

Introductory Principles

1. Incorporal Things An intangible thing. Example: Usufruct/Servitude (a limited real right) which can itself be the object of a real right (i.e. a right of real security)

2. Quasi Possession While cannot physically possess a right, the use of it = quasi possession. These causes typically involve the right to use something (i.e. servitude to draw water. Complaint: water cut off)

3. Mandament not based on 'merits' MVS only concerned with ius possessionis. Facto probanda must be proved in terms of quasi possession

4. Challenge when the thing is a right Don't we need to look at the right itself in order to see whether the plaintiff was in possession of said right?

Introductory Principles (cont)

5. Can't use MVS to claim contractual performance You need to sue in contract for specific performance and prove merits of case in courts.

So: Contract to draw water in return for R20/day = contractual remedy

Has Praedial servitude to draw water = quasi possession = MVS

But how can we KNOW if B's right is a contractual right or a servitude if we don't investigate the right? Don't we need to look at the merits?

History of protection of quasi-possession

It's accepted that the possession of incorporeals essentially consists of the exercise of the professed right. To prevent the exercise of such a [professed] right = spoliation.

How to protect exercise of a right unless there IS a right? Before plaintiffs had to prove the professed right to prove quasi possession of the right. *Kleyr*: wrong approach, it requires the court to look at the merits.

Bon Quelle v Municipality Otavi (authority)

Town drew water from Otavifontein, owner cuts water off. Municipality brought MVS against him

Bon Quelle argued town must prove right to water "because we are not dealing with recovery of corporeal property but recovery of respondent's alleged right. Thus it is necessary to prove the existence of the right that has been allegedly interfered with.

Bon Quelle v Municipality Otavi (authority) (cont)

Argument rejected: Applicant's ius possidendi never considered in MVS. MVS is an urgent application to restore the status quo. Return to court later to consider of merits of the dispute

Before respondent exercised powers of a servitude holder, believing he did bc of servitude. This is the status quo to be restored until court sits.

So, with Quasi Possession of Servitude

You do not need to prove you really do have a legal right, but rather just possession of the servitude. You do this by proving factual use of the servitude:

- Prove that you exercised powers of servitude holder as if you really had a servitude.

Then prove unlawful dispossession

MVS protects p. rights that arise from contract

Courts permit use of the MVS to protect use rights which arise from contract when the personal right is (Freedman):

- Right of Use

- And this use-right is "an incident of possession" of the tangible property. Interference with use-right = interference with possession of the tangible thing itself

Incident of [physical] possession cases: In terms of USE of a THING (*Kleyr*)

Premises are occupied & provided w services. Dispute leads to one party terminating these services through self-help which interferes with an incident of their possession of premises.



Naidoo v Moodley [incident of possession case]

M had a contract of lease- incl. provision of electricity.

Dispute over the lease - N cut electricity - M brought the MVS to have electricity supply restored

N argued M demanding specific performance - MVS not appropriate remedy

Court Held

Use of the electricity was an "incident of occupation" of the premises - M did physically occupy (or possess) the premises: Occupied the residence - physically present x using its appurtenances (power).

He [quasi] possessed this use right by actually using it

Telkom v Xsinet

Xsinet leased telephone lines from Telkom so that could provide an internet service to its customers

Contractual dispute: Telkom stopped providing the telephone lines - Xsinet brought MVS to have lines restored

Court Held:

- This was a contractual dispute, not incident of possession

- Led to unnecessary confusion, because contractual rights CAN give rise to USE rights that CAN be protected by the mandament, provided that are an incident of possession

City of Cape Town v Strümpher

S owned and managed a caravan park, supplied with water by CityofCT for 37 years in terms of contract - Dispute about water bill after water meter defective - Did not pay water bill - City cut water in terms of water bylaws & debt collection bylaws-S brought the MVS

City of Cape Town v Strümpher (cont)

City Argued: Contractual Dispute, not unlawful dispossession bc summary termination of water provided for in the City's water bylaws and debt collection laws

Was dispossession unlawful? : Held: unlawful: City didnt comply with s 4(3)(a) of Water Services Act: disconnection to be "fair and equitable".+ City failed to follow dispute resolution procedures = Thus insufficient justification for the disconnection

Were the rights suitable for protection by the mandament?

Residents forced to contract with City if they want municipal water but right to water is not just an ordinary contractual right. Not only personal rights bc these rights absorbed by statutory rights in terms of the Water Services Act, which put into operation the right to water in s 27. Thus S had public law rights arising from statute and Constitution independently of the contract [ie distinguished Telkom v Xsinet]

The court decided that interference with a public law right to water (arising from statute, and also based on the Constitution) = grounds for the MVS

Para 19

Respondent's rights to water were not merely personal rights flowing from a contract, but public-law rights to receive water, which exist independently of any contractual relationship the respondent had with the City. The respondent's use of the water was an incident of possession of the property. Clearly interference by the City with the respondent's access to the water supply was akin to deprivation of possession of property

City of Cape Town v Strümpher (cont)

Academic Comments on Para 19

Freedman: Court misinterpreted Impala bc it was based on a real right under the Water Act of 1956. Not clear if *Strümpher* was based on incident of possession of property principle (which concerns personal rights) or the real right argument in Impala.

Kleyn: Above abt Impala

Boggenpoel: Impala and *Strümpher* focus on the nature of the right dispossessed and emphasize that not merely contractual. Impala gives impression that mandament available where statutory rights dispossessed; *Strümpher* seems to expand this to dispossession of constitutional rights. This is in reaction to *Telkom v Xsinet*, but it seems to detract from the parallel jurisprudence based on use of the service as an incident of possession In the end, both cases use this principle, but *Strümpher* does not really examine the facts (ie whether use of the water really was an incident of possession).

General: The danger of focusing on the nature of the rights (in an effort to prove NOT contractual) means is that the court might stray into a consideration of the merits ... or will require some kind of proof that the right is not contractual This is unnecessary because in both Impala and *Strümpher* [and many other cases] use of the water/service/resource was an incident of possession and therefore suitable for protection against spoliation even if it DID arise from contract

Impala Water Users' Association v Lourens

Dispute between Water Users' Association and the farmers about the price of water - Farmers refused to pay increase - WUA stopped the water - Impala issued MVS - WUA argued this was a contractual dispute - Farmers used MVS.

Court Held

Not ordinary personal rights but arising from statute.

Use of the water = "incident of possession" of each farm bc water rights were linked to and registered in respect of a certain portion of each farm, & used for sugar cane, which was dependent on the water supply .

Possession was interfered with by the WUA

Quasi-possession of the use right is proved by actual use [*Bon Quelle*] - can use MVS

Academic Critique from Keynes

Why stress rights registered in terms of a statute? Even if merely contractual, the right of use that = incident of possession of the farms.

C

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