

Common law in future: Enough to stop land invasions?

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Land invasions in South Africa can be divided into two groups with different motives: homeless people who have nowhere else to go, and people with a political agenda who erect structures and invade land.

The *Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)* protects people who invade and occupy land from being evicted without a legal court order. Evictions are also legally executed by the sheriff of the court from which an eviction order was obtained.

Where landowners are concerned, the *Constitution* stipulates that no person may be unilaterally deprived of property. Both individuals and the state can commit this type of property deprivation, and therefore the *Constitution* also prohibits any legislation that would allow unilateral deprivation of property.

Spoliation or spoiling of possession can occur in different ways, for example physically taking away someone's property or prohibiting access to a premises.

Between these two opposites in the *Constitution* exists a maze of provisions that must be considered in circumstances where a response to land invasion is necessary. It is against this background that the Western Cape High Court recently heard arguments regarding a common law (legal principles from other countries and our history that have become part of our legal system) remedy known as counter spoliation.

Counter spoliation and spoliation

Counter spoliation is a counter measure against what is known in our legal system

as spoliation. Spoliation is closely related to the word 'spoil' and simply means spoiling of possession.

If you are wrongfully deprived of your right of possession by someone who takes the law into their own hands, you will be entitled to approach the court by means of a remedy – *mandament van spolie*, or spoliation remedy – to restore your right of possession through a court order. The spoliation remedy is part of an advanced way of resolving disputes in a civilised country where the rule of law is upheld and citizens are discouraged from taking matters into their own hands.

Spoliation or spoiling of possession can occur in different ways, for example physically taking away someone's property or prohibiting access to a premises. Counter spoliation is a permissible response to spoliation in our legal system. This simply means that a victim of spoliation has a legal recourse, based on counter spoliation, to immediately or spontaneously and physically take back their possession without any legal consequences for the victim of spoliation.

Land invasions can be seen as a form of spoliation. The issue on which the Western Cape High Court must decide, is whether counter spoliation (spontaneous and immediate action to physically prevent land invasions) is permissible within the scope of the aforementioned constitutional provisions, and in particular within the framework of evictions that may not take place without a court order.

Deprivation of land

In essence, this means the court will have one of two choices, namely to uphold the common law with regard to land invasions, but set clear guidelines on the manner in which landowners may use counter spoliation to prevent

land invasions, or to determine that the remedy of counter spoliation can no longer be used to stop land invasions if it is measured based on the *Constitution's* provisions on eviction.

The South African Human Rights Commission and the Economic Freedom Fighters (EFF) are the other party in this matter and it is, of course, the commission and political party's view that counter spoliation may not be used to stop land invasions.

Unfortunately, the rejection of counter spoliation as a legal remedy in the case of land invasions means that landowners or people who legally own land in ways other than property rights, will enjoy less protection of their property rights from a legal point of view. This, together with upholding the rule of law, should be a strong argument in favour of retaining counter spoliation in the case of land invasions.

The state's duty to protect rights

Section 7 of the *Constitution* places a duty on the state to respect, protect and promote the *Bill of Rights of the Constitution*. This duty includes the constitutional provisions set out in the *Constitution* to protect property rights.

The Western Cape High Court case will bring this issue to a close, although it will in all probability not be the final decision in this regard. Hopefully, in the interest of agriculture, this decision will have a positive outcome and will preserve an important legal remedy for the protection of property rights and a counter measure to unlawful deprivation of property. 🌱

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