

# City of Cape Town v The South African Human Rights Commission and Others

(1337/2022; 368/2023) [2024] ZASCA 110;  
2024 (5) SA 368 (SCA) (10 July 2024)

## INTRODUCTION

This Supreme Court of Appeal judgement examines the legality of the municipality's use of the common law defence of counter-spoliation in the context of homeless individuals occupying the City's unoccupied land. In this case, the Court was required to consider whether counter-spoliation by a municipality requires judicial oversight, and under which circumstances it can justifiably bypass the usual legal remedies, if at all. The case revolves around the Court's interpretation and ruling relating to the City of Cape Town's actions involving the removal of homeless occupiers and the demolition of their informal dwellings without a court order.

## BACKGROUND

This City of Cape Town, through its Anti-Land Invasion Unit ("ALIU") demolished structures erected by homeless individuals on various parcels of unoccupied municipal land between April and July 2020, without a court order. The structures, made from corrugated iron and plastic, were destroyed along with some of these individuals' personal belongings. During the removals, some individuals were injured, while others were treated in a degrading and humiliating manner.<sup>1</sup>

The South African Human Rights Commission ("SAHRC") initiated court proceedings on behalf of the affected persons, for urgent interlocutory relief. Relief was sought from the Court in two parts – The High Court granted interim relief in **Part A**, interdicting the City from removing the land occupiers pending the finalization of **Part B** of the proceedings, and directed that compensation be paid. In respect of the declaratory relief in **Part B**, the City sought to justify its conduct with reliance on the common law remedy of counter-spoliation, which, in certain circumstances may permit a party, *instanter*, to follow up and retrieve possession of that which it has been despoiled of.

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The broader legality of the City's reliance on counter-spoliation, proceeded to the High Court and forms the basis of this appeal. The City was partially successful on appeal in respect of **Part A**, insofar as the order for the payment of compensation was set aside. Central to the case in **Part B**, was whether the City's actions satisfied the requirements of counterspoliation under common law.

## COURT'S INTERPRETATION

The Appeal Court referred to the judgment of the High Court, with reference to the "*instanter*"<sup>2</sup> requirement of counter-spoliation, which stated that:

*"A narrow interpretation and application of instanter is preferable because it is consistent with the common law and the constitutionally enshrined Rule of Law. The very label of counter spoliation is indicative that its objective is to resist spoliation and that it may be resorted to during the act of spoliation. Furthermore, the description of counter spoliation indicates that it must be part of the res gestae or a continuation of the spoliation - thus giving guidance to what is meant by instanter. Counter spoliation is no more than the resistance to the act of spoliation. Therefore, it follows that once the act of spoliation is completed and [the] spoliator has perfected possession, the window within which to invoke counter spoliation is closed."*<sup>3</sup>

The High Court deemed it unnecessary to decide the issue of the constitutionality of counter-spoliation, as initially sought by the SAHRC. Although the SAHRC had initially approached the Court on the basis of the "constitutional attack", the Notice of Motion had been amended substantially by the time the matter was heard before the SCA, thus narrowing the issue to whether the City had satisfied the requirements of counterspoliation in the circumstances, and the appeal proceeded on this basis. The issue for determination by the Court was therefore whether the High Court was correct in finding that the City applied counter spoliation incorrectly; i.e. that the City had not acted *instanter* under the circumstances, and thus was not justified to have counter-spoliated, with the consequential damage to the unlawful occupiers' homes, structures, property

and in some cases, their injuries, and the impairment of their dignity.

The Court stated that while the Constitution preserves the common law, the common law is in alignment with the Bill of Rights. Hence, any common law provisions that contradict the Constitution must either be revised or nullified. However, this does not imply that all common law mechanisms need constitutional revision.

According to *Silberberg and Schoeman's The Law of Property*,<sup>4</sup> a possessor who has been unlawfully dispossessed cannot take the law into their own hands to recover possession. It is required for the possessor to rely on the *mandament van spolie*. If the recovery is instant it is considered a part of the act of spoliation and is regarded as a mere continuation of the breach of peace, consequently condoned by the law, known as counter-spoliation. The act of counter-spoliation is only permissible in the following circumstances:<sup>5</sup>

- a. peaceful and undisturbed possession of the property has not yet been acquired, i.e. when the taking of possession is not yet complete; and
- b. where the counter-spoliation would not establish a fresh breach of the peace.

Once a spoliator has acquired possession of the property and the breach of the peace no longer exists, counter-spoliation is no longer permissible. The person who seeks to counter-spoliate, in this case the City, must show the presence of two requirements:<sup>6</sup>

- a. the (homeless) person was not in effective physical control of the property (the possessory element); and
- b. the (homeless) person thus did not have the intention to derive some benefit from the possession (the animus element).

This means that should a homeless person occupy the municipality's unoccupied land, the municipality can only act (counter-spoliate) before any structures (such as poles, or corrugated iron sheets) have been erected, or before belongings have been placed in a way that shows effective control of the property.<sup>7</sup>

The Respondents and amicus curiae argued that once occupiers brought their materials and erected structures on the land, that they had established peaceful and undisturbed possession, and that in such instances, counter-spoliation as a remedy was no longer available to the City. The City's approach was also criticised, insofar as its arbitrariness, its subjective approach, and failure to adhere to constitutional protections, particularly under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("PIE Act").

## CONCLUSION

The Court found that the City's actions violated the occupants' property rights by destroying their personal belongings, violated constitutional values, contravened the rule of the law and violated the socio-economic rights of the occupants in respect of the demeaning treatment the occupants were forced to endure.<sup>8</sup> Consequently, the Court held that the City's use of counter-spoliation in this instance did not meet the requirements for reliance on this legal remedy, that it was wholly inappropriate, did not survive constitutional scrutiny, and could not justify the removals of the occupants. The City's conduct was therefore held to be unlawful, and the City's appeal was dismissed with costs.

*Please note: Each matter must be dealt with on a case-case basis, and you should consult an attorney before taking any legal action.*

<sup>1</sup>*City of Cape Town v The South African Human Rights Commission and Others (1337/2022; 368/2023) [2024] ZASCA 110; 2024 (5) SA 368 (SCA) at para 2.*

<sup>2</sup>*Ibid para 10: Recovery must be immediate and considered part of the spoliation act, it is viewed as a continuation of the ongoing breach of peace, thus the law condones it.*

<sup>3</sup>*Ibid para 6.*

<sup>4</sup>*G Muller et al Silberberg and Schoeman's The Law of Property 6ed (2019) at 353.*

<sup>5</sup>*Supra note 1 at para 11.*

<sup>6</sup>*Ibid.*

<sup>7</sup>*Supra note 1 at para 12.*

<sup>8</sup>*Ibid at para 36.*



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