Makeshift 1190 (Pty) Ltd v Cilliers 2020 5 SA 538 (WCC)

The increasing difficulty of protecting quasi-possession of incorporeals with the *mandament van spolie*

1 Introduction

The *mandament van spolie* (*mandament*; spoliation remedy) protects peaceful and undisturbed possession against unlawful spoliation (Muller *et al Silberberg and Schoeman's the Law of Property* (2019) 326-327; Boggenpoel *Property Remedies* (2017) 96-101; Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (LLD thesis 1986 UP) 297-307). It also protects *quasi*-possession of certain incorporeals or rights (Muller *et al* 337-346; Boggenpoel 105-121). In *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA) (*Masinda*), the Supreme Court of Appeal held that the *quasi*-possession of a right, specifically electricity supply, does not enjoy protection under the *mandament* if the right is sourced in contract (par 22). The *quasi*-possession of a right only enjoys possessory protection if the right is in the nature of a servitude, is registered or flows from statute (par 22).

In *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC) (*Makeshift*), the Western Cape Division of the High Court, Cape Town (the court; Cape High Court), recently had to decide whether the *mandament* is available for restoring the *quasi*-possession of electricity supply that derives from contract. The appellant severed the electricity supply to the respondent's home without her permission, upon which she instituted the *mandament* to have her *quasi*-possession of the supply restored. Rogers J, with Cloete J concurring, held that the *quasi*-possession of such supply, despite being contractual in nature, enjoys possessory protection. He distinguished the case from *Masinda* by reinterpreting the "incident of possession" notion, which is a key requirement for the *quasi*-possession of a right to enjoy possessory protection. He ruled that electricity supply used on land is an incident of possession of the land – and therefore enjoys possessory protection – if such supply is additional to, or part of, a professed right, the *spoliatus* has against the spoliator to occupy the premises where the right used. Furthermore, the spoliator must have an interest in the possession of the land. By severing the electricity supply, the appellant attempted to evict the respondent without following due process. He therefore granted the *mandament* to protect her *quasi*-possession of the electricity supply.

The Cape High Court's approach towards *quasi*-possession, particularly the "incident of possession" requirement, is novel and deserves attention, particularly due to the precedent in *Masinda*. This is because Rogers J identified a category of rights the *quasi*-possession of

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which enjoys possessory protection regardless of their personal nature. His attempt to distinguish the case from *Masinda* is admirable, as his judgement arguably upheld the respondent's right to have access to adequate housing and her right against arbitrary eviction from her home. Unfortunately, the decision's potential drawbacks seem to outweigh these positive features.

Rogers J's interpretation of the "incident of possession" requirement does not find authority in either case law or academic scholarship. His understanding of this requirement, though appearing to vindicate the respondent's constitutional rights, has the potential to subvert these same rights in other contexts. This is because without the *spoliatus* having an alleged occupation right against the spoliator (or when someone other than the spoliator cuts off the electricity supply), the *quasi*-possession of such *spoliatus* will not enjoy possessory protection. Furthermore, the court's construal of the "incident of possession" notion delves into the merits of the dispute, which are irrelevant in spoliation proceedings. Scrutinising the merits may subvert the speedy and robust nature of the spoliation remedy, which could undermine its purpose and, hence, the rule of law. For these reasons, the judgment is unappealing.

The case note is structured as follows: section 2 sets out the facts of the case and the court's decision. Section 3, in turn, evaluates the decision in view of the two points raised in the previous paragraph. The final part, namely section 4, sets out the conclusion.

2 The *Makeshift* case

2 1 Facts

Makeshift is an appeal to the Cape High Court from the Riversdale Magistrate's Court (court *a quo*). The appellant, namely Makeshift 1190 (Pty) Ltd (the appellant), owned a farm in the Riversdale area, on which the respondent and her family occupied a building (referred to as "the store"). It was common cause that the store was their home.

Eskom served the store with electricity. The respondent's husband paid the electricity bills, though it was the appellant who had the contract with Eskom for the provision of electricity. During December 2017, Eskom disconnected the electricity on the farm after the appellant cancelled its contract with Eskom. The only part of the farm that still used Eskom electricity at that point was the store and its related facilities. There was a strained relationship between the appellant and the respondent, and it appeared that the appellant terminated the electricity supply to force the respondent and her family off the land.

Immediately after the disconnection, the respondent launched an urgent spoliation application in the court *a quo* against the appellant to have the electricity supply restored. Following several developments which are irrelevant for present purposes, the court *a quo* finally granted the spoliation remedy in favour of the respondent on 6 December 2019.

The appellant subsequently appealed this decision to the Cape High Court.

2 2 The judgment

The legal question that confronted the court, according to Rogers J, was whether the respondent had *quasi*-possession of the electricity supply, as meant in *Masinda*, and whether she may use the *mandament* to have such *quasi*-possession restored (par 20). The spoliation remedy only protects the *quasi*-possession of certain rights and it is unnecessary to prove that the alleged right exists to reclaim *quasi*-possession with the *mandament* (par 21). To have *quasi*-possession of an alleged right, the *spoliatus* must have performed acts demonstrating the exercise of the right (par 21). Rights the *quasi*-possession of which enjoy protection under the spoliation remedy are *gebruiksregte* (use rights) or rights which are incidental to the possession or control of the property where the professed right is exercised (pars 22 and 24, with reference to *Firstrand Ltd v Scholtz* 2008 2 SA 503 (SCA) (*Firstrand*) and *Masinda*). However, the mere fact that such supply is used at residential premises does not automatically mean it is incidental to the possession of property (par 25). As held in *Masinda*, the *quasi*-possession of electricity and water supply does not enjoy possessory protection if such supply is personal in nature (par 23).

Rogers J held that *Masinda* does not confine the rights the *quasi*-possession of which enjoys possessory protection only to those right which are "bestowed by servitude, registration or statute" (pars 29-30). In his view, there are rights the *quasi*-possession of which enjoys such protection despite them being "purely personal in nature" (par 30, citing *Firstrand* par 13). He divided *quasi*-possession cases into three categories to provide clarity in this regard:

a) cases where the professed right is an alleged servitude or alleged registered statutory right; here the *quasi*-possession of the professed right enjoys possessory protection (such as in *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) (*Bon Quelle*) and *Impala Water Users Association v Lourens* 2008 2 SA 495 (SCA) (*Impala*));
b) cases where the alleged right is contractual in nature and where no servitude or similar right is alleged; here the *quasi*-possession of the right does not enjoy possessory protection (such as in *Masinda* and *Firstrand*); and
c) cases where the alleged right is personal in nature but where its *quasi*-possession still enjoys possessory protection (as happened in *Naidoo v Moodley* 1982 4 SA 82 (T) (*Naidoo*) and *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W) (*Froman*) (par 32).

In *Naidoo* and *Froman*, which were not rejected in *Masinda*, the courts awarded the spoliation remedy to protect the possession of the premises and not the *quasi*-possession of the alleged right to electricity and water supply (pars 31 and 36, referring to *Masinda*). The defining feature of these cases, and, hence, category (c), is that the claimant is not complaining about the severing of the electricity or water supply in itself

but rather about the "adverse impact" such severing has on her possession of the premises (par 37). Rogers J ruled that the same might also be said of cases in category (b), like *Masinda* (par 37). However, as *Masinda* did not share this view, there must be another consideration which distinguishes category (c) from (b).

In category (b), the supplier of the service has no interest in the possession of the land, while in category (c) the supplier has a direct interest in such possession (pars 33-34). Consequently, in category (c) cases the service provider severs the service to evict the claimant without following due process, while in category (b) there is no such attempt on the supplier's side (par 34). The distinguishing feature of category (c) is therefore that the "alleged right to electricity is an incident of, or an adjunct to, the alleged right which the [*spoliatus*] has against the spoliator to be in occupation of the premises" (par 38). If electricity supply is an incident of the claimant's possession in this manner, the *quasi*-possession of such supply enjoys protection under the *mandament* and terminating such supply amounts to spoliation of the premises where the supply is used (par 38). This is because severing electricity supply used at residential premises amounts to a substantial disturbance with the possession of the premises itself (par 39). As the spoliation remedy guards against interferences of this nature and not only against complete deprivation of possession, it may be awarded (par 39).

The court found that respondent's possession of the premises (and that of her family) was permitted in terms of a *precarium* (revocable consent) from the appellant, which *precarium* extended beyond permission to occupy the premises by including the use of Eskom electricity at the store (pars 43-44, 48). The electricity supply was thus an adjunct to the respondent's permission to occupy the store and, hence, an incident of her possession of the land (pars 44, 48). The respondent's occupation of the premises, and her use of its electrical appurtenances, therefore amounted to possession of the premises while, simultaneously, amounting to *quasi*-possession of the alleged right to electricity (par 41). Therefore, the respondent's case fell into category (c), as the appellant's severing of the electricity supply was intended – like in *Naidoo* and *Froman* – to be a constructive eviction (par 49). Consequently, Rogers J agreed with the court *a quo*'s order and dismissed the appeal.

3 Evaluation

3 1 Introduction

It seems that the source of an alleged right which is being *quasi*-possessed was initially irrelevant in spoliation proceedings, as rights the *quasi*-possession of which enjoys possessory protection could derive from either real or personal rights (Kleyn *Mandament* 394; Kleyn "The protection of *quasi*-possession in South African law" in Descheemaeker (ed) *The consequences of possession* (2014) 187, citing *Firstrand* par 12). However, since *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA)

(*Telkom*) the courts have placed more emphasis on the source of a professed right to determine whether its *quasi*-possession enjoys possessory protection (see, for instance, *Impala*; *Firstrand*; *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA); *Masinda*). This investigation is said to prevent the spoliation remedy from replacing a claim for specific performance, which would collapse the distinction between property law and contract law (*Telkom* par 14). Therefore, if the right is sourced in contract, its *quasi*-possession does not enjoy possessory protection (*Telkom*; *Firstrand*; *Impala*). This trend was recently confirmed in *Masinda* regarding *quasi*-possession of electricity supply.

Given the precedent in *Masinda*, one might have expected *Makeshift* to have gone the other way, as the alleged electricity supply in this case (as in *Masinda*) was sourced in contract. Still, Rogers J awarded the spoliation remedy by finding that the respondent's *quasi*-possession of the electricity supply was an incident of the possession of the land. As mentioned in the introduction, this finding is problematic in view of (i) the way courts and scholars have previously construed the "incident of possession" requirement, and (ii) the purpose of the spoliation remedy. I address these two matters under the next two headings below.

3 2 The "incident of possession" requirement

Rogers J relied on two considerations to award the spoliation remedy in the case before him. The first entails that the courts in *Naidoo* and *Froman* granted the *mandament* to protect the claimant's possession of the premises where the electricity supply was used and not the *quasi*-possession of the supply itself (pars 36-38, with reference to *Masinda* par 16). The second factor, which is related to the first, is the "incident of possession" requirement.

The first factor touches on how the *mandament* protects *quasi*-possession of incorporeals. There are two schools of thought in this context. Both acknowledge that *quasi*-possession plays a role when dealing with the control of rights, as rights – being incorporeals – are not susceptible to possession in the same way as tangible things (*Telkom* par 9; Boggenpoel 105-106). However, they differ as to the relative importance of *quasi*-possession in cases which concern severance of electricity (and water) supply.

For the first school of thought, which consists of Sonnekus, Van der Walt, and De Waal, the point of departure is the *possession of the premises* where the electricity supply is used (Sonnekus "Besit van serwituutbevoegdhede, *mandament van spolie* en logika" 1989 *TSAR* 430; Van der Walt "*Mandament van spolie*" 1983 *THRHR* 237-238; De Waal "*Mandament van spolie*" 1984 *THRHR* 115). By using the mentioned services through the appurtenances on land, such use is incidental to (or is a component of) the possession of the land (Sonnekus 1989 *TSAR* 430; Van der Walt "Die *mandament van spolie* en *quasi*-besit" 1989 *THRHR* 451-452; De Waal 1984 *THRHR* 115). Hence, cutting off the service

amounts to a substantial interference with the possession of the premises, which disturbance may be addressed with the spoliation remedy (Sonnekus 1989 *TSAR* 430; Van der Walt 1989 *THRHR* 452). It is unnecessary to prove the existence of the right to use the spoliation remedy here (Van der Walt 1989 *THRHR* 448, 451; but see *contra* Sonnekus 1989 *TSAR* 432-434). Sonnekus and Van der Walt argue that *quasi*-possession merely shows that the possession at hand is exceptional (Sonnekus 1989 *TSAR* 432-434; Van der Walt 1989 *THRHR* 451-452). Hence, it is unnecessary to work with this notion when dealing with electricity and water supply cases, as it does not add anything to the existing principles on possession (Van der Walt 1989 *THRHR* 451-452).

Kleyn, who represents the other school of thought, focuses on the *quasi*-possession *of the right* instead of the possession of land (Kleyn *Mandament* 391-392; Kleyn "Protection of *quasi*-possession" 200). He argues that by exercising physical acts normally associated with an alleged right on land, such exerciser acquires *quasi*-possession over the right (Kleyn *Mandament* 392-393; Kleyn "Protection of *quasi*-possession" 187, citing *Firstrand* par 12). It is unnecessary to prove the existence of the right to have *quasi*-possession over it (Kleyn *Mandament* 395). A right must be a *gebruiksreg* (use right) for its *quasi*-possession to enjoy possessory protection, as the *mandament* does not protect the *quasi*-possession of all kinds of rights (Kleyn "Protection of *quasi*-possession" 187, citing *Firstrand* par 13). There are two kinds of *gebruiksregte*, namely servitutal rights and rights which are incidental to the possession of land (which he also describes as "incidents of possession") (Kleyn "Protection of *quasi*-possession" 195). Examples of rights which are incidents of possession include electricity and water supply used on premises (Kleyn *Mandament* 393-394; Kleyn "Protection of *quasi*-possession" 204-205).

There must be a link between the exercise of an alleged *gebruiksreg* and corporeal property, like land, for such right to be an incident of possession (Kleyn *Mandament* 392-393; "Protection of *quasi*-possession" 187, citing *Firstrand* par 12). If this link is present, the spoliation remedy may be used to restore the *quasi*-possession of the alleged right, as preventing the *spoliatus* from exercising the right amounts to spoliation of the *quasi*-possession of the right. The link ensures that the spoliation remedy is not abused to compel specific performance, thereby upholding the division between contract law and property law (Kleyn "Protection of *quasi*-possession" 195). Although Kleyn acknowledges that electricity (and water) supply could also be regarded as a component of the possession of land, he prefers working with the notion of *quasi*-possession when dealing with possessory protection of incorporeals (Kleyn *Mandament* 393-394).

These approaches are two sides of the same coin – both reveal that the *mandament* may be used to restore electricity (and water) supply used on land, even though the *spoliatus* may not be entitled to the right. The

incident of possession aspect is an essential requirement for obtaining spoliatory relief under both schools of thought.

Rogers J should be applauded for referring to, and quoting from, many of the sources cited in the previous paragraphs. In terms of the outcome in *quasi*-possession cases, nothing hinges on which school of thought one favours. This is because the correct application of the principles under either one leads to the same result. This view finds support in the *Naidoo* and *Froman* cases, given that the former is characteristic of the first school of thought, while the latter is reminiscent of the second one. The fact that Rogers J preferred the first school of thought is therefore unproblematic for purposes of the outcome in *quasi*-possession cases. Though there may be doctrinal implications for favouring one school of thought over the other, such an investigation is beyond the scope of this case note.

However, Rogers J's construal of the "incident of possession" requirement is problematic. As mentioned above, this requirement highlights the link between the exercise of a professed right and the land where it is exercised under both schools of thought. Rogers J's interpretation of the requirement differs from the views of the two schools of thought and the position in case law (*Firstrand* par 12; *Zulu v Minister of Works, KwaZulu* 1992 1 SA 181 (D) 188C). At best, *Naidoo* and *Froman* only provide indirect authority for his interpretation, as both cases were decided on the basis that the services were used on the land which the *spoliatii* occupied without explicit reference to an alleged occupation right they had against the spoliators. Rogers J's approach supplements the existing considerations under this requirement, as the investigation no longer pivots on whether the *spoliatus* performed acts normally associated with a professed right on land. If the right is sourced in contract, the *spoliatus* must also have an alleged agreement against the spoliator to occupy the premises. Furthermore, it must be the landlord who severs the supply. Absent this alleged occupation right and severance by the landlord, the electricity supply is not incidental to the possession of the premises and cannot, thus, be restored with the spoliation remedy. As will be seen below, these added considerations may undermine the constitutional rights of a *spoliatus* in certain instances.

It must be emphasised that the *ratio decidendi* in *Masinda* precluded Rogers J from only focusing on the link between the exercise of the right and the land where it is used, as per the two schools of thought. Due to the personal nature of the right in *Makeshift*, strict adherence to *Masinda* would have meant that the judge had to reject the respondent's reliance on the spoliation remedy. Instead, Rogers J voiced his disagreement with *Masinda* by holding that severing electricity supply in category (b) cases entails an adverse impact of one's possession of premises in the same way as in category (c) cases, which means there is no difference between these two categories (par 37). Nonetheless, he was bound by *Masinda* due to the doctrine of *stare decisis*. It is for this reason that he attempted

to distinguish *Makeshift* from *Masinda* on another basis, which he did by reinterpreting the "incident of possession" requirement.

Distinguishing *Makeshift* from *Masinda* (as well as disagreeing with the latter decision) is commendable, given the *Masinda* court's (over)emphasis of the source of the right (Kleyn "Protection of *quasi*-possession" 206-208). Furthermore, Rogers J's decision appears to vindicate the constitutional rights of the respondent, namely her right to have access to adequate housing and her right against arbitrary eviction from her home (section 26(1) and 26(3) in the Constitution of the Republic of South Africa, 1996 (Constitution)).

Electricity is necessary for the "dignified and humane occupation of residential premises" (Freedman "The application of the *mandament van spolie* to constitutional and statutory rights" 2015 *TSAR* 200). It is "one of the most common and important basic municipal services and has become virtually indispensable" in modern society (*Joseph v City of Johannesburg* 2010 4 SA 55 (CC) (*Joseph*) par 34). It therefore comes as no surprise that electricity supply is a constitutive element of "adequate" housing, as meant in section 26(1) of the Constitution (G Muller "Restoring electricity use with the spoliation remedy" 2019 *Pretoria Student Law Review* 3-4). Where adequate housing exists, it should not "be removed unless it can be justified" (*Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) par 29). The spoliation remedy protects this right against limitation by forcing those who sever electricity supply through unlawful self-help to restore the supply forthwith. This is so that the dispute may be adjudicated on the merits in subsequent legal proceedings based on the merits (see the discussion in section 3 3 below and the sources referred to there). Although there might be other remedies available to protect an electricity user's electricity supply (and, hence, the right to have access to adequate housing), such as the interdict and perhaps even remedies in electricity legislation, these remedies are arguably not as effective as the *mandament*. This is because they – unlike the *mandament* – require proof of a right (see section 3 3 below and the sources referred to there). Furthermore, where existing legislation does not provide remedies which offer the same type of protection as the spoliation remedy (which seems to be the case in the electricity setting), it might be preferable to use the *mandament* until existing legislation is amended (or new legislation is enacted) to provide similar protection to those whose electricity supply is severed without following due process (Boggenpoel 154-155).

Rogers J's approach also seems to uphold the right against arbitrary eviction from one's home (section 26(3) of the Constitution). In *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC), it was held that any attenuation or obliteration of the incidents of peaceful and undisturbed occupation of one's home, without a court order, amounts to an eviction contrary to section 26(3) of the Constitution of the Republic of South Africa, 1996 (Constitution) (par 12). Given this *ratio* and the indispensable nature of electricity in society, as mentioned in the

previous paragraph, it follows that severing electricity used at residential premises without the occupier's permission amounts to a constructive eviction without a court order and is therefore contrary to section 26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) (see similarly Muller 2019 *PSLR* 8). Forcing the *spoliatus* to restore the electricity supply forthwith discourages the spoliator from engaging in unlawful self-help and forces him to follow due process when evicting the *spoliatus*.

The fact that *Makeshift* seems to vindicate the mentioned constitutional rights is admirable. Yet, the judgment unfortunately only achieves this goal in a narrow setting. For example, it does not cover cases where someone severs electricity supply (which is sourced in contract) to a premises when there is no alleged occupation right between such person and the one using the supply to the land. It also does not extend to instances where someone other than the landlord cuts off such supply (compare *Joseph*, where the electricity supply was severed by the relevant power utility and not the landlord). Although *Masinda*, and not *Makeshift*, bears responsibility for this shortcoming, the problem remains: absent an alleged occupation right and severance by the landlord, the *quasi*-possession of the electricity supply does not enjoy possessory protection. Excluding the *mandament* from cases which fall outside the narrow exception Rogers J created will probably frustrate the two fundamental rights discussed above, as persons using electricity supply at their homes will arguably not be able to protect their section 26(1) and 26(3) rights as effectively as would be the case if they had access to this remedy.

The single-system-of-law principle, which the Constitutional Court laid down in *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA674 (CC) (*Pharmaceutical Manufacturers*), entails that all sources of law, including the common law, flow from the Constitution and is subject to constitutional control (par 44; AJ van der Walt *Property and constitution* (2012) 20ff). All legal sources must thus promote the spirit, purport and objects of the Bill of Rights, as per section 39(2) of the Constitution (Van der Walt *Property and constitution* 20). The proviso to the second subsidiarity principle, which the Constitutional Court developed in light of the single-system-of-law principle, states that litigants may only invoke the common law to protect their rights if the common law does not conflict with a constitutional right or, should such a conflict exist, it can be developed to accord with the Constitution (Van der Walt *Property and constitution* 36ff, 115-116). Given the potential of Rogers J's understanding of the "incident of possession" requirement to undermine section 26(1) and 26(3) of the Constitution outside the narrow confines of his approach, this proviso requires that courts should adopt an interpretation of the common-law sources (or develop the common law, if necessary) which does not frustrate these fundamental rights (Van der Walt *The law of servitudes* (2016) 43-44; Van der Walt *Property and constitution* 36ff, 115-116). The construal of the "incident of possession"

requirement in terms of the two schools of thought, and as applied in *Naidoo* and *Froman*, seem to provide a constitutionally-compliant interpretation, as it does not require proof of an alleged occupation right or that the spoliator must have an alleged interest in the possession of the land. It would be better to afford possessory protection to all persons who use electricity at their homes irrespective of there being an alleged occupation right or whether the spoliator has an interest in possession of the premises. That said, this avenue was unfortunately closed to Rogers J due to the precedent in *Masinda*.

3 3 The purpose of the *mandament van spolie*

The second problem with Rogers J's interpretation of the "incident of possession" notion is that it frustrates the purpose of the *mandament* by complicating the investigation under this requirement. The spoliation remedy is usually described as being speedy and robust in nature (Kleyn "Die *mandament van spolie* as besitsremedie" 1986 *De Jure* 1; Muller *et al* 328; Boggenpoel 98-100). It can be obtained on an urgent basis and restores the *status quo ante* forthwith, as per its maxim *spoliatus ante omnia restituendus est* (the *spoliatus* must be restored to her prior position before all else) (Muller *et al* 326; Boggenpoel 96). Merits are irrelevant and may not be raised during spoliation proceedings at all; parties may only litigate on the merits in subsequent legal proceedings (*Nienaber v Stuckey* 1946 AD 1049 1053; Muller *et al* 349; Kleyn 1986 *De Jure* 6-7). The irrelevancy of merits flows from (i) the distinction between the possessory suit (where merits play no role) and the petitory suit (where rights must be proved) in South African law (Kleyn 1986 *De Jure* 3-5), and (ii) the rationale of the remedy.

The spoliation remedy protects bare possession, which is possession without reference to rights, and is therefore available to all types of possessors, namely both possessors and holders (Kleyn 1986 *De Jure* 8-9; Boggenpoel 96). Even a thief may institute the *mandament* against anyone who committed unlawful spoliation, including the owner of property (*Yeko v Qana* 1973 4 SA 735 (A) 739G). The fact that the remedy does not protect rights, but rather possession as a mere factual relationship, makes it unique (Kleyn 1986 *De Jure* 1; Boggenpoel 96-97). The purpose of the *mandament* is to uphold law and order by protecting stable possessory relations against unlawful dispossession (Van der Walt "Squatting, spoliation orders and the new constitutional order" 1997 *THRHR* 525-526). Therefore, it prevents unlawful self-help in the possessory context by discouraging people from taking the law into their own hands (*Nino Bonino v De Lange* 1906 TS 120 156; Kleyn 1986 *De Jure* 11). In *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) (*Ngqukumba*), the Constitutional Court held that "[s]elf-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled" (par 21). The remedy gives effect to the rule of law by requiring spoliators to immediately undo the consequences of their unlawful acts, thereby

encouraging parties to submit their dispute to a court of law instead of resorting to self-help (section 1(c) of the Constitution; *Ngqukumba* par 12).

The following considerations touch on the merits of a dispute and may therefore not feature in spoliation proceedings: the spoliator has a stronger right (like ownership) in the property, the *spoliatus*' possession is unlawful or illegal, the spoliator has a right to terminate the *spoliatus*' possession, and whether restoring possession to the *spoliatus* would inconvenience the spoliator (Muller *et al* 349; Boggenpoel 96-99, 129). Rogers J's construal of the "incident of possession" requirement contains elements of several of these considerations.

According to the judge, electricity supply used at a residential premises is only an incident of the possession of such premises if the supply is additional to an alleged occupation right the *spoliatus* has against the spoliator. The spoliator must therefore have a professed interest (like ownership) in possession of the premises. Stated differently, the spoliator must have a right to terminate the *spoliatus*' possession. On the flipside, the *spoliatus* must have an alleged right against the spoliator (like a lease) to occupy the premises. These aspects, notwithstanding their alleged or professed nature, all touch on the merits and should play no role in spoliation cases.

The spoliation remedy realises its purpose by providing immediate and effective relief. Such relief is only possible if merits are disregarded (Muller *et al* 331-332; Taitz "Spoliation proceedings and the 'grubby-handed' possessor" 1981 *SALJ* 40-41). Investigating the merits undermines the efficacy of the remedy, as it will delay the court in delivering judgment, thereby postponing the restoration of the *status quo ante*. This is because parties will have to lead evidence in addition to the two requirements of the *mandament van spolie*, namely peaceful and undisturbed (*quasi-*)possession and unlawful spoliation (Kleyn 1986 *De Jure* 6). Such an investigation, which involves a factual dispute, is more at home at a trail procedure and not the more expedient motion procedure in terms of which spoliation cases are normally decided (Muller *et al* 331-332). Indeed, one merely has to look at what length Rogers J went to examine the merits of the dispute before him to find that the *spoliatus*' use of the electricity supply was indeed additional to her alleged occupation right and that the severing of the electricity supply was intended to be a constructive eviction (pars 48-49).

Though the merits are examined in spoliation proceedings to some extent, namely, to determine whether an alleged right is an incident of possession to ascertain whether its *quasi*-possession enjoys possessory protection, such investigation is limited and does not dominate the proceedings (Boggenpoel 120). This restricted examination does not extend to the actual rights (namely the merits) the parties to the dispute have in the property (Boggenpoel 120-121). Though Sonnekus argues that the *spoliatus* must prove that he is entitled to the right for its *quasi*-possession to enjoy possessory protection (Sonnekus "Watervoorsiening

en die *mandament van spolie* – die Hoogste Hof verstel die wissels" 2007 *TSAR* 148-149), it is trite law that rights need not be proved in *quasi*-possession cases (*Bon Quelle* 516E-H; *Masinda* par 14; Van der Walt 1989 *THRHR* 448, 451; Kleyn *Mandament* 395). Requiring proof of an *alleged* occupation right, which is nearer Sonnekus' view, seems to conflict with the legal position that rights need not to be proved for their *quasi*-possession to enjoy protection under the spoliation remedy.

Moreover, Rogers J's approach has elements of the notion of the "grubby handed" possessor (Taitz 1981 *SALJ* 36), which entails that a court may refuse to grant the spoliation remedy to a *spoliatus* who has no right in the property (Taitz 1981 *SALJ* 40). This concept, of which scholars are critical (Taitz 1981 *SALJ* 40-41; Van der Merwe *LAWSA* (ed Joubert & Faris) 27 (2014) par 111), has been rejected by the Supreme Court of Appeal (*Yeko v Qana* 1973 4 SA 735 (A) 739G-H; *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA) par 32). Rogers J's seems to apply this notion in a unique manner, namely where the focus falls on the reprehensible conduct of the spoliator (and not that of the *spoliatus*). In his view, *quasi*-possession of electricity supply only enjoys protection if the spoliator has an (alleged) interest (or right) in possession of the premises. Here the spoliator's hands are "grubby" due to him seeking to evict the *spoliatus* without following due process (in terms of section 26(3) of the Constitution and PIE), which means the court may award the spoliation remedy. The same objection to the grubby-handed possessor defence applies to this approach, namely that it touches on the merits and would defeat the purpose of the spoliation remedy (Taitz 1981 *SALJ* 40-41).

The emphasis on the source of the right, which involves the merits, first started to feature in *quasi*-possession disputes with *Telkom*, where it was held that the *quasi*-possession of a right does not enjoy possessory protection if it is sourced in contract. This approach was carried through to the electricity supply context in *Masinda*. In light of *Makeshift*, even further scrutiny of the merits is now necessary to ascertain whether the electricity supply is incidental to the *spoliatus*' possession of the premises. The *quasi*-possession investigation is therefore characterised by increasing difficulty, one where the merits play a bigger and bigger role. The *Makeshift* decision is unattractive because of its potential to undermine the rationale of the spoliation remedy and, hence, the rule of law.

4 Conclusion

In *Makeshift*, the Cape High Court held that the *quasi*-possession of electricity supply enjoys possessory protection despite such supply being sourced in contract. According to Rogers J, exercising a professed right on land is an "incident of possession" – which means the right's *quasi*-possession enjoys protection under the *mandament* – only if the right is additional to an alleged right the *spoliatus* has against the spoliator to occupy the premises where the electricity is used and if the spoliator has

an interest in the possession of the land. The judge deserves praise for his attempt to distinguish the case before him from *Masinda*, where it was held that the *mandament* does not protect the *quasi*-possession of contractual rights at all.

Makeshift is preferable to *Masinda*, as it vindicates *spoliatus*' right to have access to adequate housing and her right against arbitrary eviction from her home (though only in a narrow setting). Nevertheless, Rogers J's decision is problematic for two reasons. Firstly, it misconstrues the "incident of possession" requirement. According to case law and academic scholarship on this notion, exercising an alleged right is incidental to the possession of premises if one performs acts usually associated with such right on land. Severing the right is then tantamount to interference with the possession of the premises, which may be addressed with the spoliation remedy. This is so irrespective of whether the right is additional to an alleged occupation right the *spoliatus* has against the spoliator. More significantly, Rogers J's interpretation of this notion has the potential to undermine the mentioned constitutional rights in cases where his restricted requirements are not met, such as when there is no such alleged right or where someone other than the landlord severs the supply.

Secondly, requiring proof of an alleged occupation right complicates the investigation under this requirement by touching on the merits of the dispute, which are irrelevant in spoliation proceedings. The *mandament*, which restores possession forthwith without considering the merits, upholds the rule of law in the possessory context by restoring the *status quo ante* immediately. Such restoration discourages unlawful self-help and forces litigants to submit their dispute to a court of law. It realises this goal by providing speedy and robust relief, which is only possible if courts disregard the merits. Rogers J's investigation of the merits has the danger of undermining the efficacy of the remedy by requiring courts to consider factors other than the two requirements of the spoliation remedy. Such added investigation has the potential to undermine the speedy and robust nature of the remedy and, hence, the rule of law.

The sourced-based investigation in *quasi*-possession cases, which began in *Telkom* and was confirmed in *Masinda*, has led Rogers J to identify a limited category of personal rights the *quasi*-possession of which enjoys possessory protection. Though preferable to *Masinda* for its potential to uphold the mentioned constitutional rights, the decision is unappealing for the reasons discussed in this case note. The decision needlessly complicates how the *mandament* protects the *quasi*-possession of incorporeals by adding to the array of considerations courts must consider when deciding spoliation cases. It would be preferable if the courts extended possessory protection to all persons who use electricity supply at their homes and not to limit it to the narrow exception Rogers J created, which can be done by returning to the legal position as per *Naidoo* and *Froman*. Given the precedent in *Masinda* and

Telkom, however, this change will have to be brought about by either the Supreme Court of Appeal or the Constitutional Court.

EJ MARAIS
Senior lecturer, University of Johannesburg