The continued relevance of the *mandament van spolie*: recent developments relating to dispossession and eviction

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OPSOMMING

Die Voortgesette Relevansie van die *Mandament van Spolie*: Onlangse Verwikkelinge met betrekking tot Uitsetting en Onteiening

Ten spyte daarvan dat artikel 26(3) van die Grondwet die uitsetting van persone in die afwesigheid van 'n hofbevel verbied, het drie onlangse hofsake aangedui dat sulke uitsettings steeds plaasvind. Hoewel verskeie opsies vir die applikante (staatsorgane) beskikbaar was om persone uit geboue en skuilings te verwyder, (nood-, gesondheids- en rampmaatreëls en die Uitsettingswet 19 van 1998), is uitsetting in die gevalle onder bespreking effektiewelik bewerk deur spoliasie – van die gebou of skuiling as 'n geheel of van elemente wat integraal tot die skuiling was (ontneming van dakplate). Om besitsherstel te bewerkstellig (en uitsetting om te keer), is die *mandament van spolie* deur die respondente geopper. Hoewel die feite en omstandighede soortgelyk (maar nie identies nie) was, is die uitsprake taamlik uiteenlopend. In twee van die drie sake was die *mandament* onsuksesvol en is 'n grondwetlike besitsherstelremedie ontwikkel. In die derde geval was die *mandament* inderdaad suksesvol, hoewel die dakplate met plaasvervangende materiaal herstel moes word.

Die bydrae ontleed die drie sake in die lig van (a) die basiese beginsels van die *mandament* en die redes vir die remedie in die algemeen; en (b) die noodsaaklikheid (al dan nie) om die remedie te ontwikkel. Dit wil voorkom of die *mandament* toenemend aangewend word om ander oogmerke, byvoorbeeld grondwetlike beskerming teen uitsetting, te bereik. Dit is problematies in die lig daarvan dat die *mandament* nooit beoog het om substantiewe regte of, soos in hierdie gevalle, veilige grondbeheer ("secure tenure") daar te stel nie. Wat egter duidelik na vore kom, is dat (a) die Uitsettingswet nie persone beskerm wat in dieselfde posisie as die respondente is nie omdat die Wet te reaktief is; en (b) dat die *mandament* steeds relevansie het deurdat alle rolspelers gedwing om aan 'n formele proses wat by 'n openbare forum afspeel, deel te neem. Solank as wat die leemtes in die Uitsettingswet voortbestaan, is die *mandament* relevant, nie net as besitsherstelremedie nie, maar ook as meganisme om die belange van kwesbares – veral by onwettige uitsetting – uit te lig.

1 Introduction

Section 26(3) of the Constitution provides that no person may be evicted from his or her home or have his or her home or shelter demolished without a court order and that a court order may only be granted after all relevant circumstances had been considered.[1] In all instances the granting of an eviction order has to be just and equitable. Yet, persons still lose their shelter or homes without a court order being granted. Three recent cases illustrate that the loss of a home or shelter, thereby effectively constituting eviction, may result from acts of dispossession, either of the home or shelter as a whole (total destruction), or some distinctive integral elements thereof (such as removal of parts of a roof). These acts of dispossession occurred unlawfully, in the absence of due process. Because they were effectively evicted without a court order being granted, the dispossessed and therefore effectively evicted, wanted restoration of their homes and shelters. But how are persons so dispossessed and often displaced to be restored to their former living environments? On what basis can they return, speedily, to their homes or can their shelter be restored to them? What options are there when there is nothing left to return to, shelters and structures having been destroyed or demolished? It is in this process of reclaiming homes and shelters that the restorative possessory remedies, in particular the *mandament van spolie,* may come into play.

The aim of the article is to ascertain to what extent, if at all, the *mandament van spolie* is still relevant today – in a post-Constitutional South Africa – within the context of vulnerable occupiers and their housing and accommodation arrangements. The question is important on two levels: Firstly, on a theoretical level, the role and function, as well as the limitations of the mandament as possessory remedy, need to be clarified. Judgments in terms of which possessory remedies were claimed, with very similar facts and surrounding circumstances have resulted in dissimilar, divergent decisions. Is there a "true" application of the *mandament van spolie* and if so, what is it? Is it possible to adjust or extend its application? Should the plight of vulnerable occupiers be highlighted more in this process or should other relief, aimed at embodying constitutional imperatives, be developed instead? Are there any differences, theoretically and practically, between the common law and constitutional remedies in these circumstances? Secondly, on a practical level, it is crucial to ascertain what options are available to persons who find themselves dispossessed (evicted) from their homes and shelters without the Prevention of Illegal Eviction from and Unlawful

1 See generally Liebenberg *Socio-economic Rights* (2010) 344-350; Van der Walt *Property in the Margins* (2009) 146-160; Pienaar & Muller "The impact of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 on homelessness and unlawful occupation within the present statutory framework" 1999 *Stell LR* 370; Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in *Essays in honour of CG van der Merwe* (eds Mostert & De Waal) (2011) 309.

Occupation of Land Act[2] (PIE) having been instituted against them. Therefore, the role of PIE and other possible options and their practical relevance within this context also needs further elaboration.

The aims of the article are achieved by firstly providing an overview of the general principles pertaining to the *mandament van spolie*, as well as its general applicability and the underlying reasons for employing it. The *mandament* has been employed differently in case law – especially with regard to vulnerable occupiers. Of importance for this contribution, are the instances where case law development had occurred in relation to non-restoration or the impossibility of repossession. Accordingly, special emphasis will be placed on these instances. The focus thereafter shifts to establish the link between dispossession and resultant eviction. In this regard the applicability of PIE and its present shortcomings in this context are identified.

Inevitably, the exposition underlines that PIE, contrary to the underlying aim of section 26(3) of the Constitution, is essentially reactive and responsive and is, where unlawful occupiers are concerned, not helpful where eviction has effectively already been orchestrated by way of dispossession or spoliation. Within this context the *mandament van spolie* remains crucially relevant, though not necessary as a restorative remedy.

2 Setting the Scene

In *City of Tshwane Metropolitan Municipality v The Mamelodi Hostel Residents Association*[3] the municipal body ("the City") became aware that a hostel complex situated in the City's municipal area was badly dilapidated, unsafe and uninhabitable. The occupiers of the hostels had mostly been employed as migrant labourers in the mines during the colonial and apartheid periods and have occupied the hostels ever since. As a result of the appalling state of the hostels, the City began addressing the problem in line with its general obligation in terms of section 26 of the Constitution, and its specific mandate according to the national housing plan. It was clear that the hostel was in a deplorable state and that redevelopment was required. Consequently, the City entered into negotiations with the hostel residents in order to ensure that redevelopment of Block J of the hostels took place. It was agreed that the residents would evacuate the premises and demolition of Block J would occur as the first step in the redevelopment process. The City arranged alternative accommodation for the residents to ensure that they were not left displaced during the renovation of the hostels. However, the residents refused to vacate the hostels when the City wished to commence with the redevelopment. Nonetheless, with the help of the police and private contractors the City proceeded with the

2 19 of 1998.
3 [2011] ZASCA 277.

redevelopment by removing the roof covering and roof structures as the first step in the demolition of the building. This was done while residents were still occupying the buildings. Accordingly, the residents applied for the *mandament van spolie* to ensure repossession of the property destroyed as a result of the demolition. The order was granted in the court *a quo* and confirmed in the North Gauteng High Court. The result of the court order was that the City was precluded from any further demolitions without an eviction order in terms of PIE. The City was also ordered to restore the roof structures and roof covering to the condition it was in prior to the destruction thereof.[4]

On appeal, the main defence raised by the City was that the residents had consented to the demolition of the hostels. The City conceded that the residents were in peaceful and undisturbed possession of the property when the dispossession took place; and it was also willing to acknowledge that dispossession did in fact occur. However, the City argued that the dispossession was lawful because the residents had consented to the demolition during the negotiations about the redevelopment.[5]

The Supreme Court of Appeal dismissed the contention that the dispossession was lawful on the basis of consent. The Court emphasised that all demolitions and evictions must be effected in terms of court orders in line with PIE, which was enacted to give effect to section 26(3) of the Constitution. It was clear that a court order to that effect was not obtained. In the end, the Court concluded that the requirements for the *mandament* – namely peaceful and undisturbed possession and unlawful dispossession – had been complied with in the case and the remedy was granted. Consequently, the City was ordered to *restore the roof structures and roof covering of Block J* of the Mamelodi hostels to at least an equivalent of the condition they were in prior to destruction thereof.[6]

The *Mamelodi* case was not the only case that has dealt with the *mandament van spolie* and vulnerable, indigent occupiers in recent years. Instead, dispossession (and therefore effective eviction) had also occurred earlier, in 2007, in relation to the destruction of shelters and building materials of unlawful occupiers in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*[7] and more recently with the disconnection of water and electricity, followed by violence and resultant evictions from a residential complex in *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*.[8] The binding factors in each of these cases were that (a) dispossession had occurred, either *in toto* or partially by the removal or dispossession of elements constituting shelter, and (b) that the *mandament van spolie* was claimed. In none of these cases official eviction proceedings had been

4 *Idem* par 3.
5 *Idem* par 6.
6 *Idem* par 11. (Emphasis added).
7 2007 6 SA 511 (SCA).
8 2013 1 SA 32 (CC).

embarked on. Though raised in all three cases mentioned here, the *mandament van spolie* was only successful in one, despite the facts being similar, though not identical. In the first case that had dealt with the *mandament*, *Tswelopele*, the *mandament* was unsuccessful on the basis that the original building materials had been utterly destroyed and that nothing existed that could be restored. For the claimants, the unlawful occupiers, there was nothing left to return to. A constitutional remedy was granted instead. In the most recent case, *Schubart Park*, the *mandament* was likewise unsuccessful and a constitutional remedy was granted in its stead. But in the *Mamelodi* case, set out above, the *mandament* was indeed successful, despite the roof having to be reconstructed with alternative constituents.[9] So why the different results? Which is the correct one? Can and should the *mandament* be "developed"? When and how, if at all, do measures prohibiting unlawful eviction come into play? Before the connection between spoliation and eviction within this context is explored in more detail, the basic principles of the *mandament,* its application and the issue of replacement materials are scrutinised first.

3 Application of the *Mandament van Spolie*

3 1 General Principles of the Remedy

The *mandament van spolie* is a remedy available in South African law to protect possession of property. The remedy results in the restoration of possession to persons who have been unlawfully dispossessed of their property. It has been described as the only true possessory remedy that remains in modern South African law.[10] The reason for its real possessory status can be ascribed to the fact that the remedy requires no *ius possidendi*. Bare possession is enough to satisfy the *locus standi* in the case of the *mandament van spolie*. Furthermore, courts should generally disregard the merits of the dispute when deciding whether the remedy should be granted. Therefore, it has been repeatedly stressed that considerations other than the remedy's requirements are inappropriate in the decision of whether the remedy should be granted.[11] From this perspective the *mandament van spolie* is an ideal remedy for unlawful occupiers as the absence of a basis in law for their occupation is

9 Although the roof coverings were not destroyed in this case, the authorities were unable to use the roof coverings because it was made of asbestos, which was prohibited. The court ordered that the City use alternative materials to ensure that the premises was reconstructed to at least the equivalent of the condition as it was before the destruction thereof. See *Mamelodi Hostel Residents Association supra* par 10.

10 Price *The possessory remedies in Roman-Dutch law* (1947) 107; Taitz "Spoliation proceeding and the 'grubby handed' possessor" 1981 *SALJ* 36 37; Kleyn "Die mandament van spolie as besitsremedie" 1986 *De Jure* 1 8; Badenhorst, Pienaar & Mostert *Silberberg & Schoeman's The Law of Property* (2006) 288.

11 Taitz 1981 *SALJ* 36 37, 40-41; Van der Walt "Naidoo v Moodley 1982 SA 82 T" 1983 *THRHR* 238 239; Kleyn 1986 *De Jure* 1 5-10.

irrelevant. Irrespective of the unlawful status of their occupation, constituting possession, this is a possessory remedy that is indeed at their disposal.

It is trite law that there are two requirements that need to be complied with in order to be successful with the spoliation remedy.[12] In the first place, the person who asserts the remedy – referred to as the *spoliatus* – must prove peaceful and undisturbed possession of the property. Secondly, unlawful dispossession (or deprivation) by the spoliator must be proven. However, even if the initial question concerning whether the remedy should be granted is answered in the affirmative on the basis of the two requirements, there are nonetheless instances where the remedy's application may still be denied. This will occur in cases where a valid defence can be raised against the *mandament van spolie*.[13] In this regard, it is clear that the question surrounding the defences against the spoliation order should logically be asked after the *facta probanda* have been proven.[14] Therefore, it should first be questioned whether the requirements of the remedy have been complied with after which the possibility of a defence may be explored. Impossibility of restoration is commonly recognised as a defence against a spoliation order.[15] Impossibility implies that repossession of the spoliated property is not likely for some reason. In some instances, it might be impossible to return the thing because it does not exist anymore. In other cases, the defence may take the form of irreparable damage or harm that makes restoration of the property impossible. Clearly, impossibility as a purported defence against the *mandament van spolie* needs to be revisited in light of the tendency recently by courts – including the *Mamelodi Hostel Residents* court – to apply the defence in an inconsistent

12 *Nino Bonino v De Lange* 1906 TS 120; *Yeko v Qana* 1973 4 SA 735 (A) 739. Interestingly, in Sonnekus "*Fredericks and another v Stellenbosch Divisional Council* 1977 3 SA 113 K" 1978 *TSAR* 168 168-172, the author asserts that there are in fact four requirements four requirements for the *mandament van spolie*. He argues that the possibility of restoration must exist before the *mandament* can be ordered. See specifically Sonnekus 1978 *TSAR* 168 169-170.

13 Taitz 1981 *SALJ* 36 37, 40-41; Taitz "A spoliation order is a robust and unique remedy" 1982 *SALJ* 351 354; Van der Walt "Defences in spoliation proceedings" 1985 *SALJ* 172 179-180; Van der Merwe *Sakereg* (1989) 134-137.

14 This is unless the defence raised is directly raised against one of the *facta probanda*. Price *The possessory remedies in Roman-Dutch law* (1947) 108 indicates that "[g]enerally speaking, the only defence open to the respondent is a denial of the facts alleged." It is also indicated by the authors of Silberberg & Schoeman that the spoliator may plead that the spoliatus was not in possession of the property or that the dispossession was not unlawful, either of which may constitute a valid defence against the spoliation order. However, Van der Walt 1985 *SALJ* 172 points out that jurisprudence has opened up the possibility that there may be other defences against the *mandament van spolie*. See also Taitz 1981 *SALJ* 36 41, where Taitz indicates that the defences against the *mandament* are limited. He also argues that there is no conceivable reason why it may be necessary to extend the defences that would be available to the respondents.

15 Van der Walt 1985 *SALJ* 172 179-180; Van der Merwe (1989) 134-137.

manner.[16] For occupiers who find themselves in the identical position as the *Mamelodi* residents the end result would mean the difference between restoration in the exact same position as before, or being unsuccessful with their claim. To that end the rationale behind the defence of impossibility due to destruction or irreparable harm has to be examined with reference to the modern developments in case law. This examination is linked to the question whether cogent reasons are evident in contemporary case law (and commentaries on that case law) that might call for reconsideration of the way in which the defence is applied. It is clear that the defence has not had smooth application in case law and has been the topic of much discussion and debate. With this in mind, the following section deliberates impossibility in its modern application as a defence against the spoliation order.

3 2 The Rationale Behind the Defence of Impossibility Due to Destruction

The *crux* of the dispute concerning whether the *mandament van spolie* is still a feasible remedy in instances where the spoliated property suffered irreparable damage seems to be grounded in the question of the justification for the remedy.[17] On the one hand, there are those who argue that the most important element of the remedy is repossession of the spoliated property. Therefore, if repossession of the same property is not possible then the *mandament* can in principle not be applied.[18] According to these critics, the remedy is primarily aimed at protecting possession. The following examples illustrate the arguments made in this regard:

> *[D]ie* mandament van spolie *is 'n regsmiddel wat besitsverhoudinge beskerm ten einde te verhoed dat die reg in eie hande geneem word en die regsorde sodoende versteur word nie.*[19]

> *By besitsbeskerming gaan dit in wese oor die beskerming van 'n beheerverhouding tussen 'n regsubjek en 'n saak.*[20]

16 We recognise that there may be other instances of impossibility which we specifically refrain from discussing; for example impossibility that results because the property has been alienated to a third party subsequent to the dispossession and consequently repossession is impossible. For a discussion of this, see De Waal "Die *mandament van spolie* as remedie vir besitsherstel" (LLM dissertation 1984 US) 36-54. Interestingly it was decided in *Schubart Park* that it was impossible to use the *mandament van spolie* because of the appalling state of the property. The Court emphasised that the *mandament* would in itself not determine constitutional rights and therefore its application was impossible in that instance, even though the two requirements could strictly be complied with.

17 *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (K).

18 Sonnekus 1978 *TSAR* 168 172; De Waal "*Naidoo v Moodley* 1982 4 SA T" 1984 *THRHR* 115 118.

19 De Waal 1984 *THRHR* 115 118.

20 Kleyn 1986 *De Jure* 1 10.

On the other hand, there are authors who believe that it should be possible in some instances to require the spoliator to restore or reconstruct what he has demolished; and this restoration or reconstruction can be done in terms of the *mandament van spolie*. Furthermore, proponents arguing in favour of this standpoint also foresee the possibility that the *mandament* can be applied in cases where alternative or replacement materials are required in order to restore possession. In this regard, the following examples are interesting:

> *Die skrywer hiervan wil dus aan die hand doen dat die* mandament *nie 'n remedie vir die beskerming van besit genoem moet word nie, omdat die* mandament *(a) in die eerste plek op die berskerming van die regsorde ingestel is, en nie op die beskerming van die individuele reg op besit nie; en (b) nie net deur besitters van die remedie gebruik kan word nie.*[21]

The *raison d'être* for the remedy was to restrain persons from taking the law into their own hands and to induce them to submit the matter to the jurisdiction of the court.[22]

> The fundamental principle of the remedy is that no one is allowed to take the law into his own hands.[23]

The decision of *Fredericks v Stellenbosch Divisional Council*[24] ("*Fredericks*") may assist in best illustrating the dispute. *Fredericks* sparked considerable interest with regard to the application of the *mandament van spolie* specifically with regard to the above mentioned arguments.[25] The facts of the case can roughly be summarised as follows: The applicants were unlawful occupiers who had erected homes on property belonging to the respondent council. The respondent demolished the applicants' homes and discarded the building materials on the basis that the applicants did not have permission to occupy its property and their rudimentary homes did not comply with building regulations. Furthermore, it was contended on behalf of the respondent that the applicants were in violation of the then Prevention of Illegal Squatting Act[26] (PISA). The applicants applied for the *mandament van spolie* for the restoration of all their possessions and building materials. They also sought an order directing the respondent to rebuild their homes. The respondent argued that it was impossible to use the spoliation remedy in these instances. However, the court rejected the

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21 Van der Walt "Nog eens *Naidoo v Moodley* – 'n Repliek" 1984 *THRHR* 429 435.

22 Taitz 1981 *SALJ* 36.

23 *Yeko v Qana supra*. See also Scholtens "Law of Property (including mortgage and pledge)" 1996 *ASSAL* 222, where the author argues that the primary function of the remedy is to prevent persons from taking the law into their own hands.

24 1977 3 SA 113 (K).

25 Sonnekus 1978 *TSAR* 168 172; De Waal "Die mandament van spolie – meer as besitsherstel?" 1978 *Responsa Meridiana* 275 275-278; De Waal (1984) 3, 32-34; Sonnekus & De Waal "Plakkery en die *mandament van spolie*" 1990 *TSAR* 514 514-527.

26 52 of 1951.

respondent's claim and granted the *mandament van spolie*. Consequently, the respondent was ordered to re-erect the homes of the applicants, even though the original materials – with which the applicants' homes were initially built – were destroyed. The court relied on *Zinman v Miller*[27] and *Jones v Claremont Municipality*[28] to come to the conclusion that the remedy could be used in instances where restoration required something to be done in addition to repossession of the thing. The court in *Fredericks* even went as far as ordering that if the original sheets of corrugated iron could not be found, the respondent should use sheets of similar size and quality as the original ones.[29] There are different ideas regarding this decision.

Blecher commends the judgment.[30] He recognises that there may be instances where repossession of the property is unrealistic or impractical; but he argues that a court may in these particular instances have the discretion to order restoration of the *res* to its prior condition. To this end, he lists factors that should be taken into consideration when the court exercises its discretion in this regard.[31] Therefore, he approves of the outcome reached in the *Fredericks* decision, but it is clear that his view on the issue is not shared by all.

De Waal criticises the judgment.[32] He maintains that the most important element of (and rationale behind) the remedy is repossession of the spoliated property. He further asserts that in some instances a second element may be added; namely that the spoliator may be required to perform certain acts in order to ensure that repossession can in fact take place. However, he states that if the first element (repossession of the property presumably in its broken state) is not possible, then the second element cannot be ordered.[33] To this end, he concludes:

> *By die aanwending van die* mandament van spolie *moet onder 'besitsherstel' dus in beginsel teruggawe van die gespolieere saak wees en nie die teruggawe van 'n plaasvervanger saak verstaan word nie.*[34]

Therefore, the extent of the meaning of *besitsherstel* (or restoration of possession) is limited according to De Waal and additional reparation

27 1956 3 SA 8 (T). In *Zinman*, the court stated that the *mandament van spolie* may allow in some instances for something to be done in addition to repossession of the thing to the spoliated person. Therefore, the remedy does not only provide for restoration of the thing; sometimes repossession can require restoration of the thing to its former state.

28 (1908) 25 SC 651. Here, the court granted the *mandament van spolie* and ordered the spoliator to re-erect the wire fence on the applicant's property in order to restore the fence to its former condition.

29 *Fredericks* 117.

30 Blecher "Spoliation and the demolition of legal rights" 1978 *SALJ* 8 9, 11.

31 Blecher 1978 *SALJ* 8 11-12.

32 De Waal (1984) 33, 35, 56.

33 De Waal 1978 *Responsa Meridiana* 275 277; De Waal (1984) 35, 56.

34 De Waal (1984) 57-58. See also De Waal 1978 *Responsa Meridiana* 275 277; Sonnekus 1978 *TSAR* 168 170.

actions by the spoliator is permitted only in so far as it will ensure reconstruction of damaged property in order to restore possession. In other words, the *mandament van spolie* would not be available in cases like *Potgieter v Davel*[35] and *Fredericks* where the property was completely destroyed and/or not in the possession of the spoliator because in those instances the spoliator would not be able to return the property at all.[36] Correspondingly, Sonnekus agrees with De Waal.[37] He confirms that if repossession of the *specific* property is not possible then the *mandament van spolie* cannot be applied in the particular case.[38] Sonnekus emphasises that the spoliation remedy is primarily a possessory one and if repossession of the identical property is not possible (either because the thing was destroyed or because it had subsequently been alienated to a third party) the *mandament van spolie* is not the appropriate remedy.

In contrast with the views of De Waal and Sonnekus, but comparable to Blecher's take on the issue, Van der Walt provides a different outlook concerning the ambit of the field of application of the *mandament*. In Van der Walt's initial work on the topic he reasoned that case law indicated that the *mandament van spolie* was seen as an action with which legal order was preserved.[39] In his later work, he clarifies that the *mandament* is not a remedy which is aimed at the function of *general* peace-keeping.[40] Rather, the remedy fulfils the function of peace-keeping as far as *unlawful dispossession of property* is concerned. In this regard, it is asserted that the remedy should not be absolutely precluded in instances where the property was suspiciously destroyed or alienated so as to ensure that repossession could not take place; and ultimately to specifically exclude the possibility of instituting the remedy in those instances. Accordingly, the argument is that if the property is fungible and can in principle easily be replaced – as was illustrated in *Fredericks* (and more recently in *Mamelodi Hostel Residents*) – the application of the *mandament* should not be completely barred. The support for these contentions concerning the remedy is found in cases like *Fredericks*, which is seen as a "judicial triumph and not as an (arguably) doctrinal aberration or a (logical) mistake".[41] Accordingly, Van der Walt condemns the judgment of *Tswelopele*[42] not so much for its outcome – which he is willing to concede is laudable – but rather for the uncertainty that it causes with regard to remedies in general.

35 1966 3 SA 555 (O).
36 De Waal (1984) 57-58.
37 Sonnekus 1978 *TSAR* 168 168-172.
38 *Idem* 170.
39 1983 *THRHR* 238 238-239; 1984 *THRHR* 429 435.
40 Van der Walt "Squatting, spoliation orders and the new Constitutional order"1997 *THRHR* 522 525.
41 Van der Walt "Developing the law on unlawful squatting and spoliation" 2008 *SALJ* 24 35.
42 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra*.

In *Tswelopele* the Supreme Court of Appeal tried to rectify the supposed anomaly concerning the appropriate field of application of the *mandament van spolie*. The Court held that in order for the *mandament van spolie* to apply in cases where reconstruction of destroyed property had to occur using replacement materials, the remedy would have to be stretched beyond its normal field of application.[43] In this regard, it was solidified in *Tswelopele* that the *mandament* is not available in instances were substitute materials are required in order to restore the *status quo ante*.[44] In this decision, occupiers of a vacant piece of land in Garsfontein were evicted from their homes and their homes demolished by the nature conservation division of the Tshwane Metropolitan Municipality, the immigration control office of the Department of Home Affairs and the South African Police Services. On behalf of the occupiers, the Tswelopele Non-Profit Organisation applied for restoration of possession of the homes to the occupiers in terms of the *mandament van spolie* and for provision of temporary shelter to the desolate occupiers in terms of their rights under sections 25 and 26(3) of the Constitution. The High Court relied on *Rikhotso v Northcliff Ceramics*[45] ("*Rikhotso*") and held that the *mandament* was appropriate only for restoration of possession and not for reparation of the property.[46] Therefore, the reasoning in *Tswelopele* was that if the property was destroyed the *mandament* was not a suitable remedial option.

In the Supreme Court of Appeal, the Court reflected on whether the spoliation remedy was available as contended by the appellants. However, it was found that the doctrinal barrier for allowing the *mandament* in these instances was too great and the Court accepted the analysis set out in *Rikhotso* as undoubtedly correct.[47] It confirmed in line with *Rikhotso* that the main objective of the *mandament* is to temporarily restore physical control and enjoyment of property and not its reconstructed equivalent.[48] Having decided that none of the existing remedies provided the occupiers with suitable protection, the *Tswelopele*-court decided instead to create a constitutional remedy to provide the type of relief, which according to the court, the *mandament* was unable to do in the particular instance. The court stressed that a development of the nature required in order for the *mandament* to be applicable in these instances would amount to forcing the common law – specifically the common law remedies – to perform a constitutional function.[49] Interestingly, it seems as though that is exactly what the court in *Mamelodi Hostel Residents* did without even considering the doctrinal arguments against and the policy arguments for the development of the *mandament* for purposes of rebuilding the destroyed property using

43 *Idem* 20-26.
44 *Idem* 24.
45 1997 1 SA 526 (W).
46 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 24.
47 *Rikhotso v Northcliff Ceramics supra* 24.
48 *Ibid*.
49 *Idem* 26.

substitute materials. Despite the doctrinal difficulty with the application of the *mandament* in these instances as illustrated in *Tswelepele* – which ostensibly was enough justification for denying the spoliation order in that decision – the court in *Mamelodi Hostel Residents* simply applied the *mandament*. This debate concerning whether the spoliation remedy is available in instances where restoration of destroyed or demolished goods is required, was not re-evaluated in *Mamelodi Hostel Residents*. This was the case even though the result of the judgment was that the roof would have to be re-erected or rebuilt so that the City could comply with the order.

Accordingly, from *Mamelodi Hostel Residents* the conclusion may be drawn that the *mandament van spolie* is available in instances where parts of property have been destroyed and the spoliator is required to do something to ensure that the *status quo ante* is restored. In other words, the *mandament van spolie* can apply in cases where reconstruction is required to place residents in the same position they were in prior to the dispossession.

In must be contended that up to this point, the decision provides nothing new. In fact, the judgment simply confirms that in some instances the spoliator might be required to do more than merely returning possession of the spoliated property. Both *Zinman v Miller*[50] and *Jones v Claremont Municipality*[51] provide authority in this regard. Moreover, based on the literature, it would appear as though even authors who are religiously in favour of the narrower confinement of the *mandament* would be willing to concede that in some instances the *mandament* might require the spoliator to do something more than mere repossession of the thing to restore the *status quo*.[52] However, these authors would no doubt place the qualification that this can only be done if the *same* property still exists and can be given back (evidently in its damaged or broken state); thereafter, some form of rebuilding may be required so that the situation is reverted to the state before the dispossession took place. However, where the spoliator is required to use replacement or substitute materials in order to restore possession, the path of agreement once again separates. At this point the doctrinal authority becomes silent, the body of case law becomes divergent and the writers' opinions become conflicting. Yet, *Mamelodi Hostel Residents* took the application of the *mandament* to exactly this level.

The City was ordered not only to rebuild the roof, but also to use *alternative constituents* because the initial roof structures and coverings were made of asbestos, which was prohibited by the authorities.[53]

50 *Zinman v Miller supra* 11.
51 *Jones v Claremont Municipality supra* 655.
52 De Waal (1984) 35; De Waal 1978 *Responsa Meridiana* 275 275-278. See also Van der Walt 1985 *SALJ* 172 180. This position also confirms the earlier *Zinman* and *Jones* decisions. See *Zinman v Miller supra* 11; *Jones v Claremont Municipality supra* 651.
53 *Mamelodi Hostel Residents supra* 10.

Importantly, as illustrated above, the issue of the development of the *mandament* to allow it to apply in instances of restoration using substitute materials was by no means settled before the *Mamelodi*-judgment was handed down. In fact, according to *Tswelopele* and the arguments discussed in that decision,[54] the *mandament* was not available in instances where different materials had to be used to restore the *status quo ante*.[55] Therefore, the outcome in *Mamelodi Hostel Residents* is dissimilar to the outcome reached in *Tswelopele*. Though restoration was ordered in both instances, different remedies were employed.

In *Mamelodi Hostel Residents*, the common law remedy was enforced. On the basis of the *mandament van spolie* the dwellers of the hostel complex obtained repossession of the hostels and an order to the effect that the City was compelled to rebuild the damaged property using replacement materials. Therefore, although the building materials were not completely destroyed, it is clear from the judgment that the City would have to restructure parts of the property using alternative building supplies. The *mandament van spolie* was nonetheless granted. In contrast, the common law remedy was denied in *Tswelopele* because it was contended that the remedy is not available in instances where the property was destroyed and substitute materials are required in order to restore possession of the property. Rather, a constitutional remedy was created so as to ensure that adequate effect was given to the constitutional rights of the occupiers as a result of non-compliance with PIE. The Court in *Tswelopele* held that the *mandament van spolie* was unsuitable in this regard.

4 Acts of Dispossession and Resultant Eviction

In both *Mamelodi Hostel Residents* and *Tswelopele* the occupiers were evicted and their homes seized upon without the respective Municipalities having obtained the required court orders in terms of PIE. In fact, in both instances it was the *initial acts of spoliation* that triggered the inevitable eviction. This result is in line with the PIE's definition of "evict" as meaning "[t]o deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning".[56]

Accordingly, the loss of home or shelter can directly be ascribed to the spoliation that occurred. It is therefore not surprising that the Supreme Court of Appeal in *Mamelodi Hostel Residents* and *Tswelopele* emphasised the importance of court orders *before* demolitions and evictions may be effected. Furthermore, it was stressed that if court orders were not obtained in this regard, the evictions and demolitions would be unlawful

54 See Kleyn *Die* Mandament van Spolie *in die Suid-Afrikaanse Reg* (LLD thesis 1986 UP) 396-406.

55 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 24.

56 S 1 PIE.

in terms of PIE[57] and the Constitution.[58] Therefore, the absence of formal eviction proceedings was consequently contradictory to statutory measures (PIE), Constitutional provisions (section 26(3)) and the common law (prohibition on self-help), thereby constituting unlawfulness on many levels. Though the interaction between the ordinary requirements of spoliation as a common law remedy and the legislative framework of PIE is apparent, it is essential to consider what the implications are of non-compliance with PIE in so far as it relates to an occupier's position in terms of common law, statutory and/or constitutional law remedies.[59]

The unlawful dispossession of homes and shelter or components thereof was a tool used extensively during the pre-Constitutional era.[60] This occurred rather regularly despite the general point of departure that self-help may not be resorted to. In *De Jager v Farah & Nestadt* for example[61] the court found that the respondents had to follow the procedure as set out in terms of the then Slums Act[62] in order to eject residents. This had to occur even in the case where the applicants were committing an offence by remaining on the premises without the consent of the landowner.[63] In this regard, the court stated:

> The fact that the appellants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of respondent's conduct that the occupation by the applicants carries with it penal consequences.[64]

This line of thinking was made clear even earlier in the decision of *Nino Bonino v De Lange*[65] where the court also highlighted that no person is entitled to take the law into their own hands; and if they do, the *status quo ante* should be restored and possession returned, implicating the

57 S 4(1) PIE states specifically that, notwithstanding anything to the contrary contained in any law or the common law, the provisions of PIE apply to the eviction of an unlawful occupier. S 8(1) PIE furthermore provides that no person may evict an unlawful occupier except on the authority of an order of a competent court, while s 8(3) PIE states that the contravention of s 8(1) PIE constitutes an offence.

58 As explained, s 26(3) Constitution prohibits eviction or demolition of homes and shelters, except in pursuance of an order of court after all relevant circumstances had been considered.

59 Van der Walt *Property and the Constitution* (2012) 35-37.

60 See especially Van der Walt *Property in the Margins* (2009) 60-61; Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in Mostert & De Waal (2011) 309-330.

61 1947 4 SA 28 (W).

62 See also Pienaar 309-330.

63 The argument that the applicant was in unlawful possession (ie without the consent of the landowner) is in any event not a valid defence against the *mandament van spolie*. This is because the merits of the dispute are irrelevant in the spoliation proceedings. See Taitz 1981 *SALJ* 36 37, 40-41; Van der Walt 1983 *THRHR* 238 239; Van der Walt 1985 *SALJ* 172 173.

64 *De Jager v Farah & Nestadt supra* 35.

65 1906 TS 120.

mandament van spolie as the appropriate remedy in such instances.[66] Likewise, the court in *Jones v Claremont Municipality*[67] emphasised its abhorrence at public bodies taking the law into their own hands and not following the recourse of the law in instances where an alleged right exists.[68] In these instances, the existence of the *mandament van spolie* may serve "as a warning to any person who can assert a real right in terms of a particular thing to rather take recourse to the courts of law and not to succumb to the allure of self-help."[69]

While land owners and relevant authorities often employed self-help (dispossession and spoliation) to effect eviction, the dispossessed resorted to possessory remedies to restore the balance. Until about 1977 squatters generally used the *mandament van spolie* to claim restoration of possession of their building materials with which they had constructed their homes.[70] However, the remedy's application was sometimes precluded because impossibility could be used as a valid defence against the use of the *mandament* in instances where the property was destroyed.[71] In this regard, the tendency by the municipalities of the time was to deliberately destroy the building materials so as to prevent the use of the *mandament van spolie* in these instances. The 1977-amendment to PISA[72] further strengthened the position of local authorities, in that it precluded claimants from applying for civil remedies in response to demolitions of buildings or structures or the removal of materials or contents from the structures, unless the claimants could prove lawful title or a right to the land.[73] This severely limited the courts' power to grant the *mandament van spolie* in favour of unlawful occupiers whose properties were seized upon and destroyed. It is thus clear that the link between dispossession and eviction and subsequent possessory remedies and statutory responses thereto has been part-and-parcel of the South-African landscape for many years.

The landscape changed when PISA's successor, PIE, commenced.[74] Again, the question of the applicability of the *mandament van spolie* arose. In contrast to the PISA-case law, the first judgment that dealt with the co-existence of PIE and the *mandament van spolie*, did so from a different perspective. In *City of Cape Town v Rudolph*,[75] the tables were

66 *Nino Bonino v De Lange supra* 122.
67 *Jones v Claremont Municipality supra*.
68 *Idem* 654-655.
69 Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (LLD thesis 2011 US) 60.
70 *Idem* 63.
71 *Ibid*.
72 Prevention of Illegal Squatting Amendment Act 72 of 1977. Blecher 1978 *SALJ* 8 13 writes that this legislative intervention was a "swift and harsh" intervention by the legislative authority in response to the *Fredericks* decision.
73 S 3B(4)(*a*) Prevention of Illegal Squatting Amendment Act 72 of 1977.
74 Van der Walt *Property in the Margins* (2009) 6-3; *PE Municipality v Various Occupiers* 2005 1 SA 217 (CC).
75 2004 5 SA 39 (C).

turned in that the applicants, the City, were the claimants instituting the *mandament*. This was based on the notion that the squatters, the respondents, had resorted to self-help in order to jump the housing queue by spoliating (dispossessing) a park that the City had up to that stage possessed peacefully and undisturbed. Therefore, of importance here is that the *mandament* was used as the *eviction tool to effect* eviction and not, as in the other cases under discussion, as a *defence* against eviction. To some extent, the findings of the Court in relation to the relative scope of the *mandament* and PIE, respectively, do not assist here as the findings are related to these mechanisms as *eviction tools*. Nevertheless, the Cape Provincial Division ruled that the *mandament van spolie* was not available where PIE was applicable. The court highlighted that an applicant municipality was not free to choose to invoke common law remedies to evict unlawful occupiers because PIE was specifically enacted to regulate eviction law. Instead, it must follow the measures set out in PIE to ensure that section 26(3) of the Constitution is given effect to.

Clearly, an interplay exists between PIE and the "normal" principles of the *mandament van spolie,* especially given the availability of recourse to PIE in order to protect occupiers against evictions and demolitions. This interplay between common law, statutory and constitutional remedies was emphasised again in *Mamelodi Hostel Residents* where the SCA stated that, even if the occupiers had at the outset consented to relocate and later withdrew their consent, the summary (unlawful) deprivation of possession of their property would still be untenable.[76] An eviction order would still have to be obtained in terms of PIE, which requires judicial oversight in the form of a court order before occupiers can be evicted from land.[77] To this end, the court relied on *Tswelopele*, in which it was also stressed that eviction proceedings in terms of PIE must first be obtained before evictions take place.[78] Without a court order, the eviction will always be in violation of the law and the Constitution; but it would also inevitably cause unlawful deprivation of possession in terms of the second requirement for the spoliation remedy. The question concerning what would be the appropriate remedy in these instances should therefore be scrutinised.

5 In Search of an Appropriate Remedy

As explained, in line with the *Rikhotso*-judgment, the *mandament van spolie* was found to be unsuitable in the *Tswelopele* case as restoration of the *status quo ante* was impossible. On the basis that the common law *mandament van spolie* could not be developed or extended, the search for an appropriate remedy or suitable relief, began.[79] The determination of

76 *Mamelodi Hostel Residents supra* 9.
77 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 2.
78 See also *Mamelodi Hostel Residents supra* 9.
79 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 26-28. See specifically s 38 Constitution.

"appropriate relief" for purposes of section 38 of the Constitution is a much broader question than whether the requirements of the *mandament* were complied with. What is more, the considerations for granting the *mandament* differ substantially from the considerations for determining appropriate relief for the occupiers under section 38. Systematically, the first question in a *mandament* case should be whether the requirements necessary to succeed with the remedy have been complied with. Thereafter, if there are defences that can be raised against the remedy – like impossibility because the property no longer exists – that should be considered. The court in *Tswelopele* – in which a constitutional remedy was finally crafted – considered the rights that were infringed and emphasised that the warrant against unauthorised eviction; the occupiers' right to personal security; the right to privacy and the occupiers' property rights had all been interfered with in this case. The court then proceeded to question whether any existing relief could remedy the wrong suffered by the occupiers. It considered an award of damages, criminal charges, an interdict and the possibility of the occupiers joining the *Grootboom* emergency relief[80] and housing queue.[81] However, the court came to the conclusion that none of these remedies were adequate to grant the relief that the court was seeking to provide to the occupiers. In this regard, the anticipated remedy had to be a speedy one, aimed at addressing the consequences of the breach of the above-mentioned rights of the occupiers. In terms of how the remedy should go about doing that, the court indicated that the remedy should vindicate the occupiers' salvage claim and require the respondents to re-create the occupiers' shelters. The appellants argued that the *mandament van spolie* should be adapted or developed so that it could afford the occupiers the relief outlined by the court.[82] In the alternative, it was argued and accepted by the court that if the foreseen remedy was not available among the existing ones (which included the *mandament*) it should be developed under the Constitution.

Ultimately, the Court found that the *mandament van spolie* was not the appropriate remedy when the property that was spoliated was destroyed or demolished. The court specifically denied that the *mandament van spolie* can (or should) be developed to allow for restoration of property that was unlawfully demolished or destroyed by the spoliator.[83] Rather,

80 *Grootboom v The Government of the Republic of South Africa* 2000 11 BCLR 1169 (CC).

81 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 18.

82 *Idem* 20.

83 The court in *Tswelopele* relied on (and accepted as correct) the doctrinal analysis in *Rikhotso v Northcliff Ceramics (Pty) Ltd supra* to come to the conclusion that the *mandament* could not be granted if the property had ceased to exist. The court also considered the earlier case of *Fredericks v Stellenbosch Divisional Council supra* in which it was found that the *mandament* was available even in the case that involved the use of replacement materials. However, in the end, the *Tswelopele* court came to the conclusion that the *mandament* was not the appropriate remedy to do what the applicants were asking for.

the court opted for the crafting of a new constitutional remedy, because it was found that it would be inappropriate to "seize upon a common law analogy and force it to perform a constitutional function".[84] It must be remembered that the Court granted a constitutional remedy in an application that was brought purely on the basis of a spoliation order. Therefore, the Court upheld the distinction between the common law requirements of the *mandament van spolie* and the constitutional relief that claimants would be entitled to in terms of section 38 of the Constitution. Similarly, the Constitutional Court later in *Schubart Park*[85] denied the application of the *mandament van spolie* on the basis that mere restoration of possession would not constitute an appropriate remedy according to section 38 of the Constitution.[86]

Schubart Park is a residential complex situated in Pretoria and owned by the first respondent (the City of Tshwane). The City rented units of the complex to various occupiers, but during the period from 1999 (when the City became owner of the complex) to 2011 (when the litigation in this matter began) the building had become badly run-down and significantly deteriorated. Furthermore, the City was unaware of exactly who occupied the property. On 21 September 2011 the City disconnected the water and electricity supply to the complex and it resulted in protest by the occupiers. The protests quickly erupted into violence and even resulted in a fire flaring up in one the blocks of the complex. As a result, the police and fire brigade officers intervened and cordoned off the streets. They also removed some of the residents from the complex. Legal representatives acting on behalf of the residents sought to negotiate with City officials, but the negotiations were unsuccessful. When residents were unable to return to their homes the following day, they brought an urgent application in the North Gauteng High Court for an order allowing them to return to their homes. They sought restoration on the basis that they were spoliated of possession of their homes.[87] The application for reoccupation of possession was dismissed.[88] The North Gauteng High Court came to the conclusion that the *mandament van spolie* was not the appropriate remedy in these instances, because restoration would require that the residents would return to the complex, which possibly endangered their lives and the court was unwilling to make an order of that nature. Therefore, the *mandament van spolie* could

84 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 26.
85 *Schubart Park Residents' Association v City of Tswhane Metropolitan Municipality supra*.
86 *Idem* 30.
87 *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality supra* 22.
88 *Idem* 9. The following day the order concerning the provision of temporary arrangements was kept in place and parties were ordered to "take further steps in an attempt to reach agreement on unresolved issues".

not be granted because reoccupation of their homes was impossible as a result of the deteriorated and unsafe state of the complex.[89]

In the Constitutional Court the applicants again sought restoration on the ground that they were spoliated of possession of their homes.[90] Therefore, section 26(3) considerations were brought into proceedings which would otherwise have been normal spoliation proceedings. The Court recognised that if the *mandament van spolie* was not the appropriate remedy, and could not be developed to be the appropriate remedy, the occupiers would be without a remedy in a case where there was clearly an infringement of section 26(3) rights. In this regard, it followed the approach adopted in *Tswelopele*. Therefore, it upheld the distinction between the spoliation remedy (with its possessory function) and the constitutional relief under section 38 of the Constitution. Froneman J correctly stated that a spoliation order would only give the occupiers factual possession and possible return of the *status quo* and it would not in itself directly determine constitutional rights.[91] Therefore, the spoliation remedy would not vindicate the occupiers' rights in terms of section 26(3). Their rights were clearly infringed and therefore restoration of factual possession of the property would not be *appropriate relief* according to section 38. In this respect, the court emphasised that spoliation proceedings merely set the scene for the subsequent determination of the constitutional rights in relation to property.[92] Therefore, the *mandament van spolie* could not be granted.[93] However, if the Court had stopped here it would have allowed an order which fell short of section 26(3) of the Constitution and the rights of the applicants would have been disregarded.[94]

6 Discussion

In order to determine whether appropriate relief had indeed been granted, it is necessary to step back for a moment. Two questions come to the fore: (a) why had the initial acts of dispossession or spoliation occurred (thus, conduct pre-dating the present *mandament* proceedings); and (b) what was it that the respondents (persons claiming the *mandament*) wanted in the present proceedings? In other words: what was the result that they had in mind? In the first case in 2007, in *Tswelopele,* authorities wanted to evict or remove the unlawful occupiers, essentially because of their unlawful occupation of land, of which the location was especially unsuitable for human occupation. In relation to

89 *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality supra*.
90 *Idem* 22.
91 *Idem* 29.
92 *Ibid*.
93 *Idem* 29-30.
94 *Idem* 18, 34, 40. This is especially in light of the fact that PIE was not given effect to and none of the legislative mechanisms that allow for removal, evacuation or eviction of people from their homes was applied.

both the *Mamelodi Hostel* dwellers and the *Schubart Park* residents, the buildings had become so unsafe and uninhabitable that occupiers had to be evacuated for their own safety. In all of these circumstances other suitable channels were open to effect relocation, other than resorting to self-help or spoliation. In all three cases PIE could have been employed, either under section 5, which provides for urgent eviction proceedings, or section 6 that enables an organ of state to institute eviction proceedings if it is in the public interest.[95] Apart from these options set out in PIE other emergency relief or health and safety measures could have been employed as well. These include the Disaster Management Act[96] and the National Building Regulations and Building Standards Act.[97] None of these available measures were employed to effect the relocation so desperately sought. To be fair to the authorities involved, in both the *Mamelodi Hostel* and the *Schubart Park* cases, some attempts had been made to enter into negotiations in order to reach some kind of agreement. Despite these attempts, however, acts of dispossession or spoliation were finally resorted to. Consequently, in all three instances, dispossession had effectively resulted in eviction. Therefore, because *dispossession* had occurred, it was a "normal reaction" to claim a *restorative remedy*, resulting in a claim for the *mandament van spolie*. Though dispossession was the legal issue, in reality much more was at stake, namely the *constitutional right not to be arbitrarily evicted* from property or to have property demolished without a court order. Inevitably therefore, the *means* employed on the one hand and the *objective* to be achieved on the other, were somewhat disjointed. *A possessory remedy was sought to meet constitutional imperatives*. From the outset thus, common law and constitutional remedies and objectives, were conjoined, leaving it to the courts to unravel the matter. It is exactly here where the courts encounter difficulty. In both *Tswelopele* and *Schubart Park* the respective courts rejected the applicability of the *mandament van spolie* – with the aim of upholding the possessory focus of the remedy – and granted constitutional relief instead.[98] A new remedy was thus crafted, not so much to restore lost possession – although that had indeed occurred as well – but to ensure that correct eviction proceedings, based on fairness and due process – would follow forthwith. The rights of the occupiers that were supposed to be given effect to in terms of PIE, were enforced in *Tswelopele* despite the application being brought purely on the basis of the *mandament van spolie*. On the other hand, the common law remedy in the form of the

95 *Silberberg & Schoeman* 653-655.
96 57 of 2002. Especially s 54.
97 103 of 1977. S 12 and reg A15 – see also *City of Cape Town v Hoosain* [2012] ZAWCHC 180. Alternative remedies also included: GN R 2378 *GG* 127 1990-10-12; the City of Tshwane Metropolitan Municipality, Fire Brigade Services By-Laws, published under LAN 267 in *Gauteng Provincial Gazette* 42 of 2005-02-09 (specifically s 11(2)).
98 *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* 24; *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality supra* 29.

mandament van spolie was granted, without more, in the *Mamelodi Hostel* case, even though it meant reconstruction with alternative materials.

Theoretically and dogmatically differences exist between the *mandament* and a constitutional remedy. This is the case because different requirements and considerations (common law as opposed to constitutional) come into play. Despite having pointed out the differences and having alluded to the disjointedness of the means employed and the objectives to be achieved concerning common law and the newly crafted constitutional remedy above, the question still remains as to what *practically* are the differences between these different sets of remedies, especially with regard to the occupiers themselves. In all three instances the unlawful occupation of the occupiers remained unchanged. Nowhere in the process had they become lawful or had they acquired *substantive rights*. If the *mandament* had been successful, as it had indeed been in *Mamelodi Hostel*, the end result would still have been restoration of possession only, after which eviction proceedings under PIE would have to be lodged. Irrespective therefore whether the *mandament* or the constitutional remedy was employed, a formal eviction process would have to follow in order to remove occupiers from buildings or land unlawfully occupied. Effectively, in both instances, the relief granted would only provide *temporary respite:* in the case of the successful *mandament* restoration is ordered after which the merits of the case are queried – possibly followed by eviction proceedings; in the case of a constitutional remedy a temporary basis for occupation only (such as alternative accommodation in *Schubart Park*) is provided, after which formal eviction applications would have to follow.

Where does PIE fit into the picture? PIE is generally initiated by the owner or person in charge of the property or organs of state in particular instances in order to evict (an) unlawful occupier(s).[99] The only way in which respondents (unlawful occupiers) can benefit from procedural and substantial measures incorporated under PIE,[100] is to fall within the ambit of PIE. To that end unlawful occupation must be paramount and an eviction application must have been lodged. Accordingly, *from the perspective of the occupier*, PIE is inherently *reactive* and *responsive* and not instigative or pro-active. In this regard PIE may fall short of protecting section 26(3) rights. Despite providing that no eviction may occur, other than under the provisions of PIE[101] these three judgments illustrate quite plainly that such evictions do occur. Clearly, various other options – apart from unlawful eviction – were available to the relevant landowners and authorities to effect relocation, as set out above. Conversely, what are the options for occupiers that find themselves in similar positions to the respondents in the three cases under discussion? If the respondents are

99 *Silberberg & Schoeman* 250-252, 653-656; Van der Walt & Pienaar *Introduction to the Law of Property* (2009) 148. See Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in Mostert & De Waal (2011) 325-327 for an analysis of "unlawful occupier".

100 See especially Van der Walt *Property in the Margins* (2009) 147-149.

101 S 4(1) PIE; see also s 8(1), (3) PIE.

still in possession (in occupation) of the building or property, an interdict may assist them in preventing their unlawful eviction and to force authorities to comply with the provisions of PIE.[102] If the occupiers have effectively already been evicted, like the cases under discussion here where acts of dispossession occurred, they can apply for a constitutional remedy in light of section 38 of the Constitution or claim the *mandament*. In none of these scenarios described here PIE is of assistance to the occupiers. The benefits, being the procedural and substantive protections, as explained, only surface once PIE had been invoked. In instances where PIE was not employed, a long and arduous process has to be followed by occupiers to be placed in re-possession of their shelter or home. These processes may include a private prosecution of the alleged offender under section 8(4) of PIE[103] or, as explained, a claim for a constitutional remedy or the *mandament van spolie*. However, the cases under discussion here illustrate that in relation to the latter two options, the outcome of the process is somewhat uncertain as courts follow different approaches with correspondingly different end results.

It is crucial that role players offer due consideration to the broad spectrum of eviction or relocation possibilities available to them. Depending on the situation at hand, emergency or disaster management measures may be more suitable than eviction proceedings under PIE. Recent case law, *City of Cape Town v Hoosain*[104] has confirmed that in any event, irrespective of the particular emergency or other measures utilised to effect eviction, no eviction may occur except after a court order had been granted. With regard to PIE, it may be fruitful to pursue an amendment of the Act that forces all role players to comply with eviction processes and procedures. One possibility may be the insertion of a provision similar to section 14 of the Extension of Security of Tenure Act[105] (ESTA). That section is aimed at restoring the *status quo ante* if an occupier for purposes of ESTA had been evicted in contravention of ESTA. Such a restoration order may also include the repair, reconstruction or replacement of any building, structure, installation or

102 This is exactly what happened in the recent decision of *Motswagae v Rustenburg Municipality* [2013] ZACC 1. In *Motswagae*, the applicants were occupiers of municipal land which the municipality wanted to rejuvenate in line with its constitutional obligation. After failed attempts at negotiations about the relocation of the occupiers during the redevelopment, the municipality began construction work next to the applicants' homes thereby leaving their foundations exposed. The applicants applied for an interdict in the High Court, which was denied on the basis that the applicants failed to prove a clear right in terms the first requirement for an interdict. They were refused leave to appeal to the High Court and to Supreme Court of Appeal. However, leave was granted in the Constitutional Court and the Court also granted the interdict because all three requirements for an interdict were proven.

103 A private prosecution is available in light of s 8(1) PIE that provides that no person may evict another except on the authority of an order of a competent court and s 8(3) PIE that confirms that a contravention of PIE constitutes an offence.

104 [2012] ZAWCHC 180.

105 62 of 1997.

thing.[106] In *Agrico Masjinerie (Edms) Bpk v Swiers*[107] the SCA formulated the underlying purpose of section 14 as follows:

> It would seem that the Legislature intended that such a person should be regarded as one who was deprived 'against his or her will of residence in terms of' ESTA. That equation is by no means unduly strained and it is consistent with the overall purpose of the legislation to which I have earlier referred because it has the effect of bringing the parties together in a controlled judicial environment in order to resolve the dispute. It also follows that resort to self-help is at odds with the means provided.[108]

Presently PIE does not allow for such a possibility, apart from the private prosecution option alluded to above.[109] Though the ESTA provision is not unproblematic as evicted occupiers may be untraceable or simply do not raise the provision as a remedy, it is possible that the provision could function better within a PIE context if occupiers, the relevant authorities and land owners are aware of and sensitised to its applicability. In light of the dire need for accommodation and shelter, the continued backlog in the provision of housing and the continuing growth of unlawful occupation[110] (even within the new constitutional paradigm and the existing responsibilities of the state and other authorities to effect access to housing),[111] shelter and housing matters will remain burning issues for years to come yet. Within this paradigm unlawful eviction, be it by way of forceful, violent removals or by way of acts of dispossession and spoliation, has no place.

7 Conclusion

In the pre-Constitutional era when *apartheid* was at its height and the application of PISA was draconically enforced, the *mandament van spolie* was regularly resorted to in order to restore possession and effectively return people to their homes and shelters. Where the demolished structures could be reconstructed with the original material, the *mandament van spolie* was an effective remedy from the view of the dispossessed. However, when building materials had been destroyed and structures demolished irreparably, legal gymnastics were sometimes employed to still make use of the *mandament van spolie*. Divergent judgments were handed down in the latter respect. Irrespective however of the actual outcome of the *mandament* proceedings during the pre-constitutional era, issues of vulnerability and homelessness were pronounced when courts were forced to deal with claims for restoration

106 S 14(3) ESTA.
107 2007 5 SA 305 (SCA).
108 *Agrico Masjinerie (Edms) Bpk v Swiers supra* 30.
109 Occupiers who find themselves in a similar position to the respondents in the three cases under discussion rarely have the resources to pursue private prosecutions. The effectiveness of this provision is questionable.
110 Van Wyk *Planning Law* (2012) 457-459.
111 See also Pienaar "Access to housing in South Africa: An overview of dimensions and mechanisms" 2011 *J Juridical Science* 119 119-139.

following dispossession. Therefore, even if the *mandament* had not been successful in restoring a home or shelter in a particular case – depending on the facts and approach followed by the court, eviction and the consequences thereof, were highlighted and brought to the fore.

This was supposed to have changed after 27 April 1994. Not only did the Constitution, by way of section 26(3), specifically provide for a right not to be arbitrarily evicted from one's home or have one's shelter demolished, but an additional measure, constituting PIE, was enacted in 1998 to give further effect to the principle. Apart from these measures, a broad range of options, aimed at relocation following emergency, disaster or other health and safety considerations, emerged. It is therefore ironic that, nineteen years after the new constitutional era dawned, the *mandament van spolie* is still resorted to in order to bring issues of vulnerability and homelessness to the fore. In this regard not much seems to have changed: PIE is too reactive and only comes into play once an eviction application had been lodged, formally. If no eviction application was lodged and the *mandament van spolie* was not claimed by the occupiers, their plight would probably remain invisible and eviction may be the inevitable result. The *mandament van spolie*, being robust and speedy, was never aimed at providing substantive rights. Its relevance in modern-day South Africa is therefore not aimed at securing tenure for unlawful occupiers. Neither, it seems, is its relevance restricted to restoration of possession only. Instead, it seems as if the *mandament van spolie* is still relevant in *highlighting the plight of vulnerable occupiers* who stand to be evicted, unlawfully, by various acts of dispossession. In light of PIE's shortcomings in this context, and the limited resources of unlawful occupiers generally, one sure way to force all role players to participate in a legal process, to be played out in a formal, legal forum, is to claim with the *mandament van spolie*.