# THE *MANDAMENT VAN SPOLIE*, THE RESTITUTION OF UNLAWFUL POSSESSION AND THE IMPACT OF THE CONSTITUTION, 1996

***Ngqukumba v Minister of Safety and Security***
**2014 5 SA 112 (CC)**


## OPSOMMING

### Die *mandament van spolie*, die herstel van onregmatige besit en die impak van die Grondwet, 1996

Gedurende 2014 het die Konstitusionele Hof in 'n eenparige uitspraak in *Ngqukumba v Minister van Veiligheid en Sekuriteit* gelas dat die polisie, wat onregmatiglik 'n motorvoertuig in beslag geneem het, die voertuig aan die eienaar daarvan moes teruggee hangende 'n ondersoek na die feite en meriete rakende die regmatige besit daarvan. In beginsel het die regsvraag verband gehou met 'n aansoek vir 'n *mandament van spolie* in 'n geval waar die applikant aansoek gedoen het vir die herstel van sy besit van 'n motorvoertuig waarvan met die onderstelnommer gepeuter is en waarvan die oorspronklike enjinnommer afgevyl is, en op welke voertuig die polisie beslag gelê het kragtens sekere bepalings van die Nasionale Padverkeerswet 93 van 1996. In hul bespreking van die beginsels van die *mandament*, bevestig die Konstitusionele Hof dat die kernbasis van die *mandament*, die herstel van besit, voor enigiets anders, van die onregmatige besitsontneming van 'n voorwerp aan die besitter vereis. Die doel van die *mandament* is gevolglik die herstel van besit in gevalle waar besit van iemand ontneem is, anders as wat die reg toelaat en dat persone, insluitende die regering, regtens beperk word om nie die reg in eie hande te neem sonder om regmatige stappe te doen nie. Met verwysing na onlangse gesag bevestig die hof dat die mandament aanwending vind, selfs teen die polisie, waar hulle onregmatig op goedere, soos die voertuig in die onderhawige geval, beslag gelê het. Die feit dat die saak gehandel het oor 'n voorwerp waarvan die besit vermoedelik onregmatig kon wees, was nie vir die hof deurslaggewend nie aangesien die hof nie bereid was om op die meriete van die saak in te gaan nie. In die bepaalde omstandighede kom die hof tot die slotsom dat die relevante artikels van die Padverkeerswet, vir sover moontlik, op 'n harmonieuse wyse saamgelees moet word met die vereistes van die *mandament*. Die hof bevind dat niks in die vermelde bepalings van die wet daarop gerig is om die gemenereg te verander nie en dus nie die normale aanwending van die *mandament* uitsluit of verander nie. Volgens die hof is sodanige aanslag nie alleen in lyn met die bepalings van artikel 39(2) van die Grondwet nie, maar voldoen dit ook aan ander bepalings van die Handves van Regte asook die funderende beginsels en waardes waarop die huidige Suid-Afrikaanse grondwetlike model gebaseer is. Met die *Ngqukumba*

beslissing bevestig die Konstitusionele Hof weer eens die regsposisie dat die *mandament* 'n robuuste remedie is wat besitsherstel vereis, voor enigiets anders, en dat die aanwending daarvan, nieteenstaande die gemeenregtelike aard daarvan, binne die vereistes van die Grondwet moet geskied. Die belang van die beslissing lê voorts daarin dat die Konstitusionele Hof met klinkklare helderheid die belangrike regspunt bevestig dat die uitleg en aanwending van die Suid-Afrikaanse gemenereg, binne die regsraamwerk van 'n oppermagtige Grondwet, hernude erkenning en oorweging moet geniet.

## 1 Introduction

On 15 May 2014 the Constitutional Court of South Africa, in a unanimous decision of ten justices, handed down the judgment in *Ngqukumba v Minister of Safety and Security*, the case under discussion (hereafter *Ngqukumba* CC). The judgment was based on an appeal from the Supreme Court of Appeal in *Ngqukumba v Minister of Safety and Security* 2013 2 SACR 381 (SCA), and a prior decision of the Eastern Cape High Court (*Ngqukumba v Minister of Safety and Security* [2011] ZAECMHC 10). The crux of the matter was based on sections 68(6)(b) and 89(1) of the National Road Traffic Act 93 of 1996 (hereafter the Traffic Act) which prohibit the possession "without lawful cause" of a motor vehicle of which the engine or chassis number has been falsified or mutilated. The matter related to the question whether these sections in the Traffic Act entitled the police to retain a vehicle which they have seized unlawfully. The Eastern Cape High Court, sitting in Mthatha and following certain previous Supreme Court of Appeal decisions, ruled against the applicant and held that the police could retain a vehicle which has been seized unlawfully. The applicant then appealed to the Supreme Court of Appeal. The appeal failed and the applicant applied for leave to appeal to the Constitutional Court (*Ngqukumba* CC para 1).

The Constitutional Court, based on the merits of the case, overturned the decision of the Supreme Court of Appeal and in effect also that of the Eastern Cape High Court. In essence, the matter concerned an application for a *mandament van spolie* in a case where the applicant asked for the restitution of possession of his motor vehicle that was seized by the police. The dispute between the parties hinged on sections 68(6)(b) and 89(1) of the Traffic Act, which provide as follows:

Section 68(6)(b):

> "No person shall –
>
> (b) without lawful cause be in possession of a motor vehicle of which the engine or chassis number has been falsified, replaced, altered, defaced, mutilated, or to which anything has been added, or from which anything has been removed, or has been tampered with in any other way."

Section 89(1):

> "Any person who contravenes or fails to comply with any provision of this Act or with any direction, condition, demand, determination, requirement, term or request thereunder, shall be guilty of an offence."

Before evaluating the reasoning and outcome of the *Ngqukumba* judgment it is important to note that in the recent past the Supreme Court of Appeal handed down several judgments concerning sections 68(6)(b) and 89(1) of the Traffic Act in cases where applicants sought restoration of possession of their vehicles that were seized by the police. (See *Basie Motors BK t/a Boulevard Motors v Minister of Safety & Security* [2006] JOL 17057 (SCA); *Marvanic Development (Pty) Ltd v Minister of Safety & Security* 2007 3 SA 159 (SCA); *Pakule v Minister of Safety & Security, Taveni v Minister of Safety & Security* 2011 2

SACR 358 (SCA); *ABSA Bank Ltd v Eksteen* [2011] JOL 26962 (SCA), hereafter referred to as the Traffic Act cases.) In these cases the Supreme Court of Appeal denied restoration of possession to the applicants, based on the court's interpretation of the words "without lawful cause" in section 68(6)(b). The Supreme Court of Appeal argued that in principle the words "without lawful cause" mean that it will in all circumstances be unlawful to be in possession of a vehicle that has been tampered with as described in section 68(6)(b). According to the court, therefore, to order the restoration of possession would amount to the applicant committing an offence in terms of the Act. These judgments dominated the reasoning in the *Ngqukumba* decisions in the Eastern Cape High Court and the Supreme Court of Appeal, and formed the basis of the legal question that the Constitutional Court had to decide.

## 2 Background and facts

On 10 February 2010, a suspect who was under investigation by the police in connection with a stolen vehicle volunteered certain information to the police. The information was that he had previously been involved in the theft of a motor vehicle and that this vehicle was located at a certain taxi rank in the city of Mthatha. The police subsequently took him to this location and he pointed out the vehicle to them. This vehicle, which is the subject matter in this case, was the vehicle that belonged to the applicant. The police then instructed that the vehicle be taken to a nearby police station. At the police station it was discovered that the vehicle's chassis number had been tampered with and it appeared that the particular number had been removed from another vehicle and placed in the applicant's vehicle. There was also no engine number on the vehicle since the original engine number had been ground off and the manufacturer's tag plate had been removed from another vehicle and had been placed on the applicant's vehicle. Based on these findings the police retained the vehicle. It should be pointed out that the police were acting without a search and seizure warrant and were accordingly acting without legal authorisation (*Ngqukumba* CC para 2). The legal question thus arose whether it would be legally permissible for the state or any other spoliator to retain possession of an item in a case where it is known or presumed that the possession of the *spoliatus* is unlawful. In order to answer such a proposition some basic features and background of the *mandament van spolie* need to be revisited.

## 3 Historical background to the *mandament van spolie*

The Constitutional Court remarked that the "essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else)" (*Ngqukumba* CC para 10). The fact that unlawful possession is also protected by the *mandament* has always been a controversial issue. Voet (41 2 16 translation Gane) states that: "If he has been thrown out of possession he can . . . claim . . . that the possession shall before anything be restored to him, even though he who was thrown out should be a thief or a robber."

Some lawyers are uncomfortable with this statement. Van den Heever J in *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 4 SA 250 NC 255D–E) made the following observation:

> "Despite generalizations that even the thief or robber is entitled to be restored to possession, I know of no instance where our Courts, which disapprove of

> metaphorical grubby hands, have come to the assistance of an applicant who admits that he has no right *vis-à-vis* the respondent to the possession he seeks to have restored to him."

In *Coetzee v Coetzee* 1982 1 SA 933 (C) 935D the same judge stated that:

> "The cases seem to suggest that, despite lip service to the sweeping statement by *Voet* 41 2 16 that even the despoiled robber will be assisted, possession will not be restored if the applicant has no vestige of a 'reasonable or plausible claim' . . . and the respondent conclusive proof of his ownership of the article in question."

However, in *Yeko v Qana* 1973 4 SA 735 (A) 739F–G the Appellate Division accepted the statement of Voet that the thief is entitled to protection by the *mandament* (see also *Magadi v West Rand Administration Board* 1981 2 SA 352 (T) 354D where Voet 41 2 16 is cited with approval). In *Schubart Park Resident's Association v City of Tshwane Metropolitan Municipality (Socio-Economic Rights Institute of South Africa* amicus curiae*)* 2013 1 BCLR 68 CC para 23, the Constitutional Court cited the Supreme Court of Appeal in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 SCA para 21) where the court stated that "even an unlawful possessor – a fraud, a thief or a robber – is entitled to the *mandament*'s protection".

Although the protection of unlawful possession might be difficult to comprehend, it makes sense in light of the historical foundations and theoretical jurisprudence that underscore possessory protection. According to the Romano-canon law of procedure, there is a separation between the possessory suit (*iudicium possessorium*) and the suit on the merits (*iudicium petitorium*). In the possessory suit where the applicant applies for a *mandament* (to be reinstated in his possession), he only has to prove that he was in possession and that there was spoliation (unlawful deprivation of possession, that is, deprivation without his consent). If the applicant succeeds, possession must be restored *ante omnia*. The court does not consider the merits of the case; for example, whether the spoliator is the owner and the possessor a thief. This means that title is never considered during the possessory suit and this approach is supported by the majority of the Roman-Dutch authorities. (See Matthaeus III *De probationibus liber* (1739) 2 no 32–34; Schomaker *Selecta consilia et responsa juris* part 3 (1752) 3 76 no 1–3 and 4 18 no 4; Van Leeuwen *CF* (1741) 1 2 10 no 4; Van der Keessel *Praelectiones* (with translation by Van Warmelo *et al* (1961–1975)) 2 2 7; Van der Linden *Koopmans handboek* (1806) 1 13 2. See also Kleyn *Die mandament van spolie in die Suid-Afrikaanse reg* (LLD thesis UP 1986) 258–259).

The protection of the unlawful possessor such as a thief, therefore, becomes theoretical. Seeing that the court does not consider the merits, it will not be aware of the fact that the possession of the *spoliatus* was unlawful or if it suspects that the possession was unlawful it is not in a position to investigate it.

However, in the case of the *notarius praedo/spoliator*, in other words, in the case where the court is fully aware of the fact that the possession of the *spoliatus* was or will be unlawful, is a problematic issue as the history of the *mandament* shows. In canon law, where the mandament originated, the exception was recognised that restitution of possession will not be awarded to the *notarius praedo* (see Kleyn 118). This approach was also followed by some of the commentators (eg Angelus Ubaldus Perusinus *In primam et secundam Codicis partes commentaria* (1580) *ad C* 8 4 8 no 1), as well as by Voet 43 16 3, De Groot *Hollandse consultatien* (1683–1698) 5 157 and Zoesius *Commentarius ad Digestorum seu Pandectarum juris civilis libros L* (1743) *ad D* 43 16 no 17–19. But this view

was rejected by Leyser *Meditationes ad Pandectas* vol 7 (1778) 7 *sp* 504-10 and Wassenaer *Practijck judicieel ofte instructie op de forme en manier van procederen in praxis judiciaria* (1669) 14 6.

There were cases in the past where the South African courts were aware that the possession of the s*poliatus* will be unlawful, but still ordered restitution of possession. For example, in *Greyling v Estate Pretorius* 1947 3 SA 514 (W) the court restored a buyer in possession who did not pay the price and against whom an eviction order was granted; in *Fredericks v Stellenbosch Divisional Council* 1977 3 SA 113 (C) illegal squatters succeeded with the *mandament*; in *Naidoo v Moodley* 1982 4 SA 82 (T) a lessee who illegally occupied the premises after the termination of the contract was protected by the *mandament*. Where in a case of spoliation the court is aware of the unlawfulness of the possession of the *spoliatus* and does not order restoration, it in effect condones the act of the spoliator.

## 4 Applying the principles of the *mandament van spolie* on the *Ngqukumba* facts: The decisions of the Eastern Cape High Court and Supreme Court of Appeal

After the police seized his vehicle, the applicant on several occasions requested the restoration of possession of the vehicle. However, the police refused restoration because they were still investigating the matter. After a lengthy delay, the applicant applied for a *mandament van spolie* in the Eastern Cape High Court to have his vehicle returned. The cause of action of the application was based on the *mandament van spolie*, which, as explained above, is a common law remedy. It was not contested between the parties that the applicant had been in possession of the vehicle prior to the seizure. However, in the main, the police contended that because the engine and chassis numbers of the vehicle had been tampered with, the court was legally incompetent to order the vehicle's return to the applicant. This "incompetency", according to the respondents, was based on the provisions of sections 68(6)(b) and 89(1) of the Traffic Act. In essence, the argument of the respondents was that, if the court were to order the restoration of possession of the vehicle to the applicant, the court effectively would be assisting the applicant in the commission of a criminal offence (*Ngqukumba* CC para 3). In essence, the High Court found the seizure of the vehicle to have been unlawful (*Ngqukumba v Minister of Safety and Security* (2011) ZAECMHC 18, hereafter the High Court judgment). However, it refused to order the return of the vehicle to the applicant because his possession of the vehicle would constitute a criminal offence in terms of sections 68 and 89 of the Traffic Act as mentioned above. Instead, the court ordered the retention of the vehicle by the police until it had been reregistered in accordance with the Traffic Act (*Ngqukumba* CC para 4).

In its judgment, the High Court explained the principles of the *mandament* by referring to the classic cases of *Nino Bonino v De Lange* 1906 TS 120 and *Yeko v Qhana* 1973 4 SA 735 (A). It pointed out that the applicant must prove that he was in peaceful and undisturbed possession of his property and that he was spoliated, in other words, unlawfully dispossessed either without his consent or without legal process such as a court order or seizure warrant (paras 27 28). The court also noted that the *mandament* is a speedy, *sui generis* remedy that requires relief *ante omnia.* It protects *mala fide* possessors and thieves who have been deprived of their possession unlawfully (para 33). It was clear that the applicant was in possession and the court found that the seizure was unlawful (para 31). However, despite the court's correct insight and application of the principles of

the *mandament van spolie*, it considered itself bound by the Supreme Court of Appeal judgments in *Marvanic*, *Phakule* and *Taveni* (referred to in section 1 above). It therefore found the seizure to be unlawful but the retention by the police to be lawful (para 39) in light of the provisions of the Traffic Act. Nevertheless, the court granted the applicant leave to appeal to the Supreme Court of Appeal.

In the subsequent appeal to the Supreme Court of Appeal (*Ngqukumba v Minister of Safety and Security* 2013 2 SACR 381 (SCA), hereafter the SCA decision), and following on a number of previous decisions, for example, the Traffic Act cases, the Supreme Court of Appeal, too, concluded that it was not competent to order the return of the vehicle to the applicant. The court based its decision on the prohibition on the possession of a tampered vehicle "without lawful course". The court held as follows (para 15 SCA decision; para 5 *Ngqukumba* CC):

> "The appellant's possession of the vehicle for now – until such time as a police clearance is issued and the vehicle is registered in accordance with the provisions of the Act – will thus be unlawful according to the criminal law. The police cannot lawfully release the vehicle to the appellant, whether he is the owner or erstwhile lawful possessor thereof. An order by a court that it be done will be no different than ordering a person to be restored in the possession of his or her heroine or machine gun which he or she may not lawfully possess. In fact, when council for the appellant was invited in argument to distinguish this case from a claim by the former possessor of heroin, he was unable to do so."

## 5 Constitutional Court decision

After the decision of the Supreme Court of Appeal, the applicant applied for condonation and for leave to appeal the decision to the Constitutional Court. (It must be noted at this point that by the time the matter came before the Constitutional Court. the police had already returned the particular vehicle to the applicant. Since they had serious overcrowding and safety problems at their vehicle storage facilities, the police returned vehicles – including the applicant's – to the people from whom they had been seized for safekeeping purposes pending the outcome of further investigations. In essence, however, the return was encumbered and it amounted to nothing more than an extension of the police storage facilities and thus could not be regarded as a true restoration of possession.) The applicant, therefore, persisted in seeking full restoration of possession of the vehicle that was seized by the police. Therefore, in the main, the issues that had to be decided by the Constitutional Court were whether (a) leave to appeal should be granted to the applicant; and (b) whether in proceedings for a spoliation order a seizure performed under section 68(6)(b) read with section 89(1) of the Traffic Act precluded the restoration of possession to the despoiled person/applicant.

On the issue of condonation it was common cause between the parties that the application for leave to appeal to the Constitutional Court was filed out of time. The respondents, however, did not oppose the application for condonation and leave to appeal and the respondents rather confirmed during oral argument that they, too, stood to benefit from a judgment of the Constitutional Court on the merits of the particular case. In light of this position, the court thus decided that condonation should be granted (*Ngqukumba* CC para 8). On the second issue of leave to appeal, the court confirmed that this particular case raised important issues that are firmly rooted in the rule of law, which is a founding value of the Constitution, 1996 (hereafter the Constitution). The case also involved important issues regarding statutory interpretation relating to possession; the right to property

entrenched by the Constitution; and also the manner in which the provisions of section 39(2) and (3) of the Constitution are to be interpreted and applied.

However, apart from such important issues and at the centre of the matter is the spoliation order in the context of the statutory provisions of the Traffic Act, which appear to preclude restoration of possession. This subject matter, according to the Constitutional Court, has been a vexing issue which has seen the Supreme Court of Appeal overruling one of its earlier judgements in as short a period of only one year (*Ngqukumba* CC para 9; see also *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA)). The Constitutional Court thus concluded that it is needless to say that these legal issues are not only of a constitutional nature, but are complex in nature and of great importance and that it is without doubt in the interests of justice for the Constitutional Court to pronounce on such issues. Leave to appeal according to the court thus had to be granted (*Ngqukumba* CC para 9).

As regards the merits of the case and particularly on the issue whether sections 68(6)(b) and 89(1) of the Traffic Act precluded a spoliation order, the court argued as follows. According to the court, the essence of the *mandament van spolie* is the restoration before all else of unlawfully-deprived possession of an object to the possessor. As was mentioned above, such legal basis finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). Under the *mandament*, the spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. The underlying philosophy of the *mandament* is that no one should resort to self-help to obtain or regain possession of an object. The court further confirmed that the main purpose of the *mandament* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow the due process of the law (*Ngqukumba* CC para 10. Refer also to *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA), in which case the Supreme Court of Appeal stated that under the *mandament*, anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided. Even an unlawful possessor – a fraud, thief or robber – is entitled to the *mandament*'s protection. The principle is that illicit depravation must first be remedied before the courts will decide competing claims to the object or property. Note also *Schubart Park Residents Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC) where the court concluded that in proceedings for a spoliation order one does not have to argue the question whether the person deprived of possession is in fact a fraud, thief or a robber, for the simple reason that this is not at issue. That the person might turn out to be one is irrelevant.) The court further confirmed that the application of the *mandament* applies equally whether the despoiler is an individual or a government entity or functionary. The court found authority for this position in *George Municipality v Vena* 1989 2 SA 263 (A) 271H–272B, and quoted with approval the following part of the *Vena* judgment:

> "[T]he clear principle of our law is that, ordinarily speaking, persons are not entitled to take the law into their own hands to enforce their rights. There is a legal process by which the enforcement of rights is carried out. Normally speaking, it is carried out as a result of an order of court being put into effect through the proper officers of the law such as the sheriff, deputy sheriff, messenger of the magistrate's court or his deputies, reinforced if necessary, by the aid of the police or some such authority; in most civilised countries there exists the same principle that no person enforces his legal rights himself. For very obvious reasons that is so; if it were not

> so, breaches of the peace, for instance, would be very common. It is clear, therefore, that if you want to enforce a right you must get the officers of the law to assist you in the attainment of your rights" (*Ngqukumba* CC para 11).

The Constitutional Court further stated that a spoliation order is available even against government entities, for the simple reason that unfortunate excesses by those entities do occur. Furthermore, such excesses, like acts of self-help by individuals, may lead to breaches of the peace, and that is what the spoliation order which is deeply rooted in the rule of law, seeks to avert. The court further confirmed that the likely consequences aside, the rule of law must be vindicated, and that is exactly what a spoliation order seeks to achieve. It was also confirmed that it does not matter that a government entity may be purporting to act under the cover of law, statutory or otherwise, but that the real issue is whether the government is properly acting within the law. After all, the court emphasised that the principle of legality requires all organs of state to act always in terms of the law. The court stated that it thus should make no difference that in dispossessing an individual of any object unlawfully, the police can argue that they acted under the authority of the search and seizure powers contained in the Criminal Procedure Act 51 of 1977. Under section 20 of the Act, the state is permitted to seize anything which *inter alia* is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence. Noncompliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful and such unlawfulness, together with the other requirements for a spoliation order, satisfies the requisites for such an order. All that a despoiled person has to prove is that (a) he or she was in possession of the object; (b) he or she was deprived of possession unlawfully (*Ngqukumba* CC para 13). Against this background the court reached the important conclusion that the *mandament* is available even against the police where they have seized goods unlawfully. Therefore, in relation to the central question whether sections 68(6)(b) and 89(1) of the Traffic Act are to be read in a manner that alters this position and stand in the way of restoration of possession of the vehicle to the applicant in terms of the spoliation order, the court held that it did not (*Ngqukumba* CC para 14). The court thus concluded that the Supreme Court of Appeal proceeded from the premise that a tampered vehicle is no different from an article of which the possession would be unlawful under all circumstances. This premise, according to the court, is erroneous because possession of a tampered vehicle will be unlawful only if its possession is "without lawful course". The court therefore held that the present case was not concerned with objects the possession of which would be unlawful under all circumstances, in which case the *mandament* might well not be available (*Ngqukumba* CC para 15). Since the issue of the spoliation of an object that cannot be lawfully possessed by a person was not an issue before the court, the court declined to answer such question. According to the court, the fact that the present case concerned an article/object that may be possessed quite lawfully made all the difference.

Against this background, the court took the view that sections 68(6)(b) and 89(1) of the Traffic Act had to be read as far as possible in a manner that is harmonious with the requirements of the *mandament*. According to the court, such interpretation would be in accordance with the principle that, to the extent possible, statutes must be read in conformity with the common law. (According to South African law, in instances where a harmonious reading is not possible, statutes must trump the common law. See *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) and Botha *Statutory interpretation: An introduction for students* (2012) 78–79.) The court then stated that nothing in sections 68 and 89

of the Traffic Act intended to alter the common law and since section 68 included the phrase "without lawful course" the section must be read not to oust the normal operation of the *mandament*, which is part of South African common law. The court further reasoned that this reading and interpretation promote the spirit, purport and objects of the Bill of Rights and, therefore, conform to the provisions of section 39(2) of the Constitution, since possession is closely associated with and often regarded as an incident of the principle of ownership. Thus, in some instances the protection of possession will guarantee wholesome enjoyment of the right to property which is protected in section 25 of the Bill of Rights as entrenched in chapter two of the Constitution. This, according to the court, is not surprising since section 39(3) of the Constitution recognises the existence of rights and freedoms created by the common law if they are not inconsistent with the Constitution (*Ngqukumba* CC para 18).

In light of the above, the court then concluded that the aforementioned reading and interpretation of the two sections of the Traffic Act do not unduly thwart effective policing. Rather, it enjoins police to act not only in accordance with the Criminal Procedure Act, but also in compliance with the Constitution. Strict compliance with the Constitution and the law will not hamper police efforts in stemming the scourge of crime. The court further mentioned that there is no doubt that the police play an important role in combating and preventing crime, including criminal investigations, and maintaining public order and thus protecting and securing the inhabitants of South Africa and their property and upholding and enforcing the law. The endeavours of the police in this regard should not be interfered with unduly. However, the police, like everyone else, are subject to the Constitution and in particular the rule of law (see s 205(3) of the Constitution). A failure to hold the police to compliance with the Constitution may have negative consequences which may encourage them to be a law unto themselves. After all, the court pointed out, police excesses are not unknown. Any reading of sections 68 and 89 in a manner that ousts the *mandament* may lead to a culture of impunity amongst police which would be at odds with the principle of constitutionalism (*Ngqukumba* CC para 20). The court finally concluded that the possession of the vehicle by the applicant pursuant to its return in terms of a court order would be unlawful only if it were established that the possessor did not have lawful cause to possess it. This, according to the court, is a conclusion that can only be reached after an enquiry into the facts surrounding the applicant's possession has been conducted. Before such an enquiry, one is not in a position to say that the applicant's possession of the vehicle will be unlawful. Any enquiry into the merits of the lawfulness of the applicant's possession is irrelevant in proceedings for a spoliation order. The despoiler must restore possession before all else. Self-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled. The court reiterated the point that "the restoration of possession may even be to a person who might eventually be shown to be a thief or a robber [and the] return to the applicant of the tampered vehicle, which may be possessed lawfully, is no different" (*Ngqukumba* CC para 21). Based on these arguments the court finally held that the appeal succeeded and that the order of the Supreme Court of Appeal had to be set aside. The respondents were ordered to return the vehicle to the applicant.

## 6 Critical analysis

As pointed out in the introduction to this contribution, the Supreme Court of Appeal's jurisprudence on section 68(6)(b) and 89(1) of the Traffic Act was

dominated by its judgments in *Basie Motors*, *Marvanic*, *Pakule*/*Taveni* and *ABSA Bank* (the so-called Traffic Act cases). The court's reasoning in these cases was based on its view that the words "without lawful cause" in section 68(6)(b) of the Traffic Act mean that possession of a tampered vehicle would be unlawful under all circumstances, just like the possession of heroin or a machine gun which one may not lawfully possess (SCA judgment para 15). The Constitutional Court rejected the Supreme Court of Appeal's example of the possession of heroin and pointed out (para 9) that this was "a vexing subject" for the Supreme Court of Appeal which has seen that court overruling its own judgment in *Invanov v North West Gambling Board* 2012 6 SA 67 (SCA). The approach of the Supreme Court of Appeal illustrates the controversial issue of restoring possession to the *mala fide* possessor, especially the *notorius praedo* as discussed above (see section 3).

It must be pointed out that there were two dissenting judgments in the Supreme Court of Appeal's Traffic Act judgments. In *Marvanic* Farlam JA disagreed with the majority judgment delivered by Lewis JA. Farlam held that

> "subsection (6)(b) which deals with motor vehicles does not penalise possession *simpliciter*. It only penalises such possession where the possessor does not have lawful cause to possess . . . In my opinion it is more likely that the legislator considered that provision had to be made for persons such as owners, pledges or lessees in cases where engine and chassis numbers have been tampered with" (paras 19–20).

In *Basie Motors* Scott JA agreed with Farlam JA and stated with reference to section 68(6)(b) of the Traffic Act that "[t]he subsection contemplates the possession of a mutilated vehicle which is lawful. If this were not so, the words "without lawful cause" would not have been inserted" (paras 19–20).

These two dissenting judgments must be supported and are fully reconcilable with the Constitutional Court judgment in *Ngqukumba* as well as the Supreme Court of Appeal's own judgment in *Ivanov* (which that court overturned one year later in *Ngqukumba*). In *Ivanov* the appellant applied with the *mandament of spolie* for restoration of his gambling machines which were unlawfully seized by the police while his possession without a requisite licence was prohibited by the National Gambling Act 7 of 2004. The court referred to *Yeko v Qana* 1973 4 SA 735 (A) and *Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 1 SA 508 (A)) and remarked:

> "It is clear from all these authorities that questions of illegality or wrongfulness of the spoliator's (*sic*) possession are irrelevant. The former has to be determined by the criminal courts; and the latter concerns the merits of the case which are irrelevant" (para 25).

*Ngqukumba* also related to sections 68(6)(b) and 89(1) of the Traffic Act. But in this case the seizure of the tampered vehicle by the police was unlawful, thus amounting to spoliation (see para 39 of the Eastern Cape High Court judgment, para 7 of the Supreme Court of Appeal judgment and paras 13 and 14 of the Constitutional Court judgment). Therefore, in *Ngqukumba* the applicant applied for a *mandament van spolie*.

In the Traffic Act cases the seizures by the police were considered to be lawful in terms of the Criminal Procedure Act (see *Marvanic* para 5, *Basie Motors* para 14, *Pakule*/*Taveni* para 4 and *ABSA Bank* para 12). In those cases the applicants, therefore, did not apply for restoration of the tampered vehicles with the *mandament*, but rather in terms of section 31(1)(a) of the Criminal Procedure Act

which provides that if no criminal proceedings are instituted in connection with any article seized it must be returned to the person from whom it was seized (see, eg, *Marvanic* para 5 and *Basie Motors* para 7).

Hence the Traffic Act cases cannot serve as precedents for *Ngqukumba.* The Supreme Court of Appeal erred in its finding that "the principle enunciated in the cases discussed in *Pakule* and *Taveni* applies with equal force to a spoliation claim as it does to a claim under s 31 of the CPA". An application for a *mandament van spolie* cannot be equated to a claim under section 31 of the Criminal Procedure Act. The *mandament* is a *sui generis* common law remedy (see *Ngqukumba* CC para 10) and not comparable to a statutory remedy as is provided for in section 31 of the Criminal Procedure Act.

It is interesting to note that the Supreme Court of Appeal also tried to shy away from restoring possession to what it regarded as a *mala fide* possessor or *notorius praedo* by erroneously finding that

> "[t]he rule that goods dispossessed against the will of the possessor must be restored forthwith, however, is not an absolute one. A legally admissible defence that might be raised against an application for a *mandament van spolie* is . . . that restoration of possession is not possible because the possession thereof by the spoliated person would not only be unlawful but would in fact constitute a criminal defence" (para 13).

In this regard, the court cited Van der Merwe *Sakereg* (1989) 133–137. The *mandament* is a robust remedy that requires restoration of possession *ante omnia* and therefore the defences against the *mandament* are very limited. One such defence is indeed the impossibility of restoration. But as Van der Merwe points out at 134–135, this defence applies when it is objectively and physically impossible to restore possession, for example when the thing has been destroyed, irreparably damaged or transferred to a *bona fide* third party. There is no authority in modern South African law or our common law that restoration of possession would be impossible because the possession of the *spoliatus* would be unlawful.

Notwithstanding the fact that the *Ngqukumba* decision mainly deals with the interpretation and application of the *mandament van spolie*, as mentioned by the Constitutional Court, the matter also raises a variety of important constitutional issues. These are (a) the supremacy of the Constitution; (b) the founding values of South Africa's new constitutional dispensation with special reference to the principle of the rule of law; and (c) the importance of fundamental rights such as the right to property and the manner in which the South African common law, inclusive of the remedy of the *mandament van spolie*, is to be applied and enforced within the new constitutional context of section 39.

As regards the supremacy of the Constitution, it is trite that with the commencement of the new constitutional order in 1994, first under the interim Constitution Act 200 of 1993 and thereafter the Constitution of 1996, the Constitution in its written format constitutes the supreme law of the Republic (s 2 and the preamble to the Constitution). According to the Constitution, it is the supreme law of the Republic of South Africa and any law or conduct inconsistent with the Constitution is invalid. All obligations imposed by the Constitution must be fulfilled (See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the RSA, 1996* 1996 4 SA 744 (CC) where the court held that no one exercises power or authority outside of the Constitution and that all statutory provisions are subject to the Constitution. Note also *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) where the court held

that the South African constitutional democracy is founded *inter alia* on the values and principles of constitutional supremacy and the rule of law. Courts must declare any law or conduct which is inconsistent with the Constitution to be invalid. Note also the obligations provided for in s 172 of the Constitution).

As regarding the founding values and the rule of law, extensive authority exists on the point that the current South African constitutional dispensation follows what is considered as the value-orientated or normative approach to constitutional law. In *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA), it was held that in South Africa the legal order and convictions of the community must be informed by the norms and values of South African society as embodied in the Constitution. The fact that no norms and values inconsistent with the Constitution can have legal validity makes the constitutional order a system of objective normative values for legal purposes (444E–G; see also *Du Plessis v Road Accident Fund* 2004 1 SA 359 (SCA)). Similarly, in *Minister of Home Affairs v NICRO* 2005 3 SA 280 (CC), the Constitutional Court held that the values enumerated in section 1 of the Constitution are of fundamental importance since they inform and give substance to all of the provisions of the Constitution. The importance and impact of the founding values are therefore self-explanatory. It is further trite that the principle of the rule of law is specifically entrenched as part of the founding values of the South African constitutional text (see s 1(c) of the Constitution). Extensive research and discussion of the principle of the rule of law have been done over many decades, not only from a South African perspective but also within foreign jurisdictions (for more details refer to Michelman "The rule of law, legality and the supremacy of the Constitution" in Woolman *et al* (eds) *Constitutional law of South Africa* (OS 02-05 at 11-1-42). In essence, the purpose of the rule of law is to protect basic individual rights by requiring the government, but also other parties, to act in terms of pre-announced, clear and general rules. People may further not be deprived of their rights through the exercise of arbitrary and wide discretionary powers of the state. The government must act and exercise its powers in terms of the law and must also obey and adhere to the law. Neither the state nor any other person is above and beyond the reach of the law and no person, including the state, may exercise a power or perform a function unless the law so permits. Even if a legal rule exists, the rule of law requires that such a law must be applied in a lawful and legitimate manner. This is often referred to as the legality principle. Furthermore, according to the legality principle, which is an incidence of the rule of law, there must be a rational relationship between the law and its application on the one hand, and the achievement of a legitimate government purpose on the other. If no such rational connection exists, then the legal rule and its application would be contrary to the principle of the rule of law and, therefore, contrary to the Constitution and invalid (see Bekink *Principles of SA constitutional law* (2012) 62–63. See also *Pharmaceutical Manufacturers of SA: In re Ex parte President of the RSA* 2000 2 SA 674 (CC) 708 where the court held that all public powers must comply with the Constitution, which is the supreme law and which includes the doctrine of legality. Note also *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC); *President of the RSA v Modderklip Boerdery Pty Ltd* 2005 5 SA 3 (CC) and *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC)).

Finally, with reference to the incorporation of fundamental rights and the application of the South African common law within the new constitutional context, the following aspects should be emphasised. Under chapter 2 of the

Constitution, a comprehensive Bill of Rights has been incorporated. This Bill of Rights is regarded as a cornerstone of democracy in South Africa and it enshrines the rights of all people. The state is obligated to respect, protect, promote and fulfil the rights in the Bill of Rights. However, rights are not absolute and are subject to the limitations contained and referred to in section 36 or elsewhere in the Bill of Rights (see s 7(1) of the Constitution). Under section 25, the right to property is specifically entrenched. Section 25 provides that no one may be deprived of property except in terms of law of general application. Furthermore, no law may permit the arbitrary deprivation of property (s 25(1)). The Constitutional Court also observed (*Ngqukumba* CC para 18) that possession is closely associated with, and is often an incident of, ownership. The confiscation of property such as the vehicle in *Ngqukumba*, must comply with the requirements of the Constitution. Furthermore, under section 39 of the Constitution, which deals with the interpretation of the Bill of Rights, the Constitution provides that when interpreting any legislation (such as the Traffic Act mentioned above) and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights (see s 39(2)). However, the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by the common law, customary law or even legislation, to the extent that such laws are consistent with the Bill of Rights (s 39(3)). In this regard, it is important to take note of *K v Minister of Safety and Security* 2005 6 SA 419 (CC) where the Constitutional Court held, in view of the provisions of section 39(2), that the purpose of section 39(2) was to ensure that the South African common law was infused with our constitutional values. Such normative influence had to be extended throughout the common law and, as such, the obligations placed on the courts by section 39(2) are extensive. Note also the important confirmation in *Pharmaceutical Manufacturers of South Africa: Ex Parte President of the RSA* 2000 2 SA 674 (CC), where the Constitutional Court confirmed the legal position that both the South African common law and the Constitution are parts of one and the same system of law. All law derives its force and legitimacy from the Constitution as the Constitution is the supreme law of the state.

It is against the above background that the decision in *Ngqukumba* should be considered. On balancing the facts and circumstances it is submitted that the Constitutional Court, in exercising its constitutionally entrenched judicial authority as the apex court in the South African judicial system, has again demonstrated its important role, not to slavishly follow decisions of lower courts such as the Supreme Court of Appeal, but to consider and apply independently all aspects of South African law on issues before the court. The court further confirmed that when the interpretation of legislation is required or when the common law or customary law is to be developed, all courts must on the one hand promote the spirit, purport and objects of the Bill of Rights, but also on the other ensure that the rights in the Bill of Rights do not deny any rights or freedoms that are recognised or conferred by the common law, customary law or legislation. (See, in this regard, the recent and already ground-breaking judgment of the Constitutional Court in *Bakgatla-Ba-Kgafela Tribal Community Property Association v Bakgatla-Ba-Kgafela Tribal Authority* CCT 231/14 (2015) ZA CC 25 (unreported)). Such rights or freedoms must, however, be consistent with both the Bill of Rights and other requirements of the Constitution. (See ss 39(2)–(3) and 2 of the Constitution which confirm that (any) law or conduct inconsistent with it (the Constitution), is invalid.) As far as reliance on the Constitution is concerned, it has been pointed out above that the Constitutional Court in *Ngqukumba* fully and in detail,

aligned the *mandament* with the Constitution and its underlying values. In the Eastern Cape High Court there is only a brief reference to the Constitution (para 31), namely, that to interfere with a person's undisturbed possession infringes the constitutional right to property. Surprisingly, there is no reference to the Constitution in the judgment of the Supreme Court of Appeal.

## 7 Conclusion

In view of the above discussion and the facts of *Ngqukumba*, it is our view that the decision of the Constitutional Court underscores and heralds a re-look at the interpretation and application of South African common law provisions within the new supreme constitutional context. Although the South African legal system finds itself 20 years after the birth of a truly democratic state founded upon the principles of *inter alia* the rule of law, constitutional supremacy and direct constitutionalism, the importance and value of the South African common-law principles, such as the *mandament van spolie*, should not be underestimated or ignored. It is important that all legal scholars, be they lawyers, judges or academics, should ensure that they are well informed about the extent and reach of the common-law legal principles and that the tendency is not developed to jettison or de-value such principles within a new statutory dominated legal environment (Note the instructions of the Constitutional Court in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC), where the court held that the indirect application of rights in the Bill of Rights operates generally through s 39(2) of the Constitution, which requires courts, when interpreting statutes or developing the common or customary law, to promote the spirit, purport and objects of the Constitution.) There should be no doubt that the South African common law, as confirmed by the Constitutional Court, is still a key primary source of South African law and must be treated and applied as such. The often haphazardous or even incorrect interpretation and application of common law provisions, such as the *mandament van spolie*, should be guarded against strongly. As pointed out above, there is but one system of law under the Constitution. Such a system incorporates not only the Constitution itself and other statutory laws, but also the South African common law and customary law, as far as such provisions fall within the constitutional legal framework or have been developed as such (See, eg, *Masiya v DPP, Pretoria* 2007 5 SA 30 (CC); *Paixao v RAF* 2012 6 SA 377 (SCA) and *RH v DE* 2014 6 SA 436 (SCA).) Finally, as *Ngqukumba* eloquently illustrates, South African common law principles, such as the *mandament van spolie*, not only provide one of the pillars of the South African legal system, but also serve an important role to support and enhance founding constitutional values, such as the rule of law, upon which the new constitutional dispensation is founded.

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