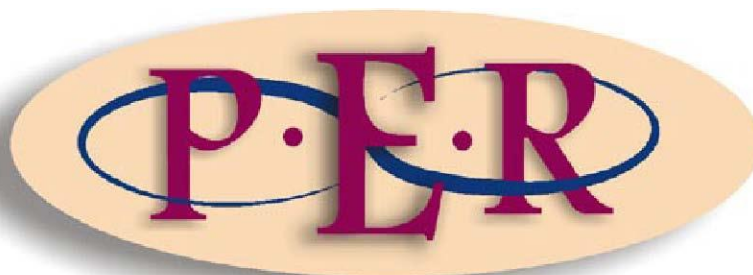


Author: ZT Boggenpoel

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**QUESTIONING THE USE OF THE MANDAMENT VAN SPOLIE IN
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ZT Boggenpoel*

1 Introduction

A recent Constitutional Court judgment handed down on Thursday 15 May 2014 emphasises what could very well be described as a growing tendency regarding the use of the common law remedy of the *mandament van spolie* in post-constitutional jurisprudence, in sometimes unorthodox or unconventional contexts.¹ It is therefore not unsurprising that Sonnekus has been at pains to point out that the remedy is becoming what he has appropriately termed a *Mädchen für Alle*.² Ironically, it is becoming clear that the remedy is being used in more cases (or at least more consistently nowadays than it was before the enactment of the *Constitution*), despite there currently being at least two other remedial avenues that litigants can exhaust, namely statutory remedies or a constitutional remedy in terms of section 38 or 172 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*).³

One example where this has recently come up is in the Constitutional Court decision of *Ngqukumba v Minister of Safety and Security* (hereafter *Ngqukumba*).⁴ The legal question in *Ngqukumba* was whether the *mandament van spolie* – as a remedy to restore possession – can be ordered if section 68(6)(b) of the *National Road Traffic Act* 93 of 1996 (hereafter the *Traffic Act*) prohibits possession "without lawful cause" of a motor vehicle of which the engine or chassis number has been falsified or mutilated. The conclusion of the Court was that the *mandament van spolie* can be

* Zsa-Zsa T Boggenpoel. BComm LLB LLD (Stell). Associate Professor in Private Law, University of Stellenbosch. Email: zsazsa@sun.ac.za. I should like to thank Juanita Pienaar, Reghard Brits and Elsabé van der Sijde for reading a draft of this note and for valuable feedback. I also wish to thank my assistant Derryn Visser for valuable research assistance. I am equally grateful for the positive comments from the reviewers of the journal. The remaining errors are my own.

¹ *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC).

² Sonnekus 1985 *TSAR* 337.

³ The same arguments were made elsewhere in the context of the unlawful occupation of land and quasi-possession. See Boggenpoel 2014 *Stell LR* 72; Boggenpoel 2015 *TSAR* 76. Also see Van der Walt 2008 *CCR* 77-128; Van der Walt *Property and Constitution* 35-39.

⁴ *Ngqukumba v Minister of Safety and Security* 2014 5 SA 112 (CC) (*Ngqukumba*).

granted despite the prohibition against the return of the vehicles in terms of the *Traffic Act*. Interestingly, the *Criminal Procedure Act* 51 of 1977 (hereafter the CPA), in terms of which the seizure of these vehicles had initially taken place, actually has a built-in remedy to allow for a claim for the return of these vehicles.⁵ This has prompted me to ask questions like: Why use a temporary remedy like the *mandament van spolie* to reclaim possession of these vehicles if the CPA has a remedy to restore possession on the one hand, and the *Traffic Act* precludes repossession in certain instances on the other?

The decision in *Ngqukumba* raises questions about the relationship between common law remedies and statutory provisions that are specifically geared towards regulating an area of law. There are interesting parallel running questions that arise in the contexts of both quasi-possession⁶ and eviction⁷ – that I have picked up on in earlier

⁵ S 31(1)(a) of the *Criminal Procedure Act* 51 of 1977 (CPA) provides that "[i]f no criminal proceedings are instituted in connection with any article referred to in section 30(c) or if it appears that such article is not required at the trial for the purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it".

⁶ With regard to the use of the remedy in the case of incorporeals, especially where the supply of water is disconnected, it remains questionable in some instances whether the *mandament van spolie* is the appropriate remedy to restore lost possession where legislation was enacted to replace the common law or regulate the field. In this regard, s 3(1) of the *Water Services Act* 108 of 1997, which provides that everyone has a right of access to basic water supply, gives effect to the constitutional right to have access to sufficient water as encapsulated in s 27(1) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*). Furthermore, s 4(3)(a) of the *Water Services Act* requires that the limitation or discontinuation of water services must be fair and equitable. To that end, the provisions are aimed at ensuring that fair and equitable disconnections take place and that the dispute resolution procedures in the Act are followed to ensure that disconnections are lawful. Therefore, it should in principle be impermissible to employ common law remedies if there are procedures (and remedies) in the legislation aimed at adequately balancing the rights of the water service authority and the water user. However, if the legislation does not provide adequate remedies, falling back on the existing common law as the residuary source of law is arguably more desirable than developing new constitutional remedies, which would seemingly run parallel to the extant common law ones. See also Boggenpoel 2015 *TSAR* 76.

⁷ In the context of eviction, it is important to consider whether an unlawful occupier who was illegally evicted can choose to apply for common law remedies or opt for direct reliance on constitutional rights to found constitutional remedies. It is also essential to determine in this context whether courts should deliberately be able to choose not to apply or develop the common law remedies in line with the *Constitution*, but instead decide to devise new constitutional remedies that again will run parallel to the common law ones. Once again, courts should probably be careful in terms of how they deal with the application of the *mandament van spolie* vis-à-vis constitutional remedies, especially in the absence of a specific remedy in the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 96 of 1998 (PIE) designed to restore the situations where local authorities evict illegally without following the procedures in the Act. See Boggenpoel and Pienaar *De Jure* 998-1021; Boggenpoel 2014 *Stell LR* 72-98.

research – though I do not specifically intend to deal with those aspects in this note. Suffice it to say that the questions asked in relation to the protection of incorporeals with the *mandament van spolie* and regarding the protection afforded by the remedy in the context of the unlawful occupation of land emerge again in the light of *Ngqukumba*.

The *Ngqukumba* judgment shows that the appropriate relationship between the existing common law remedies and statutory provisions should be re-evaluated. Significantly, I think *Ngqukumba* creates the impression that the use or application of the spoliation remedy – and probably by implication common law remedies in general – remains largely unaffected by the CPA (which has an alternative, arguably case-specific, remedy) and the *Traffic Act* (which specifically prevents the return of vehicles in certain cases).

My preliminary hypothesis is that the *mandament van spolie* may have cleverly been used to circumvent a line of Supreme Court of Appeal decisions that attempted to provide clarity about the return of so-called tampered vehicles in terms of the statutory remedy in the CPA. In order to prove this, I will firstly begin by providing a synopsis of the main points of the decision. I would then like to back-track a couple of years and investigate how these problems were solved without (or before) resort to the *mandament van spolie* – and why I think this common law lifeline may have been cleverly used, potentially as a second best option, where the statutory remedies were categorically denied by the Supreme Court of Appeal in the light of the *Traffic Act*. Finally, I will provide some observations about the outcome of this decision – especially in terms of the broader implications for the way legislative interventions may have had an impact on extant common law remedies.

2 The facts of *Ngqukumba*

The judgment of *Ngqukumba v Minister of Safety and Security* is an appeal against a Supreme Court of Appeal decision in which the spoliation remedy was denied because section 68(6)(b) of the *Traffic Act* prohibits possession "without lawful cause" of a

motor vehicle of which the engine or chassis number had been falsified or mutilated.⁸

Section 68(6)(b) of the *Traffic Act* provides that

... [n]o 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.⁹

In short, the central question before the Constitutional Court in *Ngqukumba* was whether it is possible to use the *mandament van spolie* to reclaim possession of these so-called tampered vehicles.¹⁰

The facts that gave rise to this judgment can briefly be described as follows: On 10 February 2010 a suspect provided the police with information concerning the possibility that the appellant's taxi was a stolen vehicle. The taxi – which was standing in a taxi rank in Mthatha at the time – was pointed out by the suspect to the police, and the driver of the taxi was ordered to take the vehicle to the police station. The police then inspected the taxi and discovered that the vehicle's chassis number had apparently been removed from another vehicle and placed on the appellant's one. The police also found that the engine number of the appellant's taxi had been ground off and that the manufacturer's tag plate had been removed from another vehicle and placed on the appellant's taxi. The taxi was therefore a "tampered vehicle" for the purposes of the *Traffic Act* and consequently it had been retained by the police. The vehicle had been searched and seized without a valid warrant.

The appellant applied to the Eastern Cape High Court for the return of the vehicle on the basis of the *mandament van spolie*. The court held that although both requirements of the remedy, namely peaceful and undisturbed possession and unlawful dispossession, had been complied with, the remedy could not be granted because section 68(6)(b) of the *Traffic Act* entitled the police to withhold a vehicle if the engine or chassis number had been tampered with. On appeal, the Supreme Court of Appeal reiterated that allowing the appellant to be restored to the possession of

⁸ See *Ngqukumba v Minister of Safety and Security* [2013] ZASCA 89 (31 May 2013).

⁹ S 68(6)(b) of the *National Roads Traffic Act* 93 of 1996 (*Traffic Act*).

¹⁰ *Ngqukumba* para 7.

the vehicle would be unlawful according to criminal law, and therefore the appellant's claim based on the spoliation remedy was also denied by the Supreme Court of Appeal.¹¹

In the Constitutional Court, Madlanga J granted leave to appeal and highlighted that it was in the interest of justice for the Constitutional Court to pronounce on a number of constitutional issues that arose in this case. The legal issues were deemed to be of a constitutional nature and included the statutory interpretation relating to possession in a way that complies with section 39(2) and (3) of the *Constitution* and the question of the applicability of the spoliation remedy in the context where legislation appears to preclude the restoration of possession. Therefore, the Court identified the pertinent issue on appeal as whether section 68(6)(b) of the *Traffic Act* (read with section 89(1), which makes it a criminal offence to be in possession of these tampered vehicles) precludes the restoration of possession in proceedings for a spoliation order.

The Court began by considering whether sections 68(6)(b) and 89(1) of the *Traffic Act* preclude, and therefore forms a valid defence against, a spoliation order.¹² In this regard Madlanga J first emphasised the underlying philosophy and main purpose of the remedy, which is to preserve the "public order by restraining persons from taking the law into their own hands and by inducing them to follow due process".¹³ The Court stressed that the remedy can be granted against an individual or government who fails to take recourse to a court of law to enforce rights, but rather resorts to self-help instead.¹⁴ Consequently, when government entities resort to acts of self-help, the rule

¹¹ *Ngqukumba v Minister of Safety and Security* [2013] ZASCA 89 (31 May 2013) para 15.

¹² *Ngqukumba* para 10. Impossibility of restoration is commonly recognised as a defence against a spoliation order. Impossibility implies that repossession of the spoliated property is unlikely for some reason. In some instances, it might be impossible to return the thing because it does not exist anymore or the property may have been irreparably damaged or harmed. In other cases, the defence of impossibility may be raised because the property may have been alienated to a *bona fide* third party subsequent to the dispossession, making restoration impossible. The impossibility defence could also possibly arise (as in *Ngqukumba*) because the spoliator's possession of the property is unlawful or illegal. In other words, the argument is that impossibility of restoration can be raised as a valid defence in the case where possession of the property is illegal and the spoliation order is denied because section 68(6)(b) of the *Traffic Act* prohibits possession "without lawful cause" of a motor vehicle of which the engine or chassis number has been tampered with. See Van der Merwe *Sakereg* 134-137; Van der Walt 1985 *SALJ* 179-180; De Waal *Mandament van Spolie as Remedie* 36-54.

¹³ See *Ngqukumba* para 10.

¹⁴ *Ngqukumba* para 11.

of law (a founding value of the *Constitution*) can be vindicated by using the *mandament van spolie*.¹⁵ In other words, if the police purport to act in terms of the CPA to seize someone's property, then they are required to comply with the provisions of the Act. The principle of legality will be undermined if organs of state act outside of the provisions of the alleged Act. For purposes of the *mandament van spolie*, the seizing of someone's goods is therefore unlawful if the provisions of the CPA were not complied with. Consequently, the remedy is available in principle in instances where the police acted outside of the ambit of legislation and seized goods without the necessary warrant. According to the court's reasoning, the person from whom the vehicles were seized may then use the spoliation remedy to resume control of the vehicles. This seems to be the case, even despite there actually being a remedy in the CPA to claim the return of the vehicle. I return to this point, and the concern that I have in this regard, later on in the note.

The conclusion up to this point was that the remedy is available in principle in these instances. The Court then proceeded to question whether the remedy can nonetheless be denied, as the restoration of possession was impossible because of the statutory provisions preventing the re-possession of the vehicle in the light of the *Traffic Act*. Madlanga J rejected this impossibility argument for the following two reasons: firstly, the Constitutional Court disagreed with the Supreme Court of Appeal's premise that a vehicle that had been tampered with – and was therefore suspect in terms of section 68(6)(b) of the *Traffic Act* – was the same as an article which would *per se* be unlawful to possess under all circumstances, for instance heroin or a machine gun, which someone may not lawfully possess.¹⁶ With regard to *per se* illegal objects, possession of which can never be lawful, the court emphasised that had it been concerned with objects of that nature, the *mandament van spolie* may well not have been available.¹⁷

¹⁵ *Ngqukumba* para 12.

¹⁶ *Ngqukumba* para 15.

¹⁷ *Ngqukumba* para 15. The distinction between illegal possession (where a statute for instance prohibits possession) and unlawful possession (where a possessor simply does not have consent to be in possession) should probably have played a more critical role in *Ngqukumba*. An interesting judgment, albeit in a different context, that highlights why it may be important to distinguish between illegal and unlawful possession is *Swanepoel v Crown Mines Ltd* 1954 4 SA 596 (A). The judgment deals with an unsuccessful claim by a possessor based on acquisitive prescription. The possessor was prevented from being in possession of the land because legislation prohibited such possession. The claim based on acquisitive prescription failed in *Swanepoel* because the claimant

Consequently, the Court took the view that in relation to tampered vehicles, which can in principle be possessed if there is *lawful cause* for their possession, the application of the remedy was not completely barred. Furthermore, the Court held that where the possibility of using the *mandament van spolie* still existed (in other words, where it was uncertain whether the individual might or might not have a lawful cause to possess the tampered vehicle), sections 68(6)(b) and 89(1) should be read in a manner that conformed with the common law and the statutory provisions should not be read so as to oust the operation of the remedy in principle.¹⁸ The *mandament van spolie* should therefore be granted and a court on another day in a separate enquiry into the merits of the dispute had to decide whether or not the applicant had a lawful cause to possess the vehicle. The court in this matter should be interested only in restoring possession before all else, provided the requirements of the remedy had been complied with. The decision of the Supreme Court of Appeal was consequently set aside and the police were ordered to return the vehicle to the appellant.

3 Analysis of *Ngqukumba*

The Court's conclusion that the spoliation remedy would be available even though the CPA contains a remedy to claim the property back is noteworthy and warrants further discussion. This conclusion – namely that the spoliation remedy can appropriately be used where the state acts outside of the provisions of the CPA – raises questions about the continued reliance on the common law in instances where an appropriate remedy may already exist in the legislation aimed at regulating the field. The use of the *mandament van spolie* in this context is arguably controversial. The use of the spoliation remedy becomes especially problematic in cases where the legislation says nothing about the possibility of bringing a cause of action on the basis of common law

was prohibited from being in possession of the property, irrespective of whether the claimant would have in principle been able to comply with the requirements of acquisitive prescription, because possession of the property was illegal. Similarly, a claim based on the *mandament van spolie* should fail if a claimant is not able to possess property due to the illegality of possession, irrespective of whether or not the claimant is able to prove the two requirements of the remedy in principle.

¹⁸ In this regard, the Court pointed out that the statutory provisions should not be read so as to oust the operation of the remedy, because "[r]eading sections 68(6)(b) and 89(1) in a manner that ousts the *mandament van spolie* may lead to a culture of impunity amongst police", which – according to the court – is at odds with constitutionalism. See *Ngqukumba* para 20.

remedies as opposed to the legislative ones. It is in these instances that the possibility arises that more than one source of law can provide a remedy in the particular case and the inconsistency in the approach to remedies becomes evident. For instance, section 31(1)(a) of the CPA provides that if no criminal proceedings are instituted in connection with any article seized in terms of the Act, it shall be returned to the person from whom it was seized. Therefore, the person from whom the vehicle was seized does have the possibility of claiming the return of the vehicle in terms of section 31(1)(a) of the CPA.

Two questions arise: Firstly, why then use the *mandament van spolie* in these instances? And, secondly, should it even be permitted to use the common law remedy where legislation has been enacted to regulate the field and may have an appropriate remedy in the particular case?

In relation to the first question, there are some obvious reasons why the *mandament* – logically – would probably be a good choice of remedy in these cases. The remedy is speedy¹⁹ and robust,²⁰ and its requirements are relatively clear and established.²¹ The remedy attempts to restore possession before all else, so it does not really matter what type of possession the *spoliatus* had before he was despoiled; possession is restored before competing claims to title are considered. Therefore, even if the appellant who seeks the remedy was not entitled to possession, considerations of that nature are irrelevant in *mandament van spolie* applications. This point was reiterated in the Supreme Court of Appeal decision of *Ivanov v North West Gambling Board*,²² where the appellant was in possession of gambling machines and equipment without the required licence in terms of section 9(1) of the *National Gambling Act 7 of 2004* when the police and employees of the North West Gambling Board seized the machines without the required warrant. The respondent argued that the lawfulness of the appellant's possession had to be considered in order to determine whether the

¹⁹ *Mans v Marais* 1932 CPD 352 356.

²⁰ Kleyn *Mandament van Spolie* 297; Van der Merwe *Sakereg* 120-121; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 290-291. Also see *Runsini Properties (Pty) Ltd v Ferreira* 1982 1 SA 658 (SE) 670.

²¹ *Nino Bonino v De Lange* 1906 TS 120; *Yeko v Qana* 1973 4 SA 735 (A) 739.

²² *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA).

repossession of the spoliated property should be ordered, because the appellant's possession of the machines was prohibited by the *National Gambling Act*.²³ The Supreme Court of Appeal in *Ivanov* held that for purposes of the *mandament van spolie* the question concerning the wrongfulness or illegality of the spoliator's possession of the machines was irrelevant.²⁴ The decision raised the important issue in *mandament* applications, namely that courts should not go into the merits of the dispute when deciding whether or not to grant the remedy.²⁵ The Supreme Court of Appeal confirmed that the principle was clear; possession should be restored to the person spoliated irrespective of the parties' actual rights to the property. Considerations other than the remedy's two requirements are therefore irrelevant in the decision of whether the remedy should be granted or not.²⁶ This particular aspect of the remedy is what makes it unique and especially attractive. The *mandament van spolie* has repeatedly been characterised as the only true possessory remedy that remains in modern South African law, being unique among the other possessory remedies as it requires no *ius possidendi*.²⁷ Bare possession is enough to satisfy the first requirement in the case of the *mandament van spolie*.

Furthermore, the remedy is not specifically aimed at protecting rights with regard to property.²⁸ Therefore, it is clear to see why the remedy is such a striking option in these instances. However, it should be mentioned that the Supreme Court of Appeal in *Ngqukumba* specifically considered and overturned the earlier *Ivanov* decision and the use of the spoliation remedy to claim the return of property, where possession thereof is specifically prohibited by legislation. The Supreme Court of Appeal in *Ngqukumba* reasoned that:

²³ *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA) para 18.

²⁴ *Ivanov v North West Gambling Board* 2012 6 SA 67 (SCA) para 25.

²⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 331; Van der Walt and Pienaar *Introduction to the Law of Property* 203.

²⁶ Taitz 1981 *SALJ* 37, 40-41; Van der Walt 1983 *THRHR* 239; Kleyn 1986 *De Jure* 5-10.

²⁷ Price *Possessory Remedies* 107; Taitz 1981 *SALJ* 37; Kleyn 1986 *De Jure* 8; Kleyn *Mandament van Spolie* 306; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 288.

²⁸ *Plaatjie v Olivier* 1993 2 SA 156 (O) 159: "The mandament van spolie is not concerned with the protection or restoration of rights at all. Its aim is to restore the factual position of what the spoliatus has been unlawfully deprived." Also see *Zulu v Minister of Works, KwaZulu* 1992 1 SA 181 (D) 187.

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 heroin or machine gun which he or she may not lawfully possess. ... To my mind, that finally illustrates why the *Ivanov* approach cannot be sustained.²⁹

Notwithstanding that rationale, the Constitutional Court in *Ngqukumba* granted the *mandament van spolie* and consequently reverted to the same type of thinking as the Supreme Court of Appeal in *Ivanov*. Therefore, the spoliation remedy can be used to claim the return of tampered vehicles despite the existence of legislation specifically prohibiting the return thereof. I should mention that the Constitutional Court in *Ngqukumba* did have a slightly more nuanced approach to the application of the *mandament* in instances where legislation prohibits the return of vehicles.³⁰ The court reasoned that where there is an absolute prohibition against the return of vehicles, the *mandament* may very well be excluded, for instance as in the machine gun and heroin examples.

I think that there may possibly be another – less obvious – reason for the use of the *mandament van spolie* in this case, which becomes evident if one looks at the number of cases in this context that were decided without resort to the common law remedy. The Supreme Court of Appeal has in a line of decisions (two of which were decided in

²⁹ *Ngqukumba v Minister of Safety and Security* [2013] ZASCA 89 (31 May 2013) para 15.

³⁰ It is questionable whether the court – in the process of distinguishing between objects that may in principle be possessed lawfully and those which can never be possessed lawfully – actually ventured into territory forbidden by the *mandament van spolie*. In this regard, it may be argued that the court considered the merits of the dispute when it questioned the type of (unlawful) possession that would form a defence against the application of the remedy. The question concerning the merits of the dispute relates to an instance where a court considers competing claims to title in the decision of whether the remedy can be granted specifically with regard to the first requirement of the remedy. However, that is not what the court would be doing when it considers whether possession of an article is prohibited in terms of legislation. In *Ngqukumba v Minister of Safety and Security* [2013] ZASCA 89 (31 May 2013) para 14 the court appropriately explained that "[i]t is not the requirements of the *mandament van spolie* that were in issue in *Ivanov*, nor are they any longer in issue in this appeal. There are also no competing claims to possession of the vehicle in question by the respondents. The provisions of s 68(6)(b) of the Act prohibit the appellant from being in possession of the vehicle which he might otherwise lawfully possess." Therefore, although it may seem as though the court is taking the merits into account in the particular, I would argue that one should not reach that conclusion too quickly. The court actually carved out a category of potential unlawful (or perhaps better, *illegal*) possessors to whom the *mandament* may be unavailable because legislation prohibits possession of the articles subject to the legislation. See note 18 above.

2006 and two in 2011) repeatedly closed the door on the use of the section 31(1)(a)-remedy in the CPA, because of the prohibition against the return of the vehicle in the *Traffic Act*. Although these earlier Supreme Court of Appeal decisions do not specifically deal with an application for the *mandament van spolie* to claim the return of tampered vehicles, I think there are nonetheless valuable conclusions that can be drawn from the outcomes in these decisions, especially in so far as they relate to the question of whether possession can actually be restored to the former possessor in terms of the *mandament*.

In 2006 the Supreme Court of Appeal in *Marvanic Development (Pty) Ltd v Minister of Safety and Security*³¹ made a number of interesting references in the decision about the impact of the Traffic Act on the possibility of claiming the return of vehicles in terms of the section 31(1)(a)-remedy in the CPA. Lewis JA pointed out that section 68(6) "expressly precludes possession of vehicles in particular circumstances"³² and the "mischief that the legislation sought to prevent was the possession, and thus the use, of vehicles where there has been tampering with engine or chassis numbers, almost invariably because the vehicles have been stolen".³³ The Court also stressed that "[t]he very purpose of s[ection] 68(6) is to prevent possession until the position has been rectified. It is not simply to render the possession a criminal offence".³⁴ The Court furthermore emphasised that it may have been possible before the Act to claim the return of stolen vehicles if criminal prosecution did not ensue, but section 68(6) of the *Traffic Act* clearly changed the law in this regard.

This was confirmed in the same year in *Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security*,³⁵ where the Supreme Court of Appeal again repeated that "[t]he Legislature says that no person is to be in possession of a vehicle where there has been tampering with its engine or chassis number: such possession is forbidden".³⁶ This interpretation of the *Traffic Act* was finally confirmed by the

³¹ *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA).

³² *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA) para 10.

³³ *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA) para 10.

³⁴ *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA) para 10.

³⁵ *Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security* [2006] SCA 35 (RSA).

³⁶ *Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security* [2006] SCA 35 (RSA) para 15.

Supreme Court of Appeal in 2011 in *Pakule and Tafeni v Minister of Safety and Security*³⁷ where the court held that "[t]he police cannot lawfully release the vehicle to the owner or possessor: [and] an order by a court that a vehicle be returned would defeat the provisions"³⁸ of the *Traffic Act*.

These cases dealt with a claim based on the return of the vehicles in terms the statutory remedy in the CPA. However, these decisions provide authority for the fact that repossession is not possible because section 68(6) of the *Traffic Act* specifically prohibits it. In this regard, Lewis JA and Meer AJA in *Pakule and Tafeni* attempted to provide finality in the matter and concluded that:

In light of the decisions of this court there can and should no longer be any doubt that a vehicle seized by the police cannot be returned to persons from whom they have seized if any of the features referred to in s 68(6) of the National Road Traffic Act are present.³⁹

Therefore, in essence the door was closed and the matter purportedly settled insofar as the statutory remedy in the CPA could have been used to circumvent the *Traffic Act*. Stated differently, to the extent that the statutory framework was enacted to regulate (or was geared towards regulating) the specific field, the Supreme Court of Appeal has been repeatedly unrelenting in its denial of the possibility of returning the vehicles to their prior possessors – even if they were the owners thereof.

So, the question is: if the statutory remedy allowing for the return of the vehicles is specifically barred because possession of these vehicles is prohibited by the *Traffic Act*, should it be permissible in terms of the *mandament van spolie* to by-pass the *Traffic Act* in order to claim the return of possession? It seems inconceivable that the common law remedy can be used in this context. On a careful reading of the legislation (the *Traffic Act* and the CPA) and the interpretation of the Supreme Court of Appeal decisions, it seems that the police cannot lawfully release the vehicle to the owner or possessor (whether in terms of the statutory remedy in the CPA or the common law *mandament van spolie*). The message in terms of the legislation and the court

³⁷ *Pakule and Tafeni v Minister of Safety and Security* [2011] ZASCA 107 (1 June 2011).

³⁸ *Pakule and Tafeni v Minister of Safety and Security* [2011] ZASCA 107 para 26.

³⁹ *Pakule and Tafeni v Minister of Safety and Security* [2011] ZASCA 107 para 31.

decisions is clear: the possession of vehicles that have been tampered with is *forbidden*. Using the *mandament van spolie* in order to regain possession of these vehicles would arguably defeat the provisions (and purpose) of the *Traffic Act*. In this regard, the court in *Mervanic* stressed that

... [t]his does not mean that the appellants cannot recover the vehicles at all: it was common cause that they could have applied for what is termed a 'SAPVIN' number for each vehicle from the South African Police Service, and that when issued they would be entitled to possess lawfully. Regulation 56 of the National Road Traffic Regulations 2000 provides the means for a vehicle owner (or person otherwise entitled to possess the vehicle) to obtain from the police new engine or chassis numbers where these have been tampered with, and a police clearance will be issued to the registering authorities.⁴⁰

This regulation implies that until such time as the regulation has been complied with, "possession by any person other than the police is [always] without lawful cause".⁴¹ According to these decisions, section 68(6)(b) of the *Traffic Act* does impose an absolute prohibition against possession. Nevertheless, the Constitutional Court expressly disregarded the Supreme Court of Appeal decisions and favoured a different approach, which left open the possibility of using the *mandament van spolie*.

In relation to the second question, namely whether or not it is necessary to regulate the choice of remedy where the possibility arises that more than one remedy could be a viable option, I should like to make two closing remarks. Firstly, although I see the benefit of using the spoliation remedy in this context, I would err on the side of caution when it comes to using the *mandament van spolie* in cases where legislation exists to regulate the field. The uncertainty around which remedy to use in these instances has resulted in incoherent and confusing jurisprudence on specific topics.⁴² In some instances it is unclear what the rationale is behind choosing one remedy as opposed to another – it seems to be done in a mostly random, ad-hoc manner. It is on this basis that Van der Walt suggests the subsidiarity approach, which aims to indicate the point of departure that should be used when deciding which source of law to turn to

⁴⁰ *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA) para 11.

⁴¹ *Marvanic Development (Pty) Ltd v Minister of Safety and Security* [2006] SCA 20 (RSA) para 11.

⁴² In the context of eviction and unlawful occupation of land, see *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 1 SA 323 (CC). In the context of quasi-possession, see *City of Cape Town v Strümpher* 2012 4 SA 207 (SCA).

when a dispute arises.⁴³ This is also the basis on which Davis has criticised the courts for failing to give any indication of how to determine when it is necessary to develop the common law or to follow an applicable statute as well as the interrelationship between the two systems.⁴⁴

It is particularly problematic if the common law remedy is simply being used to bypass the purpose that the legislation seeks to achieve. In other words, if the legislation aims to prevent a certain mischief one should not be able to use the common law remedy to avoid what the legislation aims to achieve. In this regard the use of the *mandament van spolie* may have a stifling effect on the possibility of adequately giving effect to rights that the legislation aims to protect. Therefore, if one chooses the *mandament van spolie* over and above the legislative (and/or constitutional) alternatives, one may run the risk that considerations, which would otherwise have been taken into account in terms of the legislation, are disregarded. This is particularly problematic in instances where the legislation is not only meant to regulate the field, but was also enacted to give effect to a right in the *Constitution*. That leads me to my second, final remark.

The various pieces of legislation that I have investigated in different contexts, all of which were enacted to regulate a particular area of the law, seem to consistently fail to provide clarity on the status of the existing common law in the light of the legislation. An example of a clause that may be helpful in this regard, although not completely devoid of application issues, is section 4(1) of the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 96 of 1998 (or PIE), which stipulates that

... [n]otwithstanding anything to the contrary in any law or the common law, the provisions of the section apply to proceedings by an owner or person in charge of land for the eviction of an unlawful occupier.

Therefore, the appropriate relationship between the legislation and the common law is set out in principle. There is also a body of case law dealing with the implications of

⁴³ Van der Walt 2008 *CCR* 77-128. Also see Van der Walt *Property and Constitution* 37. To compare the criticism of Van der Walt's notion of subsidiarity by Klare, see Klare 2008 *CCR* 134.

⁴⁴ Davis 2014 *Stell LR* 8-9.

PIE on the existing common law.⁴⁵ Other pieces of legislation would benefit from similar provisions. What I have also picked up on with regard to various pieces of legislation that were enacted to regulate a particular area of the law is that most of them have procedures that are aimed at ensuring that the goals of the legislation are achieved. However, very few of them actually have adequate remedies to vindicate violations of these procedures, a fact which makes it really difficult to decide which avenue to exhaust to rectify the violations. In this respect, at least to a certain extent, a case of unlawful search and seizure in violation of the CPA is distinguishable from the instances of quasi-possession and eviction. The legislation in the context of quasi-possession and eviction is arguably defective in the sense that the legislation itself does not contain an adequate remedy. Falling back on the *mandament van spolie* in those instances was really the only option,⁴⁶ unless section 26 and section 27 of the *Constitution* are relied upon to vindicate the violation of constitutional rights. So litigants in those contexts were forced either to use the *mandament* or to use a constitutional remedy instead. However, in the case of the CPA, where the possibility does exist that the Act has a remedy, it simply must be assumed that such a possibility should first be exhausted before one resorts to the common law remedy. Although I recognise that the remedy in the CPA is probably more limited than the *mandament van spolie*, and the *mandament* may be quicker and less cumbersome than its legislative counterpart, where such a remedy does exist that avenue should first be exhausted – even if it may require interpretive spadework or even suggestions of amendment. Accordingly, where the *Traffic Act* prevents the return of the vehicles in terms of the statutory remedy in the CPA, it should *not* be possible to claim restoration in terms of the common law remedy.

⁴⁵ *ABSA Bank Ltd v Amod* 1999 2 All SA 423 (W); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 1 SA 113 (SCA). See Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* 233; Pienaar *Land Reform* ch 10. See also Van der Walt *Property in the Margins* 152 ("The Act explicitly overrides the common law right to evict and therefore one might expect that it would simply replace the common law").

⁴⁶ Boggenpoel 2014 *Stell LR* 89-96; Van der Walt *Property and Constitution* 35-39. See also Van der Walt 2008 *CCR* 77-128. See also Boggenpoel 2015 *TSAR* 76.

4 Concluding remarks

The aim of this cursory note is to assess the outcome of the recent Constitutional Court judgment of *Ngqukumba v Minister of Safety and Security*. The decision presented the Court with the opportunity to consider what happens to extant common law remedies in the light of legislation that has been enacted to regulate a specific area of the law. In particular, the Court was faced with the question of whether the *mandament van spolie* remains a viable alternative if the *Traffic Act* precludes repossession in certain instances. The Constitutional Court held that the *Traffic Act* did not place an absolute prohibition on the possession of tampered vehicles, and therefore the Court granted the spoliatio remedy.

The Court's conclusion that the *mandament van spolie* is in principle available in these instances creates the impression that the common law remedy would be appropriate even though the CPA contains a remedy to claim the property back. This conclusion is problematic. I argue that if the CPA has a remedy to restore possession, that option should first be exhausted. In this regard, I contend that it *is* necessary to regulate the choice of remedy if both the common law and the legislation provide remedies to vindicate the violations of rights. I also assert that in instances where legislation has been enacted to regulate a specific area of the law (or to give effect to a constitutional provision) the *mandament van spolie* should in principle not be available. A legislative or constitutional remedy may be more favourable in these instances, because there are considerations that can be taken into account in terms of a statutory (or constitutional) remedy, which will not (necessarily) be taken into consideration in terms of the *mandament van spolie*. In the final instance, I conclude that in instances where the *Traffic Act* prohibits the possession of certain vehicles, it should not be possible to use the *mandament van spolie* to by-pass the legislation. To my mind, that illustrates why the approach in *Ngqukumba* is undesirable.

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LIST OF ABBREVIATIONS

CPA	Criminal Procedure Act
CCR	Constitutional Court Review
PIE	Prevention from Illegal Eviction from and Unlawful Occupation of Land Act
SALJ	South African Law Review
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

**QUESTIONING THE USE OF THE MANDAMENT VAN SPOLIE IN
NGQUKUMBA v MINISTER OF SAFETY AND SECURITY AND OTHER 2014 5
SA 112 (CC)**

ZT Boggenpoel*

SUMMARY

This cursory note reflects on the outcome of the Constitutional Court judgment of *Ngqukumba v Minister of Safety and Security*. The decision presented the Court with the opportunity to consider what happens to existing common law remedies in light of legislation that has been enacted to regulate a specific area of the law. The Constitutional Court held that the *Traffic Act* did not place an absolute prohibition on the possession of tampered vehicles and therefore the Court granted the spoliation remedy. The Court's conclusion that the *mandament van spolie* is in principle available in these instances, creates the impression that the common law remedy would be appropriate even though the *Criminal Procedure Act (CPA)* contains a remedy to claim the property back. This note argues that such a conclusion is problematic. If the *CPA* has a remedy to restore possession, that option should first be exhausted. In this regard, it *is* necessary to regulate the choice of remedy if the common law and the legislation provide a remedy to vindicate the violations of rights. Furthermore, in instances where legislation has been enacted to regulate a specific area of the law (or to give effect to a constitutional provision) the *mandament van spolie* should in principle not be available. Finally, this note concludes that in instances where the *Traffic Act* prohibits possession of certain vehicles, it should not be possible to use the *mandament van spolie* to by-pass the legislation.

KEYWORDS: property, remedies, constitutional development.

* Zsa-Zsa T Boggenpoel. BComm LLB LLD (Stell). Associate Professor in Private Law, University of Stellenbosch. Email: zsazsa@sun.ac.za. I should like to thank Juanita Pienaar, Reghard Brits and Elsabé van der Sijde for reading a draft of this note and for valuable feedback. I also wish to thank my assistant Derryn Visser for valuable research assistance. I am equally grateful for the positive comments from the reviewers of the journal. The remaining errors are my own.