJ cites *Wicomb* instead of *Nino Bonino* as authority for this ruling, his conclusion clearly rests on the latter judgment. In *Wicomb*, the court held that a provision in a hire-purchase agreement permitting the seller to retake possession of the sold thing in case of non-performance does not give the seller the right to retake the thing without the purchaser's consent.⁵⁰ Such a retaking of possession amounts to unlawful spoliation.⁵¹ Van Zyl JP's reasoning is analogous to that of the court in *Nino Bonino*, where it was decided that such agreements are against public policy and, thus, void.⁵² This latter ruling has been confirmed in many subsequent decisions.⁵³

⁴² Ibid para 11.

⁴³ Ibid.

⁴⁴ Supra note 40.

⁴⁵ *Scania* supra note 15 para 13.

⁴⁶ Ibid para 14.

⁴⁷ Ibid.

⁴⁸ Ibid para 16.1.

⁴⁹ 1906 TS 120.

⁵⁰ *Wicomb* supra note 40 at 504–5. *Wicomb* is usually cited as authority for the mandament being available to a hire-purchaser and that unlawful spoliation entails that the dispossession must be against the spoliatus's consent: see Van der Merwe op cit note 8 paras 86 and 108.

⁵¹ *Wicomb* ibid at 505.

⁵² *Nino Bonino* supra note 11 at 123–4.

⁵³ See for instance *Blomson v Boshoff* 1905 TS 429 at 431–2; *Pretoria Racing Club v Van Pietersen* 1907 TS 687 at 693; *Herring v Kimpton's* 1931 SR 89 at 93–9; *Claassens v Monia Motors* 1976 (2) SA 83 (O) at 85–6; *Erasmus v Dorsyd Farms (Pty) Ltd* 1982 (2) SA 107 (T) at 110D–E; *Graceful Blessings (Pty) Ltd v Zander*

The *Scania* court's awarding of the mandament to the applicant, as lessee, appears uncontroversial, as courts have granted the remedy to lessees of both land and movables on multiple occasions for over a century.⁵⁴ Nonetheless, Sonnekus's criticism of the judgment justifies an evaluation of the availability of the mandament to lessees. It also requires an analysis of whether the applicant spoliated the respondent by unlawfully retaining the trucks after it refused to return them to the respondent. Furthermore, the decision raises the novel question of whether the remote deactivation of movables by a lessor in the hands of the lessee amounts to spoliation, which deactivation could become increasingly prevalent in light of technological developments.⁵⁵

(b) *Sonnekus's criticism*

Sonnekus argues that the applicant's retention of the trucks after its *ius possidendi* fell away amounts to spoliation and that Swanepoel AJ therefore decided the case incorrectly. In addition, the lessee is not a possessor of the leased thing.⁵⁶ This is because the lessee was, at least since Roman law, merely a possessory servant (*besitsdienaar*) and, therefore, a holder (*houer*).⁵⁷ The lessee exercises the physical (or *corpus*) element of possession on behalf of the lessor, who is the possessory principal (*besitsheer*).⁵⁸ The lessor retains possession through the physical acts of the lessee, who is an intermediary, merely by having the intention of possessing his thing for himself through the acts of the lessee.⁵⁹ The lessor and lessee may include a provision in the lease contract that confirms this position.⁶⁰ Lessees and borrowers are examples of possessory servants or mere holders (*blote houters*).⁶¹ The law distinguishes between the lessor's juridical possession

Burger Properties (Pty) Ltd 2024 (2) SA 441 (FB) para 51; *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC) para 11; *SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) para 10; *Niehaus v High Meadow Grove Body Corporate* 2020 (5) SA 197 (GJ) paras 10ff; *Dhladhla v Mkhonto* 2024 JDR 0079 (MN) para 10; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 54.

⁵⁴ See for instance *Nino Bonino* supra note 11; *Blomson* *ibid*; *Pretoria Racing Club* *ibid*; *Herring* *ibid*; *Claassens* *ibid*; *Erasmus* *ibid*; *Nienaber* supra note 9; *Bennett Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E); *Diamond v Gill* (1893) 7 EDC 194; *Magadi v West Rand Administration Board* 1981 (2) SA 352 (T); *Swanepoel v Van de Hoeven* (1878) 8 Buch 4; *McLoughlin v Delahunt* (1880) F 129; *Mandelkoorn v Strauss* 1942 CPD 493; *Graceful Blessings* *ibid*.

⁵⁵ Examples include cellphones, tablets, electric vehicles (eg Tesla cars), and certain farming equipment, like harvesters.

⁵⁶ Sonnekus op cit note 17 at 99.

⁵⁷ *Ibid* at 99–100.

⁵⁸ *Ibid* at 100.

⁵⁹ *Ibid*.

⁶⁰ *Ibid* at 102.

⁶¹ *Ibid* at 100.

(juridiese besit) and the lessee's factual holdership (feitelike houerskap).⁶² The prohibition of co-possession prevents multiple persons from having exclusive possession of the same thing simultaneously.⁶³ Hence, the lessor and lessee cannot simultaneously be possessors of the same thing.⁶⁴

The default legal position is that the lessee is a possessory servant and, thus, a mere holder.⁶⁵ According to Savigny, lessees, holders, usufructuaries and borrowers are not possessors who enjoy possessory protection, as they only have the *animus tenendi*.⁶⁶ Therefore, they are merely possessory servants who control the thing on behalf of the owner (who is the possessory principal).⁶⁷ However, in South African law the lessor and lessee may agree — by way of exception — that the lessee will be the possessor of the leased thing for purposes of the mandament.⁶⁸

In terms of the maxim *neminem sibi ipsum causam possessionis mutare posse*,⁶⁹ the possessory servant may change his holdership to juridical possession only through an overt act; a mere change of intention is insufficient.⁷⁰ The servant changes his holdership to juridical possession if he refuses to return the thing, which amounts to him spoliating the possessory

⁶² Ibid at 102.

⁶³ Ibid at 100. The prohibition is expressed in the maxim *plures eandem rem in solidum possidere non possunt*: see Savigny op cit note 11 at 113.

⁶⁴ Sonnekus op cit note 17 at 100.

⁶⁵ Ibid at 100–1.

⁶⁶ Ibid at 101, citing F C von Savigny *Das Recht des Besitzes — Eine civilistische Abhandlung* 7 ed (1865) 82, 129ff, 130 and 157. For the English see Savigny op cit note 11 at 83, 124–5ff. The *animus tenendi* is also known as the *animus non sibi sed alteri possidendi*: see Marais op cit note 11 at 162; Van der Merwe op cit note 8 paras 80, 86–7, 105; Van der Walt op cit note 7 at 698–9. Our courts, and the Roman-Dutch authors, have differing views as to the meaning of the *animus tenendi*. Some regard it as the intention to hold for another and not on one's own behalf, which is the intention of an agent. Others view it as being the same as the intention to benefit from the holding of a thing (*animus ex re commodum acquirendi*), which is the intention of a pledgee: see *S v R* 1971 (3) SA 798 (T) 800–1; Delpont & Olivier op cit note 14 at 68–9. I use the *animus tenendi* in terms of the former meaning, as this is how Sonnekus & Neels op cit note 14 at 132 understand it. Remarkably, Jhering regards possessors *and* holders as having the same intention, namely the intention to hold the thing, which he calls the *animus tenendi*. He thinks that 'the law must protect any occupier by giving effects to possession'. See Yaëll Emerich 'Why protect possession?' in Eric Descheemaeker *The Consequences of Possession* (2014) 30 at 38–9.

⁶⁷ Sonnekus op cit note 17 at 101, citing Savigny ibid at 82, 129ff, 130, and 157.

⁶⁸ Sonnekus ibid at 100–1.

⁶⁹ This maxim is more commonly known as *nemo sibi ipse causam possessionis mutare potest* (no one is able to change the cause or basis of his possession unilaterally): see *Smit v Saipem* 1974 (4) SA 918 (A) at 926; Van der Merwe op cit note 8 para 88.

⁷⁰ Sonnekus op cit note 17 at 103, 108.

principal of his juridical possession.⁷¹ Here the lessor, and not the lessee, is the spoliatus.⁷² The lessor may then institute the mandament against the former lessee to regain possession.⁷³ The mandament is unavailable to the former lessee in such a case.⁷⁴ Here the owner, who ‘continuously [has] possession, cannot commit spoliation regarding his thing’.⁷⁵ The owner thus commits a lawful instance of counter-spoliation by retaking the thing from the lessee extra-judicially.⁷⁶ Counter-spoliation may take the form of the lessor remotely deactivating the thing.⁷⁷ By doing so, the lessor does not commit spoliation, as the lessee does not have possession.⁷⁸

Hence, the applicant in *Scania* could not invoke the mandament, as it agreed to be the respondent’s possessory servant.⁷⁹ Consequently, the respondent (and not the applicant) had possession for purposes of the mandament.⁸⁰ The applicant only acquired possession by refusing to hand back the trucks to the respondent, which conduct spoliated the respondent of its possession.⁸¹

Sonnekus argues that *Wicomb* (and, hence, *Nino Bonino*) only applies to the possessor and not to the holder (or possessory servant).⁸² In his view, the parties in *Nino Bonino* did not agree that the appellant would be the respondent’s possessory servant.⁸³ The applicant in *Scania*, being the respondent’s possessory servant, did not have possession of the trucks, which means *Wicomb* (and, thus, *Nino Bonino*) did not apply. Therefore, the respondent’s deactivation of the trucks was merely a lawful instance of counter-spoliation.⁸⁴

(c) *Evaluation*

(i) *Preliminary matters*

The outcome in *Scania* seems unproblematic at first glance. This is because courts have awarded the mandament to lessees on many previous occasions.⁸⁵ In fact, courts have also granted the remedy to various

⁷¹ Ibid.

⁷² Ibid at 102.

⁷³ Ibid.

⁷⁴ Ibid at 103.

⁷⁵ Ibid, my own translation.

⁷⁶ Ibid at 104.

⁷⁷ Ibid at 105–6, 108.

⁷⁸ Ibid.

⁷⁹ Ibid at 107.

⁸⁰ Ibid at 109.

⁸¹ Ibid.

⁸² Ibid at 111.

⁸³ Ibid.

⁸⁴ Ibid at 108, 111–12.

⁸⁵ See the discussion in part III(a) above.

other holders, such as borrowers, depositaries, hire-purchase purchasers, pledgees and agents.⁸⁶ Many scholars regard this position as uncontroversial and argue that all holders, even employees and quasi-employees, should enjoy protection under this remedy.⁸⁷

Sonnekus denies the remedy to the lessee in *Scania*. In fact, he even denies it to the lessee if a third party were to dispossess him. His argument relies on several points, namely that the mandament only protects what he calls juridical possession, the prohibition of co-possession, the lessor and lessee agreeing that the latter party will be the lessor's possessory servant, and that the intention with which the lessee controls the thing is insufficient for the mandament. The lessee spoliates the lessor of his possession when he refuses to return the leased thing. The lessor may then employ counter-spoliation to retake possession in an extra-judicial manner, such as by remotely deactivating the thing, as happened in *Scania*.

Neither the South African possession theory nor the Constitution supports these claims. By evaluating the common law (specifically the distinction between possession and holdership, the legal-political function and the rule of law, the relation between co-possessors, the nature of a lease agreement vis-à-vis an agency agreement, and the intention required for the mandament) in light of the Constitution, I show that the outcome in *Scania* is to be applauded, at least regarding the three trucks that the applicant still had in its possession when the respondent deactivated them.

A note on Sonnekus's methodology is necessary before I evaluate the case. His analysis draws strongly on modern Dutch, Belgian, and German sources to analyse the decision and our possession theory. These sources undoubtedly shed light on our possession theory from a comparative perspective. However, they do not form part of Roman-Dutch law as received at the Cape.⁸⁸ Our Roman-Dutch authorities include the works of the great Dutch authors of the seventeenth century, some Dutch authors of the eighteenth century prior to codification in the Netherlands, and works of scholars from neighbouring countries, such as France, Germany, Italy, and Spain, produced during the existence of Roman-Dutch law.⁸⁹

⁸⁶ See Van der Merwe op cit note 2 at 110–11; Muller et al op cit note 2 at 320; Van der Walt op cit note 7 at 689–90; Kleyn op cit note 5 at 361–2 and the cases they cite.

⁸⁷ Delpont & Olivier op cit note 14 at 98–9; Kleyn ibid at 350–1, 355, 369–72; Middelberg op cit note 14 at 270, 279; Muller et al ibid at 321 and note 118; Van der Walt ibid at 690–1, 718–20, 724; Marais op cit note 11 at 173.

⁸⁸ Van der Walt op cit note 18 at 14–16; Kleyn ibid at 207–8.

⁸⁹ D H van Zyl *Geskiedenis van die Romeins-Hollandse Reg* (1979) 329–30ff, 345ff, 392–5ff, 491–2; Hahlo & Kahn op cit note 26 at 548–62. See also Eduard Fagan 'Roman-Dutch law in its South African historical context' in Zimmermann & Visser (eds) op cit note 8 at 41–5; J W Wessels 'The future of Roman Dutch law in South Africa' (1920) 37 *SALJ* 265 at 267ff. The greatest Roman-Dutch authors

The codification of Dutch law at the beginning of the nineteenth century marks the end of the development of Roman-Dutch law.⁹⁰ Indeed, Roman-Dutch law was abolished in Holland in 1809.⁹¹ Legal developments after this period in the Netherlands, and the neighbouring countries, were not received into our law.⁹²

In addition to the above foreign systems, Sonnekus relies heavily on Savigny to explain, and analyse, our possession theory. Although the scholarship of members of the historical school (of which Savigny was part) is strictly speaking not part of Roman-Dutch law,⁹³ it is regarded as part of ‘the last word, literally and figuratively, on Roman law as part of the great common-law system (“gemeines Recht”) of north-western Europe, whereof Roman-Dutch law was but a branch’.⁹⁴ It is trite that parts of Savigny’s work have been influential in South Africa.⁹⁵ Even so, not all components of his possession theory (particularly his view on possessory protection) were received into our law. I expand on this matter in part III(c)(iv) below.

I am not asserting that reliance on modern civil-law systems, or the work of scholars from the historical school, is problematic when analysing our law. The problem arises when one mainly relies on these sources to describe and evaluate our possession theory *to the exclusion of relevant South African material*. The sources of our possession law are the common law (as found in Roman-Dutch law), case law (where Roman-Dutch law was applied and developed by our courts), the Constitution,⁹⁶ and, to a lesser

for purposes of South African law, according to Van Zyl op cit note 89 at 492, are Grotius, Voet, Van Leeuwen, Vinnius, Antonius Matthaeus II, Groenewegen, Huber, Noodt, Van Bijkershoek, Van der Keessel and Van der Linden. The two last-mentioned authors are eighteenth century authors.

⁹⁰ Van Zyl ibid at 420, 491–2. See similarly Hahlo & Kahn ibid at 563–4, 567, 575ff.

⁹¹ Hahlo & Kahn ibid at 563–4.

⁹² To much the same effect are Van der Walt op cit note 18 at 14–15 and Leigh-Ann Kiewitz *Relocation of a Specified Servitude of Right of Way* (LLM dissertation, Stellenbosch University, 2010) 33–4.

⁹³ Kleyn op cit note 5 at 207–8. See for instance Hahlo & Kahn op cit note 26 at 561–2, who do not mention Savigny as one of the German scholars who influenced Roman-Dutch law.

⁹⁴ Kleyn ibid at 208, quoting from Hahlo & Kahn ibid at 498. See also Van Zyl op cit note 89 at 491–2. To much the same effect is Fagan op cit note 89 at 41–5.

⁹⁵ Kleyn ibid at 207–8; M Martinek & J Sonnekus ‘Friedrich Karl von Savigny (1779–1861) — Die lewe en werk van ’n beduidende Duitse juris en sy belang ook vir die Suid-Afrikaanse reg’ (2010) 16 *Fundamina* 211. See for example *Reck v Mills* 1990 (1) SA 751 (A); *Mankowitz* supra note 9; *Mans* supra note 11; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 (2) SA 464 (W); *Bisschop v Stafford* 1974 (3) SA 1 (A).

⁹⁶ ‘[A]ll law, including the common law, derives its force from the Constitution and is subject to constitutional control.’ See *Pharmaceutical Manufacturers Association*

degree, the works of South African scholars. Of key relevance are the many cases where courts have awarded the mandament to lessees.⁹⁷ Other important materials include the work of Van der Merwe, Van der Walt, and Kleyn, who made significant contributions to our possession theory.⁹⁸ One cannot simply ignore these sources when evaluating our possession theory. Sonnekus's methodology, which for the most part disregards the mentioned case law, the scholarship of these authors and the Constitution, is therefore questionable.

(ii) *The possession concept and possessory protection in South African law*

The mandament forms part of the possessory suit, where the merits are irrelevant.⁹⁹ Any rights, such as who has the stronger right to possession (*ius possidendi*), form part of the merits and may only be raised during the subsequent petitory proceedings.¹⁰⁰ The mandament is an 'extra-ordinary, robust and powerful remedy that may result in unfair outcomes'.¹⁰¹ Any perceived unfairness towards the respondent is therefore irrelevant under the mandament. Even so, the mandament neither condones unlawful physical control, nor does it provide long-term protection to such control relations.¹⁰² It merely restores the status quo ante pending a judicial determination of the parties' rights to the disputed thing during the subsequent petitory suit.¹⁰³

The 'possession' requirement for the mandament is potentially misleading. First, possession has at least six meanings in our law.¹⁰⁴ Secondly, the remedy protects civil possession (*possessio civilis*) and many instances of holdership (*possessio naturalis* or *detentio*).¹⁰⁵ Sonnekus, however, claims that only the lessor (who he calls a juridical possessor) has possession for purposes of the mandament, while the lessee (who is a holder) does not enjoy protection under the remedy. Sonnekus's understanding of juridical possession, which is similar to how Savigny interprets it, is at odds with how courts and scholars view civil possession. I return to this matter under the explanation of Savigny's possession theory in part III(c)(iii) below.

of SA: *In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 44. See also *Barkhuizen* supra note 53 para 35.

⁹⁷ See the discussion in part III(a) above.

⁹⁸ I rely on their scholarship throughout this article.

⁹⁹ Van der Merwe op cit note 2 at 120; Kleyn op cit note 5 at 344–6; Van der Walt op cit note 7 at 662; *Nienaber* supra note 9 at 1053; *Mankowitz* supra note 9 at 767G.

¹⁰⁰ Van der Walt *ibid* at 662.

¹⁰¹ Van der Merwe op cit note 2 at 120 (my own translation). See similarly *Nino Bonino* supra note 11 at 124–5.

¹⁰² Van der Walt op cit note 7 at 718.

¹⁰³ *Ibid*.

¹⁰⁴ Marais op cit note 11 at 163–4.

¹⁰⁵ Van der Walt op cit note 7 at 674n91 and 662–73.

Sonnekus's use of the terms 'possessory principal' and 'possessory servant' to refer to the control relations of the lessor and the lessee respectively is unusual. In fact, these terms are not even used in modern Dutch or Belgian law. One also does not encounter them in Savigny's classic work, namely *Das Recht des Besitzes*, on which Sonnekus draws. They correspond to the modern German possessory principal (*Besitzherr*) and possessory servant (*Besitzdiener*).¹⁰⁶ It is preferable to avoid these terms and rather to refer to these control relations in terms of accepted South African terminology, namely the indirect (or mediate) possessor (a lessor, for example) and the direct (or immediate) possessor (such as a lessee).¹⁰⁷ This is because of the conceptual and terminological inconsistencies that already plague our possession theory.¹⁰⁸

Sonnekus limits the mandament to what he calls juridical possession. This form of possession seems to be the same as civil possession, which is the type of possession necessary for acquisitive prescription.¹⁰⁹ However, this is not the case. I explain in part III(c)(iii) below how Sonnekus understands juridical possession. It is helpful to consider Van der Merwe's possession theory, which enjoys wide support amongst courts and scholars, to explain the mandament's scope.¹¹⁰ According to him, possession is a wide genus that includes both possession in the narrow sense (*possessio civilis*, which is translated as civil or juridical possession) and natural possession (*possessio naturalis* or *detentio*), which is also known as holdership.¹¹¹ The civil possessor physically controls a thing with the intention of an owner (*animus domini*), while the holder controls the thing with a lesser intention.¹¹² The holder recognises the stronger right of another person in the thing.¹¹³ Van der Walt suggests that possession in the wide sense be replaced with the term 'control', given the conceptual and terminological confusion that the various meanings of possession cause.¹¹⁴ He also

¹⁰⁶ Harm Peter Westermann *BGB — Sachenrecht* 12 ed (2012) 17 Rdn 36; Herbert Grziwotz, Alfred Keukenschrijver & Gerhard Ring *BGB — Sachenrecht* 3 ed (2012) 3 Rdn 8, 7 Rdn 1, 9 Rdn 15. See for example § 855 of the BGB, which regulates the position of the possessory servant.

¹⁰⁷ See the discussion in part III(c)(v) below.

¹⁰⁸ See generally A J van der Walt 'Die funksies en omskrywing van besit' (1988) 51 *THRHR* 276 (part 1) and 508 (part 2); Marais op cit note 11.

¹⁰⁹ Voet 44.3.9; Van der Merwe op cit note 2 at 273.

¹¹⁰ Van der Walt op cit note 7 at 616.

¹¹¹ Van der Merwe op cit note 2 at 95; Van der Merwe op cit note 8 para 72; Van der Walt ibid at 621–2, 631–2; Middelberg op cit note 14 at 268–70. See also *Albert Falls Power Co (Pty) Ltd v Goge* 1960 (2) SA 46 (N) at 48.

¹¹² Van der Merwe op cit note 8 paras 80 and 83; Van der Merwe op cit note 2 at 104–5, 109–11; Van der Walt ibid at 612–13, 891–2; Kleyn op cit note 5 at 365–75; Middelberg ibid at 278–80.

¹¹³ Van der Walt ibid at 891–2.

¹¹⁴ Van der Walt ibid at 10; E J Marais 'The South African possession theory revisited: A re-evaluation of the possession concept and possessory terminology' (2022) 85 *THRHR* 287 at 288ff.

recommends that the term ‘possession’ be reserved for civil possession only.¹¹⁵ To promote clarity, I use the terms ‘possession’ and ‘control’ interchangeably to refer to possession in the wide sense. I employ civil possession to refer to physical control *animo domini*, while using holder-ship to describe the control relation with a lesser intention.

Possession or control performs various functions in the law.¹¹⁶ Two of the main functions are the real function, which concerns the acquisition of ownership, and the legal-political function, which concerns protection under the mandament.¹¹⁷ Possession has a narrower meaning under the real function, namely civil possession,¹¹⁸ whilst having a broader meaning for the legal-political function.¹¹⁹ This is due to the purpose of the latter function, namely to protect the socio-legal order by discouraging persons from taking the law into their own hands.¹²⁰ Under this function, possession includes civil possession and (most instances of) holdership.¹²¹ Examples of holders who enjoy protection under the mandament are lessees,¹²² unlawful occupiers,¹²³ hire-purchasers,¹²⁴ depositaries,¹²⁵ and agents.¹²⁶ The requisite intention for the mandament is usually said to be the intention to obtain a benefit from one’s holding of a thing (*animus*

¹¹⁵ Van der Walt op cit note 108 at 511–12; Middelberg op cit note 14 at 268–70.

¹¹⁶ Van der Merwe op cit note 2 at 95; Van der Merwe op cit note 8 para 72; Kleyn op cit note 5 at 357; Delpont & Olivier op cit note 14 at 57, 66; A C van Schaick *Rechtsgevolgen en Functies van Bezit en Houderschap* 3 ed (2024) 123ff, 71ff (Dutch law); Johan van de Voorde ‘Bezit en verkrijgende verjaring’ in Vincent Sagaert, Joke Baeck, Nicolas Carette, Pascale Lecocq, Mathieu Muylle & Annelies Wylleman (eds) *Het nieuwe Goederenrecht* (2021) 163 at 171ff, 173ff, 178ff (Belgian law); Westermann op cit note 106 at 83 Rnd 4–5, 85 Rnd 7 (German law).

¹¹⁷ Van der Merwe op cit note 2 at 94–5; Van der Walt op cit note 7 at 5–6; Duard Kleyn ‘Besitsbeskerming en die besitsleer: ’n Reddingspoging’ (1991) 54 *THRHR* 21 at 24.

¹¹⁸ See Van der Merwe ibid at 106; Marais op cit note 11 at 158–60 and the sources cited there.

¹¹⁹ Van der Merwe ibid at 110–11, 125–6; Kleyn op cit note 5 at 299–300, 375; Mathews op cit note 14 at 179; Marais ibid at 161–2.

¹²⁰ Delpont & Olivier op cit note 14 at 98–9; Kleyn ibid at 350–1, 355, 369–72; Muller et al op cit note 2 at 321 and note 118; Van der Walt op cit note 7 at 690–1, 718–20, 724; Marais ibid at 173–4ff.

¹²¹ See Marais ibid at 162ff and the sources cited there.

¹²² *Nino Bonino* supra note 11 (land); *McLoughlin* supra note 54 (land); *Claassens* supra note 53 (movables); *Swanepoel* supra note 54 (movables). See also *Meyer* supra note 11 at 87–9, 95; *Rieseberg v Rieseberg* 1926 WLD 59 at 67.

¹²³ *Naidoo* supra note 2; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA); *Fredericks v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

¹²⁴ *Wicomb* supra note 40; *Herring* supra note 53.

¹²⁵ *McCallum v McCallum’s Trustee* 1910–1917 GWLD 414.

¹²⁶ *Muller v Muller* 1915 TPD 28. But see to the contrary *Mbuku v Mdinwa* 1982 (1) SA 219 (Tk) and *Nel* supra note 13.

ex re commodum acquirendi).¹²⁷ As mentioned earlier, the consensus amongst many South African scholars is that the mandament's purpose justifies granting it to all holders.¹²⁸

Sonnekus's assertion that the mandament is unavailable to the lessee is unpersuasive when one considers the above reasons. He disregards the fact that possession performs various functions in the law, and that it has different meanings under them. It also goes against the long line of cases where courts held that the lessee is entitled to the mandament, and academic opinion that the remedy should even be available to an employee and quasi-employee. The applicant in *Scania* has possession for purposes of the legal-political function (in the form of holdership) despite not having possession under the real function (in the form of civil possession). Swanepoel AJ therefore hit the mark by granting the mandament to the lessee in that case.

The type of intention necessary for possessory protection and the prohibition of co-possession feature strongly in Sonnekus's argument for denying the mandament to the lessee. This reasoning is analogous to how possessory protection worked in Roman law and in Savigny's possession theory. It is, thus, instructive to consider these two sources briefly.

(iii) *Possessory protection in Roman law and in Savigny's possession theory*

Possession in Roman law stems from two sources, namely the civil law (ius civile) and the praetorian law (ius honorarium).¹²⁹ The ius honorarium spawned two types of remedies to protect possession, namely the actio Publiciana and the possessory interdicts.¹³⁰ The actio Publiciana protected, amongst others, civil possessors in whose favour usucapio (the ancient precursor to acquisitive prescription)¹³¹ was still running.¹³² It had several requirements, namely civil possession, bona fides (good faith) and iustus titulus (just title, such as a purchase agreement).¹³³ It protected possession as a relative right and not as a purely factual state.¹³⁴

¹²⁷ Van der Merwe op cit note 2 at 106; Van der Walt op cit note 7 at 687–9; Muller et al op cit note 2 at 320; Yeko supra note 11 at 739E. I return to the type of intention required for the mandament in part III(c)(vi) below.

¹²⁸ See the discussion in part I above.

¹²⁹ Max Kaser *Roman Private Law* 4 ed (1984) 104; F Schulz *Classical Roman Law* (1954) 428–9.

¹³⁰ Kaser ibid at 106; Schulz ibid at 429.

¹³¹ For a discussion see Ernst Jacobus Marais *Acquisitive Prescription in View of the Property Clause* (LLD thesis, Stellenbosch University, 2011) 18ff.

¹³² Kaser op cit note 129 at 143; W W Buckland *A Textbook of Roman Law from Augustus to Justinian* 3 ed (1963, rev P Stein) 192.

¹³³ Kaser ibid; Buckland ibid.

¹³⁴ Buckland ibid at 192–3; Schulz op cit note 129 at 376–7.

The possessory interdicts, in turn, protected possession as a factual relation and required neither bona fides nor iustus titulus.¹³⁵ They protected so-called interdictal possession (possessio ad interdicta), which included civil possession.¹³⁶ As a matter of principle, possessores naturales or detentores (whom we today call holders) did not enjoy protection under these interdicts.¹³⁷ Examples of such holders were the depositary, the borrower for use, the mandatary (or agent), the negotiorum gestor, the contractor, and, crucially, the lessee.¹³⁸ A reason for withholding the interdicts from holders was because only the possessor ad interdicta had possession, which he held through the actions of the holder.¹³⁹ Thus, if a third party dispossessed a holder (for example a lessee), he had to approach the lessor, as the possessor ad interdicta, to institute the relevant possessory interdict to regain possession of the leased thing.¹⁴⁰

Over time, the praetor extended the interdicts to a limited number of holders, such as the pledgee, the perpetual lessee (emphyteuta), and the stakeholder (sequester).¹⁴¹ Unlike the emphyteuta, however, the lessee did not enjoy protection under these interdicts, despite these two persons having broadly similar use-relations regarding land.¹⁴² Interestingly, the interdictum unde vi (which is the closest possessory interdict to the mandament) was later awarded to more and more holders, and it seems that it was eventually even available to the lessee.¹⁴³

Savigny's possession theory, in turn, draws heavily on the Roman position discussed above. The physical relation between a person and a thing (which relation he calls detention¹⁴⁴) forms the basis of possession (which he calls possessio), and lies at the heart of the possession theory.¹⁴⁵ However, detention on its own does not produce legal consequences.¹⁴⁶ Only juridical possession (juristische Besitz) produces such consequences, namely under usucapio and the possessory interdicts.¹⁴⁷ This is the type of possession Sonnekus has in mind when he refers to juridical possession.

The two forms of juridical possession are possessio civilis and possessio ad interdicta.¹⁴⁸ Usucapio requires possessio civilis, which entails detention

¹³⁵ Kleyn op cit note 5 at 37–8.

¹³⁶ Kaser op cit note 129 at 106; Schulz op cit note 129 at 429.

¹³⁷ Kaser ibid at 107; J A C Thomas *Textbook of Roman Law* (1976) 139.

¹³⁸ Kaser ibid; Schulz op cit note 129 at 431; Buckland op cit note 132 at 196.

¹³⁹ Kaser ibid; Thomas op cit note 137 at 139.

¹⁴⁰ Kaser ibid; Thomas ibid.

¹⁴¹ Kaser ibid at 106–7; Schulz op cit note 129 at 429–30.

¹⁴² Marais op cit note 11 at 170.

¹⁴³ Kleyn op cit note 5 at 26–8.

¹⁴⁴ Savigny op cit note 11 at 2–3, 39, 71.

¹⁴⁵ Ibid at 2–3, 39.

¹⁴⁶ Ibid at 3.

¹⁴⁷ Ibid at 16–17.

¹⁴⁸ Ibid at 40.

and additional requirements, such as *bona fides* and *iustus titulus*.¹⁴⁹ This is known as qualified possession.¹⁵⁰ *Possessio ad interdicta*, which Savigny simply calls *possessio*, requires only detention.¹⁵¹ This type of possession is known as unqualified possession.¹⁵² Both forms of juridical possession, namely qualified and unqualified possession, enjoy protection under the possessory interdicts.¹⁵³ However, not *all* forms of unqualified possession enjoy protection under these interdicts. Unqualified possession that does not enjoy such protection is known as *possessio naturalis*.¹⁵⁴ *Possessio naturalis*, which entails only detention (just like unqualified possession), produces no legal consequences.¹⁵⁵ Lessees and borrowers are examples of *possessores naturales* and, accordingly, do not enjoy protection under the possessory interdicts.¹⁵⁶

Mere detention is insufficient to qualify as juridical possession. Another element is necessary, namely the intention (*animus*).¹⁵⁷ The most basic *animus* is the *animus possidendi*, which is the intention of exercising ownership.¹⁵⁸ It includes the *animus domini*.¹⁵⁹ The *animus domini*, the intention of an owner, is present when the possessor intends to exercise ownership for himself.¹⁶⁰ Examples of such possessors are owners and thieves.¹⁶¹ However, if the possessor intends to exercise ownership *on behalf of another*, then such a possessor does not have the *animus possidendi* and, hence, does not have juridical possession.¹⁶² Savigny expressly mentions the lessee as a possessor who has this intention and he, therefore, does not have juridical possession.¹⁶³ The lessor has juridical possession, while the lessee (who has only detention), has non-juridical possession.¹⁶⁴ This latter type of possession produces no legal consequences.¹⁶⁵

Savigny had to explain why the law regards certain possessors who do not have the *animus domini* (such as the pledgee and the *emphyteuta*)

¹⁴⁹ Ibid at 59.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid at 39.

¹⁵³ Ibid at 83.

¹⁵⁴ Ibid at 39–40.

¹⁵⁵ Ibid at 39–40, 61. *Possessio naturalis* is known under several names, namely *esse in possessione*, *tenere*, and *naturaliter possidere*: see Savigny *ibid* at 54.

¹⁵⁶ Ibid at 56–7.

¹⁵⁷ Ibid at 71–2.

¹⁵⁸ Ibid at 72.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid at 72–3.

¹⁶¹ Ibid.

¹⁶² Ibid. It is this intention, namely the intention to exercise ownership on behalf of another, which Sonnekus calls the *animus tenendi*: see part III(b) above.

¹⁶³ Ibid at 73.

¹⁶⁴ Ibid at 80.

¹⁶⁵ Ibid.

as still having juridical possession, as they enjoy protection under the possessory interdicts.¹⁶⁶ He formulated the notion of derivative possession to solve this conundrum. It entails that some possessors, such as pledgees and emphyteutae, derive their possession from the original possessor (ie the owner, who has the *animus domini*), and this is why they have juridical possession.¹⁶⁷ Here the original possessor transfers the right of possession (*ius possessionis*) to the derivative possessor, who then physically controls the thing with the *animus possidendi*.¹⁶⁸ The derivative possessor derives his *animus possidendi* (which is sufficient for purposes of juridical possession) from the *ius possessionis*, which the original possessor transfers to him.¹⁶⁹

Savigny qualifies the notion of derivative possession by stating that it is only possible in cases where positive law permits it.¹⁷⁰ This 'positive law' position is found in classical Roman law regarding the availability of the possessory interdicts. This is why Savigny specifically declares that lessees, borrowers and usufructuaries are only *possessores naturales* who do not have juridical possession (in the form of *possessio ad interdicta*).¹⁷¹ This is why, in turn, they do not have access to the possessory interdicts. The prohibition of co-possession, which Savigny regards as an absolute rule, features strongly in his argument.¹⁷² The lessee has only factual control (or detention) without the requisite intention to have juridical possession.¹⁷³ The lessor and lessee cannot be co-possessors of the leased thing, as only the juridical possession of the lessor (and not the non-juridical possession of the lessee) enjoys protection under the possessory interdicts.¹⁷⁴ Sonnekus uses this line of reasoning to deny the mandament to the lessee.

Roman-Dutch authors such as Grotius, Voet, Huber and Van der Linden generally continued the Roman trend of limiting possessory protection to civil possessors.¹⁷⁵ In fact, Grotius and Voet explicitly exclude the lessee from such protection.¹⁷⁶ Tension developed between this restrictive approach towards possessory protection and the *condictio ex canone reintegranda* in Canon law.¹⁷⁷ This *condictio*, in which the

¹⁶⁶ See for instance Savigny *ibid* at 78–80, 83.

¹⁶⁷ *Ibid* at 80.

¹⁶⁸ *Ibid* at 80–1.

¹⁶⁹ *Ibid* at 80.

¹⁷⁰ *Ibid* at 81.

¹⁷¹ *Ibid* at 83.

¹⁷² *Ibid* at 125.

¹⁷³ See *ibid* at 114–15ff.

¹⁷⁴ *Ibid*.

¹⁷⁵ Grotius 2.2.2–3; Voet 41.2.1, 43.16.3; Huber *HR* 5.10.1; Van der Linden *Koopman's Handboek* 1.13.1.

¹⁷⁶ Grotius 2.2.3 and Voet 43.16.3.

¹⁷⁷ Kleyen *op cit* note 5 at 356.

mandament has its origin, followed a liberal approach towards possessory protection, namely by affording protection to all holders.¹⁷⁸ It is, therefore, unsurprising that the way in which the courts developed the mandament in South African law abolished the Roman-law view that holders are — in principle — excluded from possessory protection.¹⁷⁹

(iv) *The prohibition of co-possession, the legal-political function, and the rule of law*

It appears illogical, even unfair, that the possessory interdicts were available only to some, not all, holders.¹⁸⁰ Kleyn convincingly shows — contrary to Savigny's possession theory — that the distinction between protected *possessio ad interdicta* and unprotected *possessio naturalis* (or holdership) does *not* lie in the intention element.¹⁸¹

Savigny opines that only civil possessors and certain derivative possessors enjoy possessory protection.¹⁸² For him, the type of intention for possessory protection must be as close as possible to the *animus domini*.¹⁸³ Yet, one of the greatest shortcomings of his theory is that it does not satisfactorily explain why possessory protection is limited to derivative possessors (such as pledgees and *emphyteutae*) to the exclusion of other possessors who stand in similar factual control relations to things, such as lessees.¹⁸⁴ One reason for this difficulty may be that he confuses the real and legal-political functions of possession in his discussion of possessory protection.¹⁸⁵ Another is his adherence to the prohibition of co-possession.

Remarkably, Savigny's view of possessory protection did not displace the *actio spoli*,¹⁸⁶ which was used in German legal practice at the time he wrote.¹⁸⁷ The *actio spoli*, which is comparable to the mandament,

¹⁷⁸ Kleyn *ibid*; Price *op cit* note 10 at 55.

¹⁷⁹ Kleyn *ibid* at 356–7.

¹⁸⁰ Kleyn *op cit* note 117 at 33.

¹⁸¹ *Ibid*.

¹⁸² Savigny *op cit* note 11 at 83; Van der Walt *op cit* note 7 at 663; Sonnekus & Neels *op cit* note 14 at 133.

¹⁸³ Van der Walt *op cit* note 7 at 321.

¹⁸⁴ Van der Merwe *op cit* note 2 at 108; Van der Merwe *op cit* note 8 para 83; Delpont & Olivier *op cit* note 14 at 66–7; Van der Walt *ibid* at 321–2; Muller *et al op cit* note 2 at 319n98; R W M Dias *Jurisprudence* 3 ed (1970) 338–9. Sonnekus & Neels *op cit* note 14 at 133 describe Savigny's notion of derivative possession as an embarrassing product (*verleentheidsproduk*), and think that the *animus domini* is ill-suited as the main requirement for possessory protection.

¹⁸⁵ Van der Walt *ibid* at 321–2.

¹⁸⁶ Which flows from the *condictio ex canone redintegranda*. See the sources in the next footnote below.

¹⁸⁷ See Kleyn *op cit* note 5 at 215–16 and the sources he cites. See also Raffaele Caterina 'The evolution of possessory actions in France and Italy' in Descheemaeker *op cit* note 66 at 105; James Gordley & Ugo Mattei 'Protecting possession' (1996) 44 *American Journal of Comparative Law* 293 at 306.

applied to a broader range of holders and included lessees.¹⁸⁸ Significantly, the compilers of the German Civil Code (Bürgerliches Gesetzbuch or BGB) rejected Savigny's possession theory and instead opted for Jhering's one, which focuses more on the detention (or physical) element of possession than on the intention element.¹⁸⁹ The BGB expressly affords possessory protection to the lessee, which it regards as a direct possessor (unmittelbarer Besitzer).¹⁹⁰ The lessee even enjoys such protection as against the lessor, who is the indirect possessor (mittelbarer Besitzer).¹⁹¹ In *Meyer v Glendinning*,¹⁹² the former Cape of Good Hope Provincial Division (now the Western Cape High Court, Cape Town) explicitly rejected Savigny's argument for limiting possessory protection to those with juridical possession and stated, albeit obiter, that a lessee enjoys protection under the mandament.¹⁹³ Sonnekus's assertion, namely that the mandament protects only juridical possession (as seen in part III(b) above) is therefore unpersuasive.

Kleyn convincingly shows that the relevant Roman texts do not set a specific intention as a requirement for the possessory interdicts.¹⁹⁴ The intention features only in the context of the acquisition, retention and loss of possession.¹⁹⁵ The praetor's extending the interdicts to some, though not all, holders occurred casuistically and was due to considerations of practice and convenience; it did not occur in terms of theoretical principles.¹⁹⁶ One of the reasons that the praetors did not (or rather, could not) award these interdicts to most holders was because of the prohibition of co-possession ('the prohibition').¹⁹⁷

The prohibition entails that two persons cannot possess or control the same thing in the same way simultaneously.¹⁹⁸ Its purpose was to prevent the running of usucapio in cases where acquisition through this original

¹⁸⁸ See Kleyn op cit note 5 at 217 and the sources he cites.

¹⁸⁹ Caterina op cit note 187 at 105.

¹⁹⁰ See § 868 of the BGB, read with § 861 of the BGB. See Caterina ibid at 105; Sjeff van Erp & Bram Akkermans (eds) *Cases, Materials and Text on Property Law* (2012) 104–5; Grziwotz et al op cit note 106 at 3 Rdn 8; Harm Peter Westermann, Karl-Heinz Gursky & Dieter Eickmann *Sachenrecht* 8 ed (2011) 172 Rdn 4. The lessee is a possessor who possesses on behalf of another (Fremdbesitzer) in German law, and not a possessory servant (Besitzdiener). See Westermann op cit note 106 at 17 Rdn 35–6; Grziwotz et al op cit note 106 at 41 Rdn 8, 42 Rdn 9. The possessory servant does not enjoy possessory protection under § 861 of the BGB. See Van Erp & Akkermans ibid at 104–5.

¹⁹¹ Westermann et al ibid at 172 Rdn 4.

¹⁹² Supra note 11.

¹⁹³ Ibid at 95–6.

¹⁹⁴ Kleyn op cit note 117 at 33.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid. See similarly Emerich in Descheemaker op cit note 66 at 39.

¹⁹⁷ Kleyn op cit note 117 at 31–3.

¹⁹⁸ Ibid. See also Thomas op cit note 137 at 142.

mode of acquisition of ownership would be undesirable, such as when a holder (a lessee, for instance) had factual custody of a thing with the owner's permission.¹⁹⁹ The lessor exercised possession (in the form of *possessio civilis*) through the lessee, who had *possessio naturalis* or *detentio*.²⁰⁰ Even though the lessee had the corpus or factual custody of the leased thing, the lessor retained *possessio civilis* through his intention only (*solo animo*).²⁰¹ Thus, the lessee had only holdership, which could not lead to acquisition through *usucapio*.²⁰² The lessor, in turn, had possession for purposes of *usucapio*.²⁰³ The Romans were unable to distinguish possession for *usucapio* from possession for purposes of possessory protection, as they did not distinguish between the different functions of possession.²⁰⁴ *Usucapio* could run in favour of the lessee if the lessor and lessee both had possession in Roman law, which had to be prevented. The Romans used the (blunt) instrument of the prohibition to achieve this goal. An unfortunate consequence of this method was that it also denied the possessory interdicts to most holders, including the lessee.

The prohibition had a constraining effect in practice, which forced the Romans to recognise exceptions to it.²⁰⁵ For example, the law regarded the pledgor as having possession for purposes of *usucapio*, while the pledgee had possession for purposes of the possessory interdicts.²⁰⁶ Another example, according to some jurists, is that both the gratuitous lender (*precario dans*) and the gratuitous borrower (*precario tenens*) had possession for purposes of possessory protection.²⁰⁷ Kleyn, relying on Van Oven, argues that the prohibition loses much of its force once the law recognises the different functions of possession.²⁰⁸

Van Oven, a twentieth century Dutch scholar, made a seminal contribution about the different functions of possessory protection, namely the real and legal-political functions. His discussion of the real function of possessory protection must be carefully distinguished from the real function of possession in South African law, which deals with acquisition of ownership.²⁰⁹ He argues that the rationale for the prohibition becomes

¹⁹⁹ Paul van Warmelo *An Introduction to the Principles of Roman Civil Law* (1976) 73–4; Thomas op cit note 137 at 142; J C van Oven *Bezitsbescherming en hare Functies* (unpublished LLD thesis, University of Amsterdam, 1905) 158.

²⁰⁰ Kleyn op cit note 5 at 356.

²⁰¹ Van Warmelo op cit note 199 at 74.

²⁰² Ibid.

²⁰³ Kleyn op cit note 5 at 356.

²⁰⁴ Kleyn op cit note 117 at 32.

²⁰⁵ Ibid at 32–3.

²⁰⁶ Ibid at 32.

²⁰⁷ See Kleyn ibid and the sources he cites.

²⁰⁸ Kleyn op cit note 117 at 33, citing Van Oven op cit note 199 at 96.

²⁰⁹ Van der Walt op cit note 108 at 283–5.

redundant when the law distinguishes the two functions of possessory protection.²¹⁰ He thinks that this prohibition is responsible for much confusion in the possession theory.²¹¹

The law protects possession as a relative right under the real function of possessory protection, which type of protection is comparable to the *actio Publiciana*.²¹² Here, qualified possession, in the form of civil possession, is required.²¹³ The lessee does not enjoy protection under this function because he is merely a holder.²¹⁴

The legal-political function, by contrast, aims to protect the socio-legal order by forcing parties to submit their possessory disputes to a court of law, and not to resolve them through extra-judicial or unlawful self-help.²¹⁵ Here the law protects unqualified possession in the form of a factual state, and not possession as a right.²¹⁶ Here it is justified to protect a wider range of control relations when compared to the real function.²¹⁷ Van Oven specifically mentions that the lessee, at least in the context of movables, should enjoy protection under this function against unlawful dispossession, even as against the lessor.²¹⁸ Significantly, he thinks that the lessee does not engage in extra-judicial self-help by refusing to hand back the thing to the lessor after his *ius possidendi* lapsed.²¹⁹ This is because such refusal does not undermine public order.²²⁰

Van Oven further states that it is unwise to use one concept, namely possession, for the real and legal-political functions of possessory protection once the law distinguishes between these functions.²²¹ Such use causes confusion as to whether possessory protection protects possession as a right (ie civil possession) or whether it protects possession as a mere fact (all forms of control, including holdership).²²² This line of reasoning features strongly in Van der Walt's argument, namely that the law should use 'control' instead of 'possession' for possession in the wide sense, and that the term 'possession' should only be used to refer to civil possession.²²³

²¹⁰ Van Oven op cit note 199 at 96.

²¹¹ Ibid. Compare Savigny op cit note 11 at 112–13, where he states that this prohibition influences every part of the possession theory.

²¹² Van Oven op cit note 199 at 13–15, 50, 58.

²¹³ Ibid at 13–14, 141–6.

²¹⁴ Ibid at 141–6.

²¹⁵ Ibid at 14–16, 159–61.

²¹⁶ Ibid at 160.

²¹⁷ Ibid at 159–61.

²¹⁸ Ibid at 169.

²¹⁹ Ibid at 165.

²²⁰ Ibid.

²²¹ Ibid at 19–20.

²²² Ibid at 21–22ff.

²²³ See Van der Walt op cit note 108. For an analysis of the advantages of Van der Walt's control-based approach see Marais op cit note 114.

Sonnekus has the real function of possessory protection in mind when he states that the lessee (and, thus, the applicant in *Scania*) does not have possession for purposes of the mandament. Dutch law, in his view, confirms that the lessee is a holder and, hence, does not enjoy protection under the mandament: ‘The holder ... does not have the possibility, in terms of Dutch law, to invoke a real action (*goederenrechtelijke actie*) against involuntary loss of his holdership.’²²⁴ Reference to the real action refers to the real function of possessory protection under art 3:125.1–2 of the Dutch Civil Code (*Burgerlijk Wetboek* or BW),²²⁵ and not the legal-political function under art 3:125.3 of the BW. The latter provision, to which Sonnekus does not refer, encapsulates the legal-political function.²²⁶ All holders, including lessees, enjoy protection against unlawful self-help under this provision.²²⁷ Van Schaick describes this provision as follows:

‘Both the [civil] possessor and the holder can prevent a disturbance of the exercise of factual control that he has over property, such as with undesirable use or interference with a thing. Both can claim restoration of the status quo ante, and prohibit any further interferences, in terms of a claim based on an unlawful act [or delict] (articles 3:125.3 and 6:162 BW). The [civil] possessor and holder can institute this action against all parties, even those who have the right to terminate the [civil] possession or holdership but who achieves such termination though unlawful self-help.’²²⁸

An unlawful interference with possession or control (known as holdership in the wide sense (*houderschap in ruime zin*) in Dutch law) constitutes a delict under art 6:162 of the BW.²²⁹ The law protects possession as a factual relation under article 3:125.3 of the BW and not as a relative right in terms of article 3:125.1–2 of the BW.²³⁰ The legal-political protection that the holder enjoys under art 6:162 of the BW, read with art 3:125.3 of the BW, is of similar efficacy to the real protection enjoyed by the (civil) possessor under art 3:125.1–2 of the BW.²³¹

²²⁴ Sonnekus op cit note 17 at 103, quoting A C van Schaick *Rechtsgevolgen en Functies van Bezit en Houderschap* 2 ed (2014) 81 (my own translation).

²²⁵ See Van Schaick op cit note 224 at 81–2 and compare 71–3.

²²⁶ S E Bartels & A I M van Mierlo *Asser 3 — Algemeen Goederenrecht* 17 ed (2022) para 181; H H Runia *Bescherming van Bezit* (LLD thesis, University of Groningen, 2016) 421–3.

²²⁷ Bartels & Van Mierlo *ibid* para 181; Van Schaick op cit note 116 at 71.

²²⁸ Van Schaick op cit note 224 at 71 (my own translation). See similarly Van Schaick op cit note 116 at 71.

²²⁹ Van Schaick op cit note 224 at 71; Bartels & Van Mierlo op cit note 226 para 181.

²³⁰ Van Schaick op cit note 116 at 72; Runia op cit note 226 at 412–7; Bartels & Van Mierlo *ibid* para 183.

²³¹ Runia *ibid* at 386ff.

The mandament promotes the legal-political function in South Africa.²³² This function explains why courts have held that contractual undertakings allowing one party to retake control of a thing from another extra-judicially are void for being contrary to public policy.²³³ It also justifies extending the mandament to all physical controllers who do not want to give up possession or control of the thing.²³⁴ Consequently, all holders should be allowed to invoke this remedy.²³⁵ Swanepoel AJ was therefore justified in awarding the mandament to the applicant in *Scania*. Dutch law, which protects all holders under art 3:125.3 of the BW, including lessees, supports this argument.²³⁶ Given that the legal-political function does not distinguish between civil possession and holdership, the *neminem sibi ipsum causam possessionis mutare posse maxim* has no role to play under this function. This maxim is more at home under the real function of possession, where it prevents the running of acquisitive prescription in favour of holders.²³⁷

In *Ngqukumba v Minister of Safety and Security*,²³⁸ Madlanga J (on behalf of a unanimous Constitutional Court) held that the mandament is ‘deeply rooted in the rule of law’.²³⁹ This ruling confirms that our law adheres to the legal-political function of possession. The rule of law (and, hence, the mandament) shares close links with s 34 of the Constitution, namely the right to have access to courts.²⁴⁰

²³² *Nino Bonino* supra note 11 at 122, 125; *Curatoren* supra note 11 at 54; *Meyer* supra note 11 at 87, 89; *Yeko* supra note 11 at 739G; *Tswelopele* supra note 123 para 21; *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC) para 12. See also Van der Merwe op cit note 2 at 93; Van der Merwe op cit note 8 para 93; Kleyn op cit note 5 at 357; Muller et al op cit note 2 at 321; Van der Walt op cit note 7 at 666–72; Price op cit note 10 at 107–8. The real function of possessory protection enjoys little support. See Van der Walt op cit note 7 at 667 and the sources he cites.

²³³ Van der Walt *ibid* at 671–2. See for instance *Graceful Blessings* supra note 53 paras 50–1, 60–4; *Barkhuizen* supra note 53 para 54; *Chief Lesapo* supra note 53 para 11; *Van Zyl* supra note 53 para 10.

²³⁴ Van der Walt *ibid* at 714, 718; Price op cit note 10 at 107–8; Van Oven op cit note 199 at 159. To much the same effect is *Meyer* supra note 11 at 89.

²³⁵ Van der Walt *ibid* at 714.

²³⁶ For a contrary view see B van Schaick ‘Blokkeerbevoegdheden: Digitale eigenrichting’ 2024 *Tijdschrift voor Privaatrecht* 899, who argues that the *Scania* case was incorrectly decided from the perspective of Dutch law. I am indebted to Prof Bert van Schaick for bringing this article to my attention.

²³⁷ See for instance Voet 41.2.13, who discusses the maxim with reference to *usucapio*. See also B Hoops & E J Marais ‘Het verjaringsbos weer door de bomen van bezitsverkrijging zien’ (2017) 148 *Weekblad voor Privaatrecht, Notariaat en Registratie* 213.

²³⁸ Supra note 232.

²³⁹ *Ibid* para 12.

²⁴⁰ *Barkhuizen* supra note 53 para 31; *Bernstein v Bester* 1996 (2) SA 751 (CC) para 105; *Chief Lesapo* supra note 53 para 1. See also Dennis Davis ‘Access to courts’

Possessory disputes must be resolved through applying the property-law rules governing the mandament, which means they fall under the ambit of this constitutional provision. In *Barkhuizen v Napier*,²⁴¹ Ngcobo J held that s 34 forms part of public policy in private law and is, therefore, applicable to private contractual relations.²⁴² The provision thus has indirect horizontal application²⁴³ and, accordingly, applies in a case like *Scania*. It places negative obligations on private persons by requiring them to respect the right.²⁴⁴ As seen earlier, public policy featured prominently in Swanepoel AJ's ruling that the condition authorising the respondent to deactivate the trucks remotely without a court order is void. It is therefore helpful to consider the possible s 34 implications in a case like *Scania*.

*Chief Lesapo v North West Agricultural Bank*²⁴⁵ concerned a legislative provision that authorised the first respondent (a bank) to decide whether it has an enforceable claim against a debtor, upon which it could seize such debtor's property and sell it by way of public action, all without recourse to a court of law. The Constitutional Court held that such a provision amounted to self-help, which is contrary to s 34. Mokgoro J, in a unanimous decision, cited *Nino Bonino* to rule that legal subjects may not seek remedies through self-help.²⁴⁶ Such extra-judicial conduct is 'inimical to a society in which the rule of law prevails'.²⁴⁷ She described s 34 as 'foundational to the stability of an orderly society' and as being 'a bulwark against vigilantism, and the chaos and anarchy which it causes'.²⁴⁸ Proscribing self-help protects an individual 'against arbitrary

in M H Cheadle, D M Davis & N R L Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2024) at 28-1; Kevin Iles 'Access to courts' in Iain Currie & Johan de Waal (eds) *The Bill of Rights Handbook* 6 ed (2013) 711. Section 34 stipulates that '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. For in-depth analyses of this fundamental right, and references to case law, see Jason Brickhill & Adrian Friedman 'Access to courts' in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 11) ch 59.

²⁴¹ Supra note 53.

²⁴² Ibid paras 33-4.

²⁴³ Brickhill & Friedman op cit note 240 at 59-13. Langa CJ (in *Barkhuizen* ibid para 186) disagrees with Ngcobo J's view that s 34 applies only indirectly to the dispute via public policy. For criticism of this part of Ngcobo J's decision see Stu Woolman 'The amazing, vanishing Bill of Rights' (2007) 124 *SALJ* 762.

²⁴⁴ Brickhill & Friedman ibid.

²⁴⁵ Supra note 53.

²⁴⁶ Ibid para 11.

²⁴⁷ Ibid.

²⁴⁸ Ibid para 22 (footnote omitted), quoted with approval in *Barkhuizen* supra note 53 para 32. To much the same effect is *S v Makwanyane* 1995 (3) SA 391 (CC) para 168.

and subjective decisions and conduct of an adversary'.²⁴⁹ It ensures that peaceful mechanisms exist to resolve disputes.²⁵⁰ Furthermore, it prevents the creditor from being a judge in his own cause,²⁵¹ which is exemplified in the maxim *nemo iudex in sua causa*.²⁵²

Self-help would be permissible only if there is good reason for it, as per s 36 of the Constitution.²⁵³ Yet, the scope for justifying self-help becomes less the greater the potential of a dispute for causing social conflict.²⁵⁴ It is hard to think of disputes which have more potential to cause such conflict than possessory ones, *Scania* being an example.²⁵⁵

Similar reasoning applies to agreements which permit creditors to seize²⁵⁶ property in the possession (or control) of debtors — should they be in default — without court intervention (and without their permission). These cases are comparable to *Scania*. Courts have held that these agreements are contrary to public policy, as they permit self-help contrary to s 34.²⁵⁷ Such conduct amounts to unlawful spoliation.²⁵⁸ A creditor may constrain a debtor, or his property, only if the creditor had recourse to a court of law.²⁵⁹

The above reasons, which Swanepoel AJ did not consider, bolster his findings in *Scania* that the mandament is available to the applicant, and that the contractual undertaking permitting the respondent to deactivate the trucks remotely without a court order is against public policy and therefore void. The legal-political function justifies granting the mandament to a lessee like the applicant in the case. Furthermore,

²⁴⁹ *Chief Lesapo* *ibid* para 18.

²⁵⁰ *Ibid* para 22 (footnote omitted), quoted with approval in *Barkhuizen* *supra* note 53 para 32. See similarly *First National Bank of South Africa Ltd v The Land and Agricultural Bank of South Africa* 2000 JDR 0387 (O) paras 8–9. To much the same effect is *Makwanyane* *supra* note 248 para 168.

²⁵¹ *Chief Lesapo* *ibid* para 20.

²⁵² No one may be a judge in one's own case.

²⁵³ *Chief Lesapo* *supra* note 53 para 12.

²⁵⁴ *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) para 61, referred to with approval in *Barkhuizen* *supra* note 53 para 32.

²⁵⁵ See for instance *Chief Lesapo* *supra* note 53 and *Zondi* *ibid*. Brickhill & Friedman *op cit* note 240 at 59–107 agree.

²⁵⁶ Seizure includes dispossession and acts whereby the creditor prevents the debtor from using and enjoying the thing. I extrapolate this interpretation from the meaning of spoliation: see the discussion in part I above.

²⁵⁷ See *Van Zyl* *supra* note 53 para 10, citing *Nino Bonino* *supra* note 11; *First National Bank* *supra* note 250 paras 8–9; *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) para 7. See similarly *Juglal NO v Shoprite Checkers (Pty) Ltd* 2004 (5) SA 248 (SCA) para 9. See also Reghard Brits *Real Security Law* (2016) 213. See further Brickhill & Friedman *op cit* note 240 at 59–33 to 59–38; Brits *ibid* at 170ff. To much the same effect is *Bezuidenhout v Marais* 1915 OPD 134 at 138.

²⁵⁸ Brits *ibid* at 120.

²⁵⁹ See for instance *Chief Lesapo* *supra* note 53 para 16; *De Lange v Smuts NO* 1998 (3) SA 785 (CC) paras 19–20, 31.

permitting the respondent extra-judicially to deactivate the trucks in the applicant's possession undermines the rule of law and is at odds with public policy, seeing that it contravenes the applicant's right to have access to the courts. Sonnekus's assertion that the respondent's conduct accords with public policy is therefore unpersuasive.²⁶⁰ Lessors must first obtain a court order before remotely deactivating a thing in the hands of a lessee. Furthermore, as seen in part I above, spoliation includes acts whereby the spoliator prevents the spoliatus from using and enjoying the thing. It follows that the respondent spoliated the applicant of its possession or control of the trucks when it deactivated them.

(v) *Recognising co-possession and the availability of the mandament as between co-possessors*

Case law has not expressly decided whether the prohibition on co-possession applies in our law.²⁶¹ Voet recognises co-possession and Grotius accepts that it is possible.²⁶² Even the Romans recognised it by way of their exceptions to this prohibition.²⁶³ The former Appellate Division of the Supreme Court (now the Supreme Court of Appeal) expressly recognised co-possession in the form of indirect (or mediate) possession,²⁶⁴ and many cases simply assume that co-possession is possible.²⁶⁵ There is a clear need to recognise co-possession in our law, given that the prohibition no longer satisfies the needs of modern practice.²⁶⁶

One of the manifestations of co-possession concerns the traditional possessor–holder relationship, such as between a lessor and a lessee.²⁶⁷ Here the lessee, who has holdership in the form of direct (or immediate) control, exercises factual custody over the thing, while the lessor retains civil possession, in the form of indirect (or mediate) control, through the actions of the lessee.²⁶⁸ Both the lessor and the lessee, as co-possessors, are possessors or controllers for purposes of the mandament as regards third

²⁶⁰ Sonnekus op cit note 17 at 102.

²⁶¹ H van Oosten *Die Omskrywing en Funksies van die Fisiese Beheerelement in die Sakereg* (unpublished LLD thesis, UNISA, 1995) 376.

²⁶² Voet 41.2.5; Grotius 3.37.1–3.

²⁶³ Kleyn op cit note 5 at 358; Delpont & Olivier op cit note 14 at 74.

²⁶⁴ *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstien* 1980 (3) SA 917 (A) at 922G–923A.

²⁶⁵ *Oglodzinski v Oglodzinski* 1976 (4) SA 273 (D); *Rosenbuch v Rosenbuch* 1975 (1) SA 181 (W); *Dennegeur Estate Homeowners Association v Telkom SA* 2019 (4) SA 451 (SCA) paras 9–10; *Lydall v Roxton-Wiggill* 2019 JDR 1636 (GJ) para 3.

²⁶⁶ Van der Merwe op cit note 2 at 113–14, 123; Kleyn op cit note 5 at 358; Van Oosten op cit note 261 at 376, 392. Interestingly, J C Sonnekus 'Eggenote, medebesit en die mandament van spolie' (1978) 95 *SALJ* 217 at 222–4ff supports this assertion.

²⁶⁷ Kleyn *ibid* at 359–60; cf Van Oosten *ibid* at 383–5.

²⁶⁸ Cf Van Oosten *ibid* at 383–5ff.

parties.²⁶⁹ Yet, only the lessor has civil possession for the real function, which is why the lessee cannot acquire ownership of the leased thing through acquisitive prescription.²⁷⁰

A vexing question in the context of co-possession is whether the lessee spoliates the lessor if he unlawfully retains physical control after his *ius possidendi* fell away. *Van Malsen v Alderson & Flitton*²⁷¹ (*'Van Malsen'*) held that such retention does not amount to spoliation, while *Crause v Ryersbach*²⁷² (*'Crause'*) reached the opposite conclusion. Van der Walt and Van der Merwe prefer *Van Malsen*,²⁷³ while Kleyn favours *Crause*.²⁷⁴

Van der Walt thinks that such retention does not constitute spoliation because the indirect controller simply does not have physical control of the thing.²⁷⁵ He reasons that to 'ignore this reality would create a fiction which could frustrate the [legal-political function] of the mandament'.²⁷⁶ Hence, the lessee (as the direct controller) may institute the mandament against the lessor (the indirect controller) if the latter unlawfully spoliates the former.²⁷⁷ This is because such conduct could amount to a breach of the peace, which would be similar to when a third party dispossesses the direct controller.²⁷⁸ Van der Merwe, in turn, posits that that the direct controller does not commit spoliation, as such conduct does not entail the type of breach of the peace which the mandament seeks to discourage.²⁷⁹ As seen in the previous section above, Van Oven has a similar view. Interestingly, German law follows an approach comparable to *Van Malsen*. The lessor does not enjoy possessory protection under § 861 of the BGB if the lessee acts contrary to the lease agreement, such as by withholding possession of the thing from the lessor.²⁸⁰

Kleyn, by contrast, argues that the retention occurs against the will of the lessor, which highlights the unlawfulness component of the spoliation

²⁶⁹ Van Oosten *ibid* at 383–5; Kleyn *op cit* note 5 at 360, 362–3; Delport & Olivier *op cit* note 14 at 75.

²⁷⁰ Van der Merwe *op cit* note 8 para 88.

²⁷¹ 1931 TPD 38.

²⁷² (1882) 1 SAR TS 50. See also *Dawood v Robb & Co* 1933 CPD 178.

²⁷³ Van der Walt *op cit* note 7 at 716–18; Van der Merwe *op cit* note 2 at 133. See also Price *op cit* note 10 at 109. See to the contrary Van der Merwe *op cit* note 8 para 108.

²⁷⁴ Kleyn *op cit* note 7 at 290.

²⁷⁵ Van der Walt *op cit* note 7 at 716.

²⁷⁶ *Ibid* at 717 (my own translation). To much the same effect is German law: see Westermann *et al op cit* note 190 at 172 Rdn 2–3.

²⁷⁷ Van der Walt *ibid*.

²⁷⁸ *Ibid*.

²⁷⁹ Van der Merwe *op cit* note 2 at 133.

²⁸⁰ Westermann *et al op cit* note 190 at 172–3 Rdn 1–4. An investigation of German possession law is beyond the scope of my article.

requirement.²⁸¹ Furthermore, spoliation has a wide meaning and does not require dispossession in the sense that the spoliator must have obtained control of the thing.²⁸²

The views of Van der Walt and Van der Merwe are preferable when considering the legal-political function. Indeed, in *Boompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd*²⁸³ ('Boompret') the former Appellate Division preferred the *Van Malsen* position, albeit obiter. There Van Heerden JA decided that 'it cannot be said that the lessee is taking the law into his own hands or that he is committing a breach of the peace'.²⁸⁴ It is hard to understand what the direct controller spoliates the indirect controller of by refusing to return the thing, given that possession is the most basic physical control relation between a legal subject and a thing.²⁸⁵ The indirect controller simply does not have effective and exclusive physical control of the thing in the same way that the direct controller does. The fact that the indirect controller might have a mechanism, such as a remote deactivation device, does not detract from the reality that it is the direct controller — and not the indirect controller — who has the thing within his sphere of control.²⁸⁶ The *Crause* decision, in terms of which the indirect controller retains possession through the acts of the direct controller, is more at home under the real function of possessory protection, where the law protects possession as a relative right and not as a factual situation.

As a result, the applicant in *Scania* had direct control of the three trucks that it still had in its custody for purposes of the mandament. The respondent, in contrast, had only indirect control through the acts of the applicant. Swanepoel AJ was thus justified in ruling that the respondent had spoliated the applicant of its possession by remotely deactivating the trucks. A finding to the contrary would create a fiction, as Van der Walt argues, which would undermine the peace-keeping rationale of the mandament and, concomitantly, s 34 of the Constitution.

However, the Middelburg dealer (as the direct controller of the two trucks in its custody) did not spoliates the applicant when it handed the trucks to the respondent against the applicant's wishes. This is because the mandament is unavailable to an indirect controller. By that time, the applicant no longer had factual dominion over these two truck trucks, which means it had only indirect control of them. The *Scania* court's

²⁸¹ Kleyn op cit note 7 at 290.

²⁸² Ibid.

²⁸³ Supra note 11.

²⁸⁴ *Boompret* ibid at 353E. See similarly Van Oven op cit note 199 at 165.

²⁸⁵ Sonnekus & Neels op cit note 14 at 122; Van der Merwe op cit note 8 paras 70 and 73. See similarly Westermann et al op cit note 190 at 172 Rdn 2.

²⁸⁶ Van Oosten op cit note 261 at 390–1; Van Oven op cit note 199 at 87–8.

ruling to the contrary is therefore unattractive, given that the legal-political function of possession protects possession (or control) as a factual situation and not as a right.

Under *Crause*, the law would permit the indirect controller to deprive the direct controller of his factual custody extra-judicially through counter-spoliation. Sonnekus favours this position. As the thing is not within the sphere of the effective and exclusive control of the indirect controller, there is the very real possibility that counter-spoliation may result in breaches of the peace here, thereby undermining the rule of law.²⁸⁷ Indeed, the direct controller's custody is objectively ascertainable and clear to third parties, while the indirect control of the lessor is not.²⁸⁸ The *Crause* approach would also permit indirect controllers to settle disputes without recourse to the courts, which would undermine the rule of law and s 34 of the Constitution.

Counter-spoliation is ill-suited to resolving possessory disputes in the context of indirect control and should be available only to a direct controller who is dispossessed. The fact that the requirements of counter-spoliation must be interpreted restrictively, given that it is one of the few instances where the law condones extra-judicial self-help, underscores this point.²⁸⁹ Consequently, the lessee's unlawful retention of the thing does not amount to his spoliating the lessor. Hence, the applicant did not spoliator the respondent when it refused to return the trucks in *Scania*. Swanepoel AJ was therefore justified (contrary to Sonnekus's view) in regarding the applicant (and not the respondent) as the spoliator.

Despite the lessor not having the mandament against a lessee who unlawfully retains possession or control of the leased thing, it must be remembered that the law does not condone the lessee's unlawful conduct. The lessor may invoke other remedies, such as the *rei vindicatio* or the possessory action, to reclaim the thing. He may also deactivate the leased thing by way of a declaratory order, which a court will grant in light of the lessee's breach of contract.²⁹⁰ In addition, an urgent prohibitory

²⁸⁷ For a recent analysis of the applicability of counter-spoliation in the land-intrusion context with reference to the housing clause see E J Marais & G Muller 'The extra-judicial ejectment of land intruders: An evaluation of counter-spoliation and the role of possession' (2024) 87 *THRHR* 528; E J Marais & G Muller 'The extra-judicial ejectment of land intruders: An evaluation of the relation between the possession and home concepts' (2025) 88 *THRHR* 1.

²⁸⁸ Van Oosten op cit note 261 at 384–5, 395.

²⁸⁹ *South African Human Rights Commission v Cape Town City* 2022 (6) SA 508 (WCC) para 49; *City of Cape Town v South African Human Rights Commission* 2024 (5) SA 368 (SCA) paras 28–9ff. See also C G van der Merwe & S Human 'Die aanpassing van die tradisionele leerstuk van contra-spolie by moderne Suid-Afrikaanse omstandighede' (1992) 3 *Stellenbosch LR* 297 at 314.

²⁹⁰ I am indebted to Professor Jacques du Plessis for pointing this possibility out to me.

interdict would be available to the lessor in cases where he may suffer irreparable harm and where no other ordinary remedy would provide similar protection.²⁹¹ These remedial avenues address Sonnekus's concern that Swanepoel AJ's decision permits an opportunistic lessee to take the leased thing outside the Republic of South Africa, thereby frustrating any claim the lessor may have.

(vi) *The difference between lease and agency, and the intention required for the mandament*

As seen in part III(b) above, Sonnekus's claims that the default position in our law is that the lessee controls the leased thing as the lessor's servant or agent, which excludes the mandament. However, the parties may — by way of exception — agree that the lessee will have possession for purposes of the mandament. This argument touches on two aspects, namely the type of intention necessary for the mandament, and the role of the underlying agreement between the lessor and the lessee. I address the former aspect before turning to the latter one. However, it is necessary first to consider his argument about the so-called 'default' position.

The cases that he invokes (namely *Yeko v Qana*²⁹² ('Yeko') and *Nino Bonino*) to explain the default position do not support his premise. In fact, no judgment establishes this point. Nothing in the judgments from either *Yeko* or *Nino Bonino* indicates that the lessors and lessees there agreed that the lessees would have possession of the premises for purposes of the mandament. The default position should therefore have applied, namely that the lessees were the lessors' possessory servants. And yet, the courts in both instances awarded the mandament — correctly, according to Sonnekus — to the lessees (the direct controllers) whom the lessors dispossessed.

A lessee has the intention to draw a benefit from his holding of a thing (*animus ex re commodum acquirendi*) regarding the leased thing, not the intention to hold for another and not for himself (*animus tenendi* or *animus non sibi sed alteri possidendi*).²⁹³ The very nature of a lease agreement is that it permits the lessee to *use* and *enjoy* the leased thing.²⁹⁴ An agency agreement, by contrast, entails that the agent or representative acts solely *on behalf of the principal*.²⁹⁵ Even if the parties were to agree that the lessee controls the leased thing as the lessor's agent, courts would attach more weight to the true intention of the parties than to the simulated

²⁹¹ Muller et al op cit note 2 at 357–9.

²⁹² 1973 (4) SA 735 (A).

²⁹³ See for instance Voet 41.2.3; *Yeko* supra note 11; *Blomson* supra note 53; *Nino* supra note 11; *Nienaber* supra note 9; *Meyer* supra note 11.

²⁹⁴ Graham Glover Kerr's *Law of Sale and Lease* 4 ed (2014) 329, 342.

²⁹⁵ See generally L F van Huyssteen, G F Lubbe & M F B Reinecke *Contract — General Principles* 5 ed (2016) 246–9.

agreement: *plus valet quod agitur quam quod simulate concipitur*.²⁹⁶ If the lessee is permitted to use and enjoy the leased thing against payment of a fee, then courts would typify the agreement as a lease, irrespective of the form in which the parties cast it.²⁹⁷ Therefore, it simply cannot be maintained that a lessee, like the applicant in *Scania*, controlled the trucks with the *animus tenendi*. This argument, which flows from Savigny's notion of derivative possession,²⁹⁸ does not reflect developments in case law where courts awarded the mandament to more and more traditional holders, including the lessee. It also does not consider the rule-of-law element of the legal-political function, which includes the right to have access to the courts.

The requisite intention for the mandament is usually said to be the *animus ex re commodum acquirendi*.²⁹⁹ Some scholars hold the view that the *animus tenendi* is insufficient for this remedy.³⁰⁰ Yet, the intention element — as I explain in part III(c)(iv) above — never determined access to the Roman possessory interdicts. Kleyn persuasively shows that the intention for the mandament should be cast widely as widely as possible, namely the intention to possess or control (*animus possidendi*), which encapsulates all other intentions, including the *animus tenendi*.³⁰¹ This reasoning justifies granting the mandament to all controllers, including a lessee, an agent, an employee and a quasi-employee, as they all have the *animus possidendi*.³⁰²

Whether one prefers the real function or the legal-political function for possessory protection is crucial for the type of intention necessary for the mandament.³⁰³ Under the real function, the intention required would be as near as possible to the *animus domini* of civil possession to have 'possession' under the mandament.³⁰⁴ This view makes it difficult to abandon the doctrinal view that holders, at least in principle, do not enjoy possessory protection.³⁰⁵ It explains Sonnekus's reasoning as to why the intention of the lessee (as a holder) is insufficient to enjoy protection under the mandament, as he does not factually control the thing *animo domini*.

²⁹⁶ *Vasco Dry Cleaners v Twycross* 1979 (1) SA 603 (A).

²⁹⁷ I am indebted to Professor Warren Freedman for pointing this out to me.

²⁹⁸ Sonnekus & Neels op cit note 14 at 133–4.

²⁹⁹ Van der Merwe op cit note 2 at 106, 114; Van der Walt op cit note 7 at 687–9. See also *Yeko* supra note 11; *Curatoren* supra note 11; *Meyer* supra note 11.

³⁰⁰ Van der Merwe ibid at 106–7; Sonnekus op cit note 17 at 101.

³⁰¹ Kleyn op cit note 5 at 374–5; Muller et al op cit note 2 at 321; Van der Walt op cit note 7 at 691–2.

³⁰² Marais op cit note 11 at 162–5, 172–5.

³⁰³ Van der Walt op cit note 7 at 687.

³⁰⁴ Ibid.

³⁰⁵ Ibid at 687, 690.

The intention element features less under the legal function of possessory protection.³⁰⁶ Here the emphasis falls on whether a dispossession could lead to a breach of the peace.³⁰⁷ If so, the status quo ante must be restored.³⁰⁸ This reasoning justifies extending the mandament to agents, employees, and quasi-employees, even as against the principal (or indirect controller), as even they may intend to exclude the principal from the thing.³⁰⁹ It also explains why the mandament is available to the lessee (the direct controller) as against the lessor (the indirect controller).

Sonnekus would permit indirect controllers to exclude the mandament in all cases of indirect control, such as pledge, lease, borrowing, deposit and credit purchases. Besides there being no authority for this argument in either Roman or Roman-Dutch law (and that it disregards the long line of cases where courts have awarded the mandament to these controllers), it would permit indirect controllers to engage freely in extra-judicial self-help (through counter-spoliation) to resolve any possessory dispute with the direct controller. Instead of discouraging unlawful self-help, such a denial of the mandament would facilitate it — even promote it — thereby undermining the legal-political function, the rule of law, and the right of access to the courts. These reasons, which Swanepoel AJ did not consider, support his ruling that the applicant (and not the respondent) was the spoliatus in *Scania*.

Finally, the content of the agreement between the lessor and lessee is immaterial under the mandament. In *Oglodzinski v Oglodzinski*³¹⁰ — where the husband and wife were held to be co-possessors of their apartment and where the court awarded the mandament to the husband after his wife locked him out — the court ruled that the conditions of the lease agreement between the spouses (whereby she claimed that he had no right to occupy the apartment) are irrelevant.³¹¹ The mandament is part of the possessory suit, which means the merits, such as the terms of the contract, are irrelevant and need not be considered.³¹² Consequently, even if the applicant in *Scania* agreed to control the trucks as the respondent's agent, such an agreement would be irrelevant in spoliation proceedings. The focus should fall on whether the person who institutes the mandament had peaceful and undisturbed possession of the thing, not on the content of the agreement with the dispossessioner.

³⁰⁶ Ibid at 687ff. To much the same effect is Price op cit note 10 at 107–8.

³⁰⁷ Van der Walt ibid at 691–2. See similarly Price ibid at 107–8; Meyer supra note 11 at 89.

³⁰⁸ Van der Walt ibid at 691–2. See similarly Price ibid; Meyer ibid.

³⁰⁹ Van der Walt ibid at 692.

³¹⁰ Supra note 265.

³¹¹ *Oglodzinski* ibid at 275, with which Sonnekus op cit note 266 agrees.

³¹² *Oglodzinski* ibid.

IV CONCLUSION

The *Scania* case should be applauded for ruling that the respondent had to restore possession or control of the three trucks that the applicant had in its custody prior to deactivation, and that they had to be in an operational state. However, the court's ordering restoration of the other two trucks is not persuasive, since the applicant did not have direct control over them. Be that as it may, the judgment is the latest in a long line of cases that confirms that the mandament is available to protect possession in the wide sense, namely civil possession and most instances of holdership, specifically that of the lessee. It also confirms that contracting parties may not agree that the one may spoliare the other extra-judicially in instances of breach of contract, as such agreements are contrary to public policy and, therefore, void. The case is likely to become important precedent going forward, as technological developments will permit the remote deactivation of more and more movables in the future.

Sonnekus's objections to the case, namely that the mandament protects only juridical possession (and not holdership), that parties could agree that one may spoliare the other (via remote deactivation) in an extra-judicial manner, that the prohibition of co-possession prevented the applicant from possessing the trucks for purposes of the mandament, that the applicant agreed to control the trucks as the respondent's agent (thereby excluding the mandament), and that the applicant did not have the requisite intention for the mandament, are unconvincing. His understanding of juridical possession is at odds with how courts (and most scholars) construe 'possession' for purposes of the mandament. Courts have ruled, for more than a century, that the mandament protects the possession or control of a lessee. The legal-political function of possession — which entails protection of possessory relations for the sake of upholding the rule of law and the right of access to courts — justifies granting the remedy to civil possessors and *all* holders, including lessees. Van Oven supports this argument, as does the position in contemporary Dutch law. In fact, the mentioned function supports an extension of the mandament to those holders who seemingly do not yet have access to this remedy, namely employees and quasi-employees.

The mandament upholds the rule of law by discouraging legal subjects from taking the law into their own hands. It safeguards the socio-legal order in the context of possessory disputes. This goal has close links with the right to access courts. An analysis of this fundamental right shows that agreements which permit one party to retake possession from another in an extra-judicial manner conflict with this right and with public policy, and are, therefore, unconstitutional.

The prohibition of co-possession, which applied in Roman law, becomes redundant the moment that the law distinguishes the different functions of possession. It plays no role in South African law. Therefore, the lessee

is the direct controller of the thing, and the lessor has indirect control through the acts of the lessee. Swanepoel AJ found that the applicant's unlawful retention of the three trucks in *Scania* did not amount to its spoliating the respondent of its (indirect) control of the trucks. He thus approved of the *Van Malsen* approach, which finds support in *Boompriet*, the views of Van der Walt, Van der Merwe, Van Oven, German law, and the rule of law. Such acts simply do not entail breaches of the peace against which the mandament guards. Consequently, the lessor cannot institute the mandament to regain possession of the thing from the lessee who unlawfully retains it after his *ius possidendi* fell away, as the lessor does not have direct possession. He may also not employ counter-spoliation, as it is a defence that is available only to the spoliatus, who is the direct possessor.

The assertion that the lessee controls the thing as the lessor's agent is untenable, as the very essence of a lease (unlike an agency agreement) is that the lessee may use and enjoy the leased thing for his own benefit. Even so, whether someone is a lessee or an agent becomes moot given that the mandament, in light of the legal-political function, should protect civil possession and all forms of holdership. Hence, whether a controller is a lessee, an agent, an employee or a quasi-employee would be irrelevant, as the control of all these holders should enjoy protection under the mandament. Indeed, the fact that the mandament is part of the possessory suit means the content of an agreement, which touches on the merits of the dispute, is irrelevant in spoliation proceedings.

Finally, the intention with which the possessor or controller holds a thing is of little importance under the mandament, as the goal of the remedy is to guard against breaches of the peace. To achieve this purpose, civil possessors and all holders should enjoy protection under this remedy. Hence, little turns on whether the possessor or controller has factual custody over a thing with the *animus domini* (thieves and unlawful occupiers), the *animus ex re commodum acquirendi* (such as lessees) or the *animus non sibi sed alteri possidendi* (such as agents and employees).

Van der Walt's methodology, in terms of which the Constitution steers the interpretation (and development) of the common law, supports the outcome in the *Scania* decision, at least regarding the three trucks that the applicant still had in its control prior to deactivation. The *Scania* court promoted the legal-political function of possession, which upholds the rule of law and the right of access to courts, by awarding the mandament to the lessee. Breaches of the peace would occur if the law viewed the lessor, who is the indirect controller, as retaining possession through the lessee, thus allowing him to employ counter-spoliation to retake possession in an extra-judicial manner. Given the potential for unlawful self-help in resolving such disputes (because the lessor simply does not have explicit factual custody of the thing), it is preferable to exclude counter-spoliation here. This defence is ill-suited for these contexts, since it protects possession

only as an existing factual situation (in the form of direct control) and not as a right. For these doctrinal and constitutional reasons, the *Scania* case is — for the most part — a step in the right direction.

TO CONTRIBUTORS

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