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## 1 Definition and elements of possession

Possession may be defined as the physical control (*detentio*) by a person of a corporeal thing with the intention (*animus possidendi*) of keeping control of it for his or her own benefit. It comprises two elements:

- physical control (*detentio*); and
- the intention to control the thing for oneself (*animus possidendi*)

These two elements will now be discussed.

### 1.1 Physical control (*detentio*)

The first requirement demands the exercise of actual physical control or detention over the thing. This is usually acquired by taking hold of the thing, or where this is not practicable, of exercising control over it. The type and degree of control will of course vary according to the nature of the thing. Small movable things can be possessed by holding them and immovable property, such as land, can be possessed by living on it. Physical contact is not necessary to constitute detention. Where the possessor does not have immediate physical contact with the thing possessed, the question may arise as to whether he or she has sufficient control over the thing to give them possession. The certainty of their being able to exercise this power of control is not essential. A probability that they will be able to do so will suffice. What constitutes sufficient probability is a question of fact which must be decided in each case from the circumstances. In general the following factors must be taken into account:

- (a) the nature, size, extent, purpose and function of the object of possession;
- (b) whether possession of the thing is acquired by delivery or occupation; and

(c) whether acquisition or retention of possession is considered.<sup>1</sup>

This aspect of the definition of possession emphasises the factual or physical domination of corporeal things on account of the physical or corporeal nature of the objects of possession but as pointed out by WA Joubert<sup>2</sup> the law also recognises so-called quasi-possession or juridical possession (*possessio juris*). This notion consists in the exercise of control over an incorporeal thing coupled with an *animus* to exercise such control over the thing in question and this is exercised whenever the thing is exploited in accordance with an actual or presumed legal right, for example, a servitude or a contractual right of use with regard to the thing.

## 1.2 Intention (*animus possidendi*)

This is the intention to hold an exercise control over the thing possessed for one's own benefit, not for the benefit of someone else. Consequently, if the person who has detention of a thing has the intention of holding it for someone else, he or she does not have legal possession of it: he or she is the custodian, and the person on whose behalf he or she holds it is the true possessor. Hence, an employee who holds his or her employer's property on behalf of his employer does not possess it in law; his or her employer is the true possessor: the former is termed the holder and the latter the possessor.

Traditionally, the criterion used to draw the distinction between a mere holder and a possessor was the form of intent (*animus*). The presence of the will to possess (*animus possidendi*) determined whose possession should be protected in law. Possession accompanied with the will to possess (*animus possidendi*) was protected by the law whereas possession devoid of the requisite *animus possidendi* was not protected by the law. The former was described as *possessio civilis* and the latter *possessio naturalis*. The authorities indicate that in South African law, however, the legal justification for this distinction has lost much of its importance since the main reason for distinguishing between mere holders and possessors, namely the question as to whose possession should be protected, in law has fallen away. In current South African (and Namibian) law almost all holders enjoy the protection of the law.<sup>3</sup>

1 For details of these factors see WA Joubert *et al* (eds) *The law of South Africa* (First Reissue) (2003) vol 27, para 58.

2 Joubert *et al* (n 1 above) para 52.

3 WJ Hosten *et al* *Introduction to South African law and legal theory* 2nd ed (1997) 627.

## 2 Types of possession

### 2.1 Civil and natural possession

As stated earlier, the factual situation of possession arises from the existence of physical control (detention) and the mental element (*animus possidendi*) and this type of possession is referred to as civil possession (*possessio civilis*). Natural possession (*possessio naturalis*), on the other hand, is a much wider concept including not only the possession of an indirect or derivative possessor, such as that of precarist (*precario tenens*),<sup>4</sup> a stakeholder (sequester),<sup>5</sup> or a pledgee, but also the possession of a mere holder such as the depositary, the borrower for use, the mandatary, the lessee, the usufructuary and the representative or agent.<sup>6</sup> There is a further distinction drawn between holders, who are protected by possessory remedies, and those who are not. The former comprise holders who have the intention of securing benefit for themselves and the latter are those who merely hold for someone else as servant or quasi-servant. Examples of holders who are protected are a usufructuary, a pledgee, a builder, a lessee and a person who hires out his or her services. These holders in their various capacities exercise physical control over the thing with the intention of securing benefit for themselves and are therefore protected by the possessory remedies. However, a servant is not protected because a servant cannot claim to have the requisite intention and interest since he or she holds possession solely on behalf of somebody else and does not exercise possession for his or her own benefit.<sup>7</sup> As stated by Steyn AJ in *Mpunga v Malaba*<sup>8</sup> before a person can bring spoliation proceedings he or she must show that the right of which he or she has been 'spoliated' is something in which he or she has an interest over and above that interest which he or she has as servant or as a person who is in the position of a servant or as a quasi-servant.

### 2.2 Lawful possession (*possessio iusta*) and unlawful possession (*possessio iniusta*)

This distinction was employed in the Roman law systems of interdict to determine which of the parties in vindication proceedings would have the

4 The legal status of a precarist is derived from the concept of *precario*, which is by consent or permission. Land or a thing is said to be held *precario* or under *precarium* only when it is held by permission revocable at the will of the person giving it. A precarist is a person who has acquired possession through such derivative method. A *preacio habens* (or *tenens*) may be entitled to compensation for improvements affected by him or her.

5 By the Roman law two parties who disputed about the ownership of a thing could voluntarily agree to deposit such thing with a third person called a *sequester* pending the settlement of the dispute. The *sequester* then held the thing on behalf of the successful litigant.

6 F du Bois Wille's *principles of South African law 9th ed* (2007) 452.

7 As above.

8 1959 1 SA 853 (W).

advantage of being the defendant but is no longer relevant as far as the protection of possession is concerned.<sup>9</sup>

### 2.3 *Bona fide and mala fide possession*

Possession is in good faith (*bona fide*) when the possessor believes on reasonable or probable grounds, that he or she has, for some or other reason, ownership of the property possessed. If the possessor realises that he or she does not have any real right in respect of the thing which is possessed, the possession is known as possession in bad faith (*mala fide* possession).<sup>10</sup>

This distinction plays an important role as far as the acquisition of fruits by a possessor is concerned. Traditionally, it played an important role with regard to compensation for improvements to the thing affected by a possessor thereof. However, since a claim for improvement is now based on the principle of enrichment, the importance of the said distinction has declined.<sup>11</sup>

## 3 The legal effect of possession

The right to the possession of a thing is referred to as *ius possidendi* and may arise either from a personal right against the owner of the thing, for example, a lessee, or from a real right in the thing, such as owner or usufructuary. The *ius possidendi* may be exercised in the real sense by means of actual physical possession of the thing or in a constructive sense. If a person has actual possession of a thing, his or her *ius possidendi* empowers the possessor to protect his or her possession against any infringement. However, if a person does not have actual possession of the thing, the *ius possidendi* enables him or her to be given possession of the thing, for example, in terms of a contract of lease.<sup>12</sup>

The right of possession is referred to as *ius possessionis*, and comprises the rights, privileges and powers that flow from the mere fact of possession and is available only to a person in actual possession of a thing. A person may have an *ius possessionis* either with *ius possidendi*, as in the case of an owner, or without *ius possidendi*, as in the case of a bona fide possessor.<sup>13</sup> The different powers of possession available to the finder of a lost thing and the owner of the property, respectively, may be used to illustrate the difference between the right to possession of a thing (*ius possidendi*) and the right of possession to a thing (*ius possessionis*). A finder of a lost item, at the material time that he or she is in possession of the lost item, has *ius possessionis*,

9 Joubert *et al* (n 1 above) vol 27, para 67.

10 Du Bois (n 6 above) 452.

11 Joubert *et al* (n 1 above) vol 27, para 67; Du Bois (n 6 above) 453.

12 Joubert *et al* (n 1 above) vol 27, para 52.

13 As above.

which means the owner has ceased to have the *ius possessionis* because he or she lost physical control over the thing. Nevertheless, the owner retains the *ius possidendi*, the right to possession which entitles him or her to demand or regain possession.<sup>14</sup>

Opinions differ as to whether possession is a fact or real right. It has been suggested that the key solution to these divergent views lies in maintaining a clear distinction between the fact of possession and the right flowing from possession. If emphasis is placed on the fact of possession, possession can easily be regarded as a mere fact. Conversely, if the rights flowing from possession are emphasised, possession approximates a real right.<sup>15</sup>

Possession is an attribute of ownership. It is a requisite for various types of acquisition of ownership, for example, as we saw in chapter 6, for acquisition of ownership by occupation, transfer and prescription. In this regard possession serves a real function in that it facilitates the transformation of a factual situation into a legal situation.<sup>16</sup>

We saw in chapter 7 that one of the essential attributes of real securities, such as pledge and lien, is possession. In this regard, possession fulfills an important real security function. There is a rebuttable presumption in law that the possessor of a movable thing is also the owner thereof. In this regard, possession has a procedural function in indicating which of the two contesting parties in a vindicatory action is the respondent.<sup>17</sup> In the context of criminal liability, possession is an element of various statutory crimes. For example, section 2 of the Arms and Ammunition Act 7 of 1996 prohibits the possession of arms without a licence. Under section 2 of the Stock Theft Act 12 of 1990, any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence. Section 2(b) of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 prohibits dealing in, use or possession, of prohibited or dangerous dependence-producing drugs. It also provides for the removal from jurisdiction of non-citizens who are deemed to be undesirable residents and for the detention of persons in possession of information relating to drug dealing but who are unwilling to co-operate with law enforcement officers.

The general common law principle relating to possession as an element of the crime of theft was discussed in *S v Van Coller*,<sup>18</sup> which was followed in the Namibian case of *S v Hengua*.<sup>19</sup> The appellant, a medical doctor, had removed medical equipment from Botswana to South-West Africa in order to

14 See H Mostert *et al* *The principles of the law of property in South Africa* (2010) 67.

15 Joubert *et al* (n 1 above) vol 27, para 52-3.

16 Joubert *et al* (n 1 above) para 54.

17 As above.

18 1970 1 SA 417 (A); *S v Hengua* 2007 2 NR 562 (HC) 562.

19 As above.

exert pressure on an official of the Botswana Government to withdraw criminal charges against him – something which was undertaken by the official but not carried out. The Appellate Division, Jansen JA writing the judgment, held, after a thorough consideration of relevant cases, that, where someone takes the property of another, for purposes of keeping it as security for payment, it does not constitute the crime of theft as the accused continues to acknowledge the ownership of the person from whom the article was removed. Jansen JA concluded at 426 that the taking of another person's property with the intent to hold it as security, specifically to enforce a debt, does not amount to taking with intent to deprive the owner of the whole benefit of his ownership. There appears to be no reason in principle why the position should not be the same, where the owner is held to ransom for purposes other than for enforcing a debt.

#### 4 Possession compared with ownership

Ownership, as indicated earlier, is an absolute right which the holder can exercise against the whole world. Possession affords the possessor certain powers, which are in the following respects distinctive from the powers afforded by ownership:

- (a) Possession of a movable thing raises a presumption of ownership. Any claimants who do not possess must prove their title.<sup>20</sup> There is no similar presumption in relation to immovable property, because our system of land registration creates a presumption that whoever is registered in the Deeds Registry as the owner of any immovable property is indeed the true owner thereof.
- (b) In some cases a possessor can confer good title even though he or she is not the owner but only a possessor. For example, in the case of negotiable instruments, a holder in due course will not lose his or her title even if the person from whom he or she has acquired the instrument was not owner.
- (c) Possession concerns a factual relationship of a person to a thing which exists irrespective of whether or not the person has any legal right to the thing. Thus, even a thief acquires possession of the thing he or she steals. Conversely, ownership concerns a legal relationship between a person and a thing. Ownership requires a legal basis or title to the thing. An owner must be able to prove right of ownership.<sup>21</sup>
- (d) Long possession may confer ownership by prescription in terms of the provisions of the Prescription Proclamation 13 of 1943, Prescription Acts 18 of 1943 and 68 of 1969.
- (e) The acquisition of possession may establish ownership, for example, the acquisition of possession of a *res nullius*.
- (f) Possessors may be entitled to compensation for necessary and useful expenditure.

20 *Zandberg v Van Zyl* 1910 AD 302.

21 *Joubert et al* (n 1 above) vol 27, para 55.

(g) Possession is protected by various remedies, namely the *mandament van spolie*, interdicts and possessory actions.<sup>22</sup> These differ from the *rei vindicatio*, the remedy by which ownership is protected. The procedure required for the remedy of the *mandament van spolie* is less cumbersome and faster than in the case of the *rei vindicatio*. To succeed with the *mandament van spolie* the applicant has only to prove that he or she has been in peaceful possession and that this has been disturbed. In the case of *rei vindicatio* the plaintiff must prove his or her title to the thing. Whereas in the case of the *mandament van spolie* the action can in principle only be instituted against the *spoliator*, in the case of the *rei vindicatio* the action can be brought against whoever is in control of the thing.

## 5 Loss of possession

Possession is lost when the possessor loses or gives up either or both of physical control of the thing possessed and the intention to hold the thing. This may occur in instances of abandonment or transfer of the thing to a new possessor. In the case of movables, possession can be lost by the mere loss of physical control. The principle is that a thing is lost if a diligent search was made and was fruitless or if the recovery of the thing is at least uncertain and unlikely. It is immaterial whether the movable has been stolen or has merely been mislaid.<sup>23</sup> In the case of immovables however, both the physical and mental elements must be established because even if loss of physical control is established, possession may be retained 'with the mind only' (*solo animo*).<sup>24</sup> Possession is also lost if the thing is destroyed, is no longer a *res in commercio* or if the possessor dies. The establishment of loss of possession is important because it interrupts the running of prescription<sup>25</sup> and terminates the availability of the *mandament van spolie*.

## 6 The possessory remedies: protection of possession

As stated in (g) above, the law protects possession by giving possessors the benefit of the possessory remedies. The advantage of these remedies is that the possessor is not obliged to prove ownership, which would be necessary if he or she were to proceed as owner against a person who has dispossessed them by *vindicatio*. The remedies available to a person who has been deprived of peaceful and undisturbed possession are an interdict and a spoliation order (*mandament van spolie*). These remedies are discussed in more detail in the next chapter.

22 See chapter 9.

23 Joubert *et al* (n 1 above) vol 27, para 71. See also *Holmes v Payne* 1930 2 KB 301 where, after an insurance claim had been settled, a necklace was found in the folds of an evening cloak in which it had become concealed. It was held that the insurance company was nevertheless bound by the settlement.

24 As above. Examples are given of summer and winter pastures (*saltus aestivi et hiberni*) and a farmer who seldom visits the farm.

25 See chapter 6.

## **7 Summary and concluding remarks**

Possession as a legal fact and the right accruing from such legal fact are very important areas in property law as possession is a common feature of human interaction. Possession is constituted by the factual existence of physical control over a thing accompanied by the mental attitude to have possession. These are the minimum requirements since the exact content of possession will depend on the context in which and the purpose for which it is used. In the area of, for example acquisition of ownership by prescription, possession serves a functional role in facilitating the transformation of a factual situation into a legal situation. Possession, whether as a legal fact or a right flowing from such legal fact, is protected in law by certain remedies that provide relief for a claim based on possession. These are discussed in the next chapter.