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ARTIKELS

AANTEKENINGE

VONNISSE

The extra-judicial ejectment of land intruders: An evaluation of the relation between the possession and home concepts*

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OPSOMMING

Die buite-geregtelike afsetting van grondbesetters: 'n Evaluasie van die verhouding tussen die besit- en woningkonsepte

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 dat hierdie besetters nog nie onregmatige okkupeerders onder die Wet op Voorkoming van Onwettige Uitsetting en Onregmatige Besetting van Grond 19 van 1998 is nie, en daarom benodig hulle nie 'n hofbevel om hulle af te sit nie. Die besetters, daarenteen, beweer dat hulle slegs ingevolge 'n hofbevel uit hulle wonings op die grond gesit mag word. Hierdie dispute opper verskeie vrae – die verweer se vereistes, die rol van die besitkonsep, die verhouding tussen besit in die privaatreg en die "onregmatige okkupeerder"-vereiste onder die Wet, en of die woning-konsep in artikel 26(3) van die Grondwet van die Republiek van Suid-Afrika, 1996 miskien die drempelvereiste behoort te wees vir grondbetreders om beskerming onder die Wet te

* ORCID 0000-0003-2840-2653 (Marais); ORCID 0000-0003-1254-6601 (Muller). This article is partly based on a paper we co-presented at the South African Property Law Teachers Colloquium, held at the Potchefstroom Campus of North-West University from 9–11 November 2022. It is also partly based on research Marais did during the writing retreat of the School of Law at the University of the Witwatersrand, held at Clarens from 22–25 January 2024, and on a seminar he delivered at the University of Groningen on 15 May 2024 while he was a visiting professor there. We thank the participants in these events for their comments and feedback. We should also like to thank the following: the anonymous peer reviewers, whose feedback greatly helped to improve the article; Professors Warren Freedman, Vincent Sagaert, and Bram Akkermans, and Dr Harry Runia, for conversations which helped shape our thoughts; Professor Johan Scott, for his encouragement; Mrs Lizette van Zyl, law librarian at the University of Johannesburg, for her very kind assistance in helping us obtain key sources; and Emeritus Justices Edwin Cameron and Johan Froneman, for their comments on an earlier draft of this article. Marais should like to thank the National Research Foundation for funding that made research for this article possible. Any remaining errors are ours.

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* vereiste volg, en dat hulle 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 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 second in a two-part series. Together they investigate the extra-judicial ejectment of land intruders under counter-spoliation (which is a defence against the *mandament van spolie*), and the relation between this defence and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[1] and section 26(3) of the Constitution.[2] Both articles use *South African Human Rights Commission v Cape Town City*[3] as a case study. The judgment raises two points – 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 the PIE) and the home concept in section 26(3) of the Constitution.

The first article set out the facts and *ratio decidendi* of the *SA Human Rights Commission* case and investigated the relation between the possession concept and the unlawful occupier requirement under the PIE. It also evaluated the *instanter* and the peaceful and undisturbed qualification of the possession requirements for counter-spoliation.

The analysis revealed that the notion of an unlawful occupier in the PIE 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, which invariably prevent the intruder from acquiring possession of the land, 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 wrest physical control of the land away from the owner, then the owner may no longer

1 Act 19 of 1998 (PIE).

2 Constitution of the Republic of South Africa, 1996 (the Constitution).

3 2022 6 SA 508 (WCC) (*SA Human Rights Commission*). This decision was confirmed on appeal in *City of Cape Town v South African Human Rights Commission* 2024 5 SA 368 (SCA) (*City of Cape Town*). As the Supreme Court of Appeal said little about the reasoning of the court *a quo* regarding the requirements of counter-spoliation, and the relation of this defence to the PIE and s 26(3) of the Constitution, our articles use the decision in the court *a quo* as the case study.

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.

This second article assesses the possession concept, specifically its *corpus* element, 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 under 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. Given the strict requirements the common law sets for acquiring possession of land without an owner's permission, intruders acquire possession (and, thus, 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 and the PIE do. 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

In the first article, we argued that a greater emphasis on the possession concept would result in a more principled application of the law in counter-spoliation cases. The reason is that the courts tend to take irrelevant considerations into account under Van Leeuwen's generous interpretation of the *instanter* requirement[4] (and, concomitantly, the peaceful and undisturbed qualification of possession), especially when the owner invokes the defence of counter-spoliation.[5] These considerations prevent an intruder from acquiring possession of land.[6] It is worth repeating that the *instanter* requirement and the mentioned qualification are linked, as the courts do not clearly distinguish between them.[7]

In *Ness v Greef*,[8] Vivier J followed Van Leeuwen's generous interpretation and permitted an unreasonably long delay of 11 days between the first appellant's alleged act of acquiring possession of the premises and the owner's acts of regaining possession. The court took irrelevant considerations into account under the mentioned interpretation, such as whether the first appellant acquired possession of the premises contrary to, or without, the owner's permission, whether the owner protested against such dispossession, and the unlawfulness of the first appellant's conduct. Kleyn and Van der Merwe persuasively show that the court did not have enough regard for the fact that the first appellant acquired possession, in the form of effective and exclusive control, of the land.[9] This should have dispensed with the legal question, as the factors which the court considered cannot override factual cues. Kleyn and Van der Merwe posit that greater clarity may be obtained in counter-spoliation cases by focusing on whether the alleged spoliator acquired

4 Van Leuwen *Het Roomsch Hollands Regt* 2.8.3.
5 Marais & Muller "The extra-judicial ejectment of land intruders: An evaluation of counter-spoliation and the role of possession" 2024 *THRHR* 428 447–452.
6 *Ibid*.
7 *Ibid*.
8 1985 4 SA 641 (C).
9 Marais & Muller 450–452.

possession of the land. An emphasis on the physical act regarding land (which flows from the possession concept) accords with Huber's narrow view of the *instanter* requirement.[10]

The *SA Human Rights Commission* court found that the *Ness* factors form part of the merits and have no place under the *mandament* and counter-spoliation, which are both part of the possessory suit where merits are irrelevant.[11] The court agreed with the criticism of the mentioned scholars – that counter-spoliation disputes revolve around whether the alleged spoliator wrested possession of the thing away from the owner or prior possessor.[12] Here the *corpus* element is key. Indeed, the *corpus* element is usually disputed in land incursion cases.[13]

In this article, we investigate leading counter-spoliation cases from the perspective of possession, specifically the *corpus* element, to determine when a land intruder acquires possession of land. This determination serves to demarcate the operational fields of counter-spoliation cases and those instances where the PIE applies, given that possession has the same meaning as "unlawful occupier" under the PIE.[14] This delineation is crucial, as, under counter-spoliation, an owner does not need a court order (as *per* the PIE) to eject intruders from his land. Actually, section 8(3) of the PIE criminalises the eviction of an unlawful occupier without a court order.

This article consists of four sections. The next section discusses the principles of the *corpus* element of possession and then sets out the facts and *ratio decidendi* of important counter-spoliation cases. We then identify various stages of a land incursion to analyse the cases in terms of the *corpus* element, and Van der Walt's marginality argument,[15] to establish when a land intruder acquires possession of land. In section 3, we consider the relevance of a "home" to determine whether this notion, instead of that of an "unlawful occupier" under the PIE, should form the threshold requirement for intruders to enjoy protection under this Act, given that it seems to have a more generous meaning when compared to possession. Section 4 sets out our conclusion.

2 THE POSSESSION CONCEPT

2.1 The *corpus* element

Possession, or control, consists of two elements – the *corpus* (or physical) element, and the *animus* (or mental) element.[16] We focus on the *corpus* element, as this element is usually in dispute in land-incursion cases.

The law uses an objective investigation to determine whether the *corpus* element, which entails physical control or factual custody, is present.[17] The *corpus* element is the same for all types of possession or control, such as juridical

10 *Ibid*, with reference to Huber *Heedensdaegse Rechtsgeleertheyt* 5.10.8.
11 *SA Human Rights Commission* paras 47–49.
12 Paras 47–48.
13 See, for example, the cases we discuss in para 2.2 below.
14 Marais & Muller 445–447.
15 See, generally, Van der Walt *Property in the margins* (2009) ch 1.
16 Muller, Brits, Pienaar & Boggenpoel *Silberberg and Schoeman's The law of property* (2019) 309; Boggenpoel *Property remedies* (2017) 103; Van der Merwe "Things" in Joubert & Faris (eds) *LAWSA* (2014) para 70; Sonnekus & Neels *Sakereg vonnisbundel* (1994) 127–132; Van der Merwe *Sakereg* (1989) 97ff.
17 Muller *et al* 312; Sonnekus & Neels 127; Van der Merwe (1989) 97–98.

possession (*possessio civilis*) and holdership.[18] The *corpus* element entails effective physical dominion over a thing.[19] The aim of the element is to see who has the strongest physical relation regarding the thing.[20] Here the social and economic views of the community play a role.[21] Several factors exist to determine whether the *corpus* element is present; three of them are relevant for the present investigation: (a) the nature, size, and function of the thing; (b) whether possession is acquired derivatively or originally; and (c) whether one deals with the acquisition or retention of possession.[22]

For the first factor, the type of thing is important. With land, physical control takes the form of occupying or living on the land and/or exploiting the land for one's own benefit, such as by cultivating or fencing it.[23] One may acquire a portion of land by effectively seizing such part without the owner's consent and by exercising factual custody of it.[24] Concerning a building, physical control takes the form of having the only key to the building.[25]

For the second factor, the law requires a higher degree of physical control to satisfy the *corpus* element if someone seeks to acquire possession without the owner's assistance;[26] in other words, when someone tries to acquire possession in an original manner. A person must "publicly seize the land and start exploiting it".[27] This is because the owner loses possession against his will.[28]

For the third factor, the law requires more stringent physical control for the acquisition of possession than for its retention.[29] Once possession has been acquired, the law merely requires that the possessor should be able to resume physical control of any part of the thing at any time.[30] As regards a farmer who possesses a farm, the law regards him as retaining possession of a distant part of the farm "as long as he is capable of exercising control of that portion" without

18 Van der Merwe (2014) para 72; Van der Merwe (1989) 95. See also Boggenpoel 103.
19 Muller *et al* 312; Van der Merwe (2014) para 75; Van der Merwe (1989) 97, 114.
20 Van der Merwe (2014) para 75.
21 Sonnekus & Neels 128; Van der Walt *Die ontwikkeling van houerskap* (LLD thesis, Potchefstroom University for Christian Education 1985) 682.
22 Muller *et al* 312–313; Van der Merwe (2014) paras 76–78; Sonnekus & Neels 127–129; Van der Merwe & De Waal *The law of things and servitudes* (1993) paras 56–57ff; Van der Merwe (1989) 98.
23 Van der Merwe (2014) para 76; Van der Merwe & De Waal para 58; Van der Merwe (1989) 98. See, generally, the Fencing Act 31 of 1963.
24 Muller *et al* 312; Van der Merwe (2014) para 76; Van der Merwe & De Waal para 59; Van der Merwe (1989) 99.
25 Van der Merwe (2014) para 76. This factor supports Kleyn's criticism of *Ness*: Kleyn *Die* mandament van spolie *in die Suid-Afrikaanse reg* (LLD thesis, University of Pretoria 1986) 164–165. See also Marais & Muller 450–452; Van der Merwe & Human "Die aanpassing van die tradisionele leerstuk van *contra*-spolie by moderne Suid-Afrikaanse omstandighede" 1992 *Stell LR* 297 307–308.
26 Muller *et al* 314; Van der Merwe (2014) para 77; Sonnekus & Neels 128; Van der Merwe & De Waal para 58; Van der Merwe (1989) 100.
27 Van der Merwe & De Waal para 59. See also Van der Merwe (2014) para 77; Van der Merwe (1989) 100.
28 Van der Merwe (1989) 113.
29 Van der Merwe (2014) para 78; Sonnekus & Neels 128; Van der Merwe & De Waal paras 60 and 69; Van der Merwe (1989) 101.
30 *Ex parte Van der Horst: In re Estate Herold* 1978 1 SA 299 (T) 301F.

the assistance of another.[31] No third party should have a stronger physical relation to the thing than the possessor.[32]

It is clear that the law sets a high threshold for land intruders to satisfy the *corpus* element.[33] Although the law uses a stricter test when a person seeks to acquire possession without the owner's permission and in an original manner, the mere fact that the person acts unlawfully (without the owner's permission) cannot, on its own, prevent such person from satisfying the *corpus* element. This consideration forms part of the merits and is irrelevant in counter-spoliation disputes, as argued by Kleyn and Van der Merwe and as held in the *SA Human Rights Commission* decision.

The law determines the presence of the *corpus* element objectively. If a person obtains effective physical control of the thing to the exclusion of the owner, he acquires possession, provided that the *animus* element is also present.

The objective nature of the investigation under the *corpus* element reveals that the way *Ness* applied Van Leeuwen's generous interpretation of the *instanter* requirement (and, concomitantly, the peaceful and undisturbed qualification) is wrong.[34] The question is whether the intruder acquired physical control to the exclusion of the owner. If the owner is no longer able to resume control of the land without the intruder's assistance, then the intruder acquired possession. The objective nature of the *corpus* element confirms the view of Kleyn and Van der Merwe regarding the centrality of physical acts in counter-spoliation cases.

Nonetheless, it is unclear when intruders acquire physical control of the land. For example, do they acquire control when their dwellings are complete, or only once they complete *and* occupy their dwellings? If occupation of the dwelling is an aspect of acquiring control, how (and who) should determine whether it is, actually, occupied?[35] Whether or not a dwelling is occupied is a vexing question in the land-incursion context, both as regards the distinction between these concepts and as to whether occupying an informal dwelling is a requirement to enjoy protection under the PIE.[36] The occupied/unoccupied dichotomy also relates to whether an informal dwelling is a "home" for purposes of section 26(3) of the Constitution.[37] To avoid confusion with the "occupation" concept regarding land, which has the same meaning as possession, we use the term "habitation" to refer to whether an intruder lives in a complete or incomplete informal dwelling.

The answers to the above questions are crucial, as counter-spoliation may be used until intruders acquire possession of land. Unfortunately, the common-law factors we discuss above do not shed light on when an intruder acquires

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31 Van der Merwe & De Waal para 60. See also Muller *et al* 315; Van der Merwe (2014) para 78; Van der Merwe (1989) 102.

32 Muller *et al* 316; Sonnekus & Neels 127. Both sources cite *Ex parte Van der Horst*.

33 *Cf* Scott "The precarious position of a landowner *vis-à-vis* unlawful occupiers: Common-law remedies to the rescue?" 2018 *TSAR* 158 164–165.

34 Marais & Muller 450–452.

35 Boggenpoel & Mahomedy "Reflecting on evictions and unlawful occupation of land in South Africa: Where do some gaps still remain?" 2023 26 *PER/PELJ* 1 23–24; Boggenpoel & Mahomedy "Evictions during the COVID-19 Pandemic and beyond" 2021 *Stell LR* 482 489–490, 495; Cramer & Mostert "'Home' and unlawful occupation: The horns of local government's dilemma: *Fischer and another v Persons unknown* 2014 3 SA 291 (WCC)" 2015 *Stell LR* 583 591ff.

36 *Ibid*.

37 *Ibid.*

possession of land on which his (complete or incomplete) dwelling stands. The Roman-Dutch authors, such as Van Leeuwen and Huber, are unhelpful, as they did not deal with land incursions. Legal comparison is also of little assistance, as comparable foreign jurisdictions, like the Netherlands, Germany, and England and Wales, are simply not confronted with land intrusions such as those in South Africa.[38] Despite there being no shortage of publications on the availability of the PIE in the land-incursion setting,[39] scholars, rather surprisingly, do not focus on when possession of land is acquired.[40] In the next section we use case law to answer this question.

2.2 Key counter-spoliation cases

We consider the facts and *ratio decidendi* of several cases which dealt with counter-spoliation in the land-intrusion context: *Mbangi v Dobsonville City Council*[41] (the only pre-constitutional case we analyse), *Fischer v Persons Unknown*,[42] *Fischer v Ramahlele*,[43] *Denel Soc Limited v Persons Identities Unknown*,[44] *Setjwetla Informal Settlement v Johannesburg City*,[45] and *SA Human Rights Commission*.[46] In these cases land intruders were either in the process of erecting, or had completed, informal dwellings on land.

The PIE defines "building or structure" as including "any hut, shack, tent or similar structure or any other form of temporary or permanent dwelling or shelter".[47] Our analysis focuses on dwellings constructed by using corrugated iron sheets, plastic sheets, and wood,[48] as these are the types of shelters that featured in the cases under investigation.

We then analyse the cases from the perspective of the *corpus* element in the next section below. In all these cases the landowner removed intruders, allegedly in terms of counter-spoliation, upon which the intruders sought restoration of their possession of the land.

In *Mbangi*, the applicants erected informal dwellings on vacant council land on 28 June 1990 and began inhabiting them on the same day. The council wanted to

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38 The extreme levels of landlessness in South Africa, which is a direct consequence of apartheid, means that land intrusions are much more prevalent here than in developed countries, like those mentioned in the main text, which addressed housing shortages in the wake of the Second World War (see, generally, Van der Walt (2009) 146, ch 5). Hence, the courts in these countries are simply not confronted with land intrusions such as those in South Africa. Accordingly, our article focuses only on South African law.

39 See, for example, Boggenpoel & Mahomedy (2023); Boggenpoel & Mahomedy (2021); Kreuser & Marais "Protecting the 'home' against counter-spoliation during Covid-19" in Boggenpoel, Van der Sijde, Tlale & Mahomedy (eds) *Property and pandemics: Property law responses to Covid-19* (2021); Scott; Cramer & Mostert; Bilchitz & Mackintosh "PIE in the sky: Where is the constitutional framework in High Court eviction proceedings?" 2014 *SALJ* 521.

40 Exceptions here are Cramer & Mostert 592–594 and Bilchitz & Mackintosh 529–532, although they do analyse the possession concept in depth.

41 1991 2 SA 330 (W).

42 2014 3 SA 291 (WCC) (*Fischer* (WCC)).

43 2014 4 SA 614 (SCA) para 22 (*Fischer* (SCA)).

44 2015 JDR 1334 (WCC).

45 2017 2 SA 516 (GJ).

46 We discuss the *SA Human Rights Commission* decision in the first article (Marais & Muller 433–440) and so do not repeat its facts or the *ratio decidendi* here.

47 S 1 *sv* "building or structure" of the PIE.

48 See, for instance, the cases we discuss in para 2.2 below.

demolish the dwellings. An organisation (it purported to represent the intruders) and the council agreed that no further dwellings would be erected and that the council would hold back on demolitions. Negotiations broke down on 2 July 1990; the next day the council demolished various dwellings.

Flemming J ruled that the intruders did not have peaceful and undisturbed possession of the land on which their dwellings stood. He decided the case in terms of the peaceful and undisturbed qualification of possession and never referred to the *instanter* requirement by name.[49] This approach (again) reveals the intertwined nature of the *instanter* requirement and this qualification.[50]

After approving Van der Walt's definition of the peaceful and undisturbed qualification,[51] he held that when a person "usurp[s] the possession of another, … the commencement or even the continuance of the possession so obtained may be less than stable".[52] In the present case, as the council immediately resisted the land intrusion, the possession of the intruders was unstable.[53] Flemming J held that because of policy, the object of the *mandament*, fairness, or desirability, the *mandament* "should not be available to someone who is merely in the process of pushing another out of his possession and [the former person's] *de facto* [or physical] control is not yet an accomplished fact".[54] The peaceful and undisturbed qualification is meant to prevent the granting of the *mandament* where it would cause injustice instead of serve its purpose – to discourage unlawful self-help.[55] If the court granted a spoliation remedy to the intruders, it would "not stop self-help but assist self-help".[56] The court viewed this goal through the prism of section 3B(1)(*a*) of the Prevention of Illegal Squatting Act,[57] which provided that "[n]otwithstanding the provisions of any law to the contrary … the owner of land may without an order of court demolish any building or structure erected or occupied on the land without his consent, and remove the material from the land". This provision did not, however, permit landowners to evict intruders from land, as a court order was required for such eviction.[58] An eviction without a court order would constitute spoliation; the applicants' case turned on this point.[59]

The goal of the mentioned provision in the PISA was to afford landowners "a strong remedy to keep the ground physically clear, [as] permanent squatting [would] arise[…] on the outskirts of the cities of the world [if it were otherwise]".[60] What is required for the occupiers to institute the *mandament* against the council is possession which "has become ensconced".[61] This would normally be the case when *de facto* possession (physical control) was present without interference for some time.[62] Possession is not ensconced (peaceful and undisturbed) if the intruder

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49 Van der Merwe & Human 311.
50 Marais & Muller 447–452.
51 *Mbangi* 335J, quoting from *Ness* 647 where Vivier J approved Van der Walt's definition.
52 336A. Interestingly, Flemming J never refers to the *instanter* requirement by name (see Van der Merwe & Human 311).
53 336B.
54 337A–B.
55 337F–G.
56 337D.
57 Act 52 of 1951 (PISA).
58 338I.
59 *Ibid*.
60 340A.
61 338A.
62 338A–B.

uses self-help to "grab" possession to which there is continued resistance.[63] Such resistance took the form of negotiations between the applicants and the respondent regarding the occupation of the land. Physical resistance is not required to prevent compliance with the peaceful and undisturbed qualification.[64] All that is needed is that the owner protest or object to the unilateral acquisition of physical control by the intruder.[65] The court, in dismissing the application, held that the respondent acted lawfully by demolishing the informal dwellings, which stood on the land for several days, in terms of section 3B(1)(*a*) of the PISA.

In *Fischer* (WCC), officials of the City of Cape Town's Anti-Land Invasion Unit (ALIU) noticed persons off-loading building materials from vehicles near the applicant's unfenced land on the afternoon of 7 January 2014. They then began constructing informal dwellings. The ALIU officials demolished some of the dwellings before they withdrew. New dwellings had been erected when the ALIU officials returned the next morning, and they proceeded to demolish some of them, too. It was disputed whether the informal dwellings were inhabited, but it was clear that all the demolished dwellings were complete. The ALIU officials did not demolish inhabited dwellings, as they regarded them as homes. These structures were marked with a large, red, spray-painted cross as a sign to the ALIU officials to leave them in place.[66] Officials demolished only uninhabited dwellings – those where no people were inside, or where there were no signs of human habitation, such as the presence of furniture or personal effects.

Gamble J decided the case with reference to whether the intruders were "unlawful occupiers" under the PIE and whether their dwellings constituted homes for purposes of section 26(3) of the Constitution. He ruled in favour of the intruders on both counts.

He found, with reference to *Ndlovu v Ngcobo; Bekker v Jika*,[67] that intruders "effectively occupy the land upon which an informal structure is erected (regardless of its state of completion) by virtue of the fact that the structure is located thereon".[68] In that case, Olivier JA held that the word "unlawful occupier" in the PIE refers both to persons who have finished the act of occupying land and those who are *in the process of taking possession* of land.[69] Gamble J decided that a person is an unlawful occupier under the PIE irrespective of how long he has been on the land, or whether the act of occupation is still incomplete.[70]

Regarding section 26(3) of the Constitution, the judge ruled that the home concept should be interpreted generously.[71] He found that the intention to occupy land is more important than the period of occupation when determining whether a home is present.[72] Because the intruders intended to take up residency in their informal dwellings (as gleaned from their dwellings' stage of completion), they were indeed "homes", despite the short period that the dwellings were on the land.[73] The demolition of the dwellings was, therefore, unlawful and unconstitutional.

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63 338B.
64 338C–D.
65 338B–F, citing *Muller v Muller* 1915 TPD 28 30.
66 See also *Exodus* 12:13.
67 2003 1 SA 113 (SCA).
68 *Fischer* (WCC) para 79, citing, with approval, the minority judgment of Olivier JA in *Ndlovu*.
69 *Ndlovu* paras 41–42.
70 *Fischer* (WCC) para 82.
71 Paras 91, 93.
72 Para 94.
73 Paras 78, 96.

On appeal, Theron and Wallis JJA (writing for a unanimous Supreme Court of Appeal) found that the legal question was whether the City spoliated the intruders of their possession of their homes.[74] The main reason they set aside Gamble J's decision was because he required the parties to argue on issues which he raised *mero motu*, and which they did not advance themselves, as well as the fact that he did not hear oral evidence to decide the factual dispute between the parties.[75] The court also had regard to the possession requirement for the *mandament*, although this part of the decision is probably *obiter*.

The court found that a land intrusion is an act of spoliation.[76] Intruders may invoke the *mandament* against a landowner if they complied with the requirements of this remedy. Interestingly, the intruders did not rely on section 26(3) of the Constitution or the PIE in their appeal[77] – they did not allege that they had homes on the land. Theron and Wallis JJA held that the mere existence of the structure and the intention of the builder to occupy it is insufficient to have occupation for purposes of the PIE.[78] Gamble J's approach, according to the court, disregards actual physical occupation, which is a key component of the possession concept for the *mandament*.[79] Possession of land "involves factual control as well as the intention to derive some benefit from the land".[80] Possession must, furthermore, be both peaceful and undisturbed, which means the physical possession (or factual control) must be stable and durable enough for the law to take cognisance of it.[81] The judges found that Gamble J disregarded this aspect, as well as the way in which the Supreme Court of Appeal regarded occupation for purposes of the PIE in *Barnett v Minister of Land Affairs*.[82] There the court found that to have occupation of land and, concomitantly, a home, "require[s] an element of regular occupation coupled with some degree of permanence".[83] These rulings amount to a rejection of Olivier JA's findings relating to the meaning of unlawful occupier in the PIE.

In *Denel*, the respondents entered the applicant's fenced vacant land on 6 April 2015 and started constructing informal dwellings there. The court granted the applicant an interim interdict to restrain the intruders from occupying the land. On 7 April, officials from the private security company (which the applicant employed to patrol the land) informed the intruders that they must vacate the land. On 8 April, the sheriff and law enforcement officials began dismantling the informal dwellings and removed the intruders after they refused to vacate the land. The respondents instituted the *mandament* against the applicant to restore their possession

74 *Fischer* (SCA) para 12.
75 Para 17.
76 Para 23.
77 Para 20.
78 *Fischer* (SCA) para 22.
79 *Ibid*.
80 *Ibid*.
81 *Ibid*, citing *Ness* 647D–F.
82 2007 6 SA 313 (SCA).
83 Para 38. Currie & De Waal *The Bill of Rights handbook* (2014) 587 suggest that to qualify as a "home", a person would need to occupy a dwelling for residential purposes with the intention to do so permanently or for a considerable period of time. See also Cramer & Mostert 596. We find this definition of a home problematic, because it excludes those people who stand in an informal and temporary relationship to land (usually impoverished, black people) in favour of people who stand in a formal and stable relationship to land (usually affluent, white people). It is also at odds with how the PIE defines a "building or structure" to include a "*temporary* … dwelling or shelter" (s 1 *sv* "building or structure").

of the land and their demolished dwellings. They also argued that they were occupiers in terms of the PIE, and that they could be evicted only pursuant to a court order. The informal dwellings were at various stages of completion. Some were complete, although the majority were still incomplete.[84] None of the informal shelters were inhabited yet, as they did not contain personal possessions or furniture.[85]

Manca AJ confirmed that possession for purposes of the *mandament* entails factual control coupled with the intention to derive some benefit from such control.[86] By relying on *Fischer* (SCA) and *Mbangi*, he ruled that the intruders were still in the process of acquiring possession of the land. The applicant, through the acts of the security company, resisted the intruders from the beginning of their incursion. Consequently, they had not yet acquired possession of the land, which excludes the *mandament*.[87] The dismantling of the dwellings and the removal of the intruders were, therefore, held to be lawful.

In *Setjwetla*, the applicants moved onto land of the City of Johannesburg on 20 June 2016 and immediately constructed informal dwellings there.[88] Some dwellings were complete while others were incomplete.[89] Although the facts are unclear, it appears as if the dwellings were uninhabited.[90] On 23 June 2016, the City of Johannesburg demolished these dwellings.

Van der Linde J ruled that the intruders acquired possession of the sites on which the incomplete and uninhabited dwellings stood, and the City thus committed unlawful spoliation by demolishing them.[91] Hence, the demolition of their dwellings amounted to unlawful self-help. He relied on a policy consideration in ruling that the applicants acquired possession under the *mandament* – that "[i]f local authorities were permitted to [demolish informal dwellings] without first obtaining court sanction, whenever people moved onto their land, that encourages conduct which in our society with its history is reminiscent of a time best forgotten".[92]

Interestingly, the judge found that even though the applicants had possession for the *mandament*, they did not yet have occupation under the PIE.[93] In our first article, we explain why this finding is inaccurate.[94] Nonetheless, the judge ruled that the PIE applies only once dwellings are complete and inhabited.[95]

2.3 Analysing counter-spoliation cases through the lens of the *corpus* element

The cases in the previous section differ as to when intruders acquire possession of land. *Mbangi* followed an overly strict approach towards the *corpus* element, as the court found that the intruders did not acquire possession despite them having

84 Para 28.
85 Paras 27–28.
86 Para 36.
87 Paras 32–42.
88 *Setjwetla* para 2.
89 Paras 2 and 11.
90 Paras 2 and 14.
91 Paras 13–14.
92 Para 18.
93 Para 14.
94 Marais & Muller 445–447.
95 *Setjwetla* paras 14 and 16.

constructed completed dwellings on the land and inhabiting them for several days. This interpretation must be contrasted to *SA Human Rights Commission*, which decision followed a more principled interpretation of the *corpus* element. Here the court held that the third applicant acquired possession because he had a completed dwelling on the land that he inhabited. Cases involving complete or incomplete dwellings, all of which are uninhabited, fall between these two approaches. *Denel* and *Fischer* (SCA) ruled that the intruders did not satisfy the *corpus* element, while *Fischer* (WCC) and *Setjwetla* reached the opposite conclusion.

We identify several stages of a land intrusion to assist in determining when an intruder acquires possession of land. They are the following:[96]

- Stage 1: an intruder enters land but is yet to start constructing a dwelling.
- Stage 2: an intruder moved onto land and commenced construction, but the dwelling is still incomplete. Here one may distinguish between two sub-stages of completion:[97]
  - Stage 2.1: the dwelling is at an early stage of construction. Examples are where only pegs have been put into the land,[98] and where only one or two of the walls of the dwelling have been erected.
  - Stage 2.2: the dwelling is still unfinished but is at an advanced stage of construction. Examples are where only one wall must still be added, and/or where the roof must still be fitted.[99]
- Stage 3: the dwelling is complete but the intruder does not yet inhabit it.
- Stage 4: the dwelling is complete and the intruder inhabits it.

In *SA Human Rights Commission*, the court ruled that the intruder had not acquired possession under stage 1.[100] This ruling is undoubtedly correct, as it complies with the higher threshold the common law sets for acquiring physical control of land in an original manner and without the owner's permission, as shown in paragraph 2.1 above. Moving onto land without performing any acts regarding use and enjoyment is clearly insufficient to satisfy the *corpus* element, as these acts do not amount to effective and exclusive control of the land. The absence of possession means the law will not regard the intruder as an unlawful occupier under the PIE either, given that possession and occupation have the same meaning.[101] The common law applies here, and the owner may use counter-spoliation to eject the intruders. There is also no home during this stage, as no structure exists to offer shelter to the intruder.[102] Hence, section 26(3) of the Constitution does not apply.[103] We expand on the relevance of the home concept in the next section.

Under stage 2.1, the strict common-law requirements for satisfying the *corpus* element indicate that the intruders did not acquire possession. *Denel* supports this assertion. There the court ruled that the intruder does not have possession of the land if dwellings are at an early stage of construction. This is even more so if the

96 To formulate these stages, we drew on 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* 103 111; *SA Human Rights Commission* para 32.
97 *SA Human Rights Commission* para 85.
98 *Ibid*.
99 *Ibid*.
100 *Ibid*.
101 Marais & Muller 445–447.
102 Kreuser & Marais 38.
103 *Ibid*. We expand on the home concept in the next section.

owner physically resisted the incursion from the beginning, as happened there. The court also found that the intruder did not have occupation for purposes of the PIE. This ruling is correct, as possession and occupation have the same meaning.

Kreuser and Marais argue that there is no home when the structure is so far from completion.[104] Their test for determining whether there is a home is whether the incomplete dwelling provides shelter to the intruder.[105] It is worth emphasising that whether the dwelling is inhabited does not feature in their analysis. As with stage 1, neither the PIE nor section 26(3) of the Constitution apply here. The owner may accordingly use counter-spoliation to eject the intruders.

However, the *SA Human Rights Commission* court creates uncertainty by contradicting itself as to whether intruders satisfy the *corpus* element at this stage. It initially ruled that the possession requirement (and, hence, the *corpus* element) is satisfied when the occupiers *commenced* construction on the land.[106] The court's ruling is similar to the *Fischer* (WCC) and *Setjwetla* decisions. Yet, the *SA Human Rights Commission* court also ruled 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] These two conflicting rulings are probably *obiter dicta*, as the case did not deal with this stage directly on the facts before it. Rather, it dealt with stage 4, which means that the third applicant had possession of the land. One should, therefore, probably not pay too much heed to this contradiction.

Given the stricter common-law threshold for the *corpus* element when a person seeks to acquire possession originally and without the owner's permission, one may question whether the *SA Human Rights Commission*, *Fischer* (WCC), and *Setjwetla* decisions correctly reflect the common law in so far as they held that intruders acquired possession during this stage.[108] The landowner may use counter-spoliation here, as the intruders have not yet satisfied the *corpus* element. This conclusion finds support in the view of Kreuser and Marais, which we explain above and upon which we expand in the next section.

Concerning stage 2.2, the common law, again, indicates that the intruder did not meet the *corpus* element.[109] However, case law is conflicting on this point. On the one hand, there is *Setjwetla*, which the *SA Human Rights Commission* decision relied on to conclude that intruders satisfied the *corpus* element during this stage, which excluded counter-spoliation.[110] *Fischer* (WCC) is of a similar view. *Denel*, on the other hand, held that the intruder does not have possession of the land if the dwellings are at an advanced stage of construction. Kreuser and Marais posit that the dwelling here is at a sufficiently advanced stage to provide shelter and is, therefore, a home.[111] According to them, section 26(3) of the Constitution and, hence, the PIE must be used to evict the intruder instead of counter-spoliation. Here one sees a tension between the operational scope of counter-spoliation and that of section 26(3) and the PIE. We expand on this tension in the next section below.

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104 *Ibid*.
105 *Ibid*.
106 *SA Human Rights Commission* para 83.
107 Para 85.
108 See, for example, *Fischer* (SCA); Scott 164–166; Cramer & Mostert 592–594.
109 Cramer & Mostert 592–594 reach a similar conclusion. *Cf* Scott 164–166.
110 *SA Human Rights Commission* para 85.
111 Kreuser & Marais 27–28.

For stage 3, reasons similar to those under stage 2.2 might once more indicate that the *corpus* element was not satisfied.[112] The *Denel* and *Fischer* (SCA) courts held that the intruders there did not comply with the *corpus* element, even though their dwellings were complete. These rulings must be contrasted to those in *Setjwetla* and *Fischer* (WCC), which concluded the opposite. The *SA Human Rights Commission* court held that the intruder acquired physical control of the land here, which excludes counter-spoliation.[113] It is noteworthy that in *SA Human Rights Commission* the court rejected the *Fischer* (SCA) court's interpretation of the possession concept, because the latter court relied on *Ness*, which adopted Van Leeuwen's generous interpretation of the *instanter* requirement. The court viewed this interpretation as wrong.[114] In our first article, we explain why the reasoning in *Ness* is erroneous.[115]

Even so, one must still determine whether the intruders satisfy the *corpus* element during this phase. Completing an informal dwelling on land before one starts to inhabit it may potentially be insufficient to comply with the *corpus* element.[116] This is due to the strict requirements that the common law sets for satisfying the *corpus* element when a person seeks to obtain control of a thing without the owner's permission or assistance. *Fischer* (SCA) supports this assertion. Such an interpretation would allow the owner to employ counter-spoliation to eject the intruder and would exclude the PIE. Kreuser and Marais think that the appropriate legal sources here are section 26(3) of the Constitution and the PIE, not counter-spoliation. This is because the dwelling, in their view, offers shelter to the intruder, which means there is a home on the land.[117]

Concerning stage 4, the *SA Human Rights Commission* court ruled that the third applicant inhabited his completed dwelling and the City could, accordingly, not invoke counter-spoliation.[118] Kreuser and Marais would agree with this ruling from the perspective of constitutional law, as (according to them) there is clearly a home here by reason of the dwelling offering shelter.[119] Yet, if *Mbangi* correctly reflects the common-law position regarding the acquisition of possession, then the intruders have not acquired possession of the land, despite them having completed dwellings on the land and inhabiting them. Actually, this decision suggests that an intruder would *never* satisfy this element during any of the stages under discussion. This is the only decision where the court gave detailed reasons for its findings relating to the possession concept, which reasons require analysis.

Flemming J gave several reasons why the intruders did not acquire possession. These are because (a) the intruders "grabbed" possession, (b) the ongoing negotiations between the intruders and the landowner (the local authority) regarding the occupation of the land; (c) there was opposition to the intrusion (mere objections were held to be sufficient to constitute opposition); (d) awarding the *mandament* would encourage (instead of discourage) unlawful self-help; (e) policy, fairness, and the purpose of the *mandament* require that this remedy should not be granted where it would cause injustice; and (f) section 3B(1)(*a*) of the PISA permitted an

112 *Cf Fischer* (SCA); Scott 164–165.
113 *SA Human Rights Commission* para 85.
114 Paras 58–59.
115 Marais & Muller 450–452.
116 Scott 164–165. To much the same effect are Boggenpoel & Mahomedy (2021) 495.
117 Kreuser & Marais 27–28.
118 *SA Human Rights Commission* paras 120 and 159.1.1.
119 Kreuser & Marais 27–28.

owner to demolish informal shelters which were unlawfully erected on his land, irrespective of how long the intruders were on the land.

One must assess how the *Mbangi* case understood the *corpus* element in light of the supremacy of the Constitution and the single-system-of-law principle.[120] Assuming the common law applies during stage 4, the proviso to the second subsidiary principle states that a litigant may invoke the common law only if it promotes the positive features that the Constitution requires of all law, such as preventing arbitrary eviction from one's home. If the common law does not further such characteristics, its development must be considered. If more than one interpretation is available, this development may entail choosing the interpretation of the common law which best promotes the Constitution. The two interpretations to the common law are the generous and narrow approaches towards the *instanter* requirement (and, hence, the peaceful and undisturbed qualification) of Van Leeuwen and Huber. Viewed from the perspective of the *corpus* element, these approaches entail either an overly strict or a more principled approach to this element. *Mbangi* followed the former approach, while the *SA Human Rights Commission* case adhered to the more principled one. Several of the considerations Flemming J relied on to interpret and apply the *corpus* element are suspect from the perspectives of both private and constitutional law.

In terms of private law, the ruling that the intruders did not acquire possession because they "grabbed" possession of the land touches on the lawfulness of their acquisition of possession, which, as explained in our first article,[121] is irrelevant. Counter-spoliation, like the *mandament*, forms part of the possessory suit, where the merits do not feature. The fact that possession is acquired against the wishes of the owner plays no role in determining whether the *corpus* element was satisfied. The (un)lawfulness of acquisition of possession cannot override the objective factors for determining whether the *corpus* element is satisfied. It can also not supersede factual cues. If an intruder acquired effective and exclusive control of the land by excluding the owner, he obtained possession and that is the end of the matter. The views of Kleyn and Van der Merwe, in their criticism of the *Ness* decision, support this conclusion.[122]

The fact that there were negotiations between the intruders and the local authority does not detract from the fact that they may have acquired effective and exclusive control of the land.[123] That the local authority permitted the occupation pending the outcome of negotiations means, at best, that the intruders and local authority were co-possessors of the land.[124] The intruders would have direct (or immediate) possession whereas the local authority has indirect (or mediate)

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120 Van der Walt *The law of servitudes* (2016) 38–44. See also Van der Walt *Property and constitution* (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 Marais & Muller 441.

121 Marais & Muller 450–452.

122 *Idem*.

123 *Cf* Van der Merwe & Human 317–318.

124 Marais "Possessory protection under the *mandament van spolie* for the lessee against the lessor in a case of remote deactivation of movables" 2025 *SALJ* section III(c)(iv) (forthcoming); Van der Merwe (2014) para 79; Sonnekus & Neels 129–130; Van der Merwe (1989) 102–103; Kleyn (1986) 357–363; Van der Walt (1985) 684–685. For a detailed discussion of co-possession, see H van Oosten *Die omskrywing en funksies van die fisiese beheerelement in die sakereg* (LLD thesis, University of South Africa 1995) ch 14. See further Voet 41.2.5; Grotius 3.37.1–3.

possession.[125] Despite contradictory findings in case law,[126] the sounder view is that a direct possessor does not spoliate the indirect possessor by refusing to hand back the thing to the indirect possessor.[127] The reason is that such instances do not involve the type of unlawful self-help the *mandament* is meant to prevent.[128] Hence, the indirect possessor cannot institute the *mandament* against the direct possession and may, concomitantly, also not use counter-spoliation, as it is a defence against an attempted spoliation.

The fact that the municipality objected to the occupation is of little value. Any possible objection does not affect the physical acts the intruders performed, as Van der Merwe pointed out regarding *Ness*.[129] The investigation regarding the *corpus* element always turns on who has effective and exclusive control of the thing, which the law determines objectively. The acts of erecting informal dwellings on land and inhabiting them appear to amount to effective and exclusive control of the land on which they are located. Merely objecting to an intrusion without taking action to prevent it is simply insufficient to prevent an intruder from satisfying the *corpus* element.

The court's invocation of policy, the purpose of the *mandament*, and fairness to conclude that the intruders did not satisfy the *corpus* element is also problematic. The purpose of the *mandament* is to discourage unlawful self-help by forcing the spoliator to restore the *status quo ante* before all else.[130] This goal gives effect to the legal-political function – all persons must submit their disputes regarding possession to a court of law and may not resolve them through extra-judicial self-help. Any possible (in)justice that might be caused by a court awarding the *mandament* is simply irrelevant, as this remedy, like counter-spoliation, does not concern itself with the merits.[131] For these doctrinal reasons, the strict approach Flemming J adopted towards the *corpus* element is unappealing and should be rejected.

Concerning constitutional law, it is significant that the court referred to section 3B(1)(*a*) of the PISA and its purpose to construe the *corpus* element. This is because the political dimension in the South African eviction context, which includes counter-spoliation, cannot be ignored.[132] The judge described this provision as a strong remedy to keep land physically clear, as permanent squatting would arise on the outskirts of cities if it were otherwise. These aspects, which influenced how the court understood the *corpus* element, must be considered in light of the state's policy of grand spatial racial segregation at the time, and the extraordinary powers that the state afforded landowners to combat illegal squatting.[133]

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125 *Ibid*.
126 See, for example, *Crause v Ryersbach* (1882) 1 SAR TS 50; *Van Malsen v Alderson and Flitton* 1931 TPD 38.
127 See, especially, *Boompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990 1 SA 347 (A) 353E. See also Marais section III(c)(iv) and the sources he cites there. See further Van Oven *Bezitsbescherming en hare functies* (1905) 165.
128 *Ibid.*
129 Marais & Muller 450–452.
130 In terms of the maxim *spoliatus ante omnia restituendus est* (the *spoliatus* must be restored to the previous position).
131 See Kleyn 304–320 and the sources he cites. See also Kleyn "*Mandament van spolie – contra*-spolie" 1986 *De Jure* 159 162.
132 Van der Walt (2009) 60ff. See similarly *Smith v Stellenbosch Municipality* 2022 JDR 1926 (WCC) para 86.
133 Van der Walt (2009) 13, 21, 60, 74.

Section 3B(1)(*a*) of the PISA effectively extended the protection landowners enjoyed under counter-spoliation by permitting them to demolish the informal dwellings of occupiers on their land without a court order, irrespective of how long they had been on the land or whether such dwellings were inhabited. It excluded counter-spoliation from the unlawful land occupation context, as intruders could never have possession that would enjoy protection in the eyes of the law against extra-judicial self-help. It also permitted owners to remove the materials of the demolished dwellings from the land. Although the provision did not allow landowners to evict the occupiers without a court order, the fact that they could demolish their dwellings, and remove the material, are drastic consequences that clearly constitute a constructive eviction today.[134] In *Motswagae*, Yacoob J held that "an eviction does not have to consist solely in the expulsion of someone from their home[;] … [i]t can also consist in the attenuation or obliteration of the incidents of occupation".[135]

Flemming J's reasoning highlights that the removal of land intruders "served the perfectly normal and legitimate purpose of vindicating recognised property and security rights against perceived threats of invasion, chaos and lawlessness".[136] His decision regards the removal of the intruders, even those who inhabited their dwellings on the land for several days, without a court order as "normal … [and] essential for the security of private autonomy and the stability of social and economic order".[137] These apparently legitimate and "normal" policy goals mask the fact that the far-reaching powers which the PISA conferred on landowners allowed them to promote the state's system of apartheid.[138] Hence, the way in which Flemming J decided the case cannot be regarded as mere apolitical doctrinal logic.[139] The reasons he gave for his construal of the *corpus* element (by means of the peaceful and undisturbed qualification) highlight social and political thinking aimed at promoting the discredited political ideology of apartheid.[140] Courts should, therefore, approach *Mbangi* with circumspection when setting out and applying the possession concept in counter-spoliation. Indeed, Binns-Ward J ruled, in *Smith v Stellenbosch Municipality*,[141] that *Mbangi* should "be read mindful", because it was decided before the advent of constitutionalism.[142]

Binns-Ward J's counsel is not merely a theoretical postulation under the constitutional dispensation. In *Marlboro Crisis Committee v City of Johannesburg*,[143] for example, Kgomo J relied on *Mbangi* to rule that persons who inhabited informal dwellings on land for several days, and who were removed by police members without a court order, did not have possession of the land.[144] Consequently, their reliance on the *mandament* to have their possession of the land restored, failed.[145]

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134 *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC) para 12 (*Motswagae*).
135 *Ibid*.
136 Van der Walt (2009) 66.
137 *Idem* 60.
138 *Idem* 66.
139 *Idem* 13–18ff.
140 *Ibid*.
141 2022 JDR 1926 (WCC).
142 *Smith* para 86.
143 (29978/12) [2012] ZAGPJHC 187 (7 September 2012).
144 For a discussion of *Marlboro*, see Bilchitz & Mackintosh.
145 Fortunately, the occupiers and the City of Johannesburg settled the matter on the day of the appeal to the Constitutional Court. The City recognised that it needed a court order to evict the occupiers. In terms of the settlement, which was made an order of the Constitutional

continued on next page

The rhetoric surrounding Flemming J's interpretation, and application, of the *corpus* element is comparable (if not similar) to what Van der Walt calls the rights paradigm.[146] This is a rhetorical and doctrinal framework which entails a rights-centred approach towards disputes where, in a clash between the holder of a strong right (like a property right) and the holder of a weak right (like a personal right) or even no rights, the stronger right should triumph.[147] It justifies a "more or less automatic rights-biased (and often ownership-biased) outcome of particular property disputes".[148] The goal of the rights paradigm is to promote stability and security in the hands of the property holder by protecting property in a manner that disregards non-legal factors, such as the vulnerability or marginality of the non-property holder.[149]

Counter-spoliation indirectly protects ownership. This is because owners are mostly in possession of things they own (like in *Mbangi* and the other decisions under discussion) and having undisturbed possession is an entitlement of ownership.[150] Viewed in this manner, counter-spoliation entails a situation where possession (which usually resides with owners) trumps non-possession (which one usually associates with marginalised persons), and in this way upholds the rights paradigm.[151] This rights-oriented thinking led the *Mbangi* court to interpret the *corpus* element strictly so as to protect the owner against what Flemming J perceived as unjustified interference with its possession and, hence, its property. It resulted in the council retaining possession, despite clear indications from the common-law principles of the *corpus* element that the intruders had already acquired possession. Flemming J's approach towards the *corpus* element promotes the rights paradigm exceptionally well, as it does not require judicial oversight for resolving possessory disputes, unlike evictions under the PIE.

One must accordingly be sceptical of the overly strict approach *Mbangi* (and *Marlboro*) adopted towards the *corpus* element, which approach was followed in *Denel* (which cites *Mbangi*) and *Fischer* (SCA).[152] This interpretation undermines the positive features the Constitution requires of all law, as it permits (instead of prevents) eviction from one's home without a court order. Of course, a landowner is entitled to have undisturbed possession of his land, which forms part of the right against arbitrary deprivation in section 25(1) of the Constitution.

Yet, in a transformational setting the protection of property obtains a marginal character.[153] Marginality means that even though the section 25(1) right of an owner, which includes the defence of counter-spoliation, is important, an analysis of this defence should not proceed from the position of the owner or prior possessor.[154]

Court, the City offered the occupiers emergency and temporary accommodation. See Bilchitz & Mackintosh 536–537.

146 Van der Walt (2009) ch 2.

147 *Idem* 27ff, 221. See similarly Bilchitz & Mackintosh 534ff.

148 Van der Walt (2009) 27. See similarly Bilchitz & Mackintosh 534ff.

149 Van der Walt (2009) 215ff.

150 We extrapolate this argument from Jhering's justification for possessory protection, given that the protection of possession (without reference to the merits of a case) indirectly protects ownership: see Emerich "Why protect possession?" in Descheemaeker (ed) *The consequences of possession* (2014) 42.

151 *Cf* Van der Walt (2009) 27.

152 See, generally, Van der Walt (2009) ch 1.

153 Van der Walt (2009) 21.

154 *Idem* 21.

Instead, it should be conducted from the perspective of the marginalised person, especially those who suffered at the hands of the apartheid state, like the intruders in *Mbangi*.[155] This perspective entails what Van der Walt calls a "constitutional vision of property".[156] Under this vision, the starting point for all property disputes is the systemic objectives the Constitution seeks to realise for all legal sources, such as preventing arbitrary eviction from one's home, instead of simply protecting the property interest at hand.[157] This is not to say the protection of property becomes irrelevant; it is simply no longer the point of departure when deciding such disputes.[158]

We think that the law may better resolve the competing interests in stage 4 cases, like *Mbangi* and *SA Human Rights Commission*, by permitting a court to reconcile the competing rights (the intruder's section 26(3) right and the owner's section 25(1) right) instead of permitting a landowner to do so in an extra-judicial manner through counter-spoliation.[159] The constitutional commitment to "never again subject unlawful occupiers [and, by implication, unlawful intruders] to the inhumane and degrading treatment of forced evictions that characterised apartheid land law"[160] indicates that due process should be followed instead of permitting owners to resolve land incursions without judicial oversight.[161] Indeed, the fact that all evictions of unlawful occupiers are now subject to due process and judicial control supports this point.[162] It is in any event questionable whether a defence, which permits the use of extra-judicial violence to protect one's possession, still has a place regarding land in a constitutional state (*rechtstaat*) where the rule of law is a constitutional value. Here the state, and not private persons, usually has the monopoly on violence.[163]

As the *Mbangi* decision interpreted and applied the *corpus* element in a way that undermines section 26(3) of the Constitution, one must determine, in terms of the proviso to the second subsidiarity principle, whether the common law may be developed. As there is another interpretation of the common law – the one followed in the *SA Human Rights Commission* decision (and in decisions like

155 *Ibid*.
156 Van der Walt (2012) 132ff.
157 *Idem* 122–133. See also Michelman & Marais "A constitutional vision for property: *Shoprite* and beyond" in Muller, Brits, Slade & Van Wyk (eds) *Transformative property law – Festschrift in honour of AJ van der Walt* (2018) 129.
158 See Van der Walt (2012) 139ff and 142, where he advocates an approach of moving from the protection of the objects of property rights to realising the objectives that the Constitution sets.
159 To much the same effect are Boggenpoel & Mahomedy (2023) 29 and 33. On the reconciliation of these competing rights, see *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.
160 Muller & Marais 123, citing Van der Walt (2009) 53–70.
161 To much the same effect are Boggenpoel & Mahomedy (2023) 29, 33.
162 Van der Walt (2009) 148.
163 Sonnekus "Spolie en contra spolie" 1986 *TSAR* 243. See also Gevers & Muller "Regulating the use of force by third party role players during mass evictions in South Africa" 2024 *JAL* (forthcoming), where the authors consider the South African approach to the use of force during evictions in terms of s 4(11) of the PIE which permits third parties to assist the sheriff in executing an eviction order. The authors consider ancillary empowering legislation, such as the Sheriffs Act 90 of 1986, the South African Police Service Act 68 of 1995, and the Private Security Industry Regulation Act 56 of 2001, from a subsidiarity perspective to argue that the current regulatory framework for the use of force in the eviction context is inadequate.

Fischer (WCC) and *Setjwetla*) – this interpretation is preferable. This interpretation entails that intruders, like the third applicant in *SA Human Rights Commission*, acquire possession of the land during stage 4. The common-law principles which govern the *corpus* element seem to indicate that an intruder acquired possession of the land on which his informal dwelling is located once it is completed.[164] The reason is that such a dwelling entails effective and exclusive physical control of the land on which it was constructed. The *SA Human Rights Commission* court should be praised for adopting this construal, and for overruling *Mbangi*. Hence, an owner may no longer employ counter-spoliation here and must use the PIE to remove the intruder, who is now an unlawful occupier, from his land at this stage.

Nonetheless, there are systemic reasons as to why the threshold requirement for protection under the PIE should be the home concept in section 26(3) of the Constitution rather than the "unlawful occupier" requirement in the PIE. This is because the home concept is wider than the possession concept (particularly the *corpus* element) and, hence, the meaning of unlawful occupation in the PIE.[165] The stringent principles which the common law sets for satisfying the *corpus* element, where persons seek to acquire physical control of land without the owner's permission, suggest that intruders do not yet have possession (and are, hence, not yet unlawful occupiers under the PIE) prior to stage 4.[166] During these other stages, a landowner may use counter-spoliation to remove them, as the PIE does not protect persons unless they are in possession or unlawful occupation of the land. This is so even though their dwellings already seem to be homes during stages 2.2 and 3. Section 26(3) of the Constitution, and not counter-spoliation, should then be used to evict the intruder during these stages. The fact that the PIE does not use "home" as its threshold requirement means that the Act is arguably unconstitutional for not adequately giving effect to the constitutional right against arbitrary eviction from one's home during these two stages. In the next section we discuss the home concept in section 26(3) of the Constitution in terms of the first subsidiarity principle.

3 THE HOME CONCEPT

3.1 Background

Academics have noted with concern that the PIE, which purports to give direct effect to section 26(3) of the Constitution,[167] does not include a definition of a "home" in any of its substantive provisions.[168] This omission created an exceptional, and serious, interpretive problem for the courts to ensure that both the procedural protections (like notice and joinder) and the substantive safeguards (like alternative

164 See, to much the same effect, Bilchitz & Mackintosh 529–530.

165 See, for example, Kreuser & Marais; *Fischer* (WCC); Bilchitz & Mackintosh. We mention that an analysis of the relation between the possession concept and the home concept in s 26(3) of the Constitution must wait for another day (Muller & Marais 112). We address this relation in the next section.

166 *Cf* Boggenpoel & Mahomedy (2021) 495, who think that the PIE might only apply if a land intruder inhabits an informal dwelling.

167 Van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" 2008 *CCR* 77 99–114; Muller "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" 2015 *SALJ* 616 633.

168 See, for example, Boggenpoel & Mahomedy (2023) 19, Cramer & Mostert; Robbertze & Muller "Conceptualising the home in law and gender" 2015 *De Jure* 332–333.

accommodation and meaningful engagement) that the PIE affords are imbued with a normative understanding of the home. In this context, our courts have consistently held that the home should be afforded a generous interpretation.

In *Fischer* (WCC), Gamble J held that people with limited resources at their disposal "who have managed to scrape together enough money to buy the basic materials (wood, iron and plastic sheeting) to erect the most basic of structures in which they wish to live peacefully, would undoubtedly call those structures 'home'".[169]

In *Breedevallei Munisipaliteit v Die Inwoners van Erf 18184, Dikkopstraat 3, Avian Park, Worcester*,[170] Bozalek J reasoned that someone would have to suffer from aphantasia[171] not to accept that people whose existing accommodation is completely unsatisfactory and then conduct an incursion onto land with uninhabited structures "will, without the elapse of much time in occupation, consider such property to be their 'home'".[172]

In *Port Elizabeth Municipality v Various Occupiers*,[173] Sachs J held that a home was "more than just a shelter" – it was a place of "personal intimacy" and "family security" which became a "familiar habitat".[174] He held further that the home was the "only relatively secure space of privacy and tranquillity [*sic*] in what (for poor people, in particular) was a turbulent and hostile world".[175]

In *City of Cape Town v Rudolph*,[176] Selikowitz J reasoned that

> "[t]here can be no doubt that the shelters erected by respondents are their homes. Indeed, their *only* homes. They reside with their families in their shelters and have nowhere else to live".[177]

However, despite these glimpses of casuistic reasoning on the meaning of the home, there has not been a decisive articulation by our courts of the full normative meaning of the home in the context of land incursions or evictions. Such an articulation is essential to establish when a land intruder has a home on land, as the presence of a home would activate section 26(3) of the Constitution and exclude counter-spoliation.

3.2 Theory

Fox developed the foundations upon which the legal concept "home" could be constructed for South Africa by relying on theoretical findings in the social sciences of the affective value of a home.[178] It is instructive to use the concept "home" that Fox developed in the eviction context, because it captures the range of interests that unlawful occupiers have in their home. These home interests open up a whole new set of considerations that the courts may regard in determining the justice and equity of granting an eviction order. The courts, which traditionally

169 *Fischer* (WCC) para 91.
170 (A369/12) [2012] ZAWCHC 390 (13 December 2012) (*Breedevallei Munisipaliteit*).
171 Aphantasia is an inability to visualise things by way of mental pictures.
172 *Breedevallei Munisipaliteit* para 19.
173 2005 1 SA 217 (CC).
174 Para 17.
175 *Ibid*.
176 2004 5 SA 39 (C).
177 59C–D (emphasis added).
178 Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) *J of Law and Society* 580; Fox "The idea of home in law" 2005 *Home Cultures* 1; Fox *Conceptualising home – theories, laws and policies* (2007).

pride themselves on rigorous and objective legal analysis, are understandably hesitant to engage with this vague home concept. The courts, therefore, invariably find that the property interests of owners outweigh the home interests of occupiers, in line with the rights paradigm we discuss above. However, this predisposition of courts to favour the property interests of an owner cannot be wholly attributed to an inherent bias in legal reasoning. Fox notes that the courts have struggled to find sufficient grounds on which to hold that the home interests of occupiers outweigh the property interests of owners, since there is no framework of values against which the home interests of an occupier can be delineated. As a result, legal representatives find it challenging to conceptualise and canvas a persuasive argument in favour of the interests of occupiers without a central organising framework within which to locate the home interest of the occupiers.[179]

Rapoport recommended that "home" should be conceptualised in terms of the mathematical equation *home* = *house* + *x*.[180] This equation distinguishes between the fact that a home is valued, on the one hand, as a physical structure, and, on the other hand, for the social, psychological, and cultural significance that it acquires through use as a home.[181] Fox acknowledges that the emotional connection between occupiers and their homes is inherently subjective and that the same connectedness may not be held by all occupiers in the same way. Fox argues that the unique link that is fostered between occupiers and their homes must be divided into several value types.

In the first instance, the home, as a physical structure, provides its occupiers with the requisite shelter from the elements and the facilities that sustain and support them.[182] It is impossible to understate the importance of a home as a physical structure, because the most immediate need after losing a home is to obtain any form of shelter to take refuge in, or under.[183] However, the absence of a physical structure to take shelter in, or under, does not encapsulate the magnitude of being homeless.[184] It is important to recognise that a house also provides its occupiers with a space to experience the intangible values of their home. Fox notes that the physical structure of a home provides occupiers with the basis from which they can experience all the attributes of a home.[185] The house, as a physical structure, is an important starting point in the conceptualisation of the home, as it is the physical presence of the home that acts in combination with the *x* factor to create the phenomenon of a home.

Secondly, the home, as territory, is closely linked to the physical structure, because it affords the occupiers of the home the opportunity to exercise control

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179 See Coolen & Meesters "Editorial special issue: House, home and dwelling" 2012 *J of Housing and the Built Environment* 1; Mallett "Understanding home: A critical review of the literature" 2004 *The Sociological Review* 62; Moore "Placing home in context" 2000 *J of Environmental Psychology* 207.

180 Rapoport "A critical look at the concept 'home'" in Benjamin (ed) *The home: Words, interpretations, meanings and environments* (1995) 25 38.

181 Fox (2002) 590.

182 Altman & Werner (eds) *Home environments* (1985) xix.

183 *Grusd NO v Grusd* 1946 AD 465 479–480; *Buck v Parker* 1908 TS 1100 1105; *In re Bowie* 16 CH Div 486 487.

184 Fitzpatrick, Mackie & Wood "Advancing a five-stage typology of homelessness prevention" 2021 *International J on Homelessness* 79; Somerville "Homelessness and the meaning of home: Rooflessness or rootlessness?" (1992) *International J of Urban and Regional Research* 529. See also *Makama v Administrator, Transvaal* 1992 2 SA 278 (T).

185 Fox (2007) 157; Blunt & Dowling *Home* (2006) 23–24.

over the space in the home and the activities within it.[186] This territory provides the occupiers of a home with a *locus* in space where they can build family relationships, express themselves, and feel secure.[187] The sense of belonging, rootedness, and continuity that this *locus* fosters fulfils a range of social and psychological needs that are beneficial and necessary for the psychological well-being of the occupiers.[188] Fox acknowledges that the occupiers of a home can build family relationships, express themselves, and feel secure in other types of territory that cannot be described as home. However, she argues that the home presents a unique setting that is significant not only because it represents the very intimate values of family, privacy, and security, but also because it fosters a sense of belonging and rootedness.[189]

Thirdly, the home as identity, embraces the adage "home is where the heart is" and reveals the fact that occupiers forge strong emotional connotations with their homes through the experience of living in a particular place over a period of time.[190] These emotional connotations ensure that the phenomenon of the home is more than the experience of being oriented within a familiar order. The home also creates a direct link between the occupiers of a home and the place in which they dwell.[191] The symbolic significance of a home as identity is accentuated by the fact that a home is often perceived to be, on the one hand, an extension of an occupier's self-identity[192] and, on the other, a central component of the occupier's social identity.[193]

Fourthly, home as a social and cultural unit, creates an intimate link between the family and their place of residence[194] that is sustained through a complex process of social interaction between members of the household.[195] The central importance and role of the family in these interactions provide the gateway through which occupiers can experience their home.[196] It is important now to apply these articulated normative meanings of the home to the practical dynamic of a land incursion.

3.3 Structural completeness and habitability

There has been a strong focus in recent case law, such as *Fischer* (WCC), *Setjwetla*, and *SA Human Rights Commission*, on the degree or extent to which an

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186 Sebba & Churchman "The uniqueness of home" 1986 *Architecture and Behaviour* 7 21.

187 Rapoport 30.

188 Olson & Pauly "'Forced to become a community': Encampment residents' perspectives on systemic failures, precarity, and constrained choice" 2023 *International J on Homelessness* 124–138; Anthony "Bitter homes and gardens: The meaning of home to families of divorce" 1997 *Architectural and Planning Research* 1; Porteous "Home: The territorial core" 1976 *Geographical Review* 383.

189 Fox (2002) 598.

190 *Idem* 168.

191 Dovey "Home and homelessness" in Altman & Werner (eds) *Home Environments* (1985) 33 39.

192 Csikszentmihalyi & Rochberg-Halton "The home as symbolic environment" in Csikszentmihalyi & Rochberg-Halton *The meaning of things – domestic symbols and the self* (1981) 121 123.

193 Fichten "When toxic chemicals pollute residential environments: The cultural meanings of home and home ownership" 1989 *Human Organisation* 313 317.

194 Fox (2007) 175.

195 Perkins & Thorns "House and home and their interaction with changes in New Zealand's urban system, households and family structures" 1999 *Housing, Theory and Society* 124 133. See also *Dladla v City of Johannesburg* 2018 2 SA 327 (CC).

196 Dovey "HOME: An ordering principle in SPACE" 1978 *Landscape* 27.

informal structure was erected at the time of demolition (or, in the words of the courts, whether they were complete or incomplete). Put differently, the courts grappled with the question whether the informal dwelling – the first meaning of the home above – was fit for human habitation.

There are limited and disparate sources of law that provide legislative guidance on what it means to reside somewhere that is fit for human habitation.[197]

The Housing Act[198] defines the term "housing development" as

> "[t]he establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities and to health, educational and social amenities in which all citizens and permanent residents of the Republic will on a progressive basis have access to –
>
> (*a*) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and
>
> (*b*) potable water, adequate sanitary facilities and domestic energy supply…".[199]

Crucially, this description envisages the progressive realisation of habitability with permanent formal structures and tenure security as the objective. This leaves ample interpretive scope for temporary informal structures to be regarded as habitable while the threat of eviction (in terms of the PIE) or constructive eviction (possibly in terms of counter-spoliation) is abated.

The Rental Housing Amendment Act[200] defines "habitability" as

> "a dwelling that is safe and suitable for living in and includes –
>
> (*a*) adequate space;
>
> (*b*) protection from the elements and other threats to health;
>
> (*c*) physical safety of the tenant, the tenant's household and visitors; and
>
> (*d*) a structurally sound building".

We readily concede that this Act has not entered into force yet, and that the context of private rental housing is vastly different from land incursions onto vacant private or public land. However, these elements of housing that are fit for human habitation are strikingly similar to the description of habitation by the United Nations Committee on Economic, Social and Cultural Rights.[201] The committee defines "habitability" as housing that provides "inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors" while also ensuring the "physical safety of occupants". This definition provides persuasive guidance to our courts as to the meaning of habitability in terms of section 39(1)(*b*) of the Constitution, because it authoritatively interprets article 11 of the International Covenant on Economic, Social and Cultural Rights.[202]

The determination of whether an informal structure is fit for human habitation ought not to be done with the blunt tool of subjectively (and extra-judicially) observing the degree or extent to which an informal structure is erected – in other words, whether it is complete or incomplete. The same objection may be raised against the inhabited/uninhabited dichotomy for establishing whether the PIE

197 Muller & Viljoen *Property in housing* (2021) 317–319.
198 Act 107 of 1997.
199 S 1 of the Housing Act 107 of 1997.
200 Act 35 of 2014.
201 General Comment No 4 *The right to adequate housing* UN Doc E/1992/23 (1991) para 8(*d*).
202 993 UNTS 3, concluded on 16 December 1966 and entered into force on 3 January 1976. South Africa ratified this instrument on 12 January 2015.

applies in a given case.[203] Rather, a determination should be done with the requisite contextual sensitivity[204] that the exigencies of these vulnerable unlawful intruders demand. The focus should remain on whether the modest informal dwelling provides adequate space,[205] affords protection against the elements[206] and other health vectors,[207] ensures physical safety, and is structurally sound for their context and not measured against the formal conceptions of these elements for permanent structures.[208]

3.4 Home as threshold for protection under the PIE

Kreuser and Marais observe that our courts are fuelling the use of counter-spoliation in land incursion cases by describing land intruders in terms of the definition of "unlawful occupier" in the PIE.[209] In doing so, our courts are uncritically defaulting to the gravitational pull of the common law[210] by affording credence to the common-law interpretation of when someone would acquire possession, especially in terms of the *corpus* element, over land. The principled starting point of our courts' approach is that the PIE is unproblematic and that, following the proviso to the second subsidiarity principle, there is still scope for reliance on the common-law defence of counter-spoliation[211] where an informal structure has not reached a certain degree of completeness, as seen during especially stage 2.

Kreuser and Marais argue that the existence of a fragmented regulatory framework in the context of land incursions – the simultaneous application of legislation (the PIE) and the common law (counter-spoliation) – rendered land intruders (whom they call "aspirant occupiers") especially vulnerable during the recent COVID-19 pandemic.[212] This was so because they could not pass the threshold requirement of being unlawful occupiers in terms of the PIE, and, at the same time, endured the opaque subjective judgement of inhabiting an informal dwelling that was ostensibly unfit for human habitation (incomplete) for an insufficient amount of time. This lacuna in the regulatory framework enabled both private and public land owners to circumvent the application of the PIE and effectively evict people without judicial oversight in terms of counter-spoliation.[213] They argue, further,

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203 Boggenpoel & Mahomedy (2021) 495.

204 *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 19–25; *PE Municipality* paras 14–15. See also Van der Walt (2012) 117, 137.

205 Marais "Does housing size matter? The politics and realities of housing size" 2007 *Town and Regional Planning* 75.

206 Carr "Law and the precarious home: A case study of thermal inefficiency in English homes" in Carr, Edgeworth & Hunter *Law and the precarious home – socio legal perspectives on the home in insecure times* (2018) 139.

207 Parker, Siersbaek, MacConghail and Burke "Public health responses to homelessness during COVID–19 in Ireland: Implications for health reform" 2023 *International J on Homelessness* 36; Sai *et al* "Physical and mental health status of the homeless in a cold region of Japan: Alcohol intake, diet and psychosocial distress" 2023 *International J on Homelessness* 139.

208 See parts B, C, D, K, L, O, Q, R and T of the regulations promulgated in terms of s 17 of the National Building Regulations and Building Standards Act 103 of 1977: GN R2378 *GG* 12780 of 12 October 1990 (*Reg Gaz* 4564).

209 Kreuser & Marais 31.

210 Michelman "Expropriation, eviction, and the gravity of the common law" 2013 *Stell LR* 245 246ff.

211 See, for example, Scott.

212 Kreuser & Marais 36.

213 *Idem* 35. See similarly Boggenpoel & Mahomedy (2023) 29 and 33.

that aspirant occupiers ought to rely directly on section 26(3) of the Constitution for protection, and enjoined our courts to afford a generous interpretation to the meaning of home.[214] Their argument culminates with the proposal that counter-spoliation should be inapplicable to any informal dwelling that is capable of being a home for aspirant occupiers for the duration of the COVID-19 pandemic. These occupiers should be evicted from their homes in terms of a court order granted only after considering all the relevant circumstances.[215]

While our argument shares the same principled starting point with Kreuser and Marais – that the PIE inadequately regulates the instances of land incursions during stages 2.2 to 3 – we seek to calibrate the post-pandemic legal landscape with more precision. The first subsidiarity principle states that a litigant who avers that a right in the Bill of Rights has been infringed, must rely on the legislation that was specifically enacted to protect that right and may not rely directly on the provision in the Bill of Rights when he brings an action to protect the right.[216] This is problematic, as the PIE does not incorporate a fully developed normative understanding of the home flowing from section 26(3) of the Constitution into its threshold requirements and regulatory framework. This is the result of the fact that it uses the term "unlawful occupier" as its threshold requirement, which has the same meaning as possession. As seen in section 2.3 above, this means that intruders are not yet unlawful occupiers during stages 2.2 and 3 of a land incursion. Consequently, landowners may use counter-spoliation to eject them from the land during these stages.

However, the proviso to the first subsidiarity principle allows a litigant to rely directly on the provision in the Bill of Rights if he attacks the legislation for being unconstitutional, or for inadequately protecting the constitutional right.[217] Land intruders should be permitted to articulate the violation of their rights directly in terms of the independent substantive right in section 26(3) of the Constitution not to be arbitrarily evicted from their homes because the PIE inadequately protects their rights.[218] The reason is that it applies from stage 4 only, when an intruder has possession of land and is thus -an unlawful occupier under the PIE, while intruders may already have homes on the land during stages 2.2 and 3. This is because their informal dwellings offer them shelter from the elements, a territory which provides them with a space where they may feel secure, a link between their place of abode and the land itself, and a social and cultural unit.[219] The freedom to articulate their claim of a rights violation in this manner would not only promote the general characteristics of a property system (especially, the inherent human dignity of everyone,[220] and access to the courts[221]), but also promote the specific characteristics

214 Kreuser & Marais 37–38.
215 *Idem* 39.
216 Van der Walt (2012) 36 n 53; Van der Walt (2008) 100–103.
217 Van der Walt (2012) 36 n 55; Van der Walt (2008) 101, 104, 115.
218 Phillips "Opposing cynical evictions: A framework of appropriate remedies" 2020 *SALJ* 733 753–756; Van der Walt (2012) 155–163.
219 See the discussion in para 2.3 above. *Cf* Cramer and Mostert 596, who argue that an informal dwelling which offers shelter only amounts to a home if the identity of the person to whom it provides such shelter can be established. This view of the home is too narrow, as it could result in private owners circumventing the PIE. See similarly Boggenpoel & Mahomedy (2023) 21–23.
220 Woolman "Dignity" in Woolman, Bishop & Brickhill *Constitutional law of South Africa* (OS 2008) ch 36.
221 Brickhill & Friedman "Access to courts" in Woolman, Bishop & Brickhill *Constitutional law of South Africa* (OS 2008) ch 59.

of a property system (such as establishing an equitable balance between the intruder's right against arbitrary eviction from his home under section 26(3) and an owner's right to undisturbed possession in terms of section 25(1).[222]) Significantly, whether a dwelling complies with these features (whether it provides shelter and/or secure territory) does not depend on whether the intruder inhabits the dwelling, which factor featured in several of the cases under discussion.[223]

Our approach would enhance the ability of our courts to deliver context-sensitive judgments that extend protection to land intruders to much earlier on in the process of an incursion. In our view, a fully developed normative understanding of the home, as an informal dwelling that is fit for human habitation, should afford enduring protection to land intruders from stages 2.2 to 3 of a land incursion. Our approach then relegates the operational scope of counter-spoliation to the marginal space of stages 1 and 2.1.

Our argument aligns with the interpretation that Yacoob J afforded the negative obligation in section 26(3) of the Constitution in *Government of the Republic of South Africa v Grootboom*[224] not to be arbitrarily evicted from your home or have your home demolished without an order of court. He reasoned that section 26(1) and (3) of the Constitution must be read together, and, as such, they impose a duty on organs on state and private individuals to "desist from preventing or impairing" the right of access to adequate housing that people currently enjoy.[225]

In *Motswagae*, Yacoob J expanded the meaning of this negative obligation to include instances where the incidents of occupation are attenuated or obliterated.[226] This view arguably also holds true for land intruders who may not yet inhabit their completed structures, but are at the mercy of entities (like the ALIU) which demolish their informal structures and disrupt their existence without an order of court that considered the peculiarities of their circumstances. If land intruders can illustrate that their incomplete informal structures provide them with a home that is fit for human habitation – adequate space, affords protection against the elements and other health vectors, ensures physical safety, and is structurally sound – for their context, that structure should be acknowledged as their home and their precarious position should be protected under section 26(3) of the Constitution.[227] Whether or not the structure is inhabited should play no role here.[228]

It would be preferable if Parliament amended the PIE so that the home concept, and not the "unlawful occupier", is the threshold requirement to enjoy protection under this statute. An alternative may be for Parliament to amend the definition of the term "unlawful occupier" to include persons who are in the process of occupying land – land intruders – in this way ensuring that the Act also covers instances where intruders do not yet have a home on the land – stages 1 and 2.1 of a land intrusion.[229] In the meantime, litigants may invoke the proviso to the first subsidiarity principle to enjoy protection under section 26(3) of the Constitution during stages 2.2 and 3

222 Van der Walt (2012) 30–32ff.
223 See, for example, *Fischer* (WCC); *Denel*; *Setjwetla*.
224 2001 1 SA 46 (CC) (*Grootboom*).
225 Para 34.
226 *Motswagae* para 12.
227 See, to much the same effect, Boggenpoel & Mahomedy (2023) 22–23.
228 *Ibid*.
229 Muller & Marais 123.

of a land incursion. The PIE would govern land incursions under stage 4, as the intruders are by that time already unlawful occupiers under the Act.

4 CONCLUSION

SA Human Rights Commission is one of the latest decisions in a lengthening line of recent decisions, in which landowners invoke the defence of counter-spoliation to eject unlawful intruders from their land in an extra-judicial manner. These disputes concern two key issues – the requirements of the defence, and the relation between the possession concept (particularly its *corpus* element) in private law and the home concept in section 26(3) of the Constitution, which proscribes eviction from one's home without a court order. A vexing question is when an intruder acquires possession of land, and, concomitantly, becomes an unlawful occupier under the PIE. The reason is that possession has the same meaning as unlawful occupation under the PIE. Landowners usually argue that intruders do not comply with this threshold requirement, despite their dwellings being complete. Consequently, they may use counter-spoliation instead of the PIE, which requires a court order, to eject the intruders from their land.

In line with the argument in our first article, a more principled approach towards the requirements of counter-spoliation entails enquiring whether intruders satisfied the possession concept, specifically its *corpus* element. The common law sets strict requirements for the acquisition of physical control of land without the owner's permission or co-operation. Here it is helpful to divide land incursions into different stages along a spectrum, with stage 1 indicating the very beginning of a land intrusion (where an intruder has not yet started the construction of an informal dwelling) and stage 4 entailing an intruder having completed an informal dwelling and inhabiting it. The common-law principles relating to the *corpus* element suggest that an intruder acquires possession of the land (and is, therefore, an unlawful occupier) only by stage 4. Unfortunately, the case law is contradictory on this point.

Cases are divided between an overly strict and a more principled approach towards the *corpus* element, with *Mbangi* representing the former and *SA Human Rights Commission* following the latter. The approach in *Mbangi* entails that an intruder will never satisfy the *corpus* element as long as he acts unlawfully, even if his dwelling is finished and he inhabits it. As a result, intruders would not qualify for protection under the PIE, even during stage 4, given that the possession requirement has the same meaning as "unlawful occupier" in the Act. However, there are sound reasons in both private and constitutional law why the strict approach in *Mbangi*, which the *SA Human Rights Commission* case rejected, should be discarded.

Yet, even if land intruders are unlawful occupiers during stage 4 and, thus, enjoy protection under the PIE, the question remains whether the PIE is the best source to adjudicate land-intrusion cases. The reason is that the *corpus* element of the possession concept is narrower than the home concept in section 26(3) of the Constitution. Indeed, intruders already appear to have homes on the land *before* this stage – when they have incomplete dwellings on the land, which suggests that the home concept might be preferable to that of an unlawful occupier in the PIE as a threshold requirement to enjoy protection under this provision.

According to Fox, an informal dwelling is a home once it provides an intruder with shelter from the elements, is a territory which provides space where he may feel secure, is a link between his place of abode and the land itself, and is a social

unit. The dwelling need neither be complete nor inhabited to satisfy these factors, which are objectively determinable. If this understanding of home is used as the threshold requirement to enjoy protection under the abovementioned constitutional provision, then intruders would enjoy protection at an earlier stage of a land incursion than under the PIE. It is preferable that the courts, instead of private or state actors, decide whether (complete or incomplete) informal dwellings amount to a home, according to Fox's factors. Parliament should remedy this defect by amending the PIE so that the home, instead of the unlawful occupier, forms the threshold requirement to enjoy the protection that section 26(3) provides.

It seems that landowners may still employ counter-spoliation at the very beginning of a land incursion, as intruders then do not yet have homes on the land. Yet, as a result of the extra-judicial nature of this defence (which could result in abuse), the centrality of the rule of law under the Constitution,[230] and the fact that evictions are generally subject to judicial oversight, it might be preferable for the PIE, especially section 5 of the Act, to cover these instances.[231] In this way, the Act will properly give effect to both its purposes – to prevent illegal eviction *and* to prevent unlawful occupation of land.[232] To this end, courts may read the necessary words into the PIE, or Parliament could amend the Act to achieve this end.[233]

230 S 1(*c*) of the Constitution.

231 There are sound reasons why landowners should be permitted to invoke s 5 of the PIE, which deals with urgent evictions, to address land-incursion cases (Muller & Marais 118–122). Here the availability of alternative accommodation should arguably not be a consideration, at least when the landowner institutes proceedings immediately after a land intrusion began. This is the result of the potential of land incursions to be socially inflammatory, their capacity to undermine the provision of housing on a planned basis, and the danger of creating an impression that one may indirectly be "rewarded" with alternative accommodation for committing a land intrusion (Muller & Marais 123–124). In *Grootboom*, Yacoob J held that "[i]t may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions, would be reasonable" (para 92). See, similarly, Cramer & Mostert 583–584, 592, 600–601. *Cf Communicare v Apolisi* 2023 6 SA 250 (WCC) paras 38–39. As to the importance of judicial oversight in the land-incursion context, see Boggenpoel & Mahomedy (2023) 29 and 33.

232 Muller & Marais 123. Permitting landowners to rely on s 5 of the PIE to prevent unlawful land occupations would address the concern that extending PIE's applicability to land intruders who are still in the process of occupying land would "effectively render combating land invasions impossible" (Cramer & Mostert 584, 596, 599–600).

233 Muller & Marais 118.

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The following contribution met these requirements and was published in 2025:

- EJ Marais & G Muller "The extra-judicial ejectment of land intruders: An evaluation of the relation between the possession and home concepts" (2025) 88(1) *THRHR* 1–29

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