EJ Marais

Associate Professor, Department of Private Law, University of Johannesburg
ORCID: https://orcid.org/0000-0003-2840-2653

DOI: https://dx.doi.org/10.18820/24150517/JJS47.i2.2

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2022:47(2):26-54

Date Published:
2 December 2022

CONSIDERING THE BOUNDARIES OF POSSESSORY PROTECTION IN THE CONTEXT OF INCORPOREALS – SHOULD THE *MANDAMENT VAN SPOLIE* PROTECT ACCESS TO AN EMAIL ADDRESS? CRITICAL REFLECTIONS ON *BLENDRITE (PTY) LTD AND ANOTHER V MOONISAMI AND ANOTHER* 2021 5 SA 61 (SCA)

SUMMARY

The case under discussion considers whether the *mandament van spolie* (*mandament*) may be used to protect access to a director's company email address. The Supreme Court of Appeal confirmed that the *mandament* only protects the *quasi*-possession of rights linked to tangible things, particularly land. Absent this link, the *quasi*-possession simply does not qualify for possessory protection. As the first respondent's access to his email address was not linked to the use and enjoyment of a tangible thing, the appeal was upheld. The outcome of the judgment cannot be faulted, as it accords with previous case law on *quasi*-possession, as well as with the views of scholars. Nonetheless, it raises an interesting question, namely whether the thing-oriented nature of protection under the *mandament* is desirable. Reason being that the range and value of incorporeals unrelated to tangible things are increasing at an astonishing rate. This article analyses whether the *mandament* should perhaps be available to protect the *quasi*-possession of these interests from two perspectives, namely the nature and purpose of possessory protection and a systemic constitutional approach towards remedies. The first shows that the thing-oriented nature of possessory protection comes from Roman law and is thus unsurprising. Yet, Radin's personhood theory draws this nature into question. According to her, property enables persons to attain human flourishing, and it thus enjoys protection in constitutional law. The fact that an email address, which is most probably constitutional property, promotes human flourishing suggests that access to this interest is worthy

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

of protection. Whether the *mandament* is the appropriate remedy to offer such protection is then considered in terms of a systemic constitutional approach towards remedies. This approach, which flows from the single-system-of-law principle, indicates that the remedy should not be extended to the *quasi*-possession of incorporeals unrelated to tangibles if such *quasi*-possession enjoys protection under remedies that are analogous to the *mandament*. One such remedy seems to be sec. 163 of the *Companies Act* 71 of 2008, which was arguably available to the first respondent and could have restored access to his email address. Access to an email address might even enjoy protection by way of specific performance in contract law, especially when obtained by way of an urgent interdict. These reasons, which the Supreme Court of Appeal did not consider, support the outcome of the case and the decision is, therefore, welcomed.

1. INTRODUCTION*

The *mandament van spolie* (the *mandament*) is a speedy and robust remedy that protects peaceful and undisturbed possession against unlawful spoliation.[1] It requires the spoliator (or dispossessor) to immediately restore the prior possession of the *spoliatus* (or dispossessed party) before all else. Kleyn describes the *mandament* as the only true possessory remedy in our law.[2] Reason being that it forms part of the possessory suit where merits, such as who has the stronger right to the property,[3] are irrelevant and may not be raised at all.[4] Parties may only litigate on the merits of the dispute in subsequent petitory proceedings, where the rights of the parties are then central.[5] Although the *mandament* originated in the realm of possession of corporeal property (*i.e.*, things), it has been extended to protect the *quasi*-possession of certain rights, such as servitutal rights and incidents of possession (*i.e.*, electricity and water supply cases).[6] It does not, however, protect the *quasi*-possession of *all* types of rights.[7] For instance, the *quasi*-possession of purely personal rights does not enjoy protection under this possessory remedy.[8] The traditional justification for this restriction is that, if the *mandament* protected the *quasi*-possession of such rights, it could be (ab)

1 Kleyn 1986b:1; Muller *et al*. 2019:328.
2 Kleyn 1986b:1-2.
3 In the form of a *ius possidendi*, like ownership, a limited real right or a contractual right.
4 Kleyn 2014:188-189, 209. See also Muller *et al*. 2019:326.
5 Muller *et al*. 2019:349; Kleyn 1986b:6-7.
6 *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA):par. 9.
7 *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA):par. 14.
8 See, for instance, *Telkom SA Ltd v Xsinet (Pty) Ltd*:par. 14; *Firstrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others* 2008 2 SA 503 (SCA):par. 13; *Eskom Holdings SOC Ltd v Masinda*:par. 22.

*An early draft of this article was presented as a paper at the South African Property Law Teachers Colloquium, hosted virtually by the University of the Free State from 10-12 November 2021. I express my sincere gratitude to Professors Warren Freedman, Wian Erlank, and Kathleen van der Linde, as well as to Dr Michele van Eck, for engaging with me on the present topic and for bringing key sources to my attention. I am indebted to the anonymous peer reviewers whose comments led to an improved piece. Thanks also go to Ms Joyce Phiri for providing excellent research assistance. Finally, I thank the NRF for providing financial support that made research for this article possible. Remaining errors are my own.

used to replace specific performance in contract law, something for which it was not designed.[9]

Given that the *mandament* may be obtained on an urgent basis without a court considering the merits, it is unsurprising that litigants attempt to also use this remedy to protect the *quasi*-possession of incorporeals that fall outside the remedy's conventional field of application. For instance, litigants have tried to use the *mandament* to restore the use of telephone and bandwidth systems,[10] to have the name of a shareholder restored to the register of members after it was unlawfully deleted from the mentioned register,[11] to regain access to an electronic server and database,[12] and to access information stored on a communal server.[13] Of these examples, the *mandament* was only granted in the second one, namely in *Tigon Ltd v Bestyet Investments (Pty) Ltd* (*Tigon*).[14] The basis on which the *mandament* was refused in the other decisions was essentially due to there being no link between the exercise of acts associated with an incorporeal object or right (which gives one *quasi*-possession of such incorporeal) and a thing (such as land).[15]

The Supreme Court of Appeal (SCA), in *Blendrite (Pty) Ltd and Another v Moonisami and Another*[16] (*Blendrite*), recently had to decide whether the *mandament* may be used to restore access to an email address. Although the court answered this question in the negative, it is worthwhile analysing the reasoning of the court and whether this outcome is desirable. This is because the value and range of incorporeals, and their importance for participating in modern social and economic life, are increasing at an almost daily rate. Examples include email addresses, bank accounts, security alarm systems, cell-phone services, social media accounts, television streaming services, and virtual property in virtual worlds.[17] Whether the *quasi*-possession of an email address should enjoy protection under the *mandament* can only be answered in terms of two interrelated matters, namely the nature and purpose of possessory protection and a systemic constitutional approach towards remedies.

---

9 Kleyn 2014:195. See specifically *Telkom SA Ltd v Xsinet (Pty) Ltd*:par. 14.

10 *Telkom SA Ltd v Xsinet (Pty) Ltd*.

11 *Tigon Ltd v Bestyet Investments (Pty) Ltd* 2001 4 SA 634 (N).

12 *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd* 2010 2 SA 59 (N).

13 *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others* 2021 6 SA 309 (WCC).

14 *Tigon Ltd v Bestyet Investments (Pty) Ltd*. This case has been subject to criticism: see, for instance, Van der Walt & Sutherland 2003; Muller *et al*. 2019:338 fn 140; Van der Merwe 2014:par.100.

15 Kleyn 2014:195; Sonnekus 1989:434-436; Kleyn 1986a:394-395; Van der Walt 1989:448. See also Van der Walt & Sutherland 2003:102; Van der Walt 1986:228-229.

16 *Blendrite (Pty) Ltd and Another v Moonisami and Another* 2021 5 SA 61 (SCA).

17 Examples of virtual worlds that have virtual (or digital) property with real-world monetary value are Second Life and World of Warcraft. See, generally, Erlank 2012:103ff; Van der Merwe *et al*. 2021:633-666.

This article consists of four parts. This introduction is followed by part 2, which sets out the facts and reasoning of the *Blendrite* decision. The third part evaluates the decision from two perspectives, namely the nature and purpose of possessory protection and in terms of a systemic constitutional approach towards remedies. Part 4 contains the conclusion.

2. THE *BLENDRITE* CASE

2.1 Facts

The following transpired in *Blendrite*: Mr Moonisami (the first respondent) and Dr Palani (the second appellant) were the two listed directors of Blendrite (Pty) Ltd (the first appellant).[18] They jointly funded the formation of the first appellant in 2008.[19] Global (the second respondent), a web hosting entity, hosted the server and email addresses of the first appellant.[20] Disputes arose between the first respondent and the second appellant, which resulted in the first respondent launching an application to liquidate the first appellant.[21] The second appellant opposed this application.[22] It was common cause that, until the dispute arose, the first respondent functioned as the managing director of the first appellant, while the second appellant was the financial director.[23]

The second appellant – who was in control of the first appellant – claimed that the first respondent resigned as the managing director.[24] Whether this was so remained unresolved on the facts.[25] The second appellant instructed the second respondent to terminate the access the first respondent had to the email and company server of the first appellant with immediate effect.[26] It seems that the second appellant gave the mentioned instruction to the second respondent with the assistance of an attorney who purported to represent the first appellant.[27] Upon the second respondent terminating the access, the first respondent instituted spoliation proceedings in the KwaZulu-Natal Division of the High Court, Durban, to have his access to his email address restored.[28] The court granted the relief, which led to the present appeal. The legal question that confronted the SCA was whether the prior access to an email address and company network and/or server amounted to *quasi*-possession of an incorporeal which qualified for protection under the *mandament*.[29]

18 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 1.
19 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 2.
20 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 1.
21 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 1.
22 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 1.
23 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 2.
24 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 2.
25 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 2.
26 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 2.
27 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 2.
28 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 3.
29 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 19.

2.2 The judgment

Gorven AJA, for a unanimous SCA, ruled that the *mandament* protects possession, which consists of the factual control of a thing coupled with the will to possess it (*i.e.*, the *animus possidendi*).[30] He confirmed that the remedy is part of the possessory suit, where merits are irrelevant, and that possession must be restored to the *spoliatus* before all else.[31] The *mandament* is a speedy and robust remedy that discourages self-help.[32] The requirements are peaceful and undisturbed possession and unlawful spoliation of such possession.[33] Unlawful in this context means without agreement or recourse to law.[34] The *mandament*, although mainly protecting possession of tangibles, also protects the *quasi*-possession of certain rights, namely servitutal rights and incidents of occupation or possession.[35] I explain the court's view of how the *quasi*-possession of these two types of rights enjoy protection under the *mandament* in the ensuing paragraph. For now, it may be mentioned that a *spoliatus* does not have to prove that he is entitled to the right to obtain *quasi*-possession of such right, which *quasi*-possession may potentially enjoy possessory protection.[36] To acquire *quasi*-possession of a right, the *spoliatus* must show that he performed acts usually associated with the alleged right and that such acts were exercised on corporeal property.[37] Such use of the thing gives one *quasi*-possession of that right, which *quasi*-possession may be protected with the *mandament* if the other requirements for protection under this remedy are also satisfied.[38]

Concerning the question as to whether the *quasi*-possession of incidents of possession of an immovable (particularly water and electricity services used on land) enjoys protection under the *mandament*, it must be determined whether the use of such services is incidental to the possession of the immovable or whether the use merely flows from a personal right.[39] The reason for this is that the *mandament* does not have a catch-all function to protect the

30 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 5.
31 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 5.
32 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 6.
33 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 6.
34 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 6.
35 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:paras. 9-16.
36 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 12.
37 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:paras. 9-16. It is worth mentioning that *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC):paras. 33-34 added a further qualification to establish whether the *quasi*-possession of a right enjoys protection under the *mandament,* namely that the supplier of a service (such as electricity service) must have an interest in the possession of the land. I do not address this qualification in this instance, as the link to land – which featured in *Makeshift 1190 (Pty) Ltd v Cilliers* – is absent in *Blendrite (Pty) Ltd and Another v Moonisami and Another*. Furthermore, Gorven AJA did not mention this decision, nor did he engage with this qualification. For criticism of *Makeshift 1190 (Pty) Ltd v Cilliers*, see Marais 2021b.
38 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:paras. 9-16.
39 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:paras. 15-16.

quasi-possession of all kinds of rights.[40] It only protects the *quasi*-possession of water and electricity services used on land if the use of such services constitutes incidents of possession of immovable property. Gorven AJA ruled that the *quasi*-possession of rights which flow from servitude, registration, or statute enjoys protection under the remedy.[41] In other words, the right must be servitutal in nature (such as a right to draw water),[42] it must be registered against the title deed of the land (like water rights registered against the title deed of land),[43] or it must find its source in legislation (like water rights that find their source in legislation).[44] The *quasi*-possession of rights that flow from a contractual nexus between the parties (*i.e.*, rights that are purely personal in nature) does not enjoy protection under the *mandament*, as granting the *mandament* in this instance would be tantamount to granting an order for specific performance.[45]

The judge held that "[t]he [first] respondent did not possess any [movable or immovable] property in relation to his erstwhile use of the server or email address".[46] As such, the prior use of the email address and server was not an incident of possession of movable or immovable property on the part of the first respondent.[47] It was found that the entitlement to use (or access) the email address and server is a mere personal right enforceable, if at all, against the first appellant.[48] Hence, he ruled that the present case is indistinguishable from *Telkom SA Ltd v Xsinet (Pty) Ltd*,[49] where the SCA decided that the *mandament* is unavailable to protect the *quasi*-possession of purely personal rights.[50] Gorven AJA upheld the appeal by deciding that the *mandament* does not protect the first respondent's access to, and use of, his email address.

40 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 16, citing *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* 2009 4 SA 337 (SCA):par.9.

41 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 16, citing *Eskom Holdings SOC Ltd v Masinda*:par.22. For criticism of the approach whereby a right must flow from one of these sources for its *quasi*-possession to enjoy protection under the *mandament*, see Marais 2021a; 2021b.

42 An example is *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A).

43 An example is *Impala Water Users Association v Lourens NO and Others* 2008 2 SA 495 (SCA).

44 An example is again *Impala Water Users Association v Lourens NO and Others*, where the relevant water rights found their origin in the *Water Act* 54/1956.

45 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 16, citing *Eskom Holdings SOC Ltd v Masinda*:par. 22.

46 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 20.

47 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:paras. 19-20.

48 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 20.

49 *Telkom SA Ltd v Xsinet (Pty) Ltd*.

50 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 20.

3. EVALUATION

3.1 Introduction

Before I evaluate *Blendrite*, it is necessary to briefly consider a matter that should arguably have received greater attention in the SCA, namely whether the *quasi*-possession the first respondent supposedly had over his company email address was sufficiently exclusive to satisfy the first requirement of the *mandament*.[51] In terms of this requirement, as mentioned in the introduction, the *spoliatus*' possession (or *quasi*-possession, if one deals with an incorporeal) must be peaceful and undisturbed to enjoy protection under the *mandament*. One of the elements of this requirement is that the possession (or *quasi*-possession) must be sufficiently exclusive. This entails that "no third party [may be in] a better physical relation to the thing than the possessor; and … the person in question should manifest the power at his or her will to deal with the thing as he or she likes and to exclude others".[52] The *Blendrite* court did not address this matter. Nonetheless, *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others* (*Vital Sales*),[53] which was decided less than two months before *Blendrite*, highlighted the importance of exclusive possession when dealing with *quasi*-possession of an incorporeal. It may, therefore, be an important consideration in future *quasi*-possession cases where the link to a thing is absent.

In *Vital Sales*, which was about the "possession" the applicant supposedly had of information on a communal server, the first respondent obstructed the access the applicant had to this server after the applicant allegedly accessed it in an unauthorised manner. The applicant argued that it possessed the information on the communal server and that severing access to such information amounts to spoliation. The Western Cape High Court, Cape Town, with reference to *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* (*Zimbali*),[54] ruled that the applicant's possession of the information on the communal server was not sufficiently exclusive to justify protection under the *mandament*.[55] In *Zimbali*, it was held that the *mandament* protects possession and not mere access.[56] Of course, there is an important

51 Muller *et al*. 2019:315-316. See also *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another* 2007 3 SA 254 (N):par. 54.

52 Muller *et al*. 2019:316, citing *Ex parte Van der Horst: In re Estate Herold* 1978 1 SA 299 (T) 310.

53 *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others* 2021 6 SA 309 (WCC).

54 *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*:par. 54.

55 *Vital Sales Cape Town (Pty) Ltd v Vital Engineering (Pty) Ltd and Others*:paras. 23-24. One may question the court's reliance on *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*, given the factual difference between the cases. I briefly touch on this difference in the main text. I am indebted to the anonymous peer reviewer for pointing this out to me.

56 *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*:par. 54. For a view that the emphasis on exclusivity was too rigid in *De Beer v Zimbali Estate Management Association (Pty) Ltd and Another*, see Muller *et al*. 2019:315-316.

difference between *Vital Sales* and *Zimbali*. In the latter case, the issue was about access to a lifestyle estate (*i.e.*, land), while, in the former, the dispute was about access to information on a communal server, which – unlike land – is intangible. Even so, Van der Walt explains the exclusivity of *quasi*-possession when dealing with electronic service cases, such as *Vital Sales*, as follows:

> In the electronic access cases [ie cellular phones, television channels, banking services, and (arguably) virtual worlds] there can never be proof of possession that is exclusive enough (effective control) to justify summary restoration [by way of the *mandament*] if access is discontinued unilaterally. The very nature of these instruments implies that the provider of the service is always in control of access.[57]

The fact that the second respondent hosted the server and email addresses of the first appellant, it may be asked – in terms of Van der Walt's view – whether the first respondent's access to his email address gave him *quasi*-possession of this legal interest, which was sufficiently exclusive to satisfy the first requirement of the *mandament*. Based on the outcome in *Vital Sales*, it might have been possible for Gorven AJA to uphold the appeal on this basis. Nonetheless, I assume, for present purposes, that the *quasi*-possession the first respondent had over his company's email address was sufficiently exclusive to satisfy the first requirement of the *mandament*.

Blendrite is interesting for two reasons. The first reason, which I only consider briefly in this instance, is that it seems to indirectly overrule *Tigon*. A full bench of the former Natal Provincial Division of the Supreme Court, now the KwaZulu-Natal High Court, Pietermaritzburg, granted the *mandament* to have the name of the respondent, a shareholder, restored to the register of members after the appellant unlawfully deleted it from this register. Van der Walt and Sutherland criticise this decision on two bases, namely that there was, first, no link between the *quasi*-possession of the incorporeal (*i.e.*, having one's name, as a shareholder, on the register of members) and a thing and, secondly, there was a remedy available to the respondent in the previous *Companies Act* 61 of 1973 ("the 1973 *Act*") which would have adequately protected its rights.[58] Gorven AJA seems to have closed the avenue for arguing along lines similar to *Tigon* in future cases, given his emphasis on the link between the *quasi*-possession of a right and a corporeal thing for such *quasi*-possession to enjoy possessory protection. I consider the relevance of the two objections raised by Van der Walt and Sutherland against *Tigon* for purposes of *Blendrite* in section 3.3.1 below.

Secondly, and more importantly, for present purposes, *Blendrite* highlights whether *quasi*-possession of an incorporeal, which bears no relation to a thing, such as an email address, should enjoy protection under the *mandament*. In terms of existing case law and scholarship on *quasi*-possession, the reasoning

57 Van der Walt 2008b:par. 2.1.2.

58 Van der Walt & Sutherland 2003:98, 102, 104-109. The prevailing view among scholars is that *Tigon Ltd v Bestyet Investments (Pty) Ltd* unjustifiably extended the scope of the *mandament* without there being sufficient policy reasons for doing so. See, for instance, Muller *et al*. 2019:338 fn 140; Van der Merwe 2014:par.100.

and outcome in *Blendrite* cannot be faulted.[59] Cases where the *mandament* was sought to protect the *quasi*-possession of servitutal rights and incidents of possession, such as water and electricity supply used on land, reveal the link that must exist between the use and enjoyment of these alleged rights and the land on which acts associated with them are exercised.[60] This link is essential for the *quasi*-possession of the right to potentially qualify for protection under the *mandament*. According to Kleyn, the rationale for this link is to prevent the *mandament* from protecting the *quasi*-possession of all types of rights.[61] Without this link, the *mandament* may be (ab)used to enforce specific performance in contract law, for which it was not designed.[62] This link thus upholds the distinction between property law and contract law.[63] The link to corporeal property was highlighted in several fairly recent cases, such as *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another*,[64] to which Gorven AJA refers, *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd* (*Microsure*),[65] and, most recently, *Vital Sales*.

The link that must exist between the *quasi*-possession of such alleged right and a thing for such *quasi*-possession to potentially qualify for protection under the *mandament* reveals a thing-oriented approach towards possessory protection. Absent this link, the *mandament* simply does not protect the *quasi*-possession of an alleged right. This approach is unsurprising in view of the legal history of this kind of possessory protection, on which I expand in the next section.

Yet, in section 1 above, it was mentioned that the range and value of incorporeals are increasing at an astonishing rate. It should, therefore, be asked whether the link to corporeal property is still a valid gatekeeper to the availability of the *mandament* when it comes to the protection of *quasi*-possession of incorporeals. The answer to this question may be found in two interrelated matters, namely the nature and purpose of this kind of possessory

59 See, for instance, *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi*; *Telkom SA Ltd v Xsinet (Pty) Ltd*; *Firstrand Ltd t/a Rand Merchant Bank and Another v Scholtz NO and Others*; *Eskom Holdings SOC Ltd v Masinda*; *City of Cape Town v Strümpher*. For some of the academic scholarship, see Kleyn 2014:195; Marais 2021a; Marais 2021b and the sources they cite.

60 *Naidoo v Moodley* 1982 4 SA 82 (T):84E-F; *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W):611E; *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another*:paras. 2, 13-14. See also Marais 2021a and the sources referred to there.

61 Kleyn 2014:195.

62 Kleyn 2014:195.

63 Kleyn 2014:195. It is interesting to note that, in Austrian law, which has a *quasi*-possession regime comparable to ours, scholars also require a link to corporeal property for the *quasi*-possession of a right to enjoy possessory protection. See Rüfner 2014:173 and the sources he cites. It must be mentioned that the Austrian Supreme Court has not endorsed this view, though. See Rüfner 2014:173-174. An analysis of Austrian law is beyond the scope of this article.

64 *ATM Solutions (Pty) Ltd v Olkru Handelaars CC and Another* 2009 4 SA 337 (SCA).

65 *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd* 2010 2 SA 59 (N).

protection and a systemic constitutional approach towards remedies. I address each matter in turn.

3.2 The nature and purpose of possessory protection

Even though the *mandament* has its roots in Canon law and not in Roman law,[66] it bears resemblance to the Roman *interdictum unde vi*.[67] A helpful starting point to consider the nature and purpose of the protection the *mandament* offers is thus to briefly investigate how the possessory interdicts, especially the *interdictum unde vi*, originated and protected possession in Roman law.

The Roman possessory interdicts (*interdicta*) developed to protect possession.[68] These interdicts differed from the actions (*actiones*) that protected rights, such as ownership.[69] During the period that preceded the office of the praetor and the development of the interdicts, physical force – and not the rule of law – governed social relations as regards property.[70] During this period, a person's "use, enjoyment and disposal over a thing lasted only as long as he was able to ward off interferences with this power relation."[71] Consequently, there was no clear distinction between ownership and possession at that point.[72] The distinction between these two concepts in later Roman society probably only became possible – and necessary – when the rule of law supplanted force concerning the settling of disputes between different persons as regards the use and enjoyment of property.

The praetor, whose office was founded in 367 BCE, created and awarded the interdicts in terms of the *ius honorarium* (praetorian law).[73] The interdicts were only available to a closed list of possessors.[74] The praetor's granting of these interdicts to possessors and his extension to certain other possessors over time were done in terms of considerations of policy and convenience and not according to a grand possession theory.[75] The reason for this is that the Romans, at least initially, simply did not have such a theory.[76] These interdicts did not take the merits of a dispute into account.[77] As such, they were easier to institute and offered swifter (though temporary) relief to possessors when

66 Kleyn 2014:189-190. The *mandament* developed from the *Decretum Gratiani*. See Kleyn 2014:189 and fn 27.
67 Kleyn 1986a:296 fn 81, 298. See similarly Sonnekus 1985:336.
68 Kleyn 1986a:1. The three authentic possessory interdicts are the *interdictum uti possidetis*, the *interdictum utrubi*, and the *interdictum unde vi*. See Kleyn 1986a:1, 37; 2014:188.
69 Kleyn 1986a:1-2.
70 Kleyn 1986a:3.
71 Kleyn 1986a:3 (own translation).
72 Kleyn 1986a:3.
73 Kleyn 1991:33, citing Dias 1956:246; Kleyn 1986a:2, 6.
74 Kleyn 1986a:14.
75 Kleyn 1991:33, citing Dias 1956:246. See also Kleyn 1986a:1, 355-356; Muller *et al*. 2019:319-320.
76 Kleyn 1991:33, citing Dias 1956:246. See also Kleyn 1986a:1, 4-5, 355-356; Muller *et al*. 2019:319-320. The Romans only started developing a possession theory from the first century CE. See Kleyn 1986a:4-5.
77 Kleyn 2014:189.

compared to remedies such as the *rei vindicatio* that depended on the merits.[78] Parties could only litigate on the merits of the dispute, such as who has ownership of the property, in petitory proceedings, after possession has been restored.[79] This is how the distinction between the *iudicium possessorium* (possessory suit), where the merits are irrelevant, and the *iudicium petitorium* (petitory suit), where merits are central, was born.[80] As noted earlier, Gorven AJA confirmed this distinction in our law.[81]

The possessory interdicts allowed a dispossessed party to be restored in his prior possession of movables and land.[82] The interdicts initially only protected the possession of certain possessors over movables and immovables.[83] One of the oldest interdicts, the *interdictum unde vi*, permitted a person who was dispossessed of land by another through violence (*vi*) or physical force accompanied with weapons (*vis armata*) to reclaim possession of land.[84] Violence (*vi*) had a wide meaning and included instances where a person was dispossessed by another without recourse to a court of law.[85] The *interdictum unde vi* was later extended to protect the *quasi*-possession of a usufructuary over the servient property.[86] The *interdictum unde vi*, at least in principle, was unavailable to protect possession of movables.[87] In such cases, a possessor had to use the *interdictum utrubi*.[88] It was possible, under certain circumstances, to also claim damages with the *interdictum unde vi*.[89] This interdict thus had a penal character,[90] which suggests that Roman society regarded the dispossession of another person in an extra-judicial way as entailing reprehensible conduct.

This brief analysis shows that the possessory interdicts were mostly aimed at protecting the possession of corporeal property. The fact that only one instance of *quasi*-possession enjoyed possessory protection, namely that of the usufructuary over the servient property, highlights that this type of protection never included *quasi*-possession of an incorporeal which was unrelated to a thing. This fact illustrates that possessory protection under these interdicts was primarily thing-oriented in nature. The thing-oriented nature of the *mandament*, which was highlighted in *Blendrite*, is, therefore, unsurprising. The instances of *quasi*-possession that enjoy protection under

78 Kleyn 1986a:37-38 and fn 150; 2014:189.
79 Kleyn 1986a:37.
80 Kleyn 1986a:38; 2014:189.
81 *Blendrite (Pty) Ltd and Another v Moonisami and Another*:par. 5.
82 Kleyn 1986a:10.
83 See, generally, Kleyn 1986a:1-37. The *interdictum uti possidetis* provided protection against disturbances of possession land; the *interdictum utrubi* guarded against interference with possession of movables, while the *interdictum unde vi* offered protection against dispossession of land. See Kleyn 1986a:1-37, especially 34.
84 Kleyn 1986a:44-46.
85 Kleyn 1986a:48-49.
86 Kleyn 2014:190-191; 1986a:26-27, 52.
87 Kleyn 1986a:46.
88 Kleyn 1986a:46.
89 Kleyn 1986a:56-57.
90 Kleyn 1986a:57-60.

this remedy, although broader when compared to the possessory interdicts, must still relate to the use and enjoyment of a *thing*, particularly land.

The purpose of possessory protection under the *mandament* is to discourage unlawful self-help in the context of stable possessory relations.[91] By requiring persons to restore the *status quo ante* before the merits of the dispute may be heard in subsequent petitory proceedings, the law forces litigants to submit their disputes regarding possession to a court of law instead of engaging in extra-judicial self-help.[92] In this way, public order and the rule of law, which is a constitutional value,[93] are upheld.[94] This goal resonates with the reason that possession was protected in Roman law, as discussed earlier. Were it otherwise, we would live in a society where "might makes right" and where anarchy and chaos – instead of the rule of law – would be the order of the day.[95] Such a society is contrary to what the preamble of the *Constitution of the Republic of South Africa*, 1996 ("the *Constitution*"), envisions for South Africa, namely one "based on democratic values, social justice and fundamental human rights".

It follows that the law has – at least since Roman times – regarded stable possessory relations between persons and (mostly) tangible things as deserving strong legal protection to prevent disorder and chaos. However, this goal appears to only provide part of the justification for the unique (*i.e.*, speedy and robust) protection the *mandament* offers. The other component of the justification touches on the role stable possessory relations play in fostering individual self-fulfilment. This second component, which seems to draw the thing-oriented nature of possessory protection into question, finds support in Radin's theory of property and personhood and the justification for protecting property in constitutional law generally.

Radin's theory considers the personal autonomy of a person in the holding of property. Her theory enjoys support in constitutional property jurisprudence, particularly German constitutional law, on which I expand below.[96] She argues that "an individual needs some control over resources in the external environment [to achieve proper self-development]. The necessary assurances of control take the form of property rights."[97] Hence, property – more particularly property rights – should enjoy constitutional protection, given the role property plays in promoting human flourishing. The approach of the German *Bundesverfassungsgericht* (Federal Constitutional Court) regarding

91 See Van der Walt 1997:525; 2008a:par. 2.1; *Mtshingana v The City of Cape Town* 2020 JDR 2378 (WCC):par. 22.

92 *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC):par. 10; *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 3 SA 218 (C):225G-I. See also Van der Merwe 2014:par. 93; Muller *et al*. 2019:326-327.

93 *Constitution*:sec. 1(c).

94 *Ngqukumba v Minister of Safety and Security*:paras. 10 and 12. See also the sources cited in fn 86 above.

95 Kleyn 1986b:15. See also *Curatoren van "Pioneer Lodge, No. 1" v Champion en Anderen* 1879 ORC 51:54.

96 Van der Walt & Marais 2012:728. See, generally, Marais 2016; Michelman & Marais 2018 and the sources they cite.

97 Radin 1982:957 (original emphasis). See also Radin 1993:chapter 1.

the protection of property in constitutional law broadly follows her theory.[98] Elements of her theory also feature in South African constitutional law. In *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*,[99] Froneman J quoted (with approval) from a translation of *BVerfGE* 24, 367 (1968) (*Deichordnung*) – a leading decision in German constitutional law – when he addressed the purpose of property in the South African *Constitution*:

> To hold property is an elementary constitutional right that must be seen as sharing a close nexus with the protection of personal liberty. Within the general system of constitutional rights its function is to secure for its holder a sphere of liberty in the economic field in which he or she can lead a self-governing life.[100]

Consequently, property is not protected in constitutional law for its own sake. It is protected because it is a means to an end, namely that it allows persons to participate in the social and economic sphere. It is through this participation that persons are able to lead distinctly human lives. Although this purpose shows why property *rights* enjoy constitutional protection, and not why (even unlawful) possessory relations enjoy possessory protection in private law, it sheds light on the reason why such control relations should enjoy speedy and robust protection in a legal system that recognises private property. The reason for this is that it is through possessory (or "control", to use Radin's term) relations between persons and property that they may flourish as human beings. Merely having a property right on its own is insufficient; it is through the actual *use* and *enjoyment* of property (*i.e.*, by *possessing* it) that persons attain human flourishing.[101] It is interesting to note that this use and enjoyment does not depend on the presence of ownership; it may be sourced in a limited real right (such as living on another person's land pursuant to a personal servitude of habitation), a personal right (a loan agreement to use another person's laptop), or even no right at all (such as when an unlawful occupier lives on land as a home). Other instances may include a stolen vehicle that is sold to an innocent third party, who then uses it to conduct business, and even when the thief uses the vehicle himself. The property in each of these examples is possessed/controlled/used in a way that facilitates self-development. Actual use or, stated differently, possession of property constitutes a component of the purpose of property in constitutional law, as it is through such use that a person may achieve self-fulfilment.[102]

98 Van der Walt & Marais 2012:728.

99 2015 6 SA 125 (CC). In this instance, the Constitutional Court had to decide whether a liquor licence amounted to constitutional property.

100 *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*:par. 54, quoting from *BVerfGE* 24, 367 (1968), translated by Kommers & Miller 2012:632.

101 Compare Smith 2012:1693.

102 There may be parallels between this argument and Von Jhering's view of possessory protection, namely that by protecting all instances of possession, without reference to the merits, the law indirectly protects ownership. See Emerich 2014:42.

I must not be understood as saying that mere possession, without reference to rights, is a property right that qualifies as "property" for constitutional purposes. I merely wish to highlight the role possession plays in enabling persons to achieve self-development, which purpose is central to why property enjoys protection in constitutional law. From this perspective, it becomes clear why a speedy and robust remedy such as the *mandament* exists (and should, in fact, exist) in private law, namely, to protect all instances of peaceful and undisturbed possession (even though unlawful) against unlawful spoliation. Indeed, the centrality of stable possessory relations in fostering human flourishing demands such a remedy. Such fostering of human flourishing sheds new light on why the *mandament* is available to essentially all possessors in our law, including a possessor who was unlawfully spoliated by the owner of the thing.[103] The only two possessors who seemingly do not enjoy protection under this remedy nowadays are servants and *quasi*-servants.[104] This position must be contrasted with Roman law, where a much more limited group of possessors enjoyed protection under the possessory interdicts.[105] The personhood theory provides a normative account of why our courts have, over time, granted the *mandament* to more and more possessors, to the extent that almost all possessors enjoy protection in South African law at present. This position should be compared to some civil-law systems, where possessory protection is not available to all possessors.[106] To the extent that the *mandament* is still unavailable to servants and *quasi*-servants, Radin's theory justifies extending the remedy to protect the possession of these persons. There is thus a link between possessory protection under the *mandament* and the constitutional protection of property. Such constitutional protection, in turn, informs its traditional rationale, namely that the remedy promotes law and order by discouraging unlawful self-help in the possessory context.

Yet, if peaceful and undisturbed possession of property facilitates human flourishing, it must be asked how this observation features regarding the protection of *quasi*-possession of incorporeals which are unrelated to tangible property. It cannot be denied that using modern incorporeals, such as one's email address, allows persons to lead self-governing lives by enabling them to participate in the social and economic sphere. As such, should the *quasi*-possession of such an incorporeal, as in *Blendrite*, not perhaps enjoy protection under the *mandament*? The answer to this question lies in a systemic constitutional approach towards remedies, which I consider in the ensuing section.

---

103 In French law, for instance, the lessee only enjoys possessory protection against third parties and not against the person from whom he derives his rights, namely the lessor. See Van Erp & Akkermans 2012:108-109.

104 Marais 2022:160-163.

105 Marais 2022:168-169.

106 In Quebec, for instance, only persons who are possessors (*i.e.*, those who physically control property with the intention of an owner [*animus domini*]) enjoy possessory protection. See Emerich 2014:31-32, 35-36. Hence, a lessee, who lacks the *animus domini* and is, therefore, a holder, does not – as a rule – enjoy possessory protection in Quebec law. See Emerich 2014:36-37.

3.3 A systemic constitutional approach towards remedies

3.3.1 When developing the *mandament* to protect *quasi*-possession of incorporeals unrelated to things would be inappropriate

In *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*,[107] Chaskalson P held that "all law ... derives its force from the Constitution and is subject to constitutional control".[108] The *Constitution* thus determines which source of law (and, concomitantly, which remedy) must be used to decide a dispute, should more than one legal source (and remedy) be available.[109] All sources of law and, by implication, all remedies must promote the spirit, purport, and objects of the Bill of Rights, as per sec. 39(2) of the *Constitution*. Consequently, the *Constitution* forms the starting point to determine whether and, if so, how to develop the common law in terms of sec. 173 of the *Constitution*. In the present instance, the development of the common law would entail extending the *mandament* to protect the *quasi*-possession of incorporeals unrelated to tangibles (like an email address).

To determine whether an extension of the *mandament* is warranted, it is helpful to follow a systemic constitutional approach towards remedies.[110] A systemic constitutional approach, which flows from the single-system-of-law principle, "considers the legal system in its totality, with emphasis on the complex nature of the system as well as the interactions between sub-components (such as different areas of law) of the system".[111] It guides the decision regarding which remedy to use when more than one is available, especially if they derive from different legal sources.[112] In this instance, it must be emphasised that the purpose of the *mandament*, namely the promotion of the rule of law by discouraging unlawful self-help,[113] does not – on its own – justify using this remedy to guard against all forms of unlawful self-help.[114] The *mandament* discourages unlawful self-help in a very specific setting, namely that of possessory relations.[115] The focus specifically falls on protecting possession of *tangibles*, as even the limited instances of *quasi*-possession which enjoy protection under this remedy are linked to the possession of corporeal things, provided that the other requirements for such protection are satisfied. Two considerations should be kept in mind. The first is the interaction

107 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC).
108 *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte President of the Republic of South Africa and Others*:par. 44.
109 Van der Walt 2012:24-25; Boggenpoel 2017:8-10ff, 259.
110 Boggenpoel 2017:259; Van der Sijde 2015:chapter 5.
111 Van der Sijde 2015:12. See also chapter 5.
112 Boggenpoel 2017:8-10ff, 259. See also Van der Sijde 2015:chapter 5.
113 *Ngqukumba v Minister of Safety and Security*:paras. 10 and 12.
114 Van der Walt 1986:228-229.
115 Van der Walt 1997:525; 2008a:par. 2.1; *Mtshingana v The City of Cape Town*:par. 22.

between different sub-components of the law, particularly as regards the fear that granting the *mandament* to protect *quasi*-possession of incorporeals may replace specific performance in contract law. The second is the relevance of other remedies being available to provide relief similar to that which the *mandament* offers. I consider these two aspects in the next paragraphs.

As regards the first aspect, one of the goals of the single-system-of-law principle is to prevent the creation of fragmented, parallel legal systems.[116] Such fragmentation is created when the legal source (and, thereby, remedy) to solve a dispute is arbitrarily chosen, which fragmentation then has the potential to realise counter-constitutional consequences.[117] Examples of such consequences include frustrating (instead of promoting) constitutional rights or values, such as the rule of law.[118] One component of the rule of law is the promotion of legal certainty, which seems to include the production and protection of expectations in law.[119] Such expectations require that the law, as a complex system, should operate coherently. Such coherency (and, hence, the rule of law) will be undermined if a litigant may rely on an exceptional remedy in one field of law (such as the *mandament*) to obtain relief when a remedy in another field of law already provides adequate relief. Given the exceptional nature of the *mandament*, namely it being a speedy and robust remedy that does not consider the merits of a dispute, a systemic constitutional approach to remedies probably prohibits the extension of this remedy to protect the *quasi*-possession of incorporeals unrelated to land if there is a remedy in another legal field that provides relief similar to that which the *mandament* offers.[120] For instance, it would be unattractive, from a systemic perspective, if a litigant could use *mandament* to obtain relief similar to specific performance in contract law. Reason being that the *mandament* was simply not designed to replace specific performance.[121] It is usually said that, if the *mandament* could be (ab)used to obtain relief similar to specific performance, it would collapse the divide between property law and contract law, which is undesirable.[122]

Viewed from a systemic perspective, such a collapsing of two sub-components of the law (specifically private law) would needlessly fragment the law by creating parallel remedies to obtain the same relief. Such fragmentation would undermine the rule of law by undermining (instead of producing and protecting) expectations in the law. Indeed, specific performance may – like the *mandament* – also be obtained on an urgent basis, namely by way of an interim interdict.[123] There is therefore no need to extend the *mandament* to such instances. *Vital Sales* offers indirect authority for this argument, as the court there awarded an interim interdict to the applicant to protect its access to its information on the servers and systems of the respondent, given that the mentioned information was the applicant's intellectual property. The same

116 Van der Walt 2012:91-92, 102-104.
117 Van der Walt 2012:96ff.
118 Van der Walt 2012:32-33.
119 Van der Sijde 2015:258. See similarly Marais 2018:187.
120 For an argument that is much to the same effect, see Boggenpoel 2017:154-155.
121 Kleyn 2014:194-195.
122 *Eskom Holdings SOC Ltd v Masinda*:par. 14.
123 Van Huyssteen *et al*. 2016:373.

argument holds when another field of law, such as company law, offers a suitable remedy. I expand on this matter in the ensuing paragraphs.

The second systemic reason concerns the availability of other suitable remedies to protect one's interest. The *mandament* protects the legal order, thus upholding the rule of law, in situations where unlawful self-help may "typically spark conflict and [public] violence".[124] In this instance, it is preferable, in terms of maintaining public order, that the *status quo* be restored before a court has had an opportunity to pronounce on the rights of the parties.[125] Van der Walt and Sutherland – with reference to the *Tigon* case – argue that the *mandament* specifically prevents conflict as regards the use of land.[126] They question whether unlawful self-help as regards incorporeals unrelated to things could spark public violence.[127] Furthermore, where other remedies, especially statutory ones, are available to undo the consequences of unlawful self-help, it is doubtful whether the peace-keeping rationale of the *mandament* applies.[128] Careful reflection is, therefore, needed to determine whether it is desirable to extend the *mandament* to *quasi*-possession of incorporeals, where there is no link to a tangible thing.[129] In other words, whether the application of this remedy should be expanded beyond its current thing-oriented focus. They argue that, if other adequate remedies are available to vindicate the rights of the injured party, then strong policy reasons will be required for extending the *mandament*.[130] This is even more so if these remedies are analogous to the *mandament*.[131] It is interesting to note that a similar argument exists in Austrian law. Rüfner opines that it is unnecessary to use possessory remedies to protect the *quasi*-possession of incorporeals if there are other injunctive (or petitory) remedies available that provide an appropriate level of protection to an injured party.[132]

The subsidiarity principles that flow from the single-system-of-law principle support Van der Walt and Sutherland's point.[133] The proviso to the second subsidiarity principle is particularly apposite, as it states that the common law may only be used if there is no legislation that governs a dispute.[134] The *eiusdem generis* rule, in which the subsidiarity principles find support,[135] fortifies this view. It entails that a litigant must frame his cause of action in

124 Van der Walt & Sutherland 2003:103-104.
125 Van der Walt & Sutherland 2003:103.
126 Van der Walt & Sutherland 2003:109.
127 Van der Walt & Sutherland 2003:104.
128 Van der Walt & Sutherland 2003:109.
129 Van der Walt & Sutherland 2003:103, 106. See also *Microsure (Pty) Ltd and Others v Net 1 Applied Technologies South Africa Ltd*:par. 19, where it was held that courts should be cautious to extend the scope of the *mandament* to include the *quasi*-possession of more incorporeals, given the speedy and robust nature of the remedy and the fact that it disregards the merits of a dispute.
130 Van der Walt & Sutherland 2003:104.
131 Van der Walt & Sutherland 2003:106.
132 Rüfner 2014:180-181.
133 On the subsidiarity principles, see Van der Walt 2012:24ff.
134 Van der Walt 2016:43.
135 Van der Walt 2012:38.

terms of a specific rule (and not in terms of a general rule) when a specific rule and a general rule both apply to the case.[136] For instance, if legislation provides a remedy in a specialised context, such as company law, a litigant must use this remedy and may not rely on a more general remedy (like the *mandament*) instead. I expand on this argument in the following paragraphs.

Van der Walt and Sutherland persuasively show that a remedy in the 1973 *Act* was available to the respondent in *Tigon* and could have adequately vindicated its legal interest.[137] It was, therefore, unnecessary for the court in that case to have extended the *mandament* beyond its conventional realm of application.[138] By awarding the *mandament* to the respondent, the court effectively closed the remedial avenue available in legislation without explaining why this is desirable or necessary, which is unattractive in view of the single-system-of-law principle.[139] As mentioned in the preceding paragraphs, such use of the *mandament* has the danger of frustrating the rule of law by creating fragmented, parallel legal systems. Furthermore, permitting litigants to use the *mandament* instead of the statutory remedy, without explaining why this is necessary or desirable, could undermine or downplay democratically enacted legislation.[140]

3.3.2 An adequate remedy in company law to protect access to a company director's email address

It must thus be determined whether another adequate remedy was available to the first respondent to protect his access to his company's email address, as the absence of such a remedy may have counted in favour of extending the *mandament* to protect such access.[141] To answer this question, it is helpful to consider the nature of an email address. It cannot be disputed that an email address, which allows persons to participate in the social and economic sphere, is a valuable incorporeal interest. As such, it is worthy of legal protection. Email addresses, though often classified as intellectual property, form part of the broad category of virtual (or digital) property.[142] This type of property "exists only virtually (or online / digitally) … it does not exist in the real-world as tangible objects but rather more nebulously in some or the other intangible form."[143] The Constitutional Court found that some forms of virtual property, such as intellectual property interests,[144] are property for

136 Van der Walt 2012:38.
137 Van der Walt & Sutherland 2003:104-108, discussing sec. 115(1)(a) of the 1973 *Act*.
138 Van der Walt & Sutherland 2003:106-108.
139 See, generally, Van der Walt & Sutherland 2003; Van der Walt 2012:chapter 2; Marais & Muller 2018.
140 Van der Walt 2012:91-92, 102-104.
141 Van der Walt & Sutherland 2003:103-106.
142 Erlank 2015:2526. See also Fairfield 2005:1049, 1052.
143 Van der Merwe *et al*. 2021:634. An investigation of virtual property is beyond the scope of this article.
144 Van der Merwe *et al*. 2021:634-636 state that intellectual property interests are virtual property.

constitutional purposes.[145] Hence, email addresses are probably constitutional property (and may perhaps even be property for private property law).[146] Even so, these reasons do not necessarily imply that the *mandament* is the only (or even the most appropriate) remedy to protect access to an email address.

To ascertain which other remedies may have been available to the first respondent, it is necessary to consider the legal relationship between the first respondent, the second appellant, and the first appellant. It is trite that the first respondent, who functioned as the managing director of the first appellant, wants to regain access to his company's email address. It was already stated that an email address, which is a valuable intangible object, is probably constitutional property and perhaps even property for private law. Hence, there should be a remedy to protect the *quasi*-possession of this incorporeal. The second appellant, acting through an attorney who purported to represent the first appellant, seems to have instructed the second respondent to terminate the access the first respondent had to his company's email address. Although unclear from the facts, it appears that the aim of this instruction was to prevent the first respondent from continuing his application to have the first appellant liquidated. It is clear, though, that disputes arose between the two co-directors and it is within this context that the termination of the first respondent's access to his email address must be considered.

A remedy that may have been available to the first respondent is found in sec. 163 of the new *Companies Act* 71 of 2008 ("the 2008 *Act*"). This provision stipulates that "[a] shareholder or director of a company or a related person may apply to a court for relief from conduct that is oppressive or unfairly prejudicial to the applicant, or that unfairly disregards the interests of the applicant".[147] Sec. 2(2) of the 2008 *Act* states that a "related person" includes a person who controls the company.[148] Sec. 163 lists several forms of conduct whereby shareholders or directors may be oppressed or unfairly prejudiced, or how their interests may be unfairly disregarded. Such conduct includes any act or omission of the company, or a related person,[149] when the business of the company, or a related person, is being or has been carried on or conducted in a manner that results in any of the prohibited consequences,[150] or when the powers of a director or prescribed officer of the company, or a person related to the company, are being conducted or have been exercised in a manner that

145 *Laugh It Off Promotions CC v SAB International (Finance) BV t/t SABmark International* 2006 1 SA 144 (CC).

146 I do not express a view on whether an email address is property for purposes of private law. It is worth emphasising, though, that objections to the corporeality characteristic, which is one of the requirements for a legal object to be a thing in private property law, have been raised. See Muller *et al*. 2019:18-23 and the sources they cite.

147 Yeats *et al*. 2018:7-18. See similarly Delport & Fourie 2021:574(4).

148 Sec. 2(2) of the 2008 *Act*: see Delport & Fourie 2021:574(5).

149 The 2008 *Act*:sec. 163(1)(a).

150 The 2008 *Act*:sec. 163(1)(b)

brings about any of the mentioned consequences.[151] To rely on sec. 163, the applicant must be affected in his capacity as a shareholder or a director.[152]

The investigation focuses on whether the result or outcome of an act or omission (and not the act itself) brings about any of the prohibited consequences.[153] The act in question must have been completed.[154] A court must investigate the conduct itself, and the effect it has on the shareholder or director, and not the motive for such conduct.[155] Nonetheless, motive may be a relevant indicator to determine whether the complaint of conduct generated any of the unlawful consequences.[156]

The "oppressive" concept refers to conduct that is "burdensome, harsh and wrongful"[157] or "unjust, harsh or tyrannical"[158] towards the applicant and includes conduct that lacks "probity or good faith and fair dealing in the affairs of a company".[159] "Unfairly", as the qualification of "prejudicial", means "unreasonably" and "encompasses both legal and commercial unfairness."[160] It includes "a breach of a legal right, or [when] using the right in a manner which equity would regard as contrary to good faith".[161] The notion of 'interests', which is wider than the concept of 'rights',[162] includes

> interests not flowing from the memorandum of incorporation of the company, but from an understanding or agreement between the parties. Interests 'arise[s] out of fundamental understanding between the shareholders, which formed the basis of their association but was not in contractual form.' … The acts complained of need thus not necessarily flow from the articles of association or by example from a majority vote, but for instance from a breach of trust or acrimony between the parties flowing from the fundamental understanding between the shareholders.[163]

151 The 2008 *Act*:sec. 163(1)(c).
152 Yeats *et al*. 2020:7-19; Delport & Fourie 2021:574(4).
153 Yeats *et al*. 2020:7-18, citing *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP):par. 17.6; Delport & Fourie 2021:574(4).
154 Yeats *et al*. 2020:7-18; Delport & Fourie 2021:574(4). Both cite *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd*:par. 17.6.
155 Yeats *et al*. 2020:7-20, citing *Grancy Property Ltd v Manala* 2015 3 SA 313 (SCA):par. 27. See also Delport & Fourie 2021:574(10), 574(14).
156 Delport & Fourie 2021:574(10).
157 Yeats *et al*. 2020:7-19; Delport & Fourie 2021:574(6). Both cite *Scottish Cooperative Wholesale Society Ltd v Meyer* [1959] AC 324.
158 Delport & Fourie 2021:574(6).
159 Yeats *et al*. 2020:7-19; Delport & Fourie 2021:574(6). Both cite *Scottish Cooperative Wholesale Society Ltd v Meyer*; *Grancy Property Ltd v Manala*:par. 23.
160 Delport & Fourie 2021:574(7). See also Yeats *et al*. 2020:7-19.
161 Delport & Fourie 2021:574(9).
162 Yeats *et al*. 2020:7-19. See also Delport & Fourie 2021:574(20).
163 *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others*:par. 17.4. See also Van Rooyen 1988:275, quoted with approval by Delport & Fourie 2021:574(19) in their discussion of sec. 163 of the 2008 *Act*.

Interests also include "justified or reasonable expectations of a member regarding participation in the management of the company".[164] Conduct that conflicts with such expectations "may be seen as conduct which affect[s] the interests of [an applicant] and can form the basis of an order in terms of the relevant statutory remedy despite the fact that complaint of conduct occurred in terms of constitutional or statutory regulation".[165] Finally, interests also extend to financial or commercial interests of a shareholder, with the result that conduct which prejudices these interests will be unfairly prejudicial.[166]

An example of conduct that may be unfairly prejudicial is "[t]he manner in which a director is excluded from the management of a company",[167] namely through procedurally unfair processes aimed to affect the removal of such director.[168] Conduct would also be unfairly prejudicial if it disregards the rights of the director as a shareholder of the company.[169] Another example of conduct that brings about any of the prohibited consequences might be when directors of a company deny their co-director access to the financial records of the company.[170] Finally, it seems that, even if a director acts without the knowledge or agreement of a co-director, especially if such conduct conflicts with the duties of such director, such conduct might be oppressive and prejudicial towards the affected co-director.[171]

Some scholars argue that sec. 163 does not apply when the acts of one director *vis-à-vis* a co-director, which produce any of the prohibited results, are *ultra vires*.[172] Yet, in *Jenkins v Davison*[173] ("*Jenkins*"), it was held that the unauthorised transfer of monies from a company's bank account by a co-director is conduct that is oppressive and prejudicial to the interests of a co-director.[174] In this decision, an interim interdict was granted which restrained the co-director from withdrawing any further funds from the bank accounts of the company without prior authorisation by the other co-director. I thus assume, for present purposes, that sec. 163 applies, even if a director acted *ultra vires* and such conduct generated any of the prohibited consequences for a co-director.

Sec. 163(2) stipulates that a court, upon considering an application in terms of sec. 163(1), may make any interim or final order it considers fit.[175]

---

164 Van Rooyen 1988:275 (own translation), quoted with approval by Delport & Fourie 2021:574(19) in their discussion of sec. 163 of the 2008 *Act*.
165 Van Rooyen 1988:275 (own translation), quoted with approval by Delport & Fourie 2021:574(19) in their discussion of sec. 163 of the 2008 *Act*.
166 Delport & Fourie 2021:574(10).
167 Delport & Fourie 2021:574(9).
168 Delport & Fourie 2021:574(9).
169 Delport & Fourie 2021:574(9).
170 Delport & Fourie 2021:574(18). It must be mentioned, though, that having access to the financial records of a company is guaranteed by sec. 26(1)(c) of the 2008 *Act*.
171 Delport & Fourie 2021:574(20).
172 Delport & Fourie 2021:574(18).
173 *Jenkins v Davison* 2017 JDR 1380 (GP).
174 *Jenkins v Davison*:paras. 36-37.
175 The 2008 *Act*:sec. 163(2)(a) and (l). See also *Jenkins v Davison*.

The provision lists several orders a court may make, although courts are not limited to these orders.[176] Courts may make orders that include an order restraining the conduct complained of by way of an interdict and an order for the trial of any issue, as determined by the court.[177] The provision gives courts a discretion to make any order they regard as fair and equitable under the circumstances.[178]

It appears that the first respondent might have been able to regain access to his email address through sec. 163(1). Reason being that, as a director of the first appellant, he enjoys protection under this provision. Sec. 163(1)(c) appears to be the most apposite in the present instance, as the powers of the second appellant, who is the co-director of the first respondent, seem to have been exercised in a manner that oppressed the applicant, was unfairly prejudicial towards him, or unfairly disregarded his interests. It is trite that the first respondent's access to his company's email address was terminated without his permission. Such termination was effected by the second appellant, who appears to have instructed an attorney to inform the second respondent to terminate the mentioned access. Such exercise of the second appellant's powers as a co-director arguably amounts to conduct that oppressed the first respondent. The second appellant's conduct unfairly disregards the interests of the first respondent concerning his justified or reasonable expectations as a director regarding participation in the management of the company. By terminating access to the email address, the second appellant undoubtedly excluded the first respondent from the management of the company, which conduct – as noted earlier – is oppressive or unfairly disregards his interests. Although unclear from the facts, it might be that the second appellant terminated the access of the first respondent to this email address with the motive of preventing him from proceeding with his application to have the first appellant liquidated. If so, it would be a strong indication that he lacked good faith and fair dealing in the affairs of a company.

Consequently, the conduct of the second appellant seems to satisfy the requirements of sec. 163(1)(c). The fact that the second appellant might potentially have acted *ultra vires* in his instruction to the second respondent, via the attorney, is arguably irrelevant, as sec. 163 – at least in terms of the *Jenkins* case – seems to apply, irrespective of the lawfulness of a director's conduct. As such, the first respondent could have approached a court in terms of sec. 163(2) for any interim or final order it considers fit. Such an order may have included an interim interdict, as in *Jenkins*, ordering the second appellant to ensure that the first respondent's access to his company's email address is restored pending a determination of any disputes the first respondent and second appellant may have in subsequent legal proceedings. Such an interdict would have had the same practical effect, had Gorven AJA granted the *mandament* to the first respondent.

176 Delport & Fourie 2021:574(22).
177 The 2008 *Act*:sec. 163(2)(a) and (l). See also *Jenkins v Davison*.
178 Delport & Fourie 2021:574(22).

Because the remedy in sec. 163 of the 2008 *Act* offered the respondent relief, which is similar to the *mandament*, there was hardly any reason – as per the argument of Van der Walt and Sutherland, the second subsidiarity principle, and, particularly, the *eiusdem generis* rule – to award the *mandament* in the present case. The legislative route (instead of the *mandament*) to obtain relief promotes a systemic constitutional approach towards remedies, as it prevents the unnecessary fragmentation of the law by upholding the division between property law and company law. Indeed, if the *mandament* was granted in *Blendrite*, it might have had the unintended effect of allowing a property-law remedy (which flows from the common law) to replace a statutory remedy, one that was enacted to provide relief in a specialised context, namely company law. Litigants should not be allowed to invoke the more general *mandament* to obtain relief in this setting. Furthermore, allowing the respondent to institute the *mandament* would have permitted him to circumvent legislation, which the democratically elected legislature enacted to provide relief in company law, which has the danger of undermining or downplaying such legislation.[179] Sec. 163, which takes the merits of a dispute into consideration, is arguably better equipped to balance the interests of parties than the *mandament*, which does not consider them. These reasons, which Gorven AJA did not consider, support those he gave for not extending the *mandament* in the present case.

4. CONCLUSION

In *Blendrite*, it had to be decided whether the *mandament* is available to restore a director's access to his company's email address. The SCA answered this question in the negative, by ruling that there was no link between the *quasi*-possession of the incorporeal, namely the email address, and tangible property. In terms of existing case law and academic scholarship, the outcome of the judgment cannot be faulted. In fact, Gorven AJA deserves praise for setting out and applying the rules of *quasi*-possession, which is a contested part of property law, in a clear and principled manner.

Even so, the article considers whether the *mandament* should perhaps be available to protect the *quasi*-possession of incorporeals that have no link to tangible property. I investigate this research question from two perspectives, namely the nature and purpose of possessory protection under the *mandament* and in terms of a systemic constitutional approach towards remedies.

The first one shows that, in Roman law, the possessory interdicts focused almost exclusively on protecting the possession of tangible things. These interdicts offered swift and effective relief to possessors to discourage persons from engaging in extra-judicial self-help as regards disputes concerning possession of (mainly tangible) property. There are clear similarities between the nature and purpose of possessory protection in Roman law and that of the *mandament*, which also seeks to discourage self-help in the context of possessory relations. The thing-oriented nature of possessory protection in Roman law reveals why the *mandament* primarily protects possession of corporeal property at present. *Blendrite* confirmed this nature by refusing to

179 Van der Walt 2012:91-92, 102-104. See further Marais & Muller 2018.

grant the *mandament* to have the respondent's access to the email address restored. Even though the *mandament* now protects the *quasi*-possession of a wider range of incorporeals when compared to Roman law, the *quasi*-possession of these rights must still be linked to *tangible things* for it to potentially enjoy protection under the *mandament*.

Radin's theory of property and personhood, which enjoys support in constitutional jurisprudence, sheds new light on the nature and purpose of the *mandament*. It provides a normative account of why this remedy is essentially available to all possessors, especially as between a possessor and an owner who unlawfully spoliates him. It also suggests that the remedy should be extended to the remaining two possessors who seemingly do not enjoy protection under the remedy, namely employees and *quasi*-employees. Yet, it must be asked whether the *mandament*'s thing-oriented nature is still a valid gatekeeper regarding access to this remedy. Reason being that access to one's email address, like using tangible property, also promotes human flourishing. When one considers these factors, along with the purpose of the *mandament*, it becomes clear that the *quasi*-possession of intangibles unrelated to corporeal things should enjoy legal protection. The question is whether the *mandament* is the appropriate remedy to provide such protection.

The above question is answered in terms of the second perspective I use to answer the research question, namely a systemic constitutional approach towards remedies. This approach, which flows from the single-system-of-law principle, entails that all remedies (and their possible development and expansion) must promote the spirit, purport, and objects of the Bill of Rights. In this instance, it must be asked whether it will be desirable, from a systemic perspective, for the *mandament* to be available to protect the *quasi*-possession of incorporeals unrelated to tangible things. There are two systemic reasons why it would be unattractive to extend the *mandament* in this manner.

First, if it is available to protect all intangibles, it would create fragmented, or parallel, sources of law, which the single-system-of-law principle seeks to avoid. Such fragmentation would occur if the *mandament* could be (ab)used to replace specific performance in contract law, for which it was not designed. It would obfuscate the relation between distinct legal fields, particularly where a remedy analogous to the *mandament* already provides relief. Allowing litigants to invoke the *mandament* in such an instance would subvert, instead of promote, the rule of law, a constitutional value, and undermine legal certainty. Legal certainty requires the coherent functioning of different sources of law.

The second reason concerns the availability of other remedies to provide relief similar to that which the *mandament* offers, particularly in view of the second subsidiarity principle and the *eiusdem generis* rule. For instance, if specialised legislation has been enacted to provide relief in a certain context, such as company law, such legislation should preferably be used to resolve the dispute. If litigants could instead use a more general remedy, such as the *mandament*, such reliance could frustrate and even downplay such legislation. The *mandament* specifically prevents conflict and public violence in the context of possession of *tangible things*. The potential for similar conflict

is simply not as prevalent as regards intangibles unrelated to land. Compelling policy arguments will, therefore, be needed to extend the *mandament* beyond its conventional field of application, if other (particularly statutory) remedies are available to undo the consequences of unlawful self-help, especially if the relief they offer is analogous to the *mandament*.[180] A statutory remedy might have allowed the first respondent in *Blendrite* to regain access to his email address, namely sec. 163 of the 2008 *Act*. If so, a court would have been justified to grant an interim interdict – which may be obtained on an urgent basis – ordering the second appellant to have the first respondent's access to this email restored, as he was responsible for severing this access. Gorven AJA was, therefore, justified in not awarding the *mandament* in the present case. Although he did not consider the arguments in this article, they support his reasoning and the outcome of the judgment. Had the *mandament* been awarded in *Blendrite*, it might have had undesirable systemic consequences. For instance, it might have excluded the remedial avenue the first respondent had in terms of the 2008 *Act*, which would have been analogous to what happened in the *Tigon* case.[181]

The thing-oriented nature of possessory protection under the *mandament*, therefore, seems to justifiably limit the scope of this remedy.[182] Even outside the company-law setting, the *mandament* would probably be unavailable to protect the *quasi*-possession of intangibles unrelated to corporeal things in most instances. It is probably better to avoid the *quasi*-possession concept, in this instance, and simply talk about access to these intangibles. It seems that such access will mostly enjoy adequate protection under other remedies. For instance, the court in *Vital Sales*, after refusing to award the *mandament*, granted the applicant an interim interdict (which it pleaded in the alternative) to have its access to the information on the communal server restored. In this instance, the relief the interim interdict afforded the applicant was analogous to the protection the *mandament* would have offered. Another possibility might be to have one's access to an intangible restored through a claim based on specific performance in contract law, should the service provider sever the access to the service (like an email address) contrary to the agreement between such provider and the user. Specific performance may be obtained by way of an urgent interdict,[183] which (again) means that this type of relief is analogous to that which the *mandament* offers. Whether the *mandament* should be extended to protect the *quasi*-possession (or access) of incorporeals unrelated to tangibles really ought to be considered only when there is no other remedy that could adequately vindicate the rights of an injured party.

One instance where such an extension might possibly feature may be in the virtual property realm.[184] For instance, a player (or account holder) of an online computer game has an in-game virtual object, such as a virtual

180 Van der Walt & Sutherland 2003:103-106.
181 See, for instance, Van der Walt & Sutherland 2003.
182 See similarly Van der Sijde 2021:par. 2.1.1.
183 Van Huyssteen *et al*. 2016:373.
184 See, for instance, Erlank 2012:289-393.

sword (which has real-world monetary value).[185] Another player then removes the virtual sword from the first player's control in the in-game environment without his permission. As the first player has invested time, effort, and money to acquire this sword, it may foster his human flourishing, as per Radin's theory.[186] If so, it deserves legal protection.[187] If neither the inherent features of the virtual (or gaming) environment, nor existing remedies, such as those in contract law, consumer protection law or criminal law, adequately protect the first player's virtual property interest, the *mandament* should arguably be available to have the player's access to the virtual sword restored.[188] More work is needed to prove the accuracy of this prediction, though. Nonetheless, *Blendrite* was not such a case, given the availability of a suitable remedy in company law, and it is, therefore, a welcome development.

185 I borrow this example from Erlank 2012:277.
186 See Erlank 2012:172-180 and the sources he cites.
187 Erlank 2012:172-180.
188 Erlank 2012:389-400ff.

BIBLIOGRAPHY

BOGGENPOEL ZT
2017. *Property remedies*. Cape Town: Juta Publishers.

DELPORT P & FOURIE L
2021. *Henochsberg on the Companies Act 71 of 2008*. Volume 1 Service Issue August 2021. Durban: LexisNexis.

DESCHEEMAEKER E (ED.)
2014. *The consequences of possession*. Edinburgh: Edinburgh University Press. https://doi.org/10.1515/9780748693658

DIAS RMW
1956. A reconsideration of *possessio*. *Cambridge Law Journal* 14(2):235-247. https://doi.org/10.1017/S0008197300006942

EMERICH Y
2014. Why protect possession? In E Descheemaeker (ed.) 2014:30-55. https://doi.org/10.3366/edinburgh/9780748693641.003.0002

ERLANK W
2015. Introduction to virtual property: *Lex virtualis ipsa loquitur*. *Potchefstroom Electronic Law Journal* 18(7):2525-2559. https://doi.org/10.4314/pelj.v18i7.04

2012. Property in virtual worlds. Unpublished LLD thesis, Stellenbosch University. https://doi.org/10.2139/ssrn.2216481

FAIRFIELD JAT
2005. Virtual property. *Boston University Law Review* 85(4):1047-1102.

KLEYN DG
1986a. Die *mandament van spolie* in die Suid-Afrikaanse reg. Unpublished LLD thesis, University of Pretoria.

1986b. Die *mandament van spolie* as besitsremedie. *De Jure* 19(1):1-16.

1991. Besitsbeskerming en die besitsleer: 'n Reddingspoging. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 54(1):21-42.

2014. The protection of *quasi*-possession in South African law. In E Descheemaeker (ed.) 2014:185-210. https://doi.org/10.1515/9780748693658-013

KOMMERS DP & MILLER RA
2012. *The constitutional jurisprudence of the Federal Republic of Germany*. 3rd edition. Durham: Duke University Press. https://doi.org/10.1515/9780822395386

MARAIS EJ
2016. Expanding the contours of the constitutional property concept. *Tydskrif vir die Suid-Afrikaanse Reg* 3:576-592.

2018. Narrowing the meaning of "deprivation" under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection. *South African Journal on Human Rights* 34(2):167-190. https://doi.org/10.1080/02587203.2018.1506621

2021a. Protecting *quasi*-possession of electricity supply with the *mandament van spolie* – Has the Supreme Court of Appeal switched off this possibility? *Stellenbosch Law Review* 32(2):215-233. https://doi.org/10.47348/SLR/2021/i2a2

2021b. The increasing difficulty of protecting *quasi*-possession of incorporeals with the *mandament van spolie*. *De Jure Law Journal* 54(1):91-104.

2022. The South African possession theory revisited: A re-evaluation of the possession concept and possessory terminology (Part 1). *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 85(2):151-175.

MARAIS EJ & MULLER M
2018. The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: *Quo vadis* statutory interpretation and development of the common law? *South African Law Journal* 135(4):766-798.

MICHELMAN FI & MARAIS EJ
2018. A constitutional vision for property: *Shoprite* and beyond. In G Muller, R Brits, BV Slade & AMA van Wyk (eds) 2018:121-146.

MULLER G, BRITS R, PIENAAR JM & BOGGENPOEL Z
2019. *Silberberg and Schoeman's The law of property*. 6th edition. Durban: LexisNexis.

MULLER G, BRITS R, SLADE BV & VAN WYK AMA (EDS)
2018. *Festschrift in honour of AJ van der Walt*. Cape Town: Juta Publishers.

RADIN MJ
1982. Property and personhood. *Stanford Law Review* 34(5):957-1015. https://doi.org/10.2307/1228541

1993. *Reinterpreting property*. Chicago: University of Chicago Press. https://doi.org/10.7208/chicago/9780226702292.001.0001

RÜFNER T
2014. Possession of incorporeals. In E Descheemaeker (ed.) 2014:171-184. https://doi.org/10.1515/9780748693658-012

SMITH HE
2012. Property as the law of things. *Harvard Law Review* 125(7):1692-1726.

SONNEKUS JC
1985. *Mandament van spolie* – Kragtige remedie by kragonderbreking? *Tydskrif vir die Suid-Afrikaanse Reg* 3:331-338.

1989. Besit van serwituutbevoegdhede, *mandament van spolie* en logika. *Tydskrif vir die Suid-Afrikaanse Reg* 3:429-442.

VAN DER MERWE CG
2014. *Law of South Africa things*. Volume 27. 2nd edition. Durban: LexisNexis.

VAN DER MERWE D (ED.), ROOS A, ERLANK W, EISELEN S, NEL S & MABEKA Q
2021. *Information and communications technology law*. 3rd edition. Durban: LexisNexis.

VAN DER SIJDE E
2021. *Juta's Quarterly review property*. Volume 2. Cape Town: Juta Publishers.

2015. Reconsidering the relationship between property and regulation: A systemic constitutional approach. Unpublished LLD thesis, Stellenbosch University.

VAN DER WALT AJ

1986. Toepassing van die *mandament van spolie* op onroerende sake. *Tydskrif vir die Suid-Afrikaanse Reg* 2:223-232.

1989. Die *mandament van spolie* en *quasi*-besit. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 52(3):444-453.

1997. Squatting, spoliation orders and the new constitutional order. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 60(3):522-556.

2008a. *Juta's Quarterly review property*. Volume 2. Cape Town: Juta Publishers.

2008b. *Juta's Quarterly review property*. Volume 3. Cape Town: Juta Publishers.

2012. *Property and Constitution*. Pretoria: Pretoria University Law Press.

2016. *The law of servitudes*. Cape Town: Juta Publishers.

VAN DER WALT AJ & MARAIS EJ

2012. The constitutionality of acquisitive prescription: A section 25 analysis. *Tydskrif vir die Suid-Afrikaanse Reg* 4:714-736.

VAN DER WALT AJ & SUTHERLAND PJ

2003. Dispossession of incorporeals or rights – Is the *mandament van spolie* the appropriate remedy? *South African Mercantile Law Journal* 15(1):95-109.

VAN ERP S & AKKERMANS B

2012. *Cases, materials and text of property law*. Oxford: Hart Publishing.

VAN HUYSSTEEN LF, LUBBE GF & REINECKE MFB

2016. *Contract – General principles*. 5th edition. Cape Town: Juta Publishers.

VAN ROOYEN L

1988. Die statutêre beskerming van minderheidsbelange in die maatskappyereg. Belangrike ontwikkelings in die Engelse regspraak. *Tydskrif vir die Suid-Afrikaanse Reg* 2:268-294.

YEATS JL, DE LA HARPE RA, JOOSTE RD, STOOP H, CASSIM R, SELIGMANN J, KENT L, BRADSTREET RS, WILLIAMS RC, CASSIM MF, SWANEPOEL E, CASSIM FHI & JARVIS KA

2018. *Commentary on the Companies Act of 2008*. (Loose leaf) (Revision service 2020). Cape Town: Juta.