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Ernst Marais; G Muller

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The extra-judicial ejectment of land intruders: An evaluation of counter-spoliation and the role of possession*

EJ Marais
BA LLB LLD
Associate Professor, School of Law, University of the Witwatersrand, Johannesburg

G Muller
LLB LLD
Associate Professor, Department of Private Law, University of Pretoria

OPSOMMING

Die buite-geregtelike afsetting van grondbesetters

Die verweer van *contra-spolie* het gewoonlik min akademiese aandag geniet en was selfs as 'n onkontroversiële deel van die privaatreg geag. Al hoe meer privaat- en staatseienaars van grond het egter onlangs begin om hierdie verweer, wat 'n persoon toelaat om buite-geregtelike self-help te gebruik om sy besit van 'n saak te beskerm, in te span om onregmatige besetters van hulle grond te verwyder. Hulle redeneer hierdie besetters is nog nie onregmatige okkupeerders onder die Wet op Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond 19 van 1998 nie, en daarom benodig hulle nie 'n hofbevel om hulle af te sit nie. Die besetters, daarenteen, beweer hulle mag net ingevolge 'n hofbevel uit hulle wonings op die grond gesit word. Hierdie dispute opper verskeie vrae – die verweer se vereistes, die rol van die besitkonsep, die verhouding tussen besit in die privaatreg en "onregmatige okkupeerder"-vereistes onder die Wet, en of die "woning"-konsep in artikel 26(3) van die Grondwet miskien die drempelvereiste behoort te wees vir grondbetreders om beskerming onder die Wet te geniet. Ons ontleed hierdie vrae, in 'n reeks van twee artikels, vanuit 'n sistemiese perspektief – Van der Walt se grondwetlike visie van eiendom. Ons evaluasie toon dat besit dieselfde betekenis as onregmatige okkupeerder het. Dit wys ook dat sekere howe Van Leeuwen se wye benadering tot die *instanter* benadering volg, en

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dat hulle ook irrelevante oorwegings in ag neem, veral wanneer die eienaar hom op *contra-spolie* beroep. 'n Sterker klem op die besitkonsep slaag daarin om hierdie inkonsekwenthede die hoof te bied. Dit wil nietemin voorkom of besetters eers beskerming onder die Wet sal geniet selfs nadat hulle reeds wonings op die grond gevestig het. Dit is daarom beter om die woningkonsep in artikel 26(3) as drempelvereiste te gebruik, aangesien hierdie konsep wyer is as die "onregmatige okkupeerder"-vereiste. Weens die geweldige lyding waarmee vele uitsettings gedurende apartheid gepaard gegaan het, is dit beter indien die uitsetting van alle betreders, wat reeds wonings op grond het, aan geregtelike oorsig onderwerp word.

FOREWORD

This article is the first in a two-part series. Together they investigate the extra-judicial ejectment of land intruders under counter-spoliation (which is a defence to the *mandament van spolie*), and the relation of this defence to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] and section 26(3) of the Constitution.[2] Both articles use the decision of *South African Human Rights Commission v Cape Town City*[3] as a case study. The judgment raises two issues: the role of possession for counter-spoliation, particularly in view of the unsatisfactory relation between (and meaning of) the requirements for counter-spoliation, and the relation between the possession concept (which has the same meaning as "unlawful occupier" in PIE) and the "home" concept in section 26(3) of the Constitution.

The first article sets out the facts and *ratio decidendi* of the *SA Human Rights Commission* case and investigates the relation between the possession concept and the unlawful occupier requirement under PIE. It also evaluates the *instanter* (forthwith) and the peaceful and undisturbed possession requirements for counter-spoliation.

Analysis reveals that the notion of an unlawful occupier has the same meaning as possession in private law. Furthermore, the *instanter* requirement and the peaceful and undisturbed qualification for possession are intertwined, and revolve around Van Leeuwen's wide interpretation of the *instanter* requirement. Courts take irrelevant considerations into account under this interpretation, such as whether it is the owner who is being dispossessed, whether the intruder acted against the owner's wishes, and whether the owner protested against the dispossession. Such matters touch on the merits of the dispute and are immaterial for purposes of the *mandament* and counter-spoliation.

Emphasising the possession concept would permit courts and practitioners to concentrate on the real issue at hand. For example, should a land intruder (the alleged spoliator) wrest physical control of the land away from the owner (the alleged *spoliatus*), then the owner may no longer invoke counter-spoliation. The fact that the possession concept (especially in terms of the *corpus* element) focuses on physical acts regarding the thing shares similarities with Huber's narrow interpretation of the *instanter* requirement.

The second article assesses the *corpus* element of possession to determine, with reference to *SA Human Rights Commission* and other decisions, when an intruder acquires possession of land and, concomitantly, becomes an unlawful occupier in

1 Act 19 of 1998 (PIE).
2 Constitution of the Republic of South Africa, 1996 (the Constitution).
3 2022 6 SA 508 (WCC).

terms of the PIE. Demarcating the operational scopes of these two sources of law is crucial, as counter-spoliation (unlike the PIE) does not require a court order for a landowner to eject intruders.[4] Given the strict requirements that the common law sets for acquiring possession of land without an owner's permission, intruders acquire possession (and only become unlawful occupiers under the PIE) only at a late stage of an incursion. This position is undesirable, as the "home" concept in section 26(3) of the Constitution has a wider meaning than possession in private law. Stated differently, a land intruder may have a home on land before such intruder acquired possession of the land. Consequently, the Constitution provides better protection to the rights of intruders than counter-spoliation does. It is, therefore, preferable to use the "home" concept as the threshold requirement for intruders to enjoy protection under the PIE instead of the unlawful occupier requirement.

1 INTRODUCTION

The *mandament van spolie* (*mandament*) is a speedy and robust remedy that protects peaceful and undisturbed possession or control of a thing against unlawful spoliation or dispossession.[5] If the spoliator (or dispossessor) dispossesses a person, such person (the *spoliatus*) may institute the *mandament* and a court will order the spoliator to restore possession forthwith.[6] The remedy does not consider the merits of the dispute, such as who has a stronger right to possession (*ius possidendi*), like ownership or a contractual right to possession (a lease).[7] It discourages unlawful self-help by restoring the *status quo ante*, in terms of the maxim *spoliatus ante omnia restituendus est*.[8] It thus promotes the legal-political function, which aims to protect the socio-legal order in the context of stable control relations (irrespective of their lawfulness) by forcing litigants to submit their possessory disputes to a court of law.[9] Consequently, the *mandament* upholds the rule of law.[10]

One of the defences against the *mandament* is counter-spoliation (or *contra-spolie*).[11] It features when the applicant (or alleged *spoliatus*) institutes the

4 We use the verb "eject" instead of "evict" in the counter-spoliation context to distinguish this context from "proper" eviction cases. This is because a court must first decide whether the intruder acquired possession or occupation of the land in counter-spoliation disputes. If so, the landowner may no longer invoke this defence and must use the PIE to evict the unlawful occupier. The verb "evict" is more appropriate in the latter setting. We discuss the relation between possession and unlawful occupation in para 3.2 below.

5 Boggenpoel *Property remedies* (2017) 96–101; Van der Merwe "Things" in Joubert & Faris (eds) *LAWSA* (2014) paras 93ff; Kleyn *Die* mandament van spolie *in die Suid-Afrikaanse reg* (LLD thesis, University of Pretoria 1986) 297–307; Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* (2019) 326–328, 330–332.

6 Boggenpoel (2017) 97–101; Muller *et al* 328, 330–332.

7 *Ibid*.

8 *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) paras 10, 12; *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 3 SA 218 (C) 225G–I. See also Marais "Considering the boundaries of possessory protection of incorporeals – should the *mandament van spolie* protect access to an email address?" 2022 *JJS* 26 37ff; Muller *et al* 326–327; Van der Merwe (2014) para 93. For a detailed analysis, see Marais "Possessory protection under the *mandament van spolie* for the lessee against the lessor in a case of remote deactivation of movables" 2025 *SALJ* (forthcoming).

9 See the sources in the previous footnote.

10 *Ngqukumba* paras 10 and 12.

11 Muller *et al* 353–355; Boggenpoel (2017) 149–153; Van der Merwe (2014) para 113.

mandament against the respondent (or alleged spoliator), who then raises it as a defence to defeat the applicant's claim. A court will permit the respondent to invoke the defence if the applicant was still in the process of dispossessing the respondent. The defence allows a possessor to use a reasonable measure of extra-judicial force to prevent an attempted spoliation.[12] Its requirements are that the alleged spoliator must have had peaceful and undisturbed possession of the thing, and that he acted *instanter* (forthwith) against the attempted dispossession.[13] It may no longer be used once the alleged *spoliatus* acquired peaceful and undisturbed possession of the thing. Here the alleged spoliator must institute the *mandament* and may no longer invoke counter-spoliation. Any attempt at regaining possession extra-judicially here will amount to a new instance of spoliation.[14]

Property law textbooks and reference works usually discuss counter-spoliation briefly, given its traditionally limited scope of application.[15] However, more and more landowners, particularly local authorities, recently began invoking this defence to eject or remove intruders from their land.[16] This is the result of an increase in unlawful land incursions. To mention but one recent example, on 1 March 2024, people started occupying vacant farmland in the suburb of Lourierpark in Bloemfontein in the Free State.[17]

Some incursions flow from desperation of persons who still live in abject poverty, while others occur for political reasons.[18] Landowners typically argue that land intruders have not yet acquired peaceful and undisturbed possession of the land on which their complete, or incomplete, informal dwellings stand. Hence, they may remove them in terms of this defence, and need not obtain a court order under the PIE. The intruders, for their part, contest the constitutional validity of this defence and argue that they may be evicted only in terms of the PIE, which requires judicial oversight.

Courts were confronted with various aspects of counter-spoliation in these cases, as well as with how this defence relates to the PIE and section 26(3)[19] of the Constitution. These aspects straddle both private and public law, as they pertain to the meaning of the *instanter* and peaceful and undisturbed possession requirements

12 Muller *et al* 353–354; Boggenpoel (2017) 149–153; Van der Merwe (2014) para 113.
13 Muller *et al* 353–354; Boggenpoel (2017) 150–151; Van der Merwe (2014) para 113.
14 Boggenpoel (2017) 151–152.
15 See, *eg*, Boggenpoel (2017) 149–153 (five pages); Muller *et al* 353–355 (three pages); Sonnekus & Neels *Sakereg vonnisbundel* (1994) 185–186 (two pages); Van der Merwe *Sakereg* (1989) 143–145 (three pages).
16 See, *eg*, *South African Human Rights Commission v Cape Town City* 2022 6 SA 508 (WCC); *Smith v Stellenbosch Municipality* 2022 JDR 1926 (WCC); *Setjwetla Informal Settlement v Johannesburg City* 2017 2 SA 516 (GJ); *Denel Soc Limited v Persons Identities Unknown* 2015 JDR 1334 (WCC); *Fischer v Persons Unknown* 2014 3 SA 291 (WCC). For a recent decision, see *City of Ekurhuleni Metropolitan Municipality v The Unknown Individuals Trespassing* 2023 JDR 0838 (GJ).
17 Lekhafola "Stun grenades used to defuse explosive situation at Lourierpark" in *SABC News* (5 March 2024) https://www.sabcnews.com/sabcnews/stun-grenades-used-to-defuse-explosive-situation-at-lourierpark/ (accessed 06-03-2024); anon "SALGA condemns land invasion in Bloemfontein" *The Business Weekly* (4 March 2024) https://thebusiness-weekly.co.za/salga-condemns-land-invasion-in-bloemfontein/ (accessed 06-03-2024).
18 See, *eg*, *SA Human Rights Commission* para 21.
19 This provision stipulates that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

of counter-spoliation, how these requirements relate to each another and to the possession concept, when land intruders qualify for protection under the PIE (which excludes common-law remedies, like the *mandament* and, hence, counter-spoliation),[20] and what the relevance of a "home" (in section 26(3) of the Constitution) is in the land incursion context. These matters again received the attention of a full bench of the Western Cape Division of the High Court in *SA Human Rights Commission*.

The defence of counter-spoliation in the land intrusion context highlights a tension between the right of landowners not to be arbitrarily deprived of their property, as *per* section 25(1) of the Constitution, and the right of land intruders not to be evicted from their homes without a court order, as guaranteed in section 26(3) of the Constitution.[21] As possession and ownership usually coincide, counter-spoliation indirectly protects ownership by allowing an owner to ward off interferences with his *ius possidendi* (the entitlement to have undisturbed possession of a thing) in an extra-judicial manner.[22]

A contested question is – until when may an owner use counter-spoliation, and when must he use the PIE, which gives effect to section 26(3) of the Constitution, to eject intruders? Under the PIE, a landowner may evict an unlawful occupier only in terms of a court order, which a court may grant only after considering all relevant circumstances. Thus, there are two ways in which land intrusions may be resolved, one which does not require a court order (counter-spoliation) and one where such an order is integral to remove occupiers (PIE and section 26(3) of the Constitution). Since these legal sources resolve land intrusions in different ways, the question is – which source of law should be used to resolve land intrusions?

According to the single-system-of-law principle, the Constitution guides the choice, and the interpretation, when more than one legal source applies to a dispute.[23] This principle, which is a systemic constitutional approach towards all sources of law,[24] ensures that all legal sources promote the Constitution, and prevents the creation of fragmented or parallel legal systems that are insulated from constitutional influence.[25]

The law must resolve land intrusions effectively, as they are "inimical to the systematic provision of adequate housing on a planned basis".[26] Indeed, they have the "capacity to be socially inflammatory" and may pose "serious implications for stability and public peace".[27] In *Government of the Republic of South Africa v*

20 S 2 of the PIE; *City of Cape Town v Rudolph* 2004 5 SA 39 (C) 59H–61E.

21 *Fischer v Ramahlele* 2014 4 SA 614 (SCA) para 21; *City of Cape Town* para 35.

22 We extrapolate this argument from Jhering's view of how possessory protection indirectly protects ownership: see Emerich "Why protect possession?" in Descheemaeker (ed) *The consequences of possession* (2014) 30, 42.

23 Van der Walt *Property and constitution* (2012) 19–24, 96ff. See also Boggenpoel "Can the journey affect the destination? A single system of law approach to property remedies" 2016 *SAJHR* 71.

24 This notion belongs to Van der Sijde *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (LLD thesis, Stellenbosch University 2015). Van der Sijde thinks there are links between the single-system-of-law principle and a systemic constitutional approach (271–274). See further Van der Sijde *Property regulation – an integrated approach under the constitution* (2022) chs 1, 6.

25 Van der Walt (2012) 62–63ff; Van der Sijde (2015) 271–274.

26 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 92.

27 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 45.

Grootboom,[28] Yacoob J disapproved land intrusions aimed at coercing the state into providing housing on a preferential basis to persons who engage in these types of incursions. The difficult question is how to resolve the conflicting rights of landowners and intruders in a constitutionally sound manner.

Even so, it is questionable whether counter-spoliation is the ideal source to adjudicate such intrusions.[29] This is the result of it not requiring a court order, and, especially, because of the legislative intensification of this defence in the Prevention of Illegal Squatting Act[30] during the apartheid era.[31] The PIE, which repealed the PISA, was specifically enacted to prevent both illegal eviction from land and the *unlawful occupation* of land.[32] It replaced the contravention paradigm under the PISA with a human rights paradigm.[33] The PIE thus marks a shift from an extra-judicial (and violent) method for resolving evictions under the PISA, which include land incursions, to one which is humane and subject to judicial oversight.[34] It is, therefore, crucial to demarcate carefully the fields of operation of counter-spoliation and the PIE (including section 26(3) of the Constitution).

This article is divided into four parts. This part, the introduction, is followed by a discussion of the facts and *ratio decidendi* of the *SA Human Rights Commission* decision in part 2. Part 3 sets out our methodology, evaluates the possession concept and its relation to the "unlawful occupier" requirement in the PIE, and assesses the *instanter* requirement and the peaceful and undisturbed qualification. Under these entangled requirements the courts take irrelevant factors into consideration to decide counter-spoliation cases. In the process, the possession concept is largely rendered irrelevant. Evaluation reveals that a stronger emphasis on the possession concept, particularly its *corpus* element, would result in a sounder application of counter-spoliation. Section 4 sets out our conclusion.

2 THE SA HUMAN RIGHTS COMMISSION DECISION

2.1 The facts

On 1 July 2020, while South Africa was in a hard lockdown as a result of the Covid-19 pandemic, officials of the City of Cape Town's Anti-Land Invasion Unit (ALIU) dragged a naked Mr Qolani (the third applicant) from his informal dwelling in Khayelitsha, in full view of the public.[35] After removing him, the officials demolished his dwelling with crowbars. These actions are reminiscent of the brutal way in which forced removals were undertaken during apartheid.[36] The City of Cape

28 *Grootboom* para 92.
29 *City of Cape Town* para 39.
30 Act 52 of 1951 (PISA). See Lewis "The Prevention of Illegal Squatting Act: The promotion of homelessness?" 1989 *SAJHR* 233; Muller "The legal-historical context of forced evictions in South Africa" 2013 *Fundamina* 382.
31 See, *eg*, *Smith* para 86. See further the discussion in the second article of this series.
32 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 9–11.
33 Pienaar *Land reform* (2016) 668. See further Pienaar "Uitleg en toepassing van die Wet op Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond 19 van 1998" 2000 *THRHR* 464; Pienaar & Mostert "Uitsettings onder die Suid-Afrikaanse Grondwet: Die verhouding tussen artikel 25(1), artikel 26(3) en die Uitsettingswet (deel 1)" 2006 *TSAR* 277; Pienaar & Muller "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" 1999 *Stell LR* 370.
34 *PE Municipality* paras 14, 23.
35 *SA Human Rights Commission* para 1.
36 *Ibid*.

Town (the City) argues that the structure was unoccupied and that its ALIU officials demolished it lawfully in terms of counter-spoliation.[37] The informal dwelling Mr Qolani allegedly occupied was actually a fully erected structure by the time the ALIU demolished it.[38] From the facts, such as the presence of a bed in the structure, it was clear that Mr Qolani occupied the dwelling.[39]

The second matter concerned a situation where ALIU officials demolished the informal dwellings of Ms Habile and others in Khayelitsha during April 2020 and removed the materials of which their dwellings consisted.[40] The City alleged that these structures were unoccupied.[41] Some of the structures were complete and others were still in the process of being erected.[42] The City, again, argued that its demolition of these structures was done in terms of counter-spoliation.[43] The City advanced similar arguments regarding the destruction of dwellings in two further instances – in Hangberg and in Mfuleni.[44]

The South African Human Rights Commission, intervening on behalf of the third applicant and others, instituted legal proceedings. It wanted the conduct of the City to be declared unlawful and, insofar as such conduct is permitted by counter-spoliation, that this defence be declared unconstitutional.[45] The court focused on the destruction of the third applicant's dwelling and provided few details of the demolition of the other applicants' dwellings. Accordingly, our analysis focuses on the destruction of his dwelling.

2.2 The judgment

2.2.1 *The legal questions and related matters*

The main legal question is when a landowner (here, the City) may lawfully repel unlawful dispossession, or spoliation, with counter-spoliation.[46] It concerns whether the third applicant acquired possession of the City's land. If so, the City could not rely on counter-spoliation to remove him, as it would then have to use the PIE.[47] The judgment focused on the requirements for counter-spoliation to determine whether the City's understanding and application of the defence were lawful and constitutional.[48]

The essence of the applicants' argument was that counter-spoliation is inconsistent with the Constitution and invalid insofar as it permits the eviction of persons from, and the demolition of, any informal dwelling, hut, shack, tent, or similar structure, or any other form of permanent or temporary dwelling or shelter, whether occupied or unoccupied at the time of such eviction or demolition.[49] The

37 *Ibid*.
38 Para 120.
39 *Ibid*.
40 Para 2.
41 *Ibid*.
42 *Ibid*.
43 *Ibid*.
44 Para 19.
45 Para 1.
46 *Ibid*.
47 *Ibid*.
48 *SA Human Rights Commission* para 18.
49 Para 23.

City, in turn, argued that it may invoke counter-spoliation at any stage before a fully constructed informal dwelling becomes occupied as a home.[50]

The City identified three stages during which it may rely on counter-spoliation: (a) where persons seek to unlawfully occupy land and the City prevents these intruders from gaining access to the land; (b) where persons have gained access to the land unlawfully and are in the process of erecting or completing structures, and the City prevents the dwellings from being erected or completed; and (c) where persons have erected completed structures on the land and it is clear that they are unoccupied, and the City prevents such structures from being occupied.[51]

The City did not remove complete structures where it was unclear whether such structures were actually occupied.[52] It conceded that it may not rely on counter-spoliation if the structures were occupied, as it must then institute proceedings under the PIE to evict the occupiers.[53]

2.2.2 *The requirements of counter-spoliation*

The court ruled that the requirements of counter-spoliation must be considered in terms of the context where it is invoked. It noted the profound homelessness in the Western Cape Province, and in South Africa generally, and that poor and desperate people "invade", to use the court's term, private and state land.[54] It also noticed that some land invasions are orchestrated attempts at land grabs for political or other nefarious reasons, and such attempts "crudely exploit[...] the vulnerability of desperate and homeless people".[55]

It confirmed that counter-spoliation is not a stand-alone remedy; it is an extra-judicial common-law defence against the *mandament*.[56] The *mandament* restores possession forthwith if one was unlawfully dispossessed.[57] It is a speedy and robust remedy that protects public order and upholds the rule of law, by discouraging persons from taking the law into their own hands.[58] Taking the law into your own hands, in the form of extra-judicial self-help, is inconsistent with, and undermines, the rule of law, which is a constitutional value.[59] However, counter-spoliation allows a possessor (like a landowner), in limited circumstances, to rely on extra-judicial self-help to ward off unlawful interferences with his peaceful and undisturbed possession of a thing.[60] Citing *Chief Lesapo v North West Agricultural*

50 Para 32.
51 *Ibid*.
52 Para 33.
53 Para 69.
54 Para 21. In *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* 2012 4 BCLR 382 (CC) para 3, the Constitutional Court held that the terms "land invasion" and "land invaders" should be avoided. We accordingly use the terms "land intrusions" and "land incursions".
55 *SA Human Rights Commission* para 21. See Muller & Viljoen *Property in housing* (2021) 285–289: the authors propose that the act of hijacking an inner-city building or vacant land in contravention of s 3 of the PIE should activate the restraint order provisions in the Prevention of Organised Crime Act 121 of 1998.
56 *SA Human Rights Commission* para 26, citing *Ngqukumba*. See also *SA Human Rights Commission* paras 1 and 44.
57 *SA Human Rights Commission* para 25, citing *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA).
58 *SA Human Rights Commission* para 25.
59 *Ibid*, citing *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) and s 1(*c*) of the Constitution.
60 *SA Human Rights Commission* para 25.

Bank,[61] the Constitutional Court ruled that a party may resort to self-help if good reason for it exists.[62]

Counter-spoliation has two requirements – the *instanter* requirement, and the peaceful and undisturbed possession requirement.[63] The type of possession required for the *mandament* and, hence, counter-spoliation is not possession in the juridical sense.[64] The type of possession necessary for counter-spoliation is, in the words of the court, "non-juridical possession".[65] The court relied on *Yeko v Qana*,[66] which (according to the court) correctly held that non-juridical possession is required for the *mandament*.[67]

The court confirmed that two requirements must be satisfied for a person to have possession (which includes both juridical and non-juridical possession) – the *corpus* (or physical) element, and the *animus* (or mental) element.[68]

The *corpus* element entails physical control.[69] The presence of such control is "context-sensitive, as the nature of the object, its usage and objectives guide the manner of control required to be effective".[70] The intention required for non-juridical possession is the intention to derive or secure some benefit from one's possession or physical control.[71]

The *instanter* requirement, in turn, pertains to whether the original act of dispossession (also known as the *res gestae*) is still taking place, as one may invoke counter-spoliation only before such act has been completed.[72] When there is still a continuation of the dispossession, the act of counter-spoliation does not constitute a new breach of the peace.[73] The law condones a limited instance of extra-judicial self-help to prevent the breach.[74] The *spoliatus* (the landowner) may no longer invoke counter-spoliation to regain possession if the spoliator (the land intruder) has already, according to the court, "perfected" his possession.[75] Any self-help to regain possession at this stage would amount to a new act of spoliation, which the law does not allow.[76]

Counter-spoliation could negatively impact constitutional rights and values, as it permits extra-judicial self-help.[77] Hence, a narrow or restricted interpretation of the possession and *instanter* requirements is preferable, one which the Constitution guides.[78] A broad interpretation of these requirements would frustrate the rule

61 2000 1 SA 409 (CC).
62 Para 89.
63 *SA Human Rights Commission* para 20.
64 Para 51.
65 *Ibid*.
66 1973 4 SA 735 (A).
67 *SA Human Rights Commission* paras 29–30.
68 Para 43, citing Muller *et al*.
69 Para 43.
70 *Ibid*.
71 Paras 43, 51.
72 Paras 44, 50, 62.
73 Para 44.
74 *Ibid*.
75 Paras 44, 62.
76 Para 44.
77 Para 60.
78 *Ibid*.

of law, as a new breach of the peace may then be committed,[79] and it would also undermine section 26(2) of the Constitution.[80]

The court agreed with the reasoning in *Residents of Setjwetla Informal Settlement v Johannesburg City*,[81] as it sets out (according to the court) the traditional approach towards counter-spoliation.[82] There it was held that the mere act of constructing complete or incomplete dwellings, both of which were still unoccupied, on land belonging to the City of Johannesburg meant that the intruders acquired possession of the parts of the City's land on which their dwellings stood.[83] The City of Johannesburg's destruction of these dwellings without a court order did, therefore, not form part of the original act of dispossession and was hence an unlawful instance of counter-spoliation.[84]

The court considered Scott's argument[85] that the applicants in *Setjwetla* did not acquire possession of the land.[86] He posits that "the nature of possession [required for] … immovable property would appear to require more than the mere cursory moving around on property with the intention to erect flimsy shelters".[87] The court also referred to his view that the law sets more stringent requirements for the acquisition of possession when physical control (the *corpus* element) is acquired without the owner's permission.[88] The *Setjwetla* court regarded these acts of the applicants as having wrested possession of the land from the City of Johannesburg.[89] The court rejected Scott's reasoning by ruling that the type of possession he has in mind is juridical possession and not non-juridical possession, which is the type of possession required for counter-spoliation.[90]

The *SA Human Rights Commission* court decided that the narrow interpretation of the *instanter* requirement, which belongs to Huber,[91] is constitutional.[92] This is because it aligns with the purpose of the *mandament* – to discourage unlawful self-help and maintain the rule of law.[93] This interpretation entails that only a short period may elapse between the original act of dispossession and the act of

79 *SA Human Rights Commission* para 62.
80 Para 61. This provision states: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."
81 2017 2 SA 516 (GJ).
82 *SA Human Rights Commission* para 50. According to the court, this approach was set out in *Yeko*.
83 *SA Human Rights Commission* paras 52–53.
84 *Ibid*.
85 Scott "The precarious position of a landowner *vis-à-vis* unlawful occupiers: Common-law remedies to the rescue?" 2018 *TSAR* 158.
86 *SA Human Rights Commission* para 54. The court summarised Scott's argument as follows: "in respect of immovable property, the nature of possession required is more than the mere cursory moving around on property with the intention to erect flimsy shelters".
87 Scott 164, referred to by the court in *SA Human Rights Commission* (para 54).
88 *SA Human Rights Commission* para 54.
89 Scott 164.
90 *SA Human Rights Commission* para 57.
91 We discuss this interpretation in para 3.3 below.
92 *SA Human Rights Commission* para 62, citing *Setjwetla* (no paragraph reference given). See also *SA Human Rights Commission* paras 47 and 49 and nn 18 and 21, citing Muller *et al* 354, where the authors state that *Ness v Greef* 1985 4 SA 641 (C) (which allowed a delay of 11 days between the original act of spoliation and the act of counter-spoliation) is incorrect.
93 *SA Human Rights Commission* para 62.

counter-spoliation. Counter-spoliation is constitutionally valid in terms of this narrow interpretation.[94]

The court also referred to the wide interpretation of this requirement (which belongs to Van Leeuwen[95] and was followed in *Ness*), where a delay of 11 days between the original act of dispossession and the act of counter-spoliation was acceptable.[96] The court rejected this interpretation, as it considered the merits of the dispute – the basis of possession – which the law prohibits under both the *mandament* and counter-spoliation.[97] The court agreed with how the *Setjwetla* decision interpreted the *instanter* requirement[98] and rejected Scott's view. He thought that it was acceptable (under the *instanter* requirement) that the act of counter-spoliation in *Setjwetla* took place three days after the original act of spoliation.[99]

The *instanter* requirement does not hinge on how much time elapsed but rather on whether the act of counter-spoliation is part of the original act of dispossession.[100] If the intruders acquired peaceful and undisturbed possession of the land with the intention to secure a benefit from such possession, then the *instanter* requirement can no longer be complied with.[101] The peaceful and undisturbed qualification of the possession requirement means the possession must be stable and durable.[102] Under the narrow interpretation of the *instanter* requirement, which the court prefers, this qualification does not require possession that "constitute[s] some measure of permanence".[103] It ruled that "the peaceful and undisturbed possession was physically manifested by the occupiers *commencing* construction of informal structures on the land".[104] The court, in addition, ruled that "the construction of incomplete structures could very well amount to a physical manifestation of the possession".[105] It also held that "[t]he structures need not be completed or occupied for the possessory element of spoliation, as defined by *Yeko*, to be perfected".[106] However, elsewhere in the judgment the court contradicts this view of the mentioned qualification: there it stated that "[i]f the occupier *was merely putting pegs in the ground*, it may be a clear indicator that the required possession was *not* perfected".[107]

The court distinguished between two stadia in deciding when the City may invoke counter-spoliation.

The first instance is when persons are in the process of seeking to occupy land and the City prevents them from gaining access to the targeted land.[108] Here the City may invoke counter-spoliation, as its actions would be *instanter*.[109]

94 *Idem* paras 65, 67.
95 We discuss this interpretation in para 3.3 below.
96 *SA Human Rights Commission* para 62.
97 Paras 47–49 and nn 18, 21, citing Muller *et al* 354, where it is stated that *Ness* is incorrect.
98 *SA Human Rights Commission* paras 55, 59.
99 Paras 55–59.
100 Para 49 and n 21, citing Muller *et al* 354.
101 Para 83.
102 Paras 65, 67.
103 Para 67.
104 Para 83 (emphasis added).
105 Para 66.
106 Para 83.
107 Para 85 (emphasis added).
108 *Ibid*.
109 *Ibid*.

The second instance is when occupiers have gained access to land and are in the process of erecting or completing structures on the land.[110] Whether the City acted *instanter* in such circumstances – apparently – depends on the "stage of construction and [the] time period within which the City responded".[111] As explained earlier, the court contradicts itself on this matter. Be that as it may, the court held that the stage of construction is crucial, as this would indicate whether the intruder had peaceful and undisturbed possession of the land.[112] The court explained its ruling as follows:

> "In those circumstances where structures are completed and unoccupied, and it took some time and effort to transport the building materials to the land and to commence construction of the informal structures, it would, prima facie, appear that the possession was perfected, and the City … cannot rely upon counter-spoliation. It may even be that these structures are occupied as homes, but that they may appear unoccupied for various reasons, such as the occupiers having gone to work or to seek work, gone to the shops or gone to visit friends." [113]

The City acknowledged that informal structures may be erected and occupied literally overnight, sometimes in a matter of minutes or hours.[114] When complete structures or dwellings have been erected and it is unclear whether such structures are occupied, it is likely that the intruder acquired possession.[115] Counter-spoliation would then be unavailable.[116]

The City argued that it may rely on counter-spoliation, instead of the PIE, at any stage before an informal structure becomes a home.[117] Stated differently, the City may invoke this defence at any time before a person becomes an unlawful occupier under the PIE.[118] The court rejected this argument by holding that it conflates the scope and reach of the PIE with that of counter-spoliation.[119] The mere fact that the intruders were not occupiers under the PIE, according to the court, did not mean that the City could still invoke counter-spoliation.[120] This is because the availability of this defence does not depend on the non-availability of the PIE.[121] If the City does not act *instanter* (or if the possession of the intruders has been perfected), then the PIE (and not counter-spoliation) must be used to evict the intruders from the land.[122]

The court referred to our response to Scott's opinion,[123] and rejected our criticism of the *Setjwetla* decision. We argue that "occupation" in the PIE has the same meaning as "possession" for counter-spoliation.[124] Hence, we find it difficult to see how the *Setjwetla* court could rule that the intruders did not occupy the land for purposes of the PIE but nonetheless acquired peaceful and undisturbed

110 *Ibid*.
111 *Ibid*.
112 *Ibid*.
113 *Ibid*.
114 Para 120.
115 Para 86.
116 *Ibid*.
117 Para 83.
118 *Ibid*.
119 Para 80.
120 Para 83.
121 *Ibid*.
122 *SA Human Rights Commission* para 90.
123 Muller & Marais "Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle" 2020 *TSAR* 103.
124 Muller and Marais 110–112.

possession of land, which meant that the City of Johannesburg could no longer invoke counter-spoliation.[125]

The court disagreed with our view for two reasons. In the first instance, it held that possession has two meanings in our law, one relevant to property law and the other relevant to spoliation.[126] The two forms of possession are, according to the court, juridical possession and non-juridical possession.[127] Only the latter is required under the *mandament*.[128] This, so the court held, flows from *Yeko*, where it was held that non-juridical possession is sufficient for the *mandament*.[129] Secondly, the court held that the term "occupation" in the PIE does not have the same meaning as non-juridical possession.

The court found that counter-spoliation is constitutionally valid in terms of the narrow interpretation of its requirements.[130] Yet, the application of the defence, in terms of the City's incorrect interpretation and application of it, is unconstitutional and invalid insofar as it permits the demolition of, and eviction of persons from, informal dwellings or structures, whether they are occupied or unoccupied, at the time of demolition or eviction.[131] The court ruled that the conduct of the first respondent – the attempted demolition and eviction of Mr Qolani from the informal structure – is both unlawful and unconstitutional.[132] His dwelling was a completed structure and he occupied it, as indicated by the presence of a bed in the dwelling.[133]

3 THE REQUIREMENTS OF COUNTER-SPOLIATION

3.1 Methodology

SA Human Rights Commission raises several points worthy of analysis. They are the meaning of the possession concept and its relation to the unlawful occupier requirement in the PIE, the peaceful and undisturbed qualification, the *instanter* requirement, and (especially) how they relate to each other. The latter two requirements are entangled and require elucidation. Courts generally conflate the principles of the *instanter* requirement and the peaceful and undisturbed qualification to decide whether the alleged spoliator (or landowner) validly committed counter-spoliation.[134] This situation is unsatisfactory, as the courts take irrelevant factors into consideration to decide a dispute. Consequently, the possession concept (particularly the *corpus* element) is rendered largely irrelevant in such disputes.

In the next section we first consider the possession concept. There we show how possession, for purposes of counter-spoliation, relates to "unlawful occupier" in the PIE so as to delineate the fields of operation of these two legal sources. We then analyse the *instanter* requirement and the peaceful and undisturbed qualification. We then indicate how these two aspects, taken together, import irrelevant considerations into counter-spoliation disputes. Matters will be simplified considerably

125 *Ibid*.
126 *SA Human Rights Commission* para 56.
127 *Ibid*.
128 *Ibid*.
129 *Ibid*.
130 *SA Human Rights Commission* paras 90, 95.
131 Para 159.1.7.
132 Para 159.1.1.
133 Para 120.
134 See, *eg*, *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W); *Ness*; *De Beer v Firs Investments Ltd* 1980 3 SA 1087 (W); *Mans v Loxton Municipality* 1948 1 SA 966 (C).

if the emphasis were to fall on the possession concept, especially the *corpus* element, in future counter-spoliation cases.

We employ Van der Walt's methodology – a "constitutional vision of property"[135] – in our present investigation (as well as in our second article). It entails that the first step for any legal analysis, when more than one source of law applies to a dispute, especially one involving the common law, should be the supremacy of the Constitution[136] and the single-system-of-law principle.[137] Together they entail a systemic constitutional approach.[138] When read with sections 39(2) and 173 of the Constitution, the mentioned two aspects require that all legal sources must promote the spirit, purport, and objects of the Bill of rights.[139] These features are the positive characteristics the Constitution requires for the whole legal system.[140] The concrete manifestations of these characteristics include proscribing the arbitrary eviction from one's home, and the right against arbitrary deprivation of property.[141]

Under the second step, one uses the subsidiarity principles to determine which legal source applies to a dispute.[142] The Constitutional Court developed the subsidiarity principles in light of the single-system-of-law principle, as laid down in *Pharmaceutical Manufacturers Association*.[143] There Chaskalson P (as he then was) held that all law, including the common law, derives its force from the common law and is subject to constitutional control.[144] The single-system-of-law principle, from which subsidiarity principles originate, guides the question as to which source of law should be used to adjudicate a dispute when more than one source applies.[145]

One must choose the source of law which best promotes the positive features that the Constitution envisions for all law.[146] Such promotion ensures that the law operates in a systemic fashion by preventing the creation of fragmented sources of law.[147] Fragmentation could occur, for example, if the scope of counter-spoliation and the PIE (and, by implication, section 26(3) of the Constitution) is not carefully

135 Van der Walt (2012) 132ff.
136 S 2 of the Constitution.
137 Van der Walt *The law of servitudes* (2016) 38–44. See also Van der Walt (2012) 20, citing *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See further Van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" 2008 *CCR* 77. For other publications where this methodology was followed in analyses of private property law, see Marais "Protecting *quasi*-possession of electricity supply with the *mandament van spolie* – has the Supreme Court of Appeal switched off this possibility?" 2021 *Stell LR* 215 277ff; Marais "The increasing difficulty of protecting *quasi*-possession of incorporeals with the *mandament van spolie*" 2021 *De Jure* 91 99ff; Freedman "A supervening lack of utility and the judicial shift towards *ex post* controls in South African servitude law" in Muller *et al Transformative property law – Festschrift in honour of AJ van der Walt* (2018) 469 487–490.
138 Van der Sijde (2015) 271–274; Van der Sijde (2022) chs 1, 6.
139 Van der Walt (2012) 131–147; Van der Walt (2016) 39–53.
140 *Ibid*.
141 Van der Walt (2012) 32, 111, 139, 144.
142 *Idem* 39–40.
143 *Pharmaceutical Manufacturers Association* para 44.
144 *Ibid*.
145 Van der Walt (2012) 19–24. See also Marais & Muller "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: *quo vadis* statutory interpretation and development of the common law?" 2018 *SALJ* 766 770ff.
146 Van der Walt (2012) 153–168, esp 157.
147 Van der Walt (2012) 62–63ff; Van der Sijde (2015) 271–274.

delineated, which could then result in some land intrusions being dealt with under counter-spoliation and others under the PIE.[148] Here the law would operate in a "unsystemic" or haphazard manner, which could negatively impact constitutional rights,[149] such as the right to be evicted from one's home only in terms of a court order.[150]

The second subsidiarity principle states that when someone claims that a fundamental right is infringed, such person must invoke legislation enacted to protect that right to found a course of action and may not directly rely on the common law to obtain relief.[151] The inferred proviso to the second principle states that a person may rely on the common law only if legislation has not replaced the common law in a given dispute.[152] If the common law indeed applies, the third step of the analysis entails determining the common-law position.[153] This is done by interpreting the common-law sources and case law.[154] This step forms the basis of the present article – our assessment of the requirements of counter-spoliation to ascertain the common-law position.

The fourth step applies once the common-law position has been established, or if the common-law position is indeterminate on a given point.[155] Here the aim is to see if the identified common-law position, or any of the available interpretations, promotes the features that the Constitution requires of all law.[156] Here it is worth remembering that "common-law sources often provide no more than debatable or indeterminate authority for one particular legal solution".[157] The development of the common law must be considered if the common-law position does not promote the positive features.[158] If more than one interpretation exists, such development may take the form of choosing the interpretation which best promotes constitutional rights and values.[159] Our second article proceeds from this fourth step, where we investigate the relation between counter-spoliation (and the PIE) and the

148 Even though the *SA Human Rights Commission* decision refers to s 26(2) of the Constitution in many parts of the judgment, what the court probably had in mind is s 26(3). The reason is that this is the right which is implicated in counter-spoliation cases in the land-intrusion context. See, for example, *City of Cape Town* para 38.

149 Van der Sijde (2015) 210ff; Van der Sijde (2022) 14ff, 125ff.

150 As legitimate as the protection of property in terms of s 25(1) of the Constitution is, such protection must be considered in light of the positive features which the Constitution requires of all law, which include the prevention of arbitrary eviction (s 26(3) of the Constitution): see Van der Walt (2012) 131–171. See also Van der Walt "The modest systemic status of property rights" 2009 *J of Law, Property, and Society* 15, who argues that property and its protection obtain a marginal character in a transformational setting. Here, the extra-legal interests of vulnerable persons should receive greater attention. See further the discussion in the second article of the series.

151 Van der Walt (2012) 36–37ff.

152 *Ibid*; Van der Walt (2016) 43.

153 Van der Walt (2016) 41.

154 Marais 2021 *Stell LR* 227–232.

155 Van der Walt (2016) 41.

156 *Ibid*.

157 *Ibid*. This is because "historical authority on any given issue is often too indeterminate to provide clear or unambiguous answers to questions about legal development in a changed and changing social, economic and political context that may be very far removed from the context within which a principle or [legal] institution … originated or developed" (Van der Walt (2016) 9).

158 Van der Walt (2012) 36–37 ff; Van der Walt (2016) 45.

159 Van der Walt (2016) 41; Marais 2021 *Stell LR* 230–231ff.

home concept in section 26(3) of the Constitution to see which source of law best promotes the desired characteristics that the Constitution requires of all law.

Landowners may use counter-spoliation to eject land intruders before they acquire peaceful and undisturbed possession of land. For reasons we discuss in the second article, the PIE (which replaces the common law in the eviction context) does not cover these instances. As no other legislation applies to this context, the common law, in the form of counter-spoliation, must be used.[160] The second subsidiarity principle is accordingly applicable.

As *per* the proviso to the second principle, the common law may be used only if it promotes the desired features that the Constitution requires. In the counter-spoliation context, there is a tension between two competing fundamental rights – the right against arbitrary deprivation of property in section 25(1) of the Constitution, and the prevention of arbitrary eviction from one's home in section 26(3) of the Constitution. Section 26(1) of the Constitution, the right to have access to adequate housing, is also implicated insofar as intruders may already have homes on the land. As counter-spoliation is an extra-judicial defence, it may potentially permit eviction from a home without a court order.[161] It is, therefore, necessary to determine the common-law position regarding counter-spoliation to see if it complies with section 26(3) of the Constitution. In what follows, we analyse the requirements of counter-spoliation in light of *SA Human Rights Commission* and other decisions to establish the common-law position.

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160 The Trespass Act 6 of 1959 may also be relevant here. The reason is that it potentially applies to land intrusions, even though it has not yet been employed to resolve land incursions. S 1(*b*) provides that a person is guilty of an offence if he enters land, a building, or part of a building, or is present on such premises, without having permission to do so. S 2(1) stipulates that a convicted person shall be liable to pay a fine not exceeding R2 000 or face imprisonment of up to two years. S 2(2) provides that a court which convicts a person under s 1(*b*) may make an order to eject such person summarily from the land. Yet, in *S v Koko* 2006 1 SACR 15 (C) para 24, the court cautioned against attempts to use this Act to effect eviction instead of following the PIE. This case also made it clear that accused persons under the Act enjoy the protection of s 26(3) of the Constitution (para 13). Thus, once an intruder is an unlawful occupier under the PIE, an owner must use this Act, and not the Trespass Act, to evict the occupier (para 19). However, the Trespass Act applies before an intruder is an unlawful occupier. It does not expressly replace the common law, which seems to suggest an owner may elect to use either counter-spoliation or the Trespass Act to eject an intruder in such an instance. Our argument focuses on counter-spoliation and does not consider the Trespass Act. See further the Unlawful Entering on Premises Bill (B-2022). The aim of the Bill is to repeal the Trespass Act and to prohibit unlawful entry on premises (cl 11(1)). Cl 3(1) of the Bill provides that unlawful entry on premises is an offence whilst cl 3(3) stipulates that an intruder who refuses to leave the premises after being requested to do so is guilty of an offence. Those found guilty of an offence may be fined or sentenced to prison for up to two years, or both (cl 10). Cl 7(2) provides that if an intruder refuses to vacate the premises, the owner must request the assistance of the South African Police Service (SAPS). Cl 8(2) authorises the SAPS to remove intruders from premises. A court order is not required for such a removal. Cl 8(4) provides that "[i]f intruders [had] already erected any form of housing on the premises and already occupy the erected housing, the authorised member or members must arrest them for unlawful entry on a premises". Apparently, no court order is required here either. If so, this provision is contrary to s 26(3) of the Constitution, which proscribes eviction from one's home without a court order. For a discussion of this Bill, see Pienaar "Land reform" *Juta's Quarterly Review* (2022) 3 para 1.2. We are indebted to Professor Juanita Pienaar for bringing this Bill to our attention.

161 See the discussion in the second article of the series.

3.2 The possession concept

The *SA Human Rights Commission* court's analysis of the nature of counter-spoliation is sound. It is indeed a valid defence against the *mandament* that permits the alleged spoliator to exercise a reasonable measure of extra-judicial violence to ward off interferences with his possession of a thing. It is "one of the few remaining instances in South African law where a person is allowed to take the law into his own hands to protect his interests instead of having to approach a court for assistance".[162] It is noteworthy that modern Dutch law, which was influenced (albeit in a limited fashion)[163] by Roman-Dutch law, no longer has a defence like counter-spoliation.[164] The court correctly identified the two requirements of this defence – peaceful and undisturbed possession, and that the act of counter-spoliation must be *instanter* to the act of dispossession.

In this section we consider the possession concept. We address the *instanter* requirement and the peaceful and undisturbed qualification in the next section below, as the courts tend to conflate them.

Our property law, in line with the civilian tradition, draws a fundamental distinction between ownership and possession.[165] Ownership is the most complete real right a legal subject may have in property, while possession or control is the most basic legal relation between a person and a thing.[166] It is essentially a physical control relationship.[167] The court confirmed that possession has two elements – the *corpus* and the *animus* elements.[168] The *corpus* element refers to the factual custody a legal subject exercises over a thing whereas the *animus* refers to the intention with which a thing is held.[169] Both the *corpus* and *animus* elements must be present for the law to regard a person as having possession or control (in the form of either civil possession or holdership) of a thing.[170]

According to Van der Merwe, whose possession theory enjoys considerable support amongst most scholars and courts, possession is a wide *genus* which includes both civil or juridical possession (*possessio civilis*) and natural possession

162 Van der Merwe & Human "Die aanpassing van die tradisionele leerstuk van *contra*-spolie by moderne Suid-Afrikaanse omstandighede" 1992 *Stell LR* 297 (our translation). See similarly Sonnekus "Spolie en *contra* spolie" 1986 *TSAR* 243.

163 See Van der Walt (2016) 15 n 38; Kiewitz *Relocation of a specified servitude of right of way* (LLM dissertation, Stellenbosch University 2010) 33–34 and the sources they cite.

164 Van der Merwe & Human 314.

165 Muller *et al* 309–310, 316–317; Sonnekus & Neels 126; Van der Merwe (2014) para 73; Van der Merwe (1989) 96.

166 *Ibid*.

167 Sonnekus & Neels 126; Van der Merwe (2014) para 73; Van der Merwe (1989) 96.

168 *SA Human Rights Commission* para 43. See also Voet *Commentarius ad Pandectas* 41.2.1; Grotius *Inleidinge tot de Hollandsche Rechts-geleerdheid* 2.2.2; *Nienaber v Stuckey* 1946 AD 1049 1056; *Scholtz v Faifer* 1910 TS 243 247.

169 Muller *et al* 309; Van der Merwe (2014) para 70.

170 Voet *ad* 41.2.10; *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C) 281; *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 2 SA 464 (W) 474; *Welgemoed v Coetzer* 1946 TPD 701 712.

or holdership[171] (*possessio naturalis*).[172] One may also use the term "control" when referring to possession as this wide *genus*.[173]

Juridical possession requires the intention of an owner (*animus domini*), and is the type of possession necessary to acquire ownership of a thing through acquisitive prescription and appropriation (*occupatio*), for example.[174] Holdership, in turn, requires a lesser intention, such as the intention to draw a benefit from one's factual control of a thing (*animus ex re commodum acquirendi*).[175] This is the type of intention traditionally required for the *mandament* and, hence, counter-spoliation.[176] The court in the *SA Human Rights Commission* decision identified this type of possession as non-juridical possession.

Reference to this type of possession as "non-juridical possession" is new. As our possession theory already suffers from terminological and conceptual inconsistencies,[177] it is preferable to avoid the term "non-juridical possession" and simply to refer to this control relation as "holdership". It is, for similar reasons, better to steer clear of another description that the court uses – that possession has been "perfected". It is better to simply refer to the "acquisition of possession", as the term "perfecting" has a very specific meaning in the real security context, one which is foreign to the possession law framework.[178]

Van der Merwe argues that the *corpus* element is the same for both types of possession or control.[179] Hence, the distinction between juridical possession and holdership pivots on the type of *intention* with which a thing is physically controlled.[180] The way in which the *SA Human Rights Commission* court typifies the distinction between these two forms of possession, however, hinges on the physical acts required to satisfy the *corpus* element. This ruling is unattractive, as the law uses the same principles to determine whether a person acquired factual custody of a thing for both juridical possession and holdership.[181] Hence, it is difficult

171 To avoid confusion, we followed the suggestion of Van der Walt *Die ontwikkeling van houerskap* (LLD thesis, Potchefstroom University for Christian Higher Education 1985) 891–892 – the term "holdership" should be used instead of "natural possession" to refer to possessory relations other than juridical or civil possession.

172 Van der Merwe (2014) paras 72, 83; Van der Merwe (1989) 95–97, 109–111. For sources which support this school of thought, see Kleyn (thesis) 344–376; Mathews "The mental element in possession" 1962 *SALJ* 179; Muller *et al* 309–324; Van Rensburg & Van der Merwe "Die aard van besit en die *animus*-element daarvan" 1978 *THRHR* 1 13. For an evaluation of this school of thought and its shortcomings, see Marais "The South African possession theory revisited: A re-evaluation of the possession concept and possessory terminology (1)" 2022 *THRHR* 151; Marais "The South African possession theory revisited: A re-evaluation of the possession concept and possessory terminology (2)" 2022 *THRHR* 287.

173 Marais (2022) 287; Van der Walt "Die funksies en omskrywing van besit" 1988 *THRHR* 508.

174 Van der Merwe (2014) para 83; Van der Merwe (1989) 109–111.

175 Van der Merwe (2014) para 80; Van der Merwe (1989) 104–105. For a critical discussion of this intention, see Marais (2022) 151, 287.

176 Van der Merwe (2014) para 80; Van der Merwe (1989) 104–106. See also Kleyn (thesis) 365–366; Sonnekus & Neels 168.

177 See, generally, Van der Walt (1988) 508. For an analysis of how Van der Walt's suggestions may be used to resolve these inconsistencies, see Marais (2022) 287.

178 See, *eg*, Muller *et al* chs 16.5, 17.

179 Van der Merwe (2014) para 72; Van der Merwe (1989) 95.

180 Van der Merwe (2014) para 72; Van der Merwe (1989) 95.

181 Van der Merwe (2014) para 72; Van der Merwe (1989) 95.

to square the court's understanding of the distinction between juridical possession and holdership with existing legal principles. It is unlikely that the court developed the common law, as such a development would have required engaging with the sources of the *corpus* element, or at least invoking section 39(2) of the Constitution, which the court did not do.

Possession for *mandament* (and, hence, counter-spoliation) purposes probably has the same meaning as "occupation" in the PIE.[182] We think that the *Setjwetla* court erred by ruling that the intruders there were not occupiers for purposes of the PIE but still had possession for purposes of the *mandament*.[183] The *SA Human Rights Commission* court disagreed with our view by ruling that possession does have two meanings in South African law, one for property law and one for spoliation.[184] What the court probably had in mind here are the types of possession required for the PIE and spoliation, as *per* our argument.[185] Be that as it may, the two forms of possession (according to the court) are juridical possession and non-juridical possession.[186]

The court found that only non-juridical possession is required for the *mandament* and, hence, counter-spoliation. It also held that "occupation" in the PIE does not have the same meaning as non-juridical possession. It is for these reasons that the court disagreed with Scott's argument that the law sets more stringent requirements for satisfying the *corpus* element when physical control is acquired without the owner's permission. The court rejected his view by ruling that what he had in mind is juridical possession, which is not what the *mandament* (and, hence, counter-spoliation) requires.

The court's finding that possession and occupation do not have the same meaning is unpersuasive. Scholars invariably use the verb "occupy" as a synonym for "possess" when dealing with factual control or dominion of land.[187] The same applies in case law. *Yeko*, to which the *SA Human Rights Commission* court refers, used the term "occupation" to refer to the respondent's possession of the shop which he wanted restored through the *mandament*. Important counter-spoliation cases, like *De Beer v Firs Investments Ltd*[188] and *Ness*, also refer to "occupation of the shop"[189] and "occupation of the premises", respectively.[190] Other cases which followed this approach include *Fischer v Ramahlele*,[191] *Kgosana v Otto*,[192] *Ntai v Vereeniging Town Council*,[193] and *Scholtz v Faifer*.[194]

In *S v Koko*,[195] which concerned the relation between "unlawful occupier" in the PIE and the crime of trespass under the Trespass Act,[196] the court ruled that "the exercise of some form of control over the whole or part of premises, coupled

182 Muller & Marais 110–112.
183 *Ibid*.
184 *SA Human Rights Commission* para 56.
185 Paras 56–57ff. See also Muller & Marais 110–111ff.
186 Para 56.
187 Muller *et al* 312; Van der Merwe (2014) para 77; Van der Merwe and Human 307–308.
188 1980 3 SA 1087 (W).
189 *De Beer* 1089A.
190 *Ness* 645B.
191 2014 4 SA 614 (SCA) para 22.
192 1991 2 SA 113 (W) 116H.
193 1953 4 SA 579 (A).
194 1910 TS 243 247, 249.
195 2006 1 SACR 15 (C).
196 Act 6 of 1959.

with physical presence thereon, are essential prerequisites for the occupation thereof".[197] This description is similar to possession, especially the *corpus* element.[198] It is unnecessary to multiply examples, but many cases in the context of acquisitive prescription, which dealt with possession of land, also use occupation and possession as synonyms.[199] In unjustified enrichment law, particularly in the context of unauthorised improvements to land, courts and scholars refer to possessors and occupiers of land, the former being persons who physically control land with the intention of an owner (juridical possession), while the latter are persons who have factual custody over land with a lesser intention (holdership).[200] Considering these examples, it is hard to see how possession and occupation could have different meanings.

The PIE defines "unlawful occupier" as "a person who occupies land without the express or tacit consent of the owner or person in charge". This definition does not explain the meaning of the verb "occupies", which it uses to define "unlawful occupier". The common law, as the residual source of law, must accordingly be used to determine the meaning of occupation. Since occupation and possession have the same meaning when one deals with the possession of land, as explained in the previous paragraphs, it follows that "unlawful occupier" in the PIE unavoidably has the same meaning as possession in private law. The contrary ruling in *SA Human Rights Commission* is, therefore, unconvincing.

The court's finding that the availability of counter-spoliation does not depend on the non-availability of the PIE is thus questionable. This is because the PIE applies the moment an intruder acquired possession or occupation of the land. Such application would then exclude counter-spoliation, it being part of the common law. In the second article we investigate when an intruder acquires possession of land and hence becomes an unlawful occupier. The next section considers the *instanter* requirement and the peaceful and undisturbed qualification for counter-spoliation, along with the possession concept.

3.3 The *instanter* requirement, the peaceful and undisturbed qualification, and the role of the possession concept

This section analyses the *instanter* requirement and the peaceful and undisturbed qualification of possession for counter-spoliation. We investigate the *instanter* requirement and the mentioned qualification together, as the courts tend to conflate them.[201] Courts unfortunately consider irrelevant factors under these two requirements, especially when the owner invokes the defence of counter-spoliation.[202] A stronger emphasis on the possession concept has the potential to resolve these

197 *S v Koko* 2006 1 SACR 15 (C) para 19.

198 We expand on this element in the second article in this series.

199 See, *eg*, *Morkels Transport*; *Welgemoed*; *Malan v Nabygelegen Estates* 1946 AD 562; *Pienaar v Rabie* 1983 3 SA 126 (A); *Stoffberg NO v The City of Cape Town* 2019 JDR 1013 (SCA); *Katha v Pillay NO and Others* 2024 1 SA 159 (GJ).

200 See, *eg*, Eiselen & Pienaar *Unjustified enrichment – a casebook* (2017) 242–311; Du Plessis *The South African law of unjustified enrichment* (2012) 274–277; Sonnekus *Unjustified enrichment in South African law* (2017) 325–327; Visser *Unjustified enrichment* (2008) 590–621; and the sources they cite.

201 See, *eg*, *SA Human Rights Commission*; *Setjwetla*; *Ness*; *Mbangi*. See, similarly, Van der Merwe (2014) para 113; Van der Merwe & Human 306–307, 313.

202 See, *eg*, *Ness* and *Mbangi*. We evaluate *Ness* in the next paragraphs. We return to *Mbangi* in the second article in this series.

difficulties. We briefly explain the two requirements before investigating them in view of the possession concept.

The *instanter* requirement entails that the person invoking counter-spoliation (the alleged spoliator) must have acted immediately or forthwith upon an attempted spoliation.[203] The acts of the alleged spoliator may not amount to a new breach of the peace; they must be a continuation of the original breach or *res gestae*.[204] The alleged spoliator (like a landowner) may invoke this defence only if he had possession of the thing and if the alleged *spoliatus* (or intruder) did not yet wrest possession away from him.[205]

The peaceful and undisturbed qualification is usually discussed with the possession concept.[206] Kleyn opines that the qualification is meaningless and may be ignored, as it does not qualify the possession concept in a technical juridical sense.[207] Van der Merwe posits that it means nothing more than the *corpus* and *animus* elements of possession.[208] One should use these two elements only to establish whether possession is peaceful and undisturbed.[209] As a result, both scholars think the qualification is unhelpful; the principles of possession are sufficient to determine whether the alleged *spoliatus* acquired peaceful and undisturbed possession of the thing. Van der Walt argues that the qualification means possession must be "sufficiently stable or durable for the law to take cognizance of it".[210] Although the latter definition received a judicial approval in *Ness*,[211] the court afforded it a meaning which is at odds with the possession concept. We expand on this matter below.

The *instanter* requirement has two interpretations – Van Leeuwen's wide interpretation and Huber's narrow one.[212]

The wide interpretation entails that it would be acceptable for the original possessor or *spoliatus* to prepare himself, after dispossession, to regain possession, even if two, three, or more days have passed between the original act of dispossession and the act of regaining possession.[213]

Huber, by contrast, argues that much time may not elapse between the initial act of dispossession and the original *spoliatus*' act of counter-spoliation, as it would otherwise result in a new breach of the peace.[214] The act of counter-spoliation must follow immediately upon the *selfde rumoer* or original act of violence.[215] A valid instance of counter-spoliation is when someone ejected the first possessor from his land, and such possessor then immediately expelled the former party in a

203 Van der Merwe (2014) para 113.
204 Kleyn "*Mandament van spolie – contra*-spolie" 1986 *De Jure* 159 163; Van der Merwe (2014) para 113.
205 Van der Merwe (2014) para 113.
206 See, *eg*, Kleyn (thesis) 362; Muller *et al* 333; Van der Merwe (2014) para 108; Van der Merwe (1989) 129; Van der Walt (1985) 677–681.
207 Kleyn (thesis) 362. See, similarly, Muller *et al* 333.
208 Van der Merwe (2014) paras 108–109; Van der Merwe (1989) 129.
209 Van der Merwe (2014) para 109. To much the same effect is Kleyn (thesis) 363.
210 Van der Walt "Defences in spoliation proceedings" 1985 *SALJ* 172 177, referred to with approval in *Ness* 647C–E.
211 647D.
212 Van der Merwe (2014) para 113; Kleyn (1986) 163.
213 Van Leeuwen *Het Roomsch Hollands Recht* 2.8.3. See also Van der Merwe (2014) para 113.
214 Huber *Heedensdaegse Rechtsgeleertheyt* 5.10.8. See also *Mans* 977; Kleyn (1986) 163.
215 Huber 5.10.8.

similar manner.[216] If, however, the first possessor were to flee after dispossession, and gather people to assist him in regaining possession, then the original spoliator may institute possessory proceedings against the first possessor.[217] This is because "the first violence occurred by way of defending one's possession, but the second instance occurred through rioting, and the laws, especially those on possession, have been adopted to prevent and stop violence".[218]

Ness followed Van Leeuwen's approach whereas *Mans v Loxton Municipality*[219] approved Huber's interpretation.[220] In *Ness*, a period of 11 days elapsed between Ness' initial occupation of the premises and Greef finally taking possession of it. The court held that Greef (the alleged spoliator) acted *instanter* and accordingly committed a valid act of counter-spoliation. In *Mans*, a few hours seem to have passed between the original act of dispossessing a flock of sheep and the act of counter-spoliation.[221] The court there ruled that the act of counter-spoliation did not occur *instanter* the original dispossession and was accordingly unlawful.

It is worthwhile to evaluate *Ness*. It was about the possession of land, like the *SA Human Rights Commission* case, and also featured in the latter decision.

Ness took occupation of Greef's restaurant from the second appellant, who had a lease agreement with Greef. Greef instituted proceedings to cancel this lease agreement and to evict the second appellant from the premises. Against this background, Ness occupied Greef's restaurant on 5 March 1984 and disregarded the notice Greef put up on the premises that day, which stated that the restaurant was closed to the public.[222] Ness apparently occupied the restaurant with the permission of the second appellant but against Greef's express prohibition.[223] Greef replaced the locks to the premises on 7 March. On 8 March, Ness replaced these locks with new ones. Greef replaced these locks again on 16 March. Ness then instituted the *mandament* against Greef to reclaim possession of the premises, and Greef, in turn, raised the defence of counter-spoliation.

Despite Ness having had the keys to the premises, being physically present there, and trading there for his own benefit,[224] Vivier J (for a unanimous full bench) held that Ness' possession had not "become … firmly established or ensconced".[225] This is because the

> "tussle for possession of the premises commenced on 5 March 1984 and continued until 16 March 1984 when respondent [Greef] finally succeeded in ousting Ness from the premises. The events which followed after 5 March 1984 were all part of the *res gestae* of the original act of spoliation and a continuation of the breach of peace committed by Ness on 5 March 1984".[226]

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216 *Ibid*.
217 *Ibid.*
218 *Ibid* (our translation). The original Dutch reads as follows: "het eerste gewelt by maniere van verdeedinge is geschiedt, maer het tweede by forme van oproer, ende de Gerechten, voornamentlijk de possessoire, zijn daer toe ingestelt, om gewelt te beletten ende te bedwingen".
219 1948 1 SA 966 (C).
220 *Cf* Van der Merwe & Human 306, 311.
221 For a discussion of the decision, see Van der Merwe & Human 305–307.
222 *Ness* 649D–E.
223 *Ibid*.
224 647G–H.
225 649E.
226 649F–G.

Vivier J, in approving Van der Walt's definition of the peaceful and undisturbed qualification, held that Ness' possession had not yet stabilised and that Greef, concomitantly, acted *instanter*.[227] The fact that the court used the terminology of the qualification – like "established or ensconced in ... possession"[228] – to decide whether there was compliance with the *instanter* requirement highlights the link between these two requirements.[229]

Many authors reject the reasoning and outcome in *Ness*.[230] Sonnekus, however, agrees with the outcome.[231] He argues that the case did not turn on the *instanter* requirement at all, but rather hinged on the peaceful and undisturbed qualification.[232] The tussle between 5 and 16 March means Ness' possession was not yet peaceful and undisturbed by the time Greef changed the locks for the second time on 16 March.[233] This is because Ness and Greef factually contended for possession of the premises between 5 to 16 March.[234]

Kleyn disagrees with the outcome. He argues that the court confused the possession concept with the spoliation requirement and attached too much weight to the fact that Ness' possession was unlawful.[235] He thinks that the court's emphasis on the unlawfulness of Ness' possession might mean that the act of dispossession will never be completed as long as the spoliator acts unlawfully.[236] The (un)lawfulness of possession is irrelevant, as counter-spoliation – like the *mandament* – does not concern itself with the merits of a dispute.[237] This is because the *mandament* and counter-spoliation form part of the possessory suit, where courts may not consider the merits.[238] Hence, Ness acquired possession of the premises between 5 and 16 March and should have succeeded with the *mandament* against Greef.[239]

Van der Merwe also rejects the decision. He argues that Greef no longer had possession of the premises when Ness occupied it.[240] The second appellant (and not Greef) had possession of the premises up until Ness' occupation.[241] Greef did not regain possession of the premises by putting up the mentioned notice or when she changed the locks on 7 March.[242] Greef spoliated Ness twice – by changing the locks on 7 March and again on 16 March.[243] Greef was, therefore, entitled to regain possession only by way of petitory proceedings under the *rei vindicatio*.[244]

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227 647D, 649D–F.
228 649E.
229 See also *Mbangi*; *Setjwetla*.
230 Van der Merwe (2014) para 113; Kleyn (thesis) 418 n 588; Muller *et al* 354; Kleyn (1986) 163–165 and the sources he cites. See also *De Beer v Firs Investments Ltd* 1980 3 SA 1089 (W) 1090D–G, which prefers the *Mans* case. *Cf* Scott 169; Sonnekus (1986) 247.
231 Sonnekus (1986) 247.
232 *Ibid*.
233 *Ibid*.
234 *Ibid*.
235 Kleyn (1986) 164–165; see similarly Van der Merwe & Human 310.
236 Kleyn (1986) 165; see also Van der Merwe & Human 310.
237 Kleyn (1986) 162, 164, 166; see also Van der Merwe and Human 310.
238 Kleyn "Die *mandament van spolie* as besitsremedie" 1986 *De Jure* 1 3–6.
239 Kleyn (1986) 164–165; see similarly Van der Merwe & Human 310–311.
240 Van der Merwe "Law of Property (Including Mortgage and Pledge)" 1985 *Annual Survey of SA Law* 241.
241 *Ibid*.
242 *Ibid*.
243 *Ibid*.
244 *Ibid*.

Van der Merwe thinks that the court construed the *instanter* requirement too widely.[245] It is insufficient for an owner merely to protest or put up a notice to regain possession; under counter-spoliation, "physical force is needed to destabilize the factual situation".[246] The court apparently lost sight of this fact (which shares similarities with the *corpus* element of possession)[247] and followed Van Leeuwen's generous interpretation towards the *instanter* requirement merely because it was the owner who sought to regain possession.[248]

Some cases raise the possibly that courts have a discretion to interpret the *instanter* requirement (and, concomitantly, the peaceful and undisturbed qualification) more liberally when the true owner invokes counter-spoliation to regain possession when compared to other types of possessors.[249] This apparent discretion led Vivier J to condone the long period between dispossession and the alleged act of counter-spoliation, as seen in the previous paragraph.[250]

The *SA Human Rights Commission* decision agreed with several of the objections Kleyn and Van der Merwe raise against *Ness*'s interpretation (and application) of the *instanter* requirement, even though the court did not cite them. The court decided that factors like whether the alleged spoliator is the owner, whether the alleged *spoliatus* acted against the owner's express wishes, and the lawfulness of the alleged *spoliatus*' possession form part of the merits of the case, which are irrelevant to the *mandament* and counter-spoliation.[251] Such considerations are contrary to the legal-political function of the *mandament* (and, concomitantly, counter-spoliation), as not even an owner may take the law into his own hands.[252] The purpose of the *mandament* and counter-spoliation is to prevent breaches of the peace. This applies to both owners and spoliators alike.[253] As such, the mentioned discretion has no place under counter-spoliation. This ruling is a welcome development, as it brings much-needed clarity to our law.

Scholars agree that since counter-spoliation is one of the few instances where a person may invoke extra-judicial self-help to protect possession, its requirements should be interpreted restrictively.[254] The *SA Human Rights Commission* court agreed with this view by ruling that a narrow interpretation of the requirements of counter-spoliation must be followed, one which the Constitution guides.[255] The reason is that counter-spoliation could negatively impact constitutional rights and values, such as the rule of law[256] and section 26(3) of the Constitution.[257] Regarding

245 *Ibid*.
246 *Idem* 242–243.
247 We discuss the *corpus* element in our second article.
248 Van der Merwe (1985) 243. See also Van der Merwe & Human 311.
249 *Mans* 978; *Ness* 648D–G; *De Beer* 1092F. See also *Mbangi*.
250 Van der Merwe (1985) 243. See similarly Kleyn (thesis) 419 n 590.
251 SA Human Rights Commission paras 47–48. See also Kleyn (1986) 162, 164, 166; Van der Merwe & Human 310.
252 Muller *et al* 355; Van der Merwe (2014) para 113; Van der Merwe (1989) 145; Kleyn (1986) 164; Kleyn (thesis) 419. See similarly *SA Human Rights Commission* para 48.
253 Van der Merwe (1985) 243. To much the same effect, is *SA Human Rights Commission* paras 47–48.
254 Kleyn (1986) 165–166; Van der Merwe & Human 314. To much the same effect, is Sonnekus (1986) 243, 247.
255 *Ibid*. This approach was approved in *City of Cape Town* para 6ff.
256 *SA Human Rights Commission* para 62.
257 *Idem* para 61. Although the court refers to s 26(2) in many parts of the judgment, it probably had s 26(3) in mind. See, *eg*, *City of Cape Town*.

the *instanter* requirement specifically, the court held that the narrow interpretation of this requirement is constitutional.[258] It aligns with the purpose of the *mandament* – to discourage unlawful self-help and maintain the rule of law.[259]

It comes as no surprise that the *SA Human Rights Commission* court rejected the wide approach towards *instanter* in *Ness*, given the doctrinal objections to this approach and also its potential to undermine constitutional rights.[260] It is noteworthy that the court ruled that Van der Walt's definition of the peaceful and undisturbed qualification forms part of the wide interpretation towards the *instanter* requirement.[261] This, again, illustrates the link between these two requirements.

Instead of considering whether the act of counter-spoliation occurred *instanter* the dispossession, a more principled way to decide such cases would be to focus on the possession concept, specifically whether the alleged *spoliatus* already wrested possession away from the alleged spoliator.[262] This is because the availability of counter-spoliation turns more on whether the alleged *spoliatus* acquired possession than on the *instanter* requirement.[263] If the alleged *spoliatus* acquired possession, then the alleged spoliator may not invoke counter-spoliation.[264] As *per* Van der Merwe's view, whether the alleged spoliator retained possession of the thing depends on the performance of *physical acts* regarding the land, which touches on the *corpus* element of possession. Consequently, whether the alleged spoliator validly committed counter-spoliation depends less on the *instanter* requirement (and the peaceful and undisturbed qualification) and more on the possession concept.[265] Here the focus falls on whether the spoliator satisfied the *corpus* and *animus* elements of possession.

A stronger emphasis on the possession requirement also accords with the legal-political function – the law does not permit legal subjects to commit extra-judicial self-help if possession is present, even when it is unlawfully held.[266] Here legal subjects must institute the *mandament* to regain possession.[267]

Viewed from the perspective of the possession concept, it is indeed difficult (as *per* the views of Kleyn and Van der Merwe) to see how Ness did not acquire possession of the premises.[268] Sonnekus' argument is, therefore, unconvincing. His take on the case forms part of Van Leeuwen's interpretation of the *instanter* requirement, which the *SA Human Rights Commission* decision rejected.

In the second article of our series, we analyse the approach which the *SA Human Rights Commission* decision (and others) followed towards counter-spoliation in light of the possession requirement, particularly the *corpus* element. This is to ascertain up until when a landowner may use counter-spoliation to eject intruders from his land.

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258 *SA Human Rights Commission* para 62.
259 *Ibid*.
260 Para 49, citing Muller *et al* 354.
261 Paras 46–47.
262 Van der Merwe & Human 312–313.
263 *Idem* 306–307, 312–313.
264 *Idem* 313.
265 *Idem* 306–307, 313. To much the same effect, is Van der Merwe (2014) para 113.
266 Van der Merwe & Human 314; see also Marais (2025).
267 *Ibid*.
268 See similarly Van der Merwe & Human 310–311.

4 CONCLUSION

The present article sets out the facts and *ratio decidendi* in the *SA Human Rights Commission* decision and evaluates the relation between the possession concept in private law and the notion of "unlawful occupier" in the PIE. It also investigates the requirements for counter-spoliation, and the unsatisfactory relation between them, in view of the possession concept.

Analysis reveals that the possession concept in private law has the same meaning as unlawful occupier in the PIE. This is contrary to the court's ruling. Hence, a landowner must use the PIE (which excludes the common law and, thus, counter-spoliation) to evict a land intruder once he acquired possession of the owner's land, as such acquisition would mean the intruder is an unlawful occupier under the mentioned Act.

The evaluation of the *instanter* and the peaceful and undisturbed possession requirements show that the first requirement and the "peaceful and undisturbed" qualification are linked. Courts tend to construe both in terms of Van Leeuwen's wide interpretation of the *instanter* requirement, which permits a delay between the initial dispossession and the act of counter-spoliation. Under this interpretation the courts also take irrelevant considerations into account to decide counter-spoliation cases, especially when the owner invokes this defence. Examples include whether the alleged *spoliatus* (the land intruder) took possession of the land without the owner's permission, whether the owner protested against the dispossession, and the unlawfulness of the alleged *spoliatus*' actions. The *SA Human Rights Commission* court (in agreeing with scholars' criticism of this approach) found that these matters touch on the merits and, therefore, play no role under the *mandament* and counter-spoliation. This is a welcome ruling, given the difficulties the wide interpretation caused (especially in a case like *Ness*).

The court found that the requirements of counter-spoliation must be interpreted restrictively as a result of the potential of this this defence to undermine constitutional rights and values, especially the rule of law and the right of all persons against eviction from their homes without a court order. The court, thus, rejected Van Leeuwen's generous interpretation and preferred Huber's narrow construction. This interpretation, according to the court, ensures that counter-spoliation complies with the Constitution.

Greater clarity may be obtained if courts and practitioners were to focus on the possession concept (particularly the *corpus* element) rather than on the *instanter* requirement and the peaceful and undisturbed qualification in counter-spoliation cases. The reason is that the defence turns on whether the alleged *spoliatus* acquired *possession* of the land. If so, the alleged spoliator (usually the owner) may not invoke counter-spoliation and must apply for an eviction order under the PIE to evict the unlawful occupier. In our second article, we analyse the *SA Human Rights Commission* decision and others to ascertain when a land intruder satisfies the *corpus* element and, hence, acquires possession of the land. We also consider the relation between possession and the "home" concept in section 26(3) of the Constitution to identify the best source for adjudicating land incursion cases.