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## 1 Introduction

In this chapter the remedies available in terms of the Namibian law of property are discussed, which include, as indicated in the previous chapter, the remedies available to a possessor who has been unlawfully deprived of possession or whose possession is threatened. The remedies that are discussed in this chapter are by no means exhaustive and it is recommended that other sources be consulted for further understanding. Some of the recommended sources will be referred to in this chapter. Appropriate case law has been selected, but once again, the readers, particularly students, are encouraged to read other cases apart from those cited in this chapter. Before we get into the details of the remedies to be discussed, it is important that a correct meaning of the concept of remedies is clearly established.

## 2 What are remedies?

It is generally agreed in our Roman-Dutch law that the law of remedies is concerned with the character and extent of relief to which an individual who has brought a legal action is entitled once the appropriate court procedure has been followed. In *Meyer v Hessling*,<sup>1</sup> the full bench of the Supreme Court of Namibia supported the above general definition.<sup>2</sup> The party seeking a remedy must show that he or she has a substantive right that has been

1 (SA 7/91) 1991 NASC 7.

2 In this case the seller entered into a written agreement with the purchaser in terms of which the seller sold to the purchaser a certain farm in the district of Omaruru for consideration of R67 500 (equivalent to N\$67 500). The purchaser occupied the farm before paying the full purchase price as per agreement. It was stipulated that the transfer of the farm must occur as soon as possible. The farm was duly transferred to the purchaser on condition that the principal sum had to be paid within a period of three years upon the date of registration. The first mortgage bond was registered on 10 May 1985. By 10 May 1987 no portion of the purchase price had been paid. The seller sent a notice purporting to cancel the sale arguing that the purchase price had not been timeously paid. On page 5,

infringed by the defendant. For instance, in *Meyer*<sup>3</sup> the seller had to prove that the purchaser had failed to comply with his contractual obligations of paying the full purchase price as per agreement.

A remedy may also be defined as any of the methods available at law for the enforcement, protection, or recovery of rights, for obtaining redress for their-infringement.<sup>4</sup> It is important to note that since one of the central themes of the law of property is the right of ownership, the remedies that are available to an aggrieved person in the field of property relations relate either directly to the protection of the right of ownership or the protection of any other right or interest that may relate to the object of a right of ownership, for example, possession.

### 3 Protection of ownership

One of the entitlements of *dominium* is the power of exclusive possession of the *res*, with the necessary corollary that the owner may claim his or her property wherever it is found, and from whomsoever is holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner.<sup>5</sup> The right to recover, *rei vindicatio*, is by way of vindictory action, and lies against anyone, even though such person may have acquired the thing in good faith (*bona fide*) and given value for it, and the owner need not compensate him or her. For example, if a thief steals a watch belonging to A, sells it to B, and receives payment of the purchase price from B, who is totally unaware of the theft, A is entitled to recover the watch from B without compensating B for the purchase price. B may, however, claim damages from the thief. The owner's right to vindicate must be exercised by the institution of court proceedings. If the person from whom the owner wishes to recover the thing in question refuses to part with it, the owner is not allowed to take the law into his or her own hands by, for example, physically seizing the property. He or she must instead sue the possessor in court for the recovery of the property.

There are various remedies that protect ownership and these include the *rei vindicatio*, the *actio negatoria*, the archaic remedies based on neighbour law, the *actio ad exhibendum*, the Aquilian action, the *condictio furtiva*, and remedies based on enrichment.<sup>6</sup> These are classified as real remedies

Mahomed AJA held *inter alia*, that on a proper interpretation of the sales agreement, the seller had two remedies: (i) To cancel the sales agreement and take the property back; or (ii) to transfer the farm to the purchaser and then demand payment of the outstanding amount due to the seller.

3 As above.

4 Oxford Dictionary of Law.

5 *Chetty v Naidoo* 1974 3 SA 13 (A) 20.

6 F du Bois Wille's *principles of South African law 9th ed* (2007) 538-539.

(pertaining to the law of property), delictual remedies, and remedies based on unjustified enrichment.<sup>7</sup> Real remedies restore physical control of the property, or confirm the ability of an owner to exclude others from access, use or enjoyment of the property. The *rei vindicatio* and the *actio negatoria* are classified as real remedies. Delictual remedies are available to an owner who has suffered financial loss either because the property itself has been alienated, damaged or destroyed, or because the owner could not exercise the entitlements available to an owner. These remedies provide a claim for payment of compensation or damages and include the *condictio furtiva*, the *actio ad exhibendum* and *actio legis Aquiliae*. In the event of unjustified enrichment, an aggrieved owner is entitled to compensation where someone other than the owner is unjustifiably enriched at the expense of the owner.<sup>8</sup>

### 3.1 *Rei vindicatio*

#### 3.1.1 Definition

This is a common law remedy which may be instituted by an owner for an order of ejectment to reclaim his or her movable or immovable property from anyone who is in physical control thereof without the owner's consent, irrespective of whether possession is bona or male fide in accordance with the maxim *ubi rem meam invenio, ibi eam vindico* (where my property is found, there I may vindicate it).<sup>9</sup>

In approving this definition, the court in *Khuzwayo v Dlodla*,<sup>10</sup> held that this common law remedy is a well settled principle in our law. Van der Walt & Pienaar<sup>11</sup> submit that this is an action whereby an owner may recover an existing and identifiable thing from any person who is exercising unlawful physical control over it.

#### 3.1.2 Requirements

In *Shingenge v Hamunyela*<sup>12</sup> Maritz J with respect to nature of the *actio rei vindicatio* stated as follows:

The *actio rei vindicatio* is a remedy given in common law to an owner to recover his or her property from any person who is in possession thereof (see *Chetty v Naidoo* 1974 3 SA 13 (A) at 20C). Any person purporting to institute a vindicatory action and who fails to prove any of these elements on a balance of probabilities must fail. So, for instance, the action will be unsuccessful if the plaintiff cannot

7 H Mostert *et al The principles of the law of Property in South Africa* (2010) 215; WA Joubert *et al The law of South Africa* (First Reissue) (2003) vol 27, para 182.

8 As above.

9 Du Bois (n 6 above) 539; Mostert *et al* (n 7 above) 217

10 (LCC33R/00) 2000 ZALCC 26.

11 AJ van der Walt & GJ Pienaar *Introduction to the law of property 6th Edition* (2009) 145.

12 2004 NR 1 (HC).

prove that he or she is the owner of the *res* (*Vumane and Another v Mkize* 1990 (1) SA 465 (W) at 467D) or that the defendant is still in possession thereof (*Leal & Co v Williams* 1906 TS 554 at 558). It follows from the requirement of 'ownership' that, if the *res* has been consumed, acceded to or mixed or mingled with another thing or has been used to manufacture a new product, it is no longer *in esse* as a clearly identifiable thing and cannot be 'owned' as such.

It follows therefore that in order to succeed with the *actio rei vindicatio* the plaintiff must prove:

- (a) that he or she is the owner of the property;<sup>13</sup>
- (b) that the property exists and is identifiable;
- (c) that the property is under the defendant's physical control at the time when the action is brought before the court.

These requirements will now be discussed in more detail.

### 3.1.2.1 The plaintiff must be the owner of the property

The law places an onus on the person who institutes the *rei vindicatio* to prove on a balance of probabilities that he or she is the owner of the property.<sup>14</sup> In the case of the recovery of a movable thing, there is a rebuttable presumption of law that the possessor of a movable thing is also the owner thereof and therefore the owner who is seeking to recover possession must rebut the presumption of ownership arising from the possession.<sup>15</sup> For example, the registration papers of a vehicle or an invoice can serve as evidence of proof of purchase and an inference of continued ownership.<sup>16</sup> In the case of immovable property proof of registration of the property in the name of the owner will satisfy this requirement.<sup>17</sup>

In *Pascheka v Bernstein*<sup>18</sup> an application for an order was sought ordering the defendant to deliver a motor vehicle to the plaintiff since she (defendant) had no bona fide defence to the plaintiff's claim and since her defence was entered solely for the purpose of causing a delay.

In his particulars of claim the plaintiff alleged that he was the owner of the motor vehicle in possession of the defendant. In her opposing affidavit

13 In *Pascheka v Bernstein* (P16/05) 2005 NAHC 7 the owner of the car had to prove that he was the lawful owner of the car. In other situations the defendant can challenge that ownership.

14 Joubert *et al* (n 7 above) vol 27, para 183; Mostert *et al* (n 7 above) 218; *Ebrahim v Deputy Sheriff, Durban & Another* 1961 4 SA 265 (N).

15 *Zandberg v Van Zyl* 1910 AD 302 308; *McAdams v Flander's Trustee and Bell* NO 1919 AD 207 232; *K&D Motors v Wessels* 1949 1 SA 1 (A) 11; *Gleneagles Farm Dairy v Schoombe* 1949 1 830 (A) at 836; *Ebrahim* (n 14 above) 267; Du Bois (n 6 above) 539; and Joubert *et al* (n 7 above) vol 27, para 183.

16 Mostert *et al* (n 7 above) 218.

17 Joubert *et al* (n 7 above) vol 27, para 183; Du Bois (n 6 above) 539.

18 n 13 above.

the defendant stated that the plaintiff had given her 'the full right to possess and use' the vehicle on a permanent basis and by virtue of the fact that she had rendered services to him personally and to his close corporation for which she was never remunerated. According to her she had 'obtained vested and valid enrichment claims' against plaintiff.

In considering the *rei vindicatio* the court *inter alia* referred to *Arend & Another v Astra Furnitures (Pty) Ltd*<sup>19</sup> and ruled that when a plaintiff reclaims possession of property in terms of the *rei vindicatio*, the plaintiff must allege and prove that he or she was the owner of the thing and that the defendant was in possession of the property at the time of the institution of the action.<sup>20</sup> To succeed with the *rei vindicatio* the owner is therefore required to prove that he or she is the owner of the thing (the *res*) and that the defendant is holding the *res*. The *onus* is on the defendant to allege and establish any right to continue to retain possession against the owner. It appears immaterial whether the owner alleges that the defendant's possession is 'unlawful', 'against the owner's will' or without any such qualification. However, if the owner goes beyond alleging merely that he or she is the owner and that the defendant is in possession, whether unqualified or described as 'unlawful' or 'against the owner's will', other considerations come into play.

The other considerations referred to relate to a situation where for instance a plaintiff concedes in his or her particulars of claim that the defendant has had an existing right to hold the property. Plaintiff must then *ex facie* his or her statement of claim prove the termination of such right to hold.<sup>21</sup>

*In Shimaudi v Shirungu*<sup>22</sup> Levy J said the following,<sup>23</sup>

In respect of occupation, the defendant may well admit such occupation but contend that his occupation is lawful. The *onus* would then be on him to prove such lawfulness but he or she is relieved of this *onus* if there is some form of admission on the pleadings in terms whereof plaintiff concedes that he lawfully parted with such occupation.

### 3.1.2.2 The property must exist and be identifiable

As explained by Mostert *et al*<sup>24</sup> the objective of the *rei vindicatio* is the restoration of physical control of the property to the owner and this can only occur if the property is in existence and can be identified clearly. As stated in *Shingenge*,<sup>25</sup> if the *res* has been consumed, acceded to or mixed or mingled

19 1974 (1) SA CPD 298 304 F-G.

20 See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 1 SA 77 (A) 82; *Chetty* (n 5 above) 20; and *Minister van Wet en Orde v Matshoba* 1990 1 SA 280 (A) 286.

21 See *Chetty* (n 20 above) 21.

22 1990 3 SA 344 (SWA).

23 At 347.

24 *Mostert et al* (n 7 above) 218.

with another thing or has been used to manufacture a new product, it is no longer *in esse* as a clearly identifiable thing and cannot be 'owned' as such. In such case, the *rei vindicatio* is not the appropriate remedy, simply because the property no longer exists. The facts of each case will determine the appropriate remedy to be sought. A delictual remedy may in certain cases be appropriate.<sup>26</sup>

3.1.2.3 The property must be in the defendant's physical control at the time when the action is brought before the court

As stated earlier, the objective of the *rei vindicatio* is the restoration of the property to the owner and logically this objective can only be achieved if the defendant is actually in physical control of the property at the time when the action is brought before the court. This is therefore meant to ensure that the order of the court does not result in futility.

### 3.1.3 Defences against *rei vindicatio*

The concept of *rei vindicatio*, as can be seen from what is said above, is susceptible to an array of either common law or statutory defences which will now be discussed separately.

### 3.1.4 Common law defences: Estoppel

O'Linn JA, in the judgment of the Full Bench of the High Court in *Eysselinck v Standard Bank Namibia Limited Stannic Division & Another*,<sup>27</sup> after referring to several of the leading authorities on the requirements for a successful defence of estoppel, stated the principles of the Namibian law of estoppel in regard to ownership as follows:

Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner. Consistent with this, it has been authoritatively laid down by this Court that an owner is estopped from asserting his rights to his property only –

(1) where the person who acquired his property did so because, by the culpa of the owner, he was misled into the belief that the person, from whom he acquired it, was the owner or was entitled to dispose of it; or

(2) (possibly) where, despite the absence of culpa, the owner is precluded from asserting his or her rights by compelling considerations of fairness within the broad concept of the *exceptio doli*.

25 As above.

26 Mostert *et al* (n 7 above) 218. Money in the form of coins and banknotes is not easily identifiable and thus not easily vindicable. See Du Bois (n 6 above) 539.

27 2004 NR 246 (HC).

See *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (AD); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (AD) at p 409.

These two cases relate to estoppel in respect of ownership of movables. There seems no reason for not applying these principles to a case such as the present one where the plaintiff seeks a declaration that it is the 'owner' of shares.

As to the formulation in (b) supra, the occasion has not yet arisen for its further development by this Court. Certainly it does not arise in the present appeal, having regard to the pleadings, the evidence, and the arguments in this Court.

As to (a), supra, it may be stated that the owner will be frustrated by estoppel upon proof of the following requirements –

- (i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W), with its reference at p 247 to the entrusting of possession of property with the *indicia of dominium or ius disponendi*.
- (ii) The representation must have been made negligently in the circumstances.
- (iii) The representation must have been relied upon by the person raising the estoppel.
- (iv) Such person's reliance upon the representation must be the cause of his acting to his detriment. As to (iii) and (iv), see *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (AD).

This test has been consistently followed by the courts and was reaffirmed in *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* [1994] ZASCA 41; 1994 (3) SA 188 (A) at 198-199 and particularly at 199 C-G in the following terms:

In the *Electrolux* case referred to by Holmes JA, Trollip J said at 247B-E:

'To give rise to the representation of *dominium* or *ius disponendi*, the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *ius disponendi*. Such *indicia* may be the documents of title and/or of authority to dispose of the articles, as for example, the share certificate with a blank transfer form annexed ...; or such *indicia* may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade ... In all such cases the owner "provides all the scenic apparatus by which his agent or debtor may pose as entirely unaccountable to himself, and in concealment pulls the strings by which the puppet is made to assume the appearance of independent activity. This amounts to a representation, by silence and inaction ... as well as by conduct, that the person so armed with the external indications of independence is in fact unrelated and unaccountable to the representor, as agent, debtor, or otherwise."

(Spencer Bower on Estoppel by Representation at 208).'

Trollip J said further (at 247 in fine – 249 in pr):

'It follows that to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such

manner as to proclaim that the *dominium* or *ius disponendi* is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary "scenic apparatus" for begetting the effective representation.'

In the context of an attempted reliance on estoppel by conduct in respect of a motor vehicle subject to instalments sale agreements it was held as follows in *Info Plus v Scheelke and Another* [1998] ZASCA 21; 1998 (3) SA 184 (SCA) at 194-195:

'The requirements for a successful reliance on estoppel in the context under consideration have been set out in a number of decisions of this court. See, for example, *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* [1994] ZASCA 41; 1994 (3) SA 188 (A) at 198-9. The first requisite is that there must be a representation by the owner (or possessor) that the person who disposed of his property ("the defrauder") was the owner, or entitled to dispose, of it. In most cases, of course, the ultimate representation is made by the defrauder. The real question then is whether the conduct of the owner effectively contributed to the making of that representation.'<sup>28</sup>

As stated earlier,<sup>29</sup> to create the effective representation the dealer or trader must, in addition, deal with the goods with the owner's consent or connivance in such a manner as to proclaim that the *dominium* or *ius disponendi* is vested in him; as for example, by displaying, with the owner's consent or connivance, the articles for sale with his own goods. It is that additional circumstance that provides the necessary 'scenic apparatus' for begetting the effective representation.

### 3.1.5 Statutory Defences

Some statutory provisions exclude the *rei vindicatio*. Two such provisions are discussed below.

Section 36(5) of the Insolvency Act 24 of 1936 provides that:

The owner of the movable property which was in possession or custody of a person at the time of the sequestration of that person's estate, shall not be entitled to recover that property if it has, in good faith, been sold as part of the

28 For example in the *Eysseleinck* case (n 27 above) the court ruled that the second defendant had not relied upon a representation that, apart from ownership, the *ius disponendi* of the Mercedes vested in Sharman Motors. As has appeared, Gavin represented to the second defendant that Sharman Motors was the owner of the vehicle. No doubt the prior delivery of the vehicle to Sharman Motors causally assisted Gavin in making that representation but the mere delivery of property by one person to another does not by itself constitute a representation that the latter is the owner (or is entitled to dispose) thereof: *Electrolux (Pty) Ltd v Khota & Another* 1961 4 SA 244, cited with apparent approval in *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 1 SA 441 (A), and *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) (Bpk)* 1996 3 SA 273 (A). Nor does the fact that the transferee is a dealer or trader in the particular commodity transform the transfer of possession into such a representation.

29 *Electrolux* (n 28 above) 247-8; see also *Konstanz Properties (Pty) Ltd* (n 28 above) 288 and *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 3 SA 420 (A) 428.

said person's insolvent estate, unless the owner has, by notice in writing, given, before the sale, to the curator bonis if one has been appointed or to the trustee of the insolvent estate, or if there is no such curator bonis or trustee, to the Master, demanded a return of the property.

This implies that after the sale of the movable property of an insolvent estate, the said property, after having been sold and transferred, may not be vindicated by way of a *rei vindicatio*.

Section 70 of the Magistrates' Courts Act 32 of 1944 provides that:

A sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect.

This means that the previous owner of movable or immovable property cannot challenge the sale in execution of such property and the subsequent transfer of ownership after delivery in the case of movable property and registration in the case of immovable property.

The general effect of these provisions is that the owner of the property is barred from redeeming the property through the application of the *rei vindication*, thus limiting the usual effect of this remedy.<sup>30</sup>

### 3.2 *Actio negatoria*

WA Joubert *et al*<sup>31</sup> state that in Roman law the *actio negatoria* was a remedy in terms of which a landowner could restrict the exercise of unauthorised real rights, especially servitudes, with regard to his or her land. In Roman-Dutch law this remedy was transformed into a remedy in terms of which any physical disturbance of land could be challenged even though the disturbance was not based on a presumed exercise of right. Mostert *et al*<sup>32</sup> add that as a real remedy, the *actio negatoria* permits an owner to deny the existence of an alleged servitude or other right entitling the defendant to cause physical disturbance to the land. In other words, it is a remedy granted to a landowner to restrict physical disturbance of the land irrespective of the existence, or otherwise, of a servitude. The application of the *actio negatoria* has been extended to movables and therefore it can be applied to cases involving any physical infringement of a person's ownership. The following could serve as examples where the remedy would apply in situations involving physical infringement of a person's ownership: where land is trespassed upon; where movables are sold and delivered to third parties without the owner's consent; where structures are erected on land without the owner's permission; where

30 See Mostert *et al* (n 7 above) 219-220 for further explanation.

31 Joubert *et al* (n 7 above) vol 27, para 184.

32 Mostert *et al* (n 7 above) 226.

a road is obstructed; and where the owner is physically prevented from ploughing his land.<sup>33</sup>

For the owner to succeed with the *actio negatoria* he or she must prove the ownership of the property; the existence of the property; and that it is identifiable. Furthermore, he or she must establish that the defendant's conduct infringes on his or her right, either because it amounts to an excessive exercise of an acknowledged limited real right or because the defendant is exercising a non-existent limited real right.<sup>34</sup>

### 3.3 Delictual remedies

As stated earlier, the real remedies are employed to restore the possession of property to the owner, or to restore *dominium* or to prevent any infringement of *dominium*. Delictual remedies on the other hand are appropriate when physical restoration is not possible in which case the owner must be compensated for his or her patrimonial loss. This may happen in situations where, for example, the property has been destroyed, lost, or damaged so that it cannot be identified or be used for its destined purpose.<sup>35</sup> Under delictual remedies we shall specifically look at the *condictio furtiva*, the *actio ad exhibendum* and the *actio legis Aquiliae* (the general action for damages).

### 3.4 *Condictio furtiva*

The *condictio furtiva* is a *delictual* action which can be instituted by an owner against a thief or his or her heirs for the patrimonial loss (or prejudice) suffered as a result of the theft. The *condictio* is aimed at the recovery of the thing, together with its fruits, or its highest value since the commission of the theft.<sup>36</sup> It entitles the owner to the highest value of the thing between the time it was stolen and *litis contestatio*. Therefore, to the extent that it can also be employed for the recovery of the thing, it is possible to use the *condictio* in the alternative to the *rei vindicatio*.<sup>37</sup>

In order to succeed with the *condictio* certain requirements must be established by the claimant. As stated earlier, the *condictio furtiva* is a remedy available to the owner of a thing, or someone with an interest in the thing,<sup>38</sup> to claim damages from a thief and his or her heirs.<sup>39</sup> The *condictio* will

33 Joubert *et al* (n 7 above) vol 27, para 184.

34 Mostert *et al* (n 7 above) 226.

35 Mostert *et al* (n 7 above) 227; Du Bois (n 6 above) 541.

36 Joubert *et al* (n 7 above) vol 27, para 187.

37 Mostert *et al* (n 7 above) 227; Joubert *et al* (n 7 above) vol 27, para 187.

38 *Clifford v Farinha* 1988 4 SA 315 (W).

39 *Kruger v Navratil* 1952 4 SA 405 (SWA) 408; *John Bell & Co Ltd v Esselen* 1954 1 SA 147 (A) at 151-152; *Minister van Verdediging v Van Wyk & Andere* 1976 1 SA 397 (T) 400; *Crots v Pretorius* 2010 6 SA 512 (SCA) para 3.

therefore only find application if the thing in question has been stolen. It was held in *Clifford v Farinha*<sup>40</sup> that the intention to appropriate the thing permanently (a requirement for criminal theft) is not a requirement to succeed with the *condictio* where *furtum uses* is concerned. The *condictio furtiva* will be available where, for example, the defendant has deprived possession of the thing from another, or has 'taken' the thing and used it with the intention of later restoring possession. It follows that the person instituting the *condictio* must prove that he or she is the owner of the property or has a lawful interest in it.<sup>41</sup> This interest must endure from the time of the theft until the time the action is instituted.<sup>42</sup>

As mentioned earlier, the remedy is available only against the thief or, in the case of death, his or her heir. The action cannot be instituted against any subsequent (*bona fide* or *male fide*) acquirer of the stolen property.<sup>43</sup>

Since the *condictio* can be employed for the recovery of the thing, an owner can in principle avail himself or herself of either this remedy or the *rei vindicatio* if the thief is still in possession of the stolen thing. However, these remedies are available in the alternative only. The owner has the discretion to choose which one should be instituted. Since the highest value of the thing attained in the interim period, specifically the period between the date of deprivation of possession until *litis contestatio*, may be claimed, the *condictio furtiva* may in appropriate circumstances be more advantageous than the *rei vindicatio*.<sup>44</sup>

In Roman law the *actio ad exhibendum* was usually instituted in conjunction with the *rei vindicatio* to compel the possessor of a thing which was not vindicated to produce it. If the defendant produced the thing, the action for the *rei vindicatio* was proceeded with. If the thing was not produced, the defendant was ordered to compensate the plaintiff for its value.<sup>45</sup> This aspect of the *actio ad exhibendum* had become obsolete in Roman-Dutch law and never became part of South African (or Namibian) law.<sup>46</sup>

Currently, under South African (Namibian) law, the *actio ad exhibendum* is instituted as a general action against a mala fide possessor, who has fraudulently alienated, consumed or destroyed the thing, for the recovery of its value since the thing itself can obviously not be recovered. It is also available against any possessor, who after becoming aware of the title of the owner, fraudulently alienated, consumed or destroyed the thing. Since the

40 n 38 above, 322C-D.

41 Mostert *et al* (n 7 above) 227.

42 *Minister van Verdediging* (n 39 above).

43 Mostert *et al* (n 7 above) 227.

44 Joubert *et al* (n 7 above) vol 27, para 187.

45 Joubert *et al* (n 7 above) vol 27, para 185.

46 Du Bois (n 6 above) 542.

basis of the liability is *mala fides*, the plaintiff must allege and prove it.<sup>47</sup> For the claimant to succeed the following requirements must be satisfied:

- (a) the person who has instituted the action must be the owner of the property;
- (b) the defendant must have wrongfully and intentionally disposed of the property; and
- (c) the owner must have suffered patrimonial loss as a result of the disposal of the property.

As stated earlier, it must be emphasised that since the property has been disposed of, the amount claimed is the market value of the property at the time of disposal.<sup>48</sup>

### 3.5 *Actio legis Aquiliae*

The *actio legis Aquiliae* as an action to claim compensation is of general application in the sense that it can be instituted to claim damages in all cases where property has been destroyed or damaged by the defendant in an unlawful and culpable manner. The two delictual remedies discussed earlier, the *condictio furtiva* and the *actio ad exhibendum* have particular application. The former is utilised in the case of theft, whereas the latter is instituted when the possessor has wrongfully disposed of the property in bad faith. The *Aquilian* action lies for patrimonial loss caused wrongfully (unlawfully) and culpably.<sup>49</sup> For the plaintiff to succeed, it must be proved that he or she has suffered patrimonial loss as a result of the wrongful conduct of the defendant. The loss can be physical damage to person or property. The wrongful conduct must have caused the loss. The plaintiff is also required to establish blameworthiness in the form of *dolus* (intention) or *culpa* (negligence) on the part of the defendant.

## 4 Unjustified enrichment

The doctrine of unjustified enrichment is based on an equitable principle that prohibits one person from profiting or being enriched at the expense of another person without making restitution for the reasonable value of any property, services, or other benefits that have unjustifiably been received or retained. In the law of property an owner may institute a *condictio sine causa* on ground of unjust enrichment against a bona fide possessor who has acquired a thing *ex causa lucrativa* (without consideration) in respect of any

47 Joubert *et al* (n 7 above) vol 27, para 185; Du Bois (n 6 above) 542; Mostert *et al* (n 7 above) 228.

48 Mostert *et al* (n 7 above) 228. For the scope of the application between the *rei vindicatio* and the *actio ad exhibendum* see also Joubert *et al* (n 7 above) vol 27, para 185; and Du Bois (n 6 above) 543.

49 *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D) 377.

profit made when the property is sold. A *condictio* is available also where the enrichment acquired *ex causa lucrativa* is a sum of money or land which has been obtained as a result of accession.<sup>50</sup>

## 5 Protection of possession; the possessory remedies

The possessory remedies provide relief for a claim based on possession and they include the *mandament van spolie* (spoliation) and interdict. They are used to restore lost possession.<sup>51</sup>

### 5.1 Mandament van spolie (spoliation)

#### 5.1.1 Definition

The *mandament van spolie* is a common law remedy available to the possessor of property who has been dispossessed of that property by another, either unlawfully or under the pretext that the said person was entitled to dispossess the possessor.

#### 5.1.2 Requirements

The requirements for obtaining the *mandament van spolie* are:

- (a) a person must have been unlawfully deprived of the whole or part of his or her possession of a movable or immovable thing; and
- (b) a person must have been deprived unlawfully of his or her quasi-possession of a movable or immovable incorporeal thing.<sup>52</sup>

In *Nino Bonino v De Lange*<sup>53</sup> Innes CJ defined spoliation as follows:

Spoliation is any illicit deprivation of another of the right of possession which he has, whether in regard to movable or immovable property or even in regard to a legal right.

50 Du Bois (n 6 above) 546; Joubert *et al* (n 7 above) vol 27, para 188; and Mostert *et al* (n 7 above) 229.

51 See Mostert *et al* (n 7 above) 75; Badenhorst *et al Silberberg & Schoeman's the law of property* 288; Du Bois (n 6 above) 453.

52 See *Nino Bonino v De Lange* 1906 TS 120; *Shahmahomed v Hendriks & Others* 1920 AD 151; *Mans v Loxton Municipality & Another* 1948 1 SA 966 (C). The treatment of the *mandament* in volume 27 of *Lawsa* under the title 'Things' by CG van der Merwe is extremely helpful.

53 n 64 above, 122.

This definition was adopted from *Augustini a Leyser Meditationes Ad Pandectas* and was approved *inter alia* in *Sillo v Naude*,<sup>54</sup> *Nienaber v Stuckey*,<sup>55</sup> and *Van Eck NO & Van Rensburg NO v Etna Stores*.<sup>56</sup>

In the Namibian case of *Kuiiri and Another v Kandjoze and Others*,<sup>57</sup> the Supreme Court of Namibia affirmed the application of this principle as the jurisprudence in Namibia. Mtambanengwe AJA stated

The central principle of the remedy is simply that no person is allowed to take the law into his or her own hands and thereby cause a breach of the peace. The remedy is aimed at every unlawful and involuntary loss of possession by a possessor. Its single object is the restoration of the *status quo ante* as a prelude to any inquiry into the merits of the respective claims of the parties to the thing in question.

He referred to *Ness and Another v Greef*,<sup>58</sup> and added that the justice or injustice of the applicants' possession is, therefore, irrelevant.

In *New era Investments (Pty) Ltd v Ferusa Capital Financing Partners cc and Others*<sup>59</sup> the appellant appealed against the dismissal by the court *a quo* of an urgent spoliation application seeking an order to restore its possession of three building sites as well as a separate order interdicting the first and second respondents from commencing or continuing with any construction work on those sites pending an action or arbitration to be instituted against the first respondent for specific performance of building contracts entered into between the appellant and first respondent.

Appellant contended that, although it had suspended work on the sites in April 2015 because of first respondent's inability to pay, appellant retained a presence on the site and intended to resume work as soon as first respondent was able to make payment of outstanding amounts. Employees of second respondent entered the sites on or around 7 October 2016 to work on those building sites which the appellant was contracted to complete. First respondent failed to explain how second respondent lawfully took possession of the sites when appellant was still contractually in possession of sites by virtue of the handover of possession and had not terminated its possession. The nature of the possession claimed by appellant is that of a builder's lien.

The issues to be determined were whether the appellant had established an entitlement to the spoliation order and whether it should have been granted the interim interdict sought.

54 1929 AD 21.

55 1946 AD 1049.

56 1947 2 SA 984 (A) 1000.

57 (2) (SA 42 of 2007); (2009) NASC 15 (3 November 2009).

58 1985(4) SA 641 (C).

59 (87 of 2016) [2018] NASC 396 (6 July 2018).

The court held that in spoliation proceedings, an applicant must on a balance of probabilities prove peaceful and undisturbed possession of the property in question and an unlawful deprivation of that possession by the respondents.

Applying the principles outlined by Innes, CJ in *Scholtz v Faifer*,<sup>60</sup> the court reasoned that it would follow on all the facts before court that the appellant had been disturbed by the first and second respondents in the exercise of its possession of the sites. Once the sites were handed over to the appellant and it continued with the building works, it was unquestionably in possession of the sites. The works were thus under the appellant's control and the first respondent could not remove it from the site as long as it performed and remained on site and tendered to perform under the contracts. After the work was suspended by reason of the first respondent's inability to pay for works duly performed, the appellant remained on site with the view to resume the works as soon as the first respondent was once again able to meet its obligations.

This was not a case, as referred to by Innes, CJ, where a contractor was warned that if it did not continue the works, another contractor would be appointed so as to put the appellant on its guard to assert more control over the site. On the contrary, the appellant tendered to continue once the admitted amount owing to it had been paid. And it stayed on site, remaining ready to continue upon payment. Despite seeking to hold the first respondent liable for the cost of security guards, their presence was under the appellant's control and assisted it in exercising sufficient control to exercise its lien and certainly to remain in possession of the sites. It was understandable that it sought to hold the first respondent liable for payment of the costs of the security guards, given the reason for the suspension was first respondent's inability to pay due amounts – and for future work. Importantly the appellant did not terminate its possession. Nor is this alleged by the first respondent.

The court accordingly held that the appellant sufficiently established control and possession as well subsequent dispossession for the purposes of securing spoliation relief.

The question as to the utilisation of the mandament to protect incorporeal rights has been the subject of wide-ranging discussion in the case law and amongst academics. In *Telkom SA Ltd v Xsinet (Pty) Ltd*<sup>61</sup> Jones AJA deals with the origins and development of the mandament as follows.<sup>62</sup>

Originally, the mandament only protected the physical possession of movable or immovable property. But in the course of centuries of development, the law

60 1910 TS 243.

61 2003 5 SA 309 (SCA).

62 Para [9].

entered the world of metaphysics. A need was felt to protect certain rights (tautologically called incorporeal rights) from being violated. The mandament was extended to provide a remedy in some cases. Because rights cannot be possessed, it was said that the holder of a right has 'quasi-possession' of it, when he or she has exercised such right. Many theoretical and methodological objections can be raised against this construct, *inter alia*, that it confuses contractual remedies and remedies designed for protecting real rights. However, be that as it may, the semantics of 'quasi-possession' has passed into our law. This is all firmly established.'

The facts of the case were that the appellant supplied the respondent (an internet service provider) with a telephone system and a bandwidth system in order for the latter to conduct its business as an internet service provider. The appellant alleged that the respondent was indebted to it in a sum of money in respect of one of the services provided, which the respondent disputed. The appellant thereupon disconnected the respondent's telephone and bandwidth systems. The respondent successfully brought an urgent spoliation application in a Provincial Division. In an appeal it was held that there was no suggestion that the appellant had interfered with the respondent's physical possession of its equipment.<sup>63</sup>

It was held, further, that there was no evidence that the respondent had ever been in possession of any of the mechanisms by which its equipment was connected to the internet.<sup>64</sup> It was held further, that the appellant had not entered the respondent's premises and removed an item of respondent's equipment in order to affect the disconnection.<sup>65</sup> The court was of the view that it was both artificial and illogical to conclude on the facts that the respondent's use of the telephones, lines, modems or electrical pulses gave it 'possession' of the connection of its corporeal property to the appellant's systems.<sup>66</sup>

Furthermore, Jones AJA held that the quasi-possession of the right to receive the appellant's telecommunication services consisted of the actual use of those services and that was a mere personal right.<sup>67</sup> He further held that the order sought was essentially to compel specific performance of a contractual right in order to resolve a contractual dispute. This had never been allowed under the *mandament van spolie* and there was no authority for such an extension of the remedy.<sup>68</sup>

In *Zulu v Minister of Works, Kwazulu, & Others*,<sup>69</sup> Thirion J grappled with the question of incorporeal rights and accepted that "the possession of

63 Para [13].

64 As above.

65 As above.

66 As above.

67 Para [14].

68 As above.

69 1992 1 SA 181 (D).

incorporeal rights is protected against spoliation". (*Nienaber v Stuckey* 1946 AD 1049 at 1056). The judge then had the following to say:

In truth the *mandament van spolie* is not concerned with the protection or restoration of *rights* at all. Its aim is to restore the factual possession of which the *spoliatus* has been unlawfully deprived. The question of the lawfulness of the *spoliatus*' possession is not enquired into at all. What then does a *spoliatus* have to prove to establish the possession of 'an incorporeal right' and what such 'rights' qualify for protection by the *mandament van spolie*? ... Accepting then that what is protected by the remedy is the actual performance of acts which, if lawfully performed, would constitute the exercise of a right, the question which arises is what such acts are protected by the remedy.<sup>70</sup>

Thirion J in discussing this question considered *Nienaber v Stuckey*<sup>71</sup> where Greenberg JA observed as follows with reference to Voet;<sup>72</sup> Wassenaar;<sup>73</sup> and Lee.<sup>74</sup>

The fact that these authorities state generally and without any limitation or exception that the possession of incorporeal rights is protected against spoliation means that the holders of such servitudinal rights as rights of way ... are entitled to the relief against dispossession by spoliation.

Thirion J maintained that:

Too much should not be read into this statement. Greenberg JA was here simply pointing out that possession need not be exclusive in order to qualify for protection by the mandament. The question of what kinds of rights the possession of which is protected by the mandament did not arise because the *spoliatus* there had clearly been in physical possession of the land. It is true that *Wassenaar* states in the passage referred to that the mandament van spolie may be obtained in any case of a spoliation of 'enige goederen of gerechtigheden' but I would not conclude from this bald statement that the dispossession of just any right can be made the subject of spoliation proceedings. If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense then supposedly rights such as the right to performance of a contractual obligation would have to be included – which would be to extend the remedy beyond its legitimate field of application and usefulness.

The possession in *Nienaber* was fairly extensive and encompassed a whole year from June 1945 during which period the appellant ploughed the lands. From 1943 the appellant had leased the land in question. The court found that he had not abandoned the possession in question and that when the respondent locked the gate he effectively despoiled the appellant's possession.<sup>75</sup>

70 At 187 et seq.

71 1946 AD 1049 1055-6.

72 43.16.7.

73 G Wassenaar *Praktijk judicieel* (1708) ch 14, art 1

74 RW Lee *An Introduction to Roman-Dutch Law 3rd ed* (1931) 167.

75 1057-8.

## 5.2 Interdict

### 5.2.1 Definition

An interdict is an order made by a court prohibiting or compelling performance of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm. In this instance the interdict would be prohibitory, ordering the respondent to desist or refrain from doing a particular act. Three requisites exist for the granting of a high court interdict, namely a clear right, an actual or threatened invasion of the right, and the absence of another suitable remedy. A further requisite, namely that a balance of convenience favours the granting of the interdict, exists where a temporary interdict is sought pending an action between the parties.

### 5.2.2 Requirements

The requirements of an interdict were set out in an appeal judgment by the Supreme Court of Namibia in the case of *Van Ellinckhuijzen v Botha*.<sup>76</sup> For the sake of completeness it is important to set out the salient facts in this case.

The applicant, Jan Botha, a businessman of Swakopmund in Namibia, and the respondent, Koos van Ellinckhuijzen, an artist residing in Windhoek, had entered into an agreement in terms of which Botha had commissioned van Ellinckhuijzen, to paint for him a so-called 'relief map' or 'tourist perspective map of Namibia' as well as a 'relief map' of South Africa. The final price to be paid by applicant to respondent for the paintings was N\$36 000 for the Namibian map and N\$45 000 for the South African map. After completion of the maps they were delivered to the applicant.

Prior to the institution of litigation, the applicant had paid to the respondent the full purchase price of the Namibian map and all but N\$5 000 of the purchase price of the South African map. After keeping the maps in his possession for a certain period, the applicant returned the maps to the respondent for certain purposes.

Whilst the maps were in the possession and/or custody of the first respondent, the applicant discovered that the first respondent was busy selling the maps through the agency of the House of Art, the second respondent, who had been placed in possession of the maps and who had framed the maps on the instructions of first respondent.

The applicant immediately confronted the two respondents to state his claim as owner of the paintings and got the following response from the

76 (SA 11/01) [2002] NASC 11.

respondents. The first respondent said in effect: 'I have done my homework and am entitled to sell the paintings'. Second respondent, in reaction to a letter from applicant's attorneys, indicated by means of a letter from her attorneys, that 'she will not let the paintings out of her possession or control, until such time as her retention rights, for work done on the pictures in the amount of N\$3 000,00 has been satisfied'. The applicant was not satisfied with the aforesaid responses and applied to the court *a quo* on an urgent basis for an interdict to prevent the paintings from being sold by the first respondent.

After a settlement was reached with the second respondent and certain agreements were reached with the first respondent relating to the procedure to be followed for an expeditious finalisation of the dispute, the applicant and respondents set out their respective cases in their affidavits and argued the matter before the court *a quo*.

Gibson J after careful consideration made the following order, *inter alia*:

That first and second respondents are ordered forthwith, upon second respondent's right of retention in respect of work done in framing the paintings, to place the applicant in possession of the aforesaid original paintings, failing which the Deputy Sheriff for the district of Windhoek is authorized and directed to attach and hand over to the applicant, the aforesaid painting.

This is part of the order against which an appeal was noted. The following requirements for an interdict were confirmed in this case:

- (a) a clear right;
- (b) impending unlawful infringement; and
- (c) no other effective remedy.

In *Passano v Leissler*,<sup>77</sup> a case that touched on a number of topics of property law, Maritz J confirmed the requisites of an interdict by stating:

Seeking a final mandatory interdict, the applicant must satisfy the well-established requisites thereof: '(i) a clear right (ii) unlawful interference with that right, actually committed or reasonably apprehended; and (iii) the absence of any other satisfactory remedy.'<sup>78</sup>

## 6 Protection of servitudes

As we saw in chapter 7, one basic characteristic of every servitude is the right of use and enjoyment granted by the owner to the holder of the servitude. Almost invariably the effective utilisation and enjoyment of these

77 2004 NR 10 (HC).

78 Quoting Smalberger JA in *Diepsloot Residents and Landowners' Association & Another v Administrator, Transvaal* 1994 3 SA 336 (A) 344.

entitlements involve possession of the object of the right. In this regard, therefore, the remedies for the protection of servitudes will include the possessory remedies and most of the remedies available to an owner, discussed earlier. These will include an application for a declaration of rights if the servitudinal rights have been infringed or there is a risk of interference. The holder of the servitude may also ask for a mandatory interdict compelling the wrongdoer to restore the *status quo ante* and/or a prohibitory interdict prohibiting the wrongdoer from perpetrating future infringements. This replaces the old *actio confessoria* which may be instituted against the owner of the servient property or any third party who unlawfully infringes the holder's right. In order to succeed, the plaintiff has to prove the existence of the servitude; that he or she is the holder; and that the defendant has unlawfully infringed the plaintiff's use and enjoyment of the servitude.<sup>79</sup> The *mandament van spolie* is also available for the restoration of lost possession of a right of servitude.<sup>80</sup>

## 7 Concluding remarks

Every legal system provides for rights and obligations and how these may be enforced. In the law of property there are various remedies that are available to the individual whose rights have been violated. These remedies may be instituted to restore ownership, to recover property and for compensation for patrimonial loss and prejudice. The remedies may be broadly classified as real remedies because they pertain to the infringements of real rights, delictual damage to property and unjustified enrichment where property is involved. The choice of an appropriate remedy will be determined by the peculiar circumstances of each case.

79 WJ Hosten *et al* *Introduction to South African law and legal theory 2nd ed* (1997) 650; *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A) 513-516.

80 Joubert *et al* (n 7 above) vol 25, para 105.