RECONSIDERING COUNTER-SPOLIATION AS A COMMON-LAW REMEDY IN THE EVICTION CONTEXT IN VIEW OF THE SINGLE-SYSTEM-OF-LAW PRINCIPLE

A reply to Scott's discussion of *Residents of Setjwetla Informal Settlement v Johannesburg City* 2017 2 SA 516 (GJ)*

1 *Introduction*

After 25 years of democracy, landlessness remains a major problem in South Africa, as millions of people still do not have access to adequate housing. This inevitably causes persons, who act either out of necessity or, sometimes, for more questionable reasons (such as to make political statements), to occupy the land of others (see,

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for instance, https://ewn.co.za/Topic/Illegal-land-invasions (28-08-2019)). Despite the desperate plight of these persons, and the motivations behind these intrusions, the law cannot (and does not) condone such conduct (s 3 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998). If land occupations are not properly addressed, they hold several dangers. These include undermining the rule of law (s 1(c) of the Constitution of the Republic of South Africa, 1996) through subverting public order (Cramer and Mostert "'Home' and unlawful occupation: the horns of local government's dilemma: *Fischer v Persons Unknown* 2014 3 SA 291 (WCC)" 2013 *Stell LR* 583 584; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) par 45), infringing the right of landowners against arbitrary deprivation of their property (s 25(1) of the constitution), and (perhaps most pertinently) frustrating the state's legitimate efforts to provide housing on a planned basis under section 26(1) of the constitution (*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 92). The question is therefore how best to prevent – and discourage – these occupations.

The answer to this question is twofold, namely which source of law governs such intrusions, and whether the applicable source promotes the positive characteristics the constitution envisions for all law. The common-law defence of counter-spoliation (*contra-spolie*), like the *mandament van spolie*, discourages unlawful self-help by permitting possessors to commit a reasonable measure of lawful self-help to protect their possession of property (see, for instance, Boggenpoel *Property Remedies* (2017) 149-153; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (2006) 306-308 and the sources they cite). Act 19 of 1998 brings the applicability of this defence into question in cases where persons are in the process of unlawfully occupying land to establish a home there. This is because the act expressly excludes the common law when it comes to evicting unlawful occupiers from land they occupy as a home (s 4(1) of Act 19 of 1998, read with s 26(3) of the constitution). Landowners, both private and the state, must follow the relevant procedure in this act to evict such occupiers from land and may no longer merely invoke the common law to obtain an eviction order – whether actual or constructive. It thus has to be determined what the relationship between these two sources of law is.

Several recent cases emphasise a very specific aspect of land occupations, namely where persons are still in the process of occupying land and where their possession has thus not yet stabilised. Stated differently, here the intruders are *still in the process of acquiring physical control of land* but have not yet obtained it. The question is whether Act 19 of 1998 governs such instances or whether owners are free to rely on the defence of counter-spoliation to protect their possession. It is precisely this latter possibility that Scott raises in his case note ("The precarious position of a land owner *vis-à-vis* unlawful occupiers: common-law remedies to the rescue?" 2018 *TSAR* 158) on *Residents of Setjwetla Informal Settlement v Johannesburg City* 2017 2 SA 516 (GJ)). His contribution prompted us to write this response.

Scott argues that the Gauteng local division, Johannesburg, in the *Setjwetla* case erred by not considering that the respondent's demolition of the applicants' informal homes without a court order might have amounted to counter-spoliation, which is a lawful act. For reasons on which we elaborate in more detail below, Scott's reasoning – in terms of the applicable common-law principles governing counter-spoliation – cannot be faulted.

The normative aspect that underlies the question how land intrusions should be prevented entails that the law must provide a speedy and effective mechanism to

owners to protect their land against unlawful occupation. This mechanism links up with the rationale that the law should discourage people from taking the law into their own hands. Scott posits that the defence of counter-spoliation provides adequate protection to property owners, as it allows these owners to effectively prevent land intrusions.

In view of the single-system-of-law principle, the defence of counter-spoliation is arguably not the most appropriate legal source to solve these disputes. We question whether this defence is able to promote the positive systemic objectives under a single legal system by avoiding the negative features the constitution prohibits. Our concern is that allowing landowners to commit even a "reasonable measure" of violence – in accordance with the defence of counter-spoliation – to protect their possession of land from intrusion has the danger of sparking violence in return. This could take the form of land intruders resisting an owner's efforts to oust them, given the dire plight of such persons in most instances, and the volatile nature of land occupations generally. Indeed, people who unlawfully occupied land in Vereeniging recently killed one of the "Red Ants" who was in the process of evicting them (https://citizen.co.za/news/south-africa/crime/2115381/red-ants-member-killed-in-vereeniging-clash-with-illegal-squatters/ (26-07-2019)). Consequently, there is a very real possibility that land intruders may resist an owner trying to remove them in terms of counter-spoliation, to such an extent that injuries (or even fatalities) could occur. Simultaneously, damage could also be caused to the property of both landowners and intruders. It is therefore necessary to reconsider whether counter-spoliation should apply in this context and whether another source of law should not perhaps regulate these instances.

It is necessary to explain the terminology we use in this contribution. We deliberately refrain from using the terms "land invasion" and "land invaders", given the constitutional court's ruling in *Occupiers of Skurweplaas 353 JR v PPC Aggregate Quarries (Pty) Ltd* (2012 4 BCLR 382 (CC)) that such references should be avoided (par 3). Instead, we use the terms "land intruders" and "land incursions". Another reason we use these terms (and not, for instance, "land occupiers") is because the situation we focus on here concerns persons who are still in the process of occupying land and who have not yet settled there. They therefore do not yet have peaceful and undisturbed possession of the sites on the land they are in the process of occupying, which is the very reason landowners may – at least in terms of how the common law currently stands – use the defence of counter-spoliation to eject them. Our argument therefore does not pertain to traditional cases of "squatting" (like *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC), where the occupiers have been on the land for quite some time), tenants who are holding over (*Brisley v Drotsky* 2002 4 SA 1 (SCA); *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) and *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA)) or former mortgagees.

The case note consists of four parts. Part 2 briefly recounts the facts of the *Setjwetla* case, while part 3 discusses Scott's argument regarding counter-spoliation and sets out our view on it. Part 4 analyses counter-spoliation in view of the single-system-of-law principle, specifically the second subsidiarity principle, and argues that Act 19 of 1998 provides a more appropriate remedial framework for addressing land incursions. Part 5 summarises our argument and sets out the conclusion.

2 *Facts and the court's decision*

The facts of the *Setjwetla* case, which was decided on an urgent basis, were disputed. According to the respondent, the City of Johannesburg, the applicants began invading its land on 20 June 2016 when they started constructing informal dwellings on it (par 2). The land was being prepared for a housing development project. On 23 June 2016, the respondent demolished these informal homes, some of which were incomplete, while others were complete (though all were seemingly still unoccupied) with the assistance of a law enforcement agency, which used heavy engineering equipment. This took place without a court order. On that very same day, the applicants obtained a rule *nisi*, coupled with an interim interdict that prevented the respondent from further demolishing their informal homes without a court order (par 2).

The applicants rejected the respondent's version of events and stated that they have been living in their informal homes on the land for some months (par 2). They argued that they occupied completed homes and that the respondent had to evict them in terms of Act 19 of 1998 (par 4).

Van der Linde J had to decide whether it is necessary for the respondent to obtain a court order prior to demolishing the applicants' homes. In other words, was the respondent's demolition of the applicants' informal homes lawful in the absence of a court order permitting it? If the court found that the demolition was unlawful, the interim interdict granted to the applicants would become final.

Van der Linde J assumed that the respondent's version of the facts was correct. He ruled that the respondent's conduct was unlawful, as it amounted to self-help (par 13). According to him, the applicants acquired possession of the sites on which their informal homes stood in the period between 20 and 23 June (par 13). The applicants thus committed unlawful spoliation, which means they first had to restore possession of those sites to the respondent before all else (par 13-14).

The fact that the informal homes (both the completed and incomplete ones) were as yet unoccupied led the judge to rule that the provisions of Act 19 of 1998 are inapplicable (par 14 and Scott 161). The respondent therefore did not have to follow the procedure in this act to evict them from the land. Nevertheless, Van der Linde J decided that the applicants' actions amounted to unlawful spoliation. This is because, on the respondent's version of events, the applicants

> "[probably drove] poles into the ground; perhaps wrapped corrugated-iron sheets around some of those; perhaps fixed roofing material on top of those. That implies further that they actually moved around on the land, at least in the areas of those sites, while they were busy with their construction endeavours. It also implies that their own movable assets were affixed with a measure of permanence, at least to such measure that it could afford effective protection against the elements" (par 15).

Based on these assumptions, for which no evidence was provided, the high court ruled that the applicants obtained possession of the sites on which their informal homes stood, which means they dispossessed the respondent of these sites. As a result, the respondent – in turn – committed unlawful spoliation when it demolished their homes (par 16-17). Not obtaining court sanction to demolish the homes would, according to Van der Linde J, "[encourage] conduct which in our society with its history is reminiscent of a time best forgotten" (par 18). He thus granted the interdict in favour of the applicants by prohibiting the respondent from "demolishing, vandalising and from continuing to destroy" the informal homes of the applicants (par 20).

3 *Counter-spoliation in the land intrusion context*

3.1 Introduction

Scott questions the high court's finding that the mere fact that the respondent committed self-help (through demolishing the applicants' informal homes) means its conduct is unlawful (Scott 167). This is because not all forms of self-help are unlawful, such as with the common-law defence of counter-spoliation (168). He maintains that, according to modern case law, counter-spoliation is still a valid defence and that "there is no reason why it should all of a sudden be viewed as undesirable, for example by being contrary to the 'spirit, purport and objects' of the constitution as envisaged in section 39(2)" (Scott 168).

Scott's analysis necessitates a discussion of the requirements of counter-spoliation, specifically the possession and *instanter* requirements. Like him, we also do not purport to give a detailed analysis of counter-spoliation or its requirements (for a discussion of this defence and references to the relevant sources, see Boggenpoel 149-153; Van der Merwe "Things" XXVII *LAWSA* (2014) par 113 and Badenhorst, Pienaar and Mostert 306-308 and the sources they cite).

The defence of counter-spoliation entails that a counter-spoliator's actions of violently retaking possession from a spoliator, who is still in the process of dispossessing such counter-spoliator, amounts to lawful (as opposed to unlawful) self-help (Boggenpoel 149-150). The law allows legal subjects to protect their possession of property against spoliation by employing a limited and reasonable measure of self-help without recourse to a court of law (Van der Walt and Pienaar *Introduction to the Law of Property* (2016) 235; Van der Merwe par 113 and *Fischer v Ramahlele* 2014 4 SA 614 (SCA) par 23). The requirements for this defence may be summarised as follows: (a) the counter-spoliator must have had peaceful and undisturbed possession of the property; (b) the spoliator committed unlawful spoliation and (c) the counter-spoliator took immediate steps (*ie* acted *instanter* or forthwith) to reclaim possession from the spoliator (see Scott 168-169 and the sources he cites).

3.2 The possession requirement

Scott rejects Van der Linde J's finding that the applicants committed unlawful spoliation, as the limited acts they seemingly performed, all of which are based on assumptions the judge made, which have no basis in evidence, mean they never obtained effective physical control of the sites on which their informal homes stood (Scott 163-164). He points out, correctly, that the law sets a higher threshold when physical control is obtained over property for the first time, as opposed to retaining control, and that the law sets more stringent requirements when physical control is obtained originally (*ie* through appropriation) than through derivative means (*ie* receiving possession through co-operation with the previous possessor) (see Scott 163 and sources he cites).

Scott's contention that the land intruders did not have possession is probably correct. Possession consists of two elements, namely the physical (*corpus*) and mental (*animus*) elements (*Scholtz v Faifer* 1910 TS 243 247; *Nienaber v Stuckey* 1946 AD 1049 1056; De Groot *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 2 2 2; Voet *Commentarius ad Pandectas* 41 2 1, 41 2 10 and Van der Merwe par 70). Both elements must coincide for a person to have possession (the *Scholtz* case 247 and the *Nienaber* case 1056). Whether someone complies with the physical element is an objective investigation that depends on a number of factors. These include

the nature and size of the property (is it movable or immovable?), the purpose of the property (what is it used for?), and whether physical control is being acquired unilaterally or through derivative means (Van der Merwe par 76-78; Badenhorst, Pienaar and Mostert 276-279). The aim of this investigation is to establish who has the strongest physical relation with a thing, as that person satisfies the *corpus* element (Van der Merwe par 75). In other words, who has effective and exclusive control over a thing?

Generally, the law attaches consequences to instances only where possession is present and not when someone is still in the process of acquiring possession. The consequences of possession include acquiring ownership (or a limited real right in movable property) under the real function of possession and protecting possession under the legal political function, namely in terms of the *mandament van spolie* (Van der Walt "Die funksies en omskrywing van besit" 1988 *THRHR* 276 283-286; Van der Merwe par 72). In no property-law context, other than counter-spoliation, does the law seem to attach relevance to when someone is in the process of wresting physical control of a thing away from a person who already possesses it. This "wrester" does not acquire any right in the property and also cannot rely on the spoliation remedy, as he does not yet have peaceful and undisturbed possession.

One of the difficult questions in eviction law, one which is yet unresolved in courts and amongst scholars, is at what point in time a land intruder becomes an "unlawful occupier" under Act 19 of 1998 (see, for instance, *Marlboro Crisis Committee v City of Johannesburg* (29978/12) 2012 ZAGPJHC 187 (7 Sept 2012); *Fischer v Persons Unknown* 2014 3 SA 291 (WCC); *Denel SOC Limited v Persons whose Identities are to the Applicants Unknown and who have Attempted or are Threatening to Unlawfully Occupy ERF 52676, Khayelitsha* (6084/15, 6143/15) 2015 ZAWCHC 97 (24 June 2015); the *Setjwetla* case; Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* (2011 thesis Stell) 105-106 and Bilchitz and Mackintosh "PIE in the sky: where is the constitutional framework in high court eviction proceedings? *Marlboro Crisis Committee v City of Johannesburg*" 2014 *SALJ* 521). This is an important matter, as it has implications for which source of law (*ie* which remedy) governs the dispute at hand.

Act 19 of 1998 applies only to instances of unlawful *occupation* of land. It defines "unlawful occupier" as "a person who occupies the land without the express or tacit consent of the owner or person in charge" (see further Pienaar "'Unlawful occupier' in perspective: history, legislation and case law" in Mostert and De Waal *Essays in Honour of CG van der Merwe* (2011) 309). It is easy to see that someone who has constructed an informal dwelling on land and has been living there, without interference, for some time, say a month (or even only for a week, *cf* Cramer and Mostert 599 n 109), would be in unlawful occupation. This is because such an occupier clearly complies with both the *corpus* and *animus* elements of possession. Yet, what about someone who began constructing an informal shelter on land and has been on the land for only several hours, or perhaps even overnight? This is what happened in the *Fischer* case *a quo* and the *Denel* case. The facts of these cases are comparable to those in the *Setjwetla* case and reveal the difficulties of determining when a "land intruder" becomes an "unlawful occupier".

In the *Fischer a quo* case, the applicant's land was subject to frequent incursions by land intruders. The applicant's large, unfenced property appears to have been highly sought after by landless persons, given its close proximity to the industrial hub of the Cape Flats and the privacy that the overgrown vegetation provided. The dispute centred on the demolition of around 47 informal dwellings by the City of Cape Town's Anti-Land Invasion Unit. At 15:00 on 7 January 2014, officials of the

unit observed several vehicles in the street near the applicant's land. Persons were off-loading large quantities of building material from these vehicles. These persons simultaneously began constructing informal structures on the land. These seem to have consisted of wood and corrugated iron sheets. The unit began demolishing the informal dwellings at about 18:00 that day and took down about 32 structures. However, the unit did not succeed in taking all of them down on that day. When the officials of the unit withdrew from the area at around 19:00 there were between 20 and 30 structures left on the land. The unit returned the next morning at around 09:00 and discovered that a further 15 structures had been erected on the land overnight. It took immediate steps to demolish some of them. The unit withdrew from the property at around 10:30 that day and since then there seems to have been no further incursions onto the land.

On 10 February 2014, the applicant instituted proceedings to obtain a broad-ranging interim interdict from the Western Cape division of the high court, Cape Town, aimed at preventing any further intrusion of the property with the purpose of erecting residential structures (par 13). The respondents countered by seeking a declaration that the unit's demolition of their informal shelters was unlawful; an interdict preventing the unit from demolishing any further informal structures, destroying any building material, or evicting the respondents without a court order and directing the City of Cape Town to provide "temporary habitable dwellings that afford shelter, privacy, and amenities" to the respondents that are at least equivalent to those demolished by the unit (par 15). The affidavits of the applicant and the respondents revealed a material dispute of fact as to whether the informal structures the unit demolished were unoccupied and vacant (par 16). Put differently, the court had to grapple with the novel problem of whether the informal structures constituted the homes of the respondents and, by extension, whether it attracted the protection of section 26(3) of the constitution and, thus, Act 19 of 1998.

Gamble J held that the fundamental principle of Act 19 of 1998, and section 26(3) of the constitution, is "to afford a right to due process to the most marginalised members of society before being evicted from another's land" (par 82). In his view, a contextual interpretation should be afforded to the word "home" in section 26(3). He held that when people with limited resources managed "to scrape together enough money to buy the basic materials (wood, iron and plastic sheeting) to erect the most basic of structures in which they wish to live peacefully, [they] would undoubtedly call those structures 'home'" (par 91). Hence, he decided that it is irrelevant how long the intruders have been on the land or whether there are factors which indicate that the act of occupation is still incomplete (par 82). In his view, if a structure is complete, occupation occurred and the provisions of Act 19 of 1998 apply (par 82). He also suggests that land intruders "effectively occupy the land upon which an informal structure is erected (regardless of its state of completion) by virtue of the fact that the structure is located thereon" (par 79, citing the minority judgment of Olivier JA in the *Ndlovu* case par 41 with approval). According to Gamble J, it is not so much the period of occupation of the land that renders Act 19 of 1998 applicable but rather the intention behind it (par 94). He explained this finding as follows: "[t]he fact that the structure had reached the stage of its completion indicates an intention on the part of the builder thereof to take up residency therein" (par 78). The short duration the dwellings were present on the land therefore did not prevent these structures from qualifying as "homes" (par 96). Consequently, he ruled that the unit's conduct was unlawful and unconstitutional and restrained the city from demolishing any other dwellings, while ordering it to re-erect their demolished dwellings. Though the court did not make it clear in terms of which source of law

it awarded this remedy, it seems to have been based on the constitutional remedy crafted in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* (2007 6 SA 511 (SCA)) (Cramer and Mostert 589, 592).

On appeal, the supreme court of appeal set aside Gamble J's decision for reasons which are irrelevant for present purposes. What is interesting about that decision, however, is that Theron and Wallis JJA (for a unanimous court) rejected Gamble J's finding that the mere existence of a structure, and the intention of the builder to occupy it, is sufficient for the respondents to qualify for protection under Act 19 of 1998 (the *Fischer* SCA case par 22). The court confirmed that actual physical occupation (or control) of land is one of the elements of possession (par 22), which seems to imply that it is a requirement to enjoy protection under Act 19 of 1998.

In the *Denel* case, the respondents began occupying the applicant's land on 6 April 2012 and began constructing informal dwellings on it. The land, which is fenced off, is adjacent to an established informal settlement in Khayelitsha. The applicant, which employed a private security company to patrol the land and to guard it against occupation, immediately resisted the intrusion by obtaining an urgent interdict. Officials from the security company informed the intruders on 7 April that they are there unlawfully and must vacate the land. The applicant immediately sought a court order interdicting and restraining the intruders from "entering upon or commencing to occupy the property and from commencing to erect or occupy any structure on the property" (par 5). The interim interdict was granted as a rule *nisi* on the evening of 7 April.

On the morning of 8 April, the sheriff and law enforcement officials from the City of Cape Town arrived at the land to read out the interdict and warned the intruders if they did not willingly vacate the land, they would dismantle the informal homes and physically remove the intruders from the land in terms of the interdict. This is indeed what happened, as the intruders refused to comply with the interdict. There were approximately 10 to 15 people on the land, with about 40 informal dwellings at various stages of completion. It seems that about 10 were near completion, if not completed, while 30 were still incomplete. None of the dwellings were as yet occupied, in terms of the intruders either living there or any furniture or personal belongings being in the dwellings (par 28). Relying on the *Fischer* SCA case, and with reference to *Mbangi v Dobsonville City Council* 1991 2 SA 330 (W), Manca AJ held that the limited acts of the intruders did not result in them wresting possession away from the applicant (par 32-42). They therefore did not have peaceful and undisturbed possession of the land, as the *mandament van spolie* requires. Manca AJ rejected the argument by land intruders that their ejectment from the applicant's land by the sheriff and law enforcement officials of the City of Cape Town amounted to unlawful spoliation. Consequently, they also did not have unlawful occupation as required by Act 19 of 1998, which means this act was inapplicable (par 32-42). He thus confirmed the interdict, which prevented the intruders from re-occupying the land and erecting structures on it.

These cases illustrate the difficulty of determining when land intruders are to be regarded as "unlawful occupiers" under Act 19 of 1998, or as having "homes" for purposes of section 26(3) of the constitution. The high court in the *Setjwetla* case was also unclear on this, as it ruled that the possession of the applicants was insufficient for them to enjoy protection under Act 19 of 1998, yet it was sufficient to constitute unlawful spoliation, which means they succeeded in wresting possession away from the respondent. As such, they committed unlawful spoliation and the respondent, according to Van der Linde J, first had to reclaim possession of the land through the spoliation remedy.

It is hard to see how the actions of the applicants were at the same time insufficient for them to qualify as unlawful occupiers under Act 19 of 1998, but simultaneously constituted unlawful spoliation. There are not two forms of possession in South African property law, one relevant to Act 19 of 1998 and one relevant to spoliation. Though Act 19 of 1998 uses the term "occupation", it probably has the same meaning as "possession" in private law for purposes of the spoliation remedy (*ie* peaceful and undisturbed physical control with the intention to benefit from such control) (the *Fischer* SCA case par 22-23; on the requirements of the *mandament van spolie* generally, see Boggenpoel 91-175; Badenhorst, Pienaar and Mostert 287-308 and Van der Merwe par 92-116 and the sources they cite). If the actions of the intruders were insufficient to comply with the definition of "unlawful occupier" in Act 19 of 1998, it automatically means they did not have exclusive physical control of the land, which means they did not dispossess the applicant and, hence, the defence of counter-spoliation could then be used.

The question remains: at what point in time does a land intruder become an unlawful occupier? This is the pertinent question, as Act 19 of 1998 – though giving effect to section 26(3) – does not use the term "home" as the threshold requirement to enjoy the act's protection. It uses the term "unlawful occupier" instead. In view of Act 19 of 1998's definition of "unlawful occupier", it does not seem to include persons engaging in "land incursions" (*ie* by those persons who are still in the process of obtaining possession). It may be helpful to consider the timeline of intrusion at three intervals. Stage one concerns instances where persons enter land without the landowner's permission with the aim of settling on it. Here they are yet to begin constructing dwellings. The second stage is when these persons are in the process of constructing dwellings but are still coming and going from the land (*ie* do not yet live on the land) and their dwellings are still incomplete. The facts of the *Fischer* (SCA)*, Denel* and *Setjwetla* cases correspond with this phase. The third is when they have homes on the land (*ie* when they start living on it), irrespective of the fact that their dwellings may still be incomplete. This phase is characteristic of the *PE Municipality* and *Blue Moonlight* cases.

It seems that land intruders become unlawful occupiers (*ie* have possession) only during the third stage. There are two reasons for this. The first is the possession concept. As Act 19 of 1998 does not define "unlawful occupier" other than stating (somewhat circularly) that it means a person who "occupies land without the express or tacit consent of the owner or person in charge", resort must be had to the possession concept in private property law. For reasons discussed above, it is hard to see how persons who have started constructing dwellings, and have been on land for mere hours (or overnight), could have wrested possession away from the landowner, thereby satisfying the physical element of possession. This also applies to persons in the second phase.

Second, it is useful to consider what the Prevention of Illegal Squatting Act 52 of 1951 considered to be "unlawful occupation". Though the act contains no definition for "unlawful occupation", it states (in s 1(a)) that no person shall *enter upon* or *remain on* any land or building without the permission of the owner or lawful occupier of such land. The act thus aimed to prevent both land incursions (as happened in the *Setjwetla* case) and land occupations proper (as occurred in the *PE Municipality* case). This stands in contrast to Act 19 of 1998's definition of "unlawful occupier". The fact that Act 19 of 1998, unlike Act 52 of 1951, does not refer to the *entering* of land, coupled with the present tense in which "occupier" is framed (the *Ndlovu* case par 5), suggests that "occupy" in Act 19 of 1998 does not refer to instances where an intruder is still in the process of obtaining possession.

Indeed, the verb *occupying*, which is the present continuous tense of "occupy", is not used in Act 19 of 1998 (see *contra* Olivier JA's minority ruling in the *Ndlovu* case and Gamble J in the *Fisher a quo* case). For these reasons, the respondent in the *Setjwetla* case probably retained possession and complied with this requirement for the defence of counter-spoliation.

If this is how "unlawful occupier" under Act 19 of 1998 should be understood, Act 19 of 1998 may potentially be constitutionally invalid for not giving proper effect to section 26(3) of the constitution. This provision uses the term "home", which may potentially be wider than the possession concept in private property law. Gamble J raises this suggestion in the *Fischer a quo* case, and Bilchitz and Mackintosh (529-532) as well (see *contra* the *Fischer* SCA case; the *Denel* case and Cramer and Mostert 599 ff). The answer to this matter must wait for another day, though, as we think there are reasons outside section 26(3) (upon which we expand below) why Act 19 of 1998 should (and perhaps already does) cover land intrusions.

3.3 The *instanter* requirement

Closely related to the possession requirement of counter-spoliation is the *instanter* requirement. There is disagreement as to the precise content of this requirement, in terms of both case law and academic commentary (see, for instance, the sources Scott cites at 169). Case law follows two interpretations (Mostert and Pope (eds) *The Principles of the Law of Property in South Africa* (2010) 82). The narrow interpretation entails that only a very short period may elapse between the original spoliation deed and the act of counter-spoliation (see, for instance, *Mans v Loxton Municipality* (1948 1 SA 966 (C) 977), where a few hours elapsed between the original dispossession of a flock of sheep and the act of counter-spoliation – the defence of counter-spoliation was unsuccessful), while under the broader interpretation a period of up to eleven days is acceptable. In *De Beer v Firs Investments Ltd* (1980 3 SA 1087 (W)), the applicant obtained possession of the respondent's shop, without his permission, by installing new locks, and a few hours later the respondent removed the locks and replaced them with his own. Here the defence of counter-spoliation succeeded. In *Ness v Greef* (1985 4 SA 641 (C)), on facts largely similar to those of the *De Beer* case, counter-spoliation occurred nearly eleven days after the initial dispossession. Here the defence of counter-spoliation also succeeded.

Instead of focusing only on the temporal element, it is helpful to investigate whether there is compliance with the *instanter* requirement from another perspective, namely whether the original spoliator has become "ensconced" in his possession or, stated differently, whether possession has stabilised (Van der Merwe par 113). Whether someone acted *instanter* therefore perhaps depends more on the possession concept than on the duration between the original deed of spoliation and the act of counter-spoliation.

Despite the contested meaning of the *instanter* requirement, Scott – with reference to several well-put factors – persuasively argues that there was compliance with this requirement (as well as the others) in the *Setjwetla* case (Scott 170-171). These include the fact that the respondent began demolishing the informal homes between 70 and 73 hours after the applicants began erecting them (which amounts to swift action, considering the fact that the owner is a local authority and not a private party), that it is a state department which owns multiple plots of land, that it would have been another state branch, like the metro police department, which would have discovered the unlawful intrusion of the land and had to inform the respondent, which would then have to act accordingly (Scott 170-171).

Scott questions whether a court should consider the reasonableness of the counter-spoliator's actions to regain possession, given that this remedy, like the *mandament van spolie*, does not consider the merits of a case (Scott 171-172, citing Kleyn *Die Mandament van Spolie in die Suid-Afrikaanse Reg* (1986 thesis UP) 421 and Van der Walt *Die Ontwikkeling van Houerskap* (1985 thesis Potchefstroom) 703). He questions Van der Linde J's investigation of the method the respondent used to demolish the informal homes (*ie* with heavy engineering equipment). In his view, this pertains to the merits and may not have been considered at all.

Yet, counter-spoliators do not enjoy absolute freedom when it comes to the kind of violence they may lawfully resort to in an effort to regain possession. Counter-spoliation must be proportional to the original act of spoliation, both in terms of intensity and scope (Van der Merwe par 113). In *Bosman NO v Tworeck* (2000 3 SA 590 (C)), for instance, the court ruled that counter-spoliation, in the form of removing a lock used to close a gate leading to a farm road, might be justified, but that removing the whole gate would be disproportionate. Following this line of argument, the respondent's actions in the *Setjwetla* case might have been proportional to the original act of spoliation. If so, the defence of counter-spoliation might have succeeded (if it was used) in the *Fischer a quo* and *Denel* cases as well.

The requirement that local authorities (and perhaps even private landowners?) must first obtain a court order before committing counter-spoliation is foreign to this defence and constitutes a major qualification, one not supported in law (Scott 167; see also Boggenpoel 149-150). If local authorities are required in future to first obtain a court order before they may validity commit counter-spoliation, it could be counter-intuitive, as the possession of intruders might have stabilised by then, which means Act 19 of 1998 (which requires a court order to effect an eviction) would have kicked in (Scott 175, but see *contra* the *Denel* case, where the applicant was granted an urgent prohibitive interdict before the intruders managed to obtain possession of the land). If this were to happen, the victims would be those who stand to benefit from the housing initiative planned on the land, which will be delayed while the local authority follows the process of evicting the occupiers under Act 19 of 1998 (Scott 175). Requiring one to obtain a court order first might inadvertently encourage land incursions, especially if the state is the landowner, as the state usually has to provide alternative accommodation to unlawful occupiers before a court will grant it an eviction order (Muller "Considering alternative accommodation and the rights and needs of vulnerable people" 2014 *SAJHR* 41).

Landowners must have an effective remedy at their disposal to vindicate their constitutional rights (*Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) par 69). These rights include the right against arbitrary deprivation of property (s 25(1) of the constitution) and the state's legitimate efforts to realise the right to have access to adequate housing (s 26(1) of the constitution) for all, both of which are undermined if land intrusions are not effectively prevented. The defence of counter-spoliation is one remedy to prevent such incursions. However, this remedy must be considered in the proper historical and legal context surrounding evictions (Muller "The legal-historical context of forced evictions in South Africa" 2013 *Fundamina* 367), which Sachs J refers to as a "constitutional matrix" in the *PE Municipality* case (par 14). This context is one with a past where evictions were characterised by a complete disregard for the fact that evictees may be rendered homeless, that their property may be destroyed during eviction, and the fact that evictions could be undertaken in terms of self-help without a court order (Muller (2011) 99-100). This led to extreme suffering and injustice and explains the volatile nature of land intrusions today. It is therefore necessary to reconsider – in terms of the single-

system-of-law principle – whether legal subjects (both private individuals and organs of state) should be allowed to employ extra-judicial self-help, in the form of the defence of counter-spoliation, to protect their property against land intrusions.

4 *Preventing land intrusions under one system of law*

4.1 The single-system-of-law principle

In *Pharmaceutical Manufacturers Association of SA: in re Ex parte President of the Republic of South Africa* (2000 2 SA 674 (CC)), Chaskalson P held that "all law … derives its force from the Constitution and is subject to constitutional control" (par 44). According to this single-system-of-law principle, the constitution indicates which source of law should be used when more than one source applies to a given dispute (Van der Walt *Property and Constitution* (2012) 24 ff). To assist courts and litigants in choosing which legal source to apply, the constitutional court developed a set of subsidiarity principles.

The subsidiarity principles are discussed at length elsewhere (Van der Walt "Normative pluralism and anarchy: reflections on the 2007 term" 2008 *CCR* 77; Van der Walt (2012) 35-91), which makes it unnecessary to have a detailed discussion of them here. Suffice it to say that they require all sources of law to display the positive characteristics the constitution envisions for the whole legal system (Van der Walt (2012) 29-30). Examples of these objectives (specifically in the land intrusion context) include (i) the prevention of arbitrary deprivation of property (s 25(1) of the constitution), (ii) protecting the freedom and security of each person by ensuring freedom from violence from both public or private sources (s 12(1)(*c*) of the constitution), (iii) preventing arbitrary eviction from one's home (s 26(3), in as far as it may be applicable (given that it may be unclear whether the intruders already have "homes" on the land)), (iv) protecting each person's inherent human dignity (s 10 of the constitution), (v) upholding the rule of law (s 1(c) of the constitution), and (vi) establishing a society based on social justice (the preamble of the constitution). Achieving these desired features may require that existing legislation (especially pre-1994 legislation) be amended, that the common law and customary law be developed, and – where necessary – that new legislation be promulgated to give effect to constitutional rights (Van der Walt (2012) 31 ff).

The subsidiarity principles guide the choice of law by ensuring that all legal sources work together in unison, in a systemic fashion (Van der Sijde *Reconsidering the Relationship Between Property and Regulation: A Systemic Constitutional Approach* (2015 thesis Stell) 271-274), to realise the positive objectives. The advantage of such a methodology is that it promotes the transformative and constitutional features mentioned, which consequences may be frustrated if the source of law applicable to a dispute is arbitrarily selected (Van der Walt (2012) 105 ff). Such a choice may also undermine constitutionally enacted legislation (Van der Walt (2012) 91 ff, 102-104). The transformative and democratic nature of such statutes means they warrant serious consideration in disputes which concern the fundamental rights they give effect to (Van der Walt (2012) 91-92). These pieces of legislation may not be sidestepped or ignored merely because of more conventional (or comfortable) ways of resolving disputes under the common law (see Michelman "Expropriation, eviction, and the gravity of the common law" 2013 *Stell LR* 245; see also Boggenpoel "Can the journey affect the destination? A single system of law approach to property remedies" 2016 *SAJHR* 71 and Boggenpoel "Does method

really matter? Reconsidering the role of common-law remedies in the eviction paradigm" 2014 *Stell LR* 72).

The legal sources which govern land intrusions, and the remedies they provide, must be accurately identified to determine which subsidiarity principle applies. The sources, and their remedies, include the following: the common-law defence of counter-spoliation (Scott's argument); requiring a local authority to obtain a court order (though it is uncertain which source of law requires such an order (Scott 167)) before demolishing incomplete dwellings of intruders who are not yet "unlawful occupiers" under Act 19 of 1998 (the *Setjwetla* case); granting a landowner (in the form of a state-owned enterprise) an urgent interdict, under the common law, in terms of which the sheriff and law enforcement officials may eject intruders from its land and dismantle their incomplete dwellings (the *Denel* case) and using Act 19 of 1998 to regulate land intrusions by requiring landowners to obtain an order of court to evict land intruders. Additional remedial avenues, all of which originate from the constitution, are the following: developing the defence of counter-spoliation by excluding its operation in the context of land incursions (see Bilchitz and Mackintosh 529-530 for a suggestion to this effect); developing the possession concept, so that persons who are still in the process of occupying land have "possession" and are therefore "unlawful occupiers", which means they fall within the protective scope of Act 19 of 1998 (in terms of which eviction cannot take place without a court order) and crafting (or applying) a constitutional remedy, in terms of section 38 of the constitution, to vindicate the fundamental rights at hand (see the *Tswelopele* case; Cramer and Mostert 589 ff think the *Fischer a quo* court awarded a remedy of this nature).

These different remedial possibilities show why it is necessary to "[think] about a legal doctrine for remedies from a systemic point of view" (Boggenpoel 2016 *SAJHR* 73), as the choice of which remedy to apply (*ie* which source of law to use) has implications for whether the positive characteristics the constitution requires are realised (Boggenpoel 2016 *SAJHR* 73, 80-84). Here the subsidiarity principles are helpful, as they provide a methodology, or "angle of approach", when it comes to deciding which remedy (or source of law) to apply to a dispute (see Van der Walt (2012) 105 ff).

Consequently, various legal sources (in the form of the constitution, legislation, and the common law) potentially apply to land intrusions. Assuming, as we do, that Act 19 of 1998 (which is partial property legislation (Van der Walt (2012) 49 ff) enacted to give effect to sections 25(1) and 26(3) of the constitution) does not extend to land intruders, the common law – as the residual source of law – applies. The second subsidiarity principle is therefore at play. This principle states that when a litigant claims a fundamental right has been infringed, he must rely on legislation enacted to give effect to that right and may not directly rely on the common law to protect that right (Van der Walt (2012) 103-105). The proviso to this principle entails that a litigant may directly rely on the common law if the legislation does not replace the common law in that specific context (Van der Walt (2012) 115-116). This would be permitted in only two instances, namely where (i) the common law does not conflict with the fundamental right at hand, or with the legislative scheme that gives effect to that right, or (ii) in case such a conflict exists, the common law can be developed to comply with the fundamental right or the legislative scheme (Van der Walt (2012) 36 ff and 115-116).

Scott thinks the defence of counter-spoliation is in line with the spirit, purport and objects of the bill of rights and that it is therefore an appropriate remedy to prevent land incursions (Scott 168). This argument, which defers to the common

law without any further elaboration, is an example of what Michelman calls the "gravitational pull" of the common law (2013 *Stell LR* 246 ff). It entails the assumption that the common law provides the ideal or "best" solution to a dispute, even though it might undermine (or even conflict with) other constitutional rights and values. The danger of not resisting this "gravitational pull" is that the common law, as the selected source of law, might promote negative systemic features in a given case. Indeed, allowing landowners to invoke the defence of counter-spoliation in the land intrusion setting is likely to realise the several undesirable characteristics. These include the arbitrary deprivation of property (which could occur if an owner does not have an effective remedy to prevent land intrusions, and, conversely, if a landowner – through employing lawful self-help – destroys the materials of which the informal homes of the intruders consist and, perhaps, their personal belongings); infringing the freedom and security of landowners and intruders, should uncontrollable violence break out when a landowner ejects them through employing "reasonable violence"; undermining the intruders' right not to be arbitrarily evicted from their homes (in as far as they may already have homes on the land) and the right of intruders to dignified treatment, even if they knowingly intrude on land that does not belong to them (see *S v Makwanyane* 1995 3 SA 391 (CC) par 88, where Chaskalson P held that "[i]t is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected").

Furthermore, the rule of law requires that intrusions be prevented without infringing the rights of both landowners and intruders, which is arguably not the case if landowners may commit lawful self-help without an order of court when preventing such incursions. Nonetheless, the fact that land incursions have the "capacity to be socially inflammatory" and may pose "serious implications for stability and public peace" (the *Modderklip* case par 45) means that the rule of law requires that such occupations be prevented in an effective, though human rights-oriented, manner. If the law does not discourage land intrusions, which amount to unlawful self-help, such incursions will frustrate the state's legitimate efforts to provide housing to law-abiding citizens on a planned basis under section 26(1) of the constitution. This could create an incentive among landless persons to intrude upon land in the hope that they will be afforded alternative (or temporary) accommodation by doing so, which would pose a serious threat to law and order.

Finally, social justice is also frustrated if owners are allowed to rely on counter-spoliation, as permitting them to commit even a reasonable measure of violence in protecting their possession over land is not only reminiscent of how evictions occurred under Act 52 of 1951 (which allowed municipalities and landowners to demolish informal homes on their land without a court order, see s 3B of the act; Muller 2013 *Fundamina* 389-392 and Boggenpoel and Pienaar "The continued relevance of the *mandament van spolie*: recent developments relating to dispossession and eviction" 2013 *De Jure* 998 1012), it could also repeat the injustices and suffering which occurred in this setting during apartheid. The fact that the constitution and Act 19 of 1998 replaced the contravention-paradigm under Act 52 of 1951 with a human-rights paradigm underscores this point (Pienaar *Land Reform* (2016) 668). It must be emphasised, though, that social justice also requires that the law adequately protect owners against land intruders, as not doing so would indirectly sanction unlawful self-help in the form of intruders occupying another person's land without his permission.

Hence, the question arises how best to reconcile the opposing interests at hand. This could be done by developing the common law to avoid this conflict. Another

option might be to have another common-law remedy, namely the urgent interdict, operate in this context, as was seen in the *Denel* case. Creating (or applying) a constitutional remedy, as arguably happened in the *Fischer a quo* case, is also a possibility. In our view, a systemic approach towards the law, as a single legal system, reveals that Act 19 of 1998 is the most appropriate source to address land intrusions.

Act 19 of 1998 provides a specialised regulatory framework that reconciles the different competing fundamental rights at hand. It was enacted *inter alia* to give effect to sections 25(1) and 26(3) of the constitution in a very specific context, namely, to deal with all forms of unlawful occupation of land, including land incursions (Muller (2011) 106). However, section 26(3) is implicated only if someone has a home. As mentioned earlier, it is difficult to see how persons in phase one and two of a land incursion could have a home, as they are still coming and going from the land and are not living there yet. Nonetheless, we argue that it is preferable to have Act 19 of 1998 apply even in such instances, given its secondary goal of "preventing unlawful occupation of land" and its aim of protecting the human dignity of all persons in the land occupation context.

Act 19 of 1998 indirectly gives effect to section 12(1)(*c*) of the constitution, given the procedural and substantive safeguards it puts in place as regards how evictions must occur, by criminalising any evictions in the absence of a court order (s 8(1) of Act 19 of 1998). The act seems to offer adequate protection to landowners, upon which we expand in the next section below, which obviates the necessity of developing the common law, using an urgent interdict (as was done in the *Denel* case) or relying on a constitutional remedy. The fact that Act 19 of 1998 may govern land intrusions shows why courts should not grant an interdict in this context, as an interdict is a discretionary remedy that may be awarded only if the claimant has no other effective remedy available to protect his interest (see Boggenpoel (2017) 247-248 and the sources she cites). In our view, Act 19 of 1998 provides effective relief to both landowners and land intruders.

Yet, our argument holds only if (i) Act 19 of 1998 applies (or can be made to apply) to land intrusions, and (ii) Act 19 of 1998 provides an *effective* remedy to both private and public landowners to prevent land incursions. As regards the first matter, Act 19 of 1998 will apply to land intruders only if they qualify as "unlawful occupiers". This may be achieved in various ways. First, the possession concept, which is part of private property law, may be developed so that persons who are in the process of wresting possession away from a landowner already have "possession", which will make them "unlawful occupiers" under Act 19 of 1998. Such a development finds support in Olivier JA's minority judgment in the *Ndlovu* case (par 41). However, it may have unforeseen implications for other parts of private property law (and perhaps private law generally). For instance, would such a development be relevant only to the land intrusion context, or will it have wider operation? If the latter, how is the defence of counter-spoliation, with its requirements of "peaceful and undisturbed possession", to operate in future, specifically as regards movables? Though an investigation of this matter falls outside this case note, it is worth emphasising that developing the common law must be done holistically and with proper reflection for both constitutional law and private law. One should carefully reflect whether to opt for this route if constitutionally-inspired legislation, like Act 19 of 1998, already exists and provides (or could be made to provide) an effective remedy, especially if such an act can be made applicable to a dispute. Boggenpoel's view, namely that one is precluded from either relying on the common law or crafting a constitutional remedy if constitutionally-inspired legislation clearly applies to a

dispute (Boggenpoel 2016 *SAJHR* 83 ff), supports our argument in as far as Act 19 of 1998 can be made applicable to land incursions.

We should not be understood as arguing against development of the common law or being in favour of insulating it from constitutional influence. We merely state that developing the common law becomes more pressing if there is no constitutionally enacted legislation at hand. If constitutionally-inspired legislation replaces the common law in a certain legal field, the development of the common law still occurs, albeit indirectly. Here the constitutional legislation, namely Act 19 of 1998 in the present context, narrows the common law's field of application by excluding its operation in the land incursion setting, thereby prohibiting landowners from relying on it to find a cause of action. In the process, the common law is brought in line with the constitution by preventing it from realising negative features the constitution seeks to avoid, which characteristics would probably be promoted if landowners could rely on this legal source.

In view of the above considerations, it is preferable to read words into the definition of "unlawful occupier" in Act 19 of 1998 (as s 172(1)(*b*) of the constitution permits), so that it reads as follows: "'unlawful occupier' means a person who occupies [or who is in the process of occupying] land". Alternatively, parliament could amend the act so as to expressly bring land intruders within its operational scope, as was the case with Act 52 of 1951. In the next section below, we expand on how Act 19 of 1998 could prevent land incursions in a manner that effectively vindicates the interests of both landowners and intruders, thereby giving effect to the (much-neglected) preventative goal of this act.

4.2 Urgent evictions to prevent land intrusions

Section 5(1) of Act 19 of 1998 creates an exception to the normal procedure private owners must follow to evict unlawful occupiers in terms of section 4 of the act by allowing such owners to obtain an eviction order on an urgent basis. Section 4 of Act 19 of 1998 affords significant procedural protection and substantive safeguards to such occupiers (see, for instance, the *PE Municipality* case par 12; Van der Walt *Property in the Margins* (2009) 149 ff). One of the factors courts must consider when deciding whether it is just and equitable to grant an eviction order under section 4 of Act 19 of 1998 is whether alternative accommodation can reasonably be made available to the unlawful occupiers by a municipality, an organ of state or another landowner (*Lingwood v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 3 BCLR 325 (W) par 18; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) par 313). Although the availability of alternative accommodation is not an absolute requirement for obtaining an eviction order, in the *PE Municipality* case Sachs J held that courts "should be reluctant to grant an eviction against relatively settled occupiers unless [courts are] satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme" (par 28). The pertinent question that arises is what role the (non-)availability alternative accommodation plays when evicting unlawful intruders from land.

Section 5(1) of Act 19 of 1998 affords a private owner the power to institute urgent eviction proceedings against unlawful occupiers and empowers a court to grant that order if it is satisfied that:

> "(a) there is a real and imminent danger of substantial injury or damage to any person or property if the unlawful occupier is not forthwith evicted from the land; (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the

unlawful occupier against whom the order is sought, if an order for eviction is granted; and (c) there is no other effective remedy available."

In *Groengras Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* (2002 1 SA 125 (T)) the applicants instituted urgent eviction proceedings in the former Transvaal provincial division of the supreme court (now the South Gauteng high court, Johannesburg) for the eviction of the first respondents, who co-ordinated a large-scale land intrusion of the first applicant's farm just north of Benoni. The first respondents intruded upon a piece of the farm over which both Transnet and Eskom, which were applicants in the case, had praedial servitudes (to access the railway reserve and railway line with a service road, to run a fuel pipeline, and to run high-voltage electrical power lines over the land). The first respondents, who used the service road to transport their belongings and building materials to the farm, removed the fence next to the railway line and started erecting informal homes on top of the fuel line and directly under the high-voltage electrical cables.

Rabie J found that the part of the farm on which the first respondents settled was unfit for human habitation, since it had no infrastructure, running water, sanitary facilities or facilities for garbage and waste disposal (140H). He explained that there was a high probability that disease would break out under these living conditions and that the resulting risk of contamination would have widespread effects for those living downstream along the way to the Rietvlei Dam (140H-I). The constant influx of people onto the farm posed a very real threat for the business and personal interests of the tenant (to whom the first applicant leased the farm), as the unlawful occupiers were on the verge of moving onto the arable land of the property (141A). He noted that the first respondents ran the risk of either igniting the highly flammable fuel in the pipeline, by creating a spark, or of contaminating the groundwater on the farm by damaging the pipeline in the process of digging trenches. This posed a very real and imminent threat to their health and safety (141B-C). The first respondents erected their informal homes on a part of that farm that was dangerously near the high-voltage cables, which put them directly at risk of being electrocuted, as the informal homes could serve as conductors (141E-F). Rabie J accepted that it was in the interests of justice and of the public to uphold the rule of law by firmly condemning any land occupations (142C). He accordingly found that the applicants satisfied all the requirements of section 5(1) of Act 19 of 1998 and that they were entitled to an urgent eviction order (142G). He issued an interim order (145C) that evicted the first respondents from the farm; directed them to vacate the farm within 48 hours of the order and instructed the sheriff to execute the eviction order if the first respondents failed to vacate the farm as directed. The first respondents did not vacate the farm, as ordered, and the sheriff executed the eviction order with the assistance of the South African Police Service eight days after the urgent eviction proceedings were instituted.

The fact that this case was brought as an urgent eviction in terms of section 5 of Act 19 of 1998 allowed Rabie J to focus on pertinent factors the facts gave rise to, namely the health and safety of the occupiers, the business interests of the landowner, and upholding the rule of law by effectively preventing unlawful occupations. As such, he could emphasise, like the constitutional court in the *Modderklip* case, that the obligations of government to provide access to adequate housing cannot be shifted onto the shoulders of a private landowner (137H). This case is unique not only as a result of the conjuncture of truly life-threatening circumstances and the threat land incursions pose to the rule of law, but also because it is the only reported case to date that has been decided exclusively in terms of section 5(1) of Act 19 of

1998. This confirms the exceptional nature of urgent evictions in section 5 and the limited instances to which this provision would apply.

In our view, the wording of section 5(1) of Act 19 of 1998 is sufficiently flexible to accommodate the dynamic factual nature of unlawful intrusions of land. It is clear from the *Fischer a quo* and *Setjwetla* cases that land incursions are usually met with extra-judicial self-help from landowners, private security companies (see s 4(11) of Act 19 of 1998) and/or enforcement agencies of the state (see s 205(3) of the constitution) in an effort to resist the incursion and effect a *de facto* eviction without an order of court. However, the *Modderklip* case, where the unlawful occupiers confronted both the sheriff and the police with weapons when they attempted to execute the eviction order, and the killing of a "Red Ant" we referred to earlier, serve as reminders that the desperate need for access to land and abject poverty of people who unlawfully intrude upon land cause them to resort to violence to protect their interests. In addition to violence, there is also the risk of spreading infectious diseases when living in close proximity to other people on an under-serviced site. The use of violence and the spread of diseases pose "a real and imminent danger of substantial injury" (as per the wording of section 5(1)(*a*) of Act 19 of 1998) to a range of people. Furthermore, land intruders invariably erect informal structures which do not comply with building regulations and constitute "a real and imminent danger of substantial … damage … to property". These informal structures might not only be unsafe for human habitation, but could also hold the potential to bring about significant fire damage to property (*Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC)) and contribute to the formation of sink holes (*Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC)). All of these factors can be adequately ventilated and considered on an urgent basis in terms of section 5(1)(*a*) of Act 19 of 1998.

Similarly, a court should be able to determine and evaluate the hardship for the owner, any other affected person and the unlawful intruder(s) for purposes of section 5(1)(*b*) of Act 19 of 1998. From the owner's perspective, possible hardship includes preventing the arbitrary deprivation of property (which will follow if he is unable to evict the occupiers timeously); protecting his right to freedom and security (which is done by requiring the sheriff and the police (and not the owner himself) to effect the eviction); promoting the rule of law by protecting both public order (via effectively preventing land intrusions) and the state's legitimate efforts to provide housing on a planned basis, which benefits law-abiding citizens (as "affected persons" under section 5(1)(*b*)) who do not break the law in an effort to obtain housing); and, finally, promoting social justice by discouraging unlawful land intrusions, which is a form of unlawful self-help and – as such – has the potential to be socially inflammatory.

As regards unlawful intruders, possible hardship includes preventing the arbitrary deprivation of property in the form of the possible destruction of their property during an unregulated eviction; upholding their freedom and security by precluding violence during a court-sanctioned eviction; ensuring dignified treatment during an eviction; promoting the rule of law by having judicial oversight over the procedure in terms of which they may be evicted and ensuring social justice by showing that the law does not condone, or reward, unlawful self-help.

In the *Fose* case, the constitutional court held that the appropriateness of a remedy is determined by its efficacy, "for without effective remedies for breach [of constitutional rights], the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced" (par 69). This requires careful attention to the nature of the constitutional infringement in the particular case and the "probable impact" of a specific remedy. The objective of the remedy is twofold,

namely to provide suitable relief to the victims of a violation of constitutionally protected rights and to deter future violations of these rights (par 96-97). Our argument, simply put, is that counter-spoliation is ill-suited to provide an effective remedy in these circumstances for the reasons mentioned in the previous section above. The "constitutional matrix" that Act 19 of 1998 provides, especially in terms of section 5, is the most appropriate source of law to provide effective relief on an urgent basis for unlawful land intrusions. While the eight-day period it took to hand down the decision in the *Groengras Eiendomme* case under section 5 of Act 19 of 1998 is certainly longer than the three days it took to bring the *Setjwetla* case to finality, the hardship caused by this delay, and the cost of urgent proceedings, is mitigated by the resulting systemic coherence of identifying Act 19 of 1998 as the most appropriate source to provide effective relief to all parties to the dispute.

A court is empowered to provide effective relief in terms of section 5 of Act 19 of 1998 because the justice and equity of the eviction is subjected to judicial oversight, made contingent upon its execution on a reasonable date by the sheriff, with the assistance of the police (if necessary), and the fact that the availability of alternative accommodation ought to be disregarded. The latter point is significant, given the importance of alternative accommodation in section 4 cases under Act 19 of 1998 (see, for instance, the *Blue Moonlight* case). Promoting the positive characteristics the constitution envisions for all law and securing the interests of landowners, affected persons and intruders arguably justify granting an urgent eviction order in the absence of alternative accommodation. Though this would undoubtedly cause hardship for intruders, especially if the urgent eviction would render them homeless, such hardship – in our view – is unfortunately unavoidable. Allowing courts to suspend the coming into effect of an urgent eviction order pending provision of alternative (or emergency) accommodation to the intruders might incentivise persons to unlawfully intrude upon land in the hope that they would obtain housing, even if only on a temporary basis. Such an occurrence could lead to mass land intrusions throughout South Africa, which poses a very real threat to our constitutional state by undermining the systemic features and interests mentioned. In the long run, justice and equity (which are central considerations when a court decides whether to grant an eviction order) are arguably better served (via the promotion of the positive features and relevant interests) by leaving alternative accommodation out of the equation. Of course, disregarding the availability of alternative accommodation might encourage landowners to rely on section 5 of Act 19 of 1998 to evict unlawful occupiers in all cases, even those which concern classic instances of "squatting" (like the *PE Municipality* and the *Blue Moonlight* cases). This prospect need not materialise, though, given the limited field of application of section 5 and the fact that alternative accommodation should be disregarded only when dealing with unlawful land intrusions (namely phase one and two instances), given the dangers they hold to the constitutional order.

The power to institute urgent eviction proceedings in terms of section 5 of Act 19 of 1998 is afforded only to private owners, while section 6 of Act 19 of 1998 – which affords organs of state the power to institute eviction proceedings – does not have an equivalent urgent procedure. It therefore appears that the regulatory framework of Act 19 of 1998 inadequately regulates urgent evictions to the extent that it does not afford organs of state, like municipalities and state-operated enterprises, the same power as private owners to prevent unlawful land intrusions in an effective manner. This possible inadequacy poses a threat to the rule of law and the state's efforts to provide access to adequate housing on a planned manner in terms of section 26(1) of the constitution.

The *lacuna* in Act 19 of 1998 pertaining to how organs of state are to effect urgent evictions could be ameliorated in two ways. First, section 5 of Act 19 of 1998 could be declared unconstitutional to the extent that it does not allow organs of state to also institute urgent eviction proceedings to prevent unlawful land incursions. The courts could then direct parliament to remedy this inadequacy by extending the power to institute urgent eviction proceedings to organs of state. Addressing the *lacuna* in this manner has the benefit of creating a unified procedure for urgent evictions under a single provision. A single procedure for urgent evictions has the added advantage of enhancing jurisprudential coherence through the interpretation of the requirements in section 5(1) of Act 19 of 1998. Yet, it might be necessary to distinguish between private owners and organs of state concerning the unique inconveniences they might have to endure as a result of an unlawful intrusion of their land for purposes of the requirement in section 5(1)(*b*) of Act 19 of 1998 and whether they will be able to withstand the ensuing hardship in the event that the urgent eviction order is not granted.

Second, and closely related to the first proposal, is that section 6 of Act 19 of 1998 could be declared unconstitutional to the extent that it does not afford organs of state the power to also institute urgent eviction proceedings to prevent unlawful land incursions. The courts could then direct parliament to remedy this *lacuna* in express terms. This could be achieved by inserting a carefully crafted subsection into the act that deals with the unique exigencies of unlawful intrusions of land owned by organs of state. Addressing the inadequacy of Act 19 of 1998 in this manner has the benefit of regulating the approach state organs must follow to effect an eviction in a single provision. The consequence of this proposed amendment, however, might be the opposite of what we articulate for the first proposal, namely the jurisprudential *incoherence* that could flow from regulating urgent eviction proceedings for private owners and organs of state under separate sections, and the similarities in the inconveniences (in particular, preventing the state from fulfilling its mandate of well-planned housing delivery) which the state would have to endure.

As both these proposals are likely to be realised only in the medium to long term, it is necessary to address the matter of how state organs are to protect their land against unlawful incursions in the interim. A possible solution might be for state organs to follow the approach in the *Denel* case, namely by applying for an urgent interdict that requires unlawful intruders to vacate the land forthwith and that prevents them from re-entering it.

5 *Conclusion*

The *Setjwetla* case is one of several recent decisions that grappled with a very specific problem in contemporary eviction law, namely how to prevent instances where persons are in the process of occupying land and where their possession has not yet stabilised. It appears that Act 19 of 1998 does not cover these intruders, as these persons do not yet have possession and are, seemingly, not unlawful occupiers. Scott argues that landowners, in such cases, are free to rely on the common-law defence of counter-spoliation, which allows possessors to commit lawful self-help (in the form of employing a "reasonable measure" of violence) to protect their land against spoliation (*ie* unlawful intrusion). In terms of the common-law rules governing this defence, Scott's reasoning cannot be faulted.

Yet, from the perspective of a single legal system we question whether the defence of counter-spoliation is the most appropriate remedy to prevent land incursions. Allowing landowners to rely on counter-spoliation could undermine the positive

features the constitution seeks to achieve, namely the prevention of arbitrary deprivation of property, upholding the freedom and security of both landowners and land intruders (by avoiding violence when landowners eject land intruders through self-help), promoting the human dignity of intruders (in terms of how they are ejected), preventing the arbitrary eviction from one's home (in as far as land intruders may already have "homes" on land), maintaining the rule of law (by effectively preventing and discouraging land incursions) and realising social justice (by ensuring that land intrusions are prevented in a human-rights oriented manner while simultaneously protecting the state's efforts to provide housing to law-abiding citizens on a planned basis).

In the constitutional era, there has been a clear shift in emphasis from the prevention of illegal squatting to the prevention of illegal eviction (Pienaar and 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* 370 380; the *PE Municipality* case par 11-13). The "subtle preference" (according to Scott 175) that Act 19 of 1998 displays for the rights and interests of unlawful occupiers is a constitutionally-inspired commitment of the anti-eviction measure in the constitution to never again subject unlawful occupiers to the inhumane and degrading treatment of forced evictions that characterised apartheid land law (see generally Van der Walt (2009) 53-70). This commitment extends to unlawful intruders. Act 19 of 1998 explicitly requires courts to infuse the law of eviction with elements of grace and compassion and to reconcile the competing interests of landowners and unlawful occupiers in a principled way to "promote the constitutional vision of a caring society based on good neighbourliness and shared concern" (the *PE Municipality* case par 37). This represents a decisive break from the position under apartheid, where the requirements of the *rei vindicatio*, and the particular politics which underlined the powers of the state, allowed private landowners and the state to evict squatters without any regard for their personal circumstances or what would become of them after the eviction. It is against this background that the "definite bias" (Scott 175) of Act 19 of 1998 must be interpreted.

Act 19 of 1998 should be used instead of counter-spoliation when preventing land intrusions. It is better able to realise the desired features by reconciling the conflicting interests at hand in a constitutionally-sound way. Furthermore, using Act 19 of 1998 gives effect to the "prevention of unlawful occupation of land" component of the act which, to date, has received insufficient attention. Using Act 19 of 1998, instead of the common law, to prevent unlawful incursions gives greater impetus to the proactive element of this act (*ie* preventing unlawful intrusions of land) instead of it operating only reactively (addressing instances where land intruders already have possession and are therefore "unlawful occupiers" under the act) (see, for instance, Boggenpoel and Pienaar 1000 ff, 1018). Both elements are important for purposes of upholding the rule of law and reconciling the rights of owners with those of land intruders.

To make Act 19 of 1998 applicable to land incursions a court may read the necessary words into the definition of "unlawful occupier" to cover land intruders as well. Alternatively, parliament could amend the act to make this change explicit. Landowners, both private and organs of the state, must have an effective remedy at their disposal to prevent (and discourage) unlawful intrusions of land. Section 5 of Act 19 of 1998, which governs urgent evictions, provides such a remedy for preventing unlawful land incursions in an effective and human-rights oriented way. This includes subjecting the eviction to judicial oversight and making the eviction

order contingent upon the fact that it will be just and equitable only if it is executed by the sheriff, with the assistance of the SAPS (if necessary). Furthermore, and perhaps most significantly, this includes the fact that the availability of alternative accommodation should not be considered in the land intrusion context in order to achieve the positive objectives mentioned, which include securing the well-being and safety of people and upholding the rule of law (through effectively preventing and discouraging land incursions).

Section 5 of Act 19 of 1998 applies only to private landowners and not to state organs, though. Hence, this *lacuna* in the act might draw its constitutional validity into question. It is thus preferable that parliament amend Act 19 of 1998 to allow state organs to effect urgent evictions, especially given the threat unlawful land incursions pose for the state's legitimate efforts to provide housing on a planned basis under section 26(1) of the constitution. In the interim, organs of state could institute urgent interdict proceedings (as done in the *Denel* case) to effectively prevent unlawful intrusions onto its land.

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