CASES / VONNISSE

IS THE *MANDAMENT VAN SPOLIE* AN APPROPRIATE REMEDY IN CASES OF STATUTORY CONFLICTS?

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

1 Introduction

The availability of the *mandament van spolie* in cases where a statutory provision provides for despoilment has been dealt with in a recent Constitutional Court judgment, handed down on 15 May 2014 (*Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC)). In this case the Court had to decide on the question whether the *mandament van spolie,* as a common-law remedy aimed to restore lost possession, can be granted by the Court despite the fact that section 68(6)(b) of the National Road Traffic Act 93 of 1996 (hereinafter "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 question was answered in the affirmative. The Court held that the *mandament van spolie* can be granted, despite the prohibition against the return of the vehicle as provided for by the Traffic Act (where restoration of possession would constitute a criminal offence in terms of s 68(6)(b) read with s 89(1) of the National Road Traffic Act 93 of 1996; *Ngqukumba v Minister of Safety and Security supra*; *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA); *Pakule and Tafeni v Minister of Safety and Security* 2011 (2) SACR 358 (SCA)). This is also the case despite the fact that section 31(1)(a) of the Criminal Procedure Act 51 of 1977 (hereinafter "the CPA") provides for almost the same relief as that which can be achieved by the *mandament van spolie*, except that the remedy provides for an urgent relief (*Mans v Marais* 1932 CPD 352 356), and it is more cost-effective than resorting to the CPA (s 31(1)(a) of the Criminal Procedure Act 51 of 1977 (CPA) which 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").

In terms of a *mandament van spolie*, a person who has been unlawfully despoiled of possession may apply to the Court for this remedy, claiming restoration of that possession (Badenhorst, Pienaar and Mostert *Silberberg and Schoeman The Law of Property* 5ed (2006) 288). The main purpose of the remedy is to protect lost possession of the property by the applicant (Gibson (eds) *Wille's Principles* 7ed (1977) 453; Price *The Possessory Remedy in Roman-Dutch Law* (1947) 108; Taitz "Spoliation Proceedings and the 'Grubby-handed' Possessor" 1981 *SALJ* 37). This remedy is only concerned with whether the applicant was in factual possession (*ius possessionis*) of the property, whether movable or immovable (for the applicability of the *mandament van spolie* in case of immovable property, see Boggenpoel and Pienaar "The Continued Relevance of the Mandament van Spolie: Recent Developments Relating to Dispossession and Eviction" 2013 *De Jure* 998–1021), rather than the right to possess (*ius possidendi*) (*Nino Bonino v De Lange* 1906 TS 120 122). The merits of the case are therefore not considered by the Court in an application for a *mandament van spolie* (this point has been emphasized in *Ivanov v North West Gambling Board supra*. The facts of this case was that members of the South African Police Service seized gambling machines and equipment from an applicant who possessed them without a licence as required by s 9(1) of the National Gambling Act 7 of 2004. The seizure was done without a search and seizure warrant. The applicant then applied for a *mandament van spolie*, claiming restoration of possession of the machines and equipment. A spoliation order was granted by the Court without even considering the lawfulness or unlawfulness of the applicant's possession). The aim is to prevent people from taking the law into their own hands by prohibiting the taking of possession otherwise than in accordance with the law (*Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA) ([2007] ZASCA 70) 21). There are two requirements that must first be met for a successful reliance on the *mandament van spolie*. Firstly, the applicant must prove on a balance of probabilities that he was in peaceful and undisturbed possession of the item (in *Meyer v Glendinning* 1939 CPD 84, the Court held that both the *corpu*s and *animus* element must be proved in order to satisfy the requirement). Secondly, the applicant must also prove that the respondent deprived him of possession unlawfully. The first requirement will not be discussed because it was not an issue in this case. A brief analysis of the second requirement will be conducted because of the role it played in this judgment (*Ngqukumba v Minister of Safety and Security supra*). It is, however, important to mention that these requirements were not the subject of dispute in the present case.

In a number of Supreme Court of Appeal decisions (*Ivanov v North West Gambling Board supra*; *Pakule v Minister of Safety and Security supra*, *Tafeni v Minister of Safety and Security supra*), the Court held that the *mandament van spolie* is not available in cases where restoration of possession is prohibited by a statutory provision. Relevant to this note is the provisions of section 68(6)(b), read with section 89(1) of the Traffic Act (93 of 1996). Section 68(6)(b) of the Traffic Act prohibits possession of a tampered vehicle "without a lawful cause". This section provides that no one shall,

without a lawful cause, possess a vehicle of which the engine or chassis number has been tampered with in any manner, or to which anything has been added, altered or removed. Section 89(1) makes it an offence to contravene, or not to comply with any provision of this Act, or with any direction, demand or any request under the Act. These sections complement each other against the possession of a vehicle of which an engine or chassis number has been removed from one car and inserted to another.

In *Ngqukumba v Minister of Safety and Security (supra)* the Constitutional Court ordered restoration of possession of a vehicle with falsified or mutilated engine or chassis number to an applicant for a *mandament van spolie* despite the fact that the provisions of section 68(6)(b) and 89(1) prohibited restoration. In deciding this case, Madlanga J, came to the view that these sections did not preclude an order in spoliation proceedings for the restoration of possession of a tampered vehicle which was unlawfully (the police had seized the vehicle without a search-and-seizure warrant, as required by s 21(1) of the Criminal Procedure Act 51 of 1977) seized by the police. As a point of departure, it is important to note that dispossession of the vehicle by the police in this case took place without a search-and-seizure warrant, as required by section 21(1) of the Criminal Procedure Act (Act 51 of 1977). The judgment of *Ngqukumba* is the first Constitutional Court judgment to pronounce on the applicability of the common-law principle of *mandament van spolie* in cases of a statutory conflict where movable property was the object of possession. The judgment is noteworthy because it sets precedence for the Courts below the Constitutional Court in terms of the doctrine of *stare decisis.*

This note carries the view that the *Ngqukumba* judgment strengthened the applicability of the *mandament van spolie* in cases of dispossession where compliance with due legal process has been compromised. The judgment is important because it promotes the rule of law and due legal process, by ensuring that no one (including organs of State) is above the law. This is particularly true, taking into account the high volume of civil claims lodged by individuals against the Minister of Police in cases where police officials failed to comply with the law. The rule of law has both a procedural and a substantive component (*Masethla v President of the Republic of South Africa* 2008 1 BCLR 1 (CC) par 184). The procedural component of the rule of law requires every action (be it by an individual or an organ of State) to be in accordance with the relevant provisions regulating that act. This is meant to prevent the abuse of power by individuals or Government institutions (Jowell "The Rule of Law Today" in Jowell and Oliver (eds) *The Changing Constitution* 5ed (2004) 19). The substantive component is concerned with the protection of rights, and this includes the right to dignity, privacy and property (Tamanaha *On the Rule of Law*: *History, Politics, Theory* (2004) 112–113).

The purpose of this note is threefold. Firstly, the facts, arguments and the judgment will be stated briefly. Secondly, this note will analyse the applicability of the remedy in cases where a statutory provision provides for

despoilment. Thirdly, suggestions for a way forward for the applicability of the remedy in cases of a conflict with a statutory provision will be given.

2 The facts of *Ngqukumba*

The judgment of *Ngqukumba v Minister of Safety and Security* is a Constitutional Court judgment that involves an application for leave to appeal against a full-bench decision of the Eastern Cape High Court, Mthatha. In this case, an applicant for a *mandament van spolie* instituted proceedings in the High Court for the return of a vehicle in which the engine or chassis number has been tampered with. The respondents did not contest possession of the vehicle by the applicant prior to the seizure (par 3). The High Court refused to grant the spoliation order on the ground that section 68(6)(b) of the Traffic Act prohibits possession "without lawful cause" of a vehicle of which the engine or chassis number has been tampered with. Section 68(6)(b) provides as follows:

> "[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."

The respondents (members of the South African Police Service) argued that restoration of possession of a tampered vehicle to the applicant would constitute a criminal offence in terms of section 68(6)(b), read with section 89(1) of the Traffic Act. The applicant was then granted leave to appeal to the Supreme Court of Appeal, which subsequently failed. This resulted with the applicant approaching the Constitutional Court, seeking restoration of possession of the vehicle.

The pertinent facts of the case are as follows: On 10 November 2010 a suspect who was under investigation by the police in connection with a stolen vehicle, voluntarily gave unrelated information to the police that he had previously been involved in the theft of another vehicle (par 2). The applicant informed the police that the vehicle in question was at a taxi rank in Mthatha. The police took him to the location of the vehicle. The suspect, upon arrival, pointed out the vehicle to the police (par 2). The applicant's driver was then instructed by the police to take the vehicle to the police station. The police then inspected the vehicle. Though the vehicle was found to be owned by the applicant, the police's inspection revealed that the vehicle's chassis number had apparently been removed from another vehicle and placed on the applicant's vehicle (par 2). The vehicle did not have an engine number since the original engine number had been ground off, and the manufacturer's tag plate had been removed from another vehicle and placed in the applicant's vehicle (par 2). These facts resulted in the police retaining possession of the vehicle without a search-and-seizure warrant.

The High Court ordered the retention of the vehicle by the police until it had been reregistered in accordance with the Traffic Act (par 4). The

Supreme Court of Appeal, in rejecting leave to appeal, strictly applied the provisions of the Traffic Act and held as follows:

> "The appellant's possession of the vehicle for now–until such time as a police clearance is issued and the vehicle is reregistered 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" (par 5).

The Supreme Court of Appeal, in deciding on the matter, relied on its previous judgments in *Pakule* and *Tafeni v Minister of Safety and Security* cases ([2011] ZASCA 107; see also *Marvanic Development (Pty) Ltd v Minister of Safety and Security* 2007 (3) SA 159 (SCA), where restoration of possession of a tampered vehicle "without lawful cause", was denied due to the fact that a statutory provision provided otherwise). The Supreme Court of Appeal, in deciding on both cases, held that an order by the Court for the return of a vehicle where the engine or chassis number had been tampered with, would defeat the provisions of section 68(6)(b), read with section 89(1) of the Traffic Act. However, these cases are distinguishable from the *Ngqukumba* case because a search-and-seizure warrant, as required by section 21(1) of the CPA, was obtained by the police. The principle of legality was therefore not compromised in this regard. This, in my opinion, renders the *mandament van spolie* inapplicable. In this regard the police can therefore rely on the provisions of the Traffic Act in seizing the vehicle.

The availability of the *mandament van spolie* in cases of a statutory conflict had always resulted in conflicting court decisions, and it was therefore necessary for the Constitutional Court to pronounce on this legal issue and to provide a definitive answer in that regard. Boggenpoel states that parties often have a tendency to use the remedy, even in cases where there are other statutory remedies that parties can resort to (Boggenpoel "Questioning the use of the Mandament van Spolie in *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC)" *PER*/*PELJ* 2015 18(3) 735–754; see also Sonnekus "Mandament van Spolie: Kragtige Remedie by Kragonderbreking" 1985 *TSAR* 331–338). Boggenpoel's view is that the Court in *Ngqukumba* case should have resorted to the provisions of the CPA to claim the return of the vehicle other than using the temporary relief provided by the *mandament van spolie*. This, to my view, has the effect of disregarding the purpose which the *mandament van spolie* seeks to achieve. The purpose of the remedy is to prevent self-help. Allowing police officers to resort to the provisions of the CPA, despite non-compliance with section 21(1) of the CPA, which requires a search warrant in order to seize someone's property creates an impression that police officers are empowered to take the law into their own hands and thereby violating the rule of law. This is of course subject to the exception where there are reasonable grounds to believe that following due legal process (in other words, obtaining the search-and-seizure warrant) might defeat the purpose of the seizure. However, this was not the position in the present case. In the

Ngqukumba case, the Constitutional Court set aside the order of the Supreme Court of Appeal and ordered the respondents to return the vehicle to the applicant (par 23). The respondents were also ordered to pay the applicant's costs, including the costs of two counsels (par 23).

3 The judgment and analysis of arguments

The police's (respondents') argument on appeal was that it will be incompetent for the Court to order restoration of the vehicle to the applicant "without a lawful cause" because its engine or chassis number has been tampered with. They contended further that restoration of a tampered-with vehicle to the applicant would amount in the Court assisting the applicant in the commission of an offence. This argument seems to have been based on the presumption that theft is a continuous offence, and a person continues to commit that particular offence as long as he remains in possession of an object involved, or suspected to be involved in, the commission of an offence (Snyman *Criminal Law* 5ed (2008) 509).

The Constitutional Court had to analyse the availability of the *mandament van spolie* to the applicant. Before analysing the judgment, it is important to first understand what the remedy of *mandament van spolie* entails and when it is available. For fear of repetition, it must be emphasized that the common-law remedy of *mandament van spolie* is aimed at restoration of possession of unlawfully-deprived possession of the possessor without taking into account any other factor. The remedy protects any person (natural or juristic person) deprived of possession otherwise than in accordance with the law (in this case the police having deprived the applicant of possession of a tampered vehicle without a search-and-seizure warrant, as required by s 21(1) of the Criminal Procedure Act 51 of 1977). This also includes an unlawful possessor (*Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* par 21). What is relevant is the factual possession of an applicant, rather than whether he/she indeed had the right to possess (Price *The Possessory Remedies in Roman-Dutch La*w (1947); see also *Nino Bonino v De Lange supra*). In *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* (*supra* par 21) the Supreme Court of Appeal interpreted the applicability of the *mandament van spolie as* follows:

> "Under [the *mandament van spolie*], anyone illicitly deprived of property is entitled to be restored to possession before anything else is debated or decided (*spoliatus ante omnia restituendus est*). Even an unlawful possessor–a fraud, a thief or a robber–is entitled to the *mandament*'s protection. The principle is that illicit deprivation must be remedied before the Court will decide competing claims to the object or property."

The Courts should not investigate the merits of the case when confronted with a question of whether or not to grant a spoliation order (Badenhorst *et al Silberberg and Schoeman's The Law of Property* 289). What is required of the applicant is to prove on a balance of probabilities that he had been in peaceful and undisturbed possession before the despoilment (Mostert and Pope *The Principles of the Law of Property in South Africa* (2010) 76). Both

the *corpus* and *animus* elements must be proved (*Durandt v Du Randt* 1995 (1) SA 401 (O)). Should the applicant successfully prove the second requirement, the Court will therefore be under a legal obligation to grant the spoliation order (*Bon Quelle (Edms) Bpk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A)). This remedy is only available against the person responsible for the despoilment and in the present case, the police (Badenhorst *et al Silberberg and Schoeman's The Law of Property* 294–295). The requirements for the successful reliance on the *mandament van spolie* were not in issue. The question before the Court was whether the provisions of the Traffic Act authorizes the respondent to remain in possession of the vehicle with tampered chassis and engine number, although the seizure of such vehicle was done unlawfully (without a search-and-seizure warrant). In other words does the provision of the Act alter the application of the *mandament van spolie* (par 1)?

It is clear that the purpose of the *mandament van spolie* is to prevent people from taking the law into their own hands. This applies to anyone, including Government institutions (the police in the present case) (par 12) (see also *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529, where reference is made to Government institutions). It is therefore aimed at ensuring that the principle of legality is upheld. This principle requires all State organs to strictly comply with the rule of law (*Affordable Medicines Trust v Minister of Health supra* 526). Therefore, if the police want to seize a vehicle, the law requires that they must have a search-and-seizure warrant in order for them to conduct a seizure (s 21(1) of the Criminal Procedure Act 51 of 1977). The principle of legality will be compromised if the police conduct a search-and-seizure without being in possession of a search warrant, as it happened in the present case.

In analysing the judgment, Judge Madlanga correctly held the view that the availability of the *mandament van spolie* in cases of a statutory conflict is a purely constitutional matter which involved the question whether section 68(6)(b), read with section 89(1), was intended to alter the common law. The interpretation clause, as provided for in section 39(2) and (3) of the Constitution, was therefore considered (the Constitution of the Republic of South Africa, 1996). Section 39(2) of the Constitution provides as follows:

> "When interpreting any legislation, and when developing the common law or customary law every Court, tribunal or forum must promote the spirit, purport and object of the Bill of Rights."

Section 39(3) reads:

> "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 legislation to the extent that they are consistent with the Bill of Rights."

Uncertainties as to when the Courts can develop the common law in cases of statutory conflicts and the circumstances under which a statutory provision can trump the common law, are acknowledged (Davis "Where is a

Map to Guide Common Law Development" 2014 25 *Stell LR* 3–14). However, the plain reading of section 68(6)(b) and section 89(1) of the Traffic Act does not show any indication of the intention on the part of the legislature to alter the common-law principle of *mandament van spolie* (par 18). The *Ngqukumba* judgment made it clear that the provisions of section 68(6)(b), read with section 89(1) of the Traffic Act, were not enacted with the intention to alter the common law principle of *mandament van spolie*. These statutory provisions can therefore not be a valid defence against a spoliation order (par 10). This is in accordance with the purpose of the *mandament van spolie* which is to prevent self-help and to promote respect for the rule of law. The inclusion of the phrase "without lawful cause" in the provisions of section 68(6)(b) of the Act, to my view, makes it clear that the Act cannot be resorted to as a defence against the spoliation order. The police can determine whether the suspect has a lawful cause to possess the vehicle only once they have complied with the provisions of the CPA. It is clear from the facts of the case that the police, in conducting the search-and-seizure acted without a search warrant, as required by the CPA. The Act makes it clear that the police must comply with the provisions of the Act when seizing someone's property. Otherwise the Act is not applicable. This then entitles the applicant to apply for a *mandament van spolie* to claim possession of the property. I am of the view that the remedy must be applicable in cases of this nature, particularly taking into account the fact that the respondent did not comply with the provisions of the CPA. In cases of due compliance with the provisions of the CPA, the respondent can resort to the relief, as provided by section 31(1)(a) of the CPA. Section 68(6)(b), and section 89(1) must therefore be read in a manner that is harmonious with the *mandament van spolie* and not as an exception to it (par 16). The principle that statutes must be read in conformity with the common law, unless an intention to alter the common law is clear from a statutory provision, was endorsed in *Dhanabakium v Subramanian* (1943 AD 160 167).

The police's argument seems to exclude the possibility that a person can possess a tampered vehicle lawfully, which is not the case. Judge Madlanga, rejected the example set out in the Supreme Court of Appeal that restoration of possession of a tampered vehicle to the applicant will have the same consequences as ordering a person to be restored in the possession of his heroin or machine gun, on the ground that it is in fact possible to possess a tampered vehicle lawfully while one cannot possess heroin or a machine gun lawfully (par 15).

The second requirement for the successful reliance on the *mandament van spolie* makes it clear that this common-law remedy is available only in cases where the applicant has been despoiled of possession unlawfully. I will briefly comment on the circumstances where the remedy is available. The legislature, by the inclusion of the phrase "without lawful cause" in the provisions of section 68(6)(b) of the Traffic Act simply implied that it is possible for one to possess a tampered vehicle "with a lawful cause". This then means that under these circumstances the police will have to act in accordance with section 21(1) of the CPA in seizing the vehicle from the possession of a person, unless the search and seizure can be justified in

terms of section 22 of the Act. Failure to comply with the provisions of the CPA in seizing property from the possession of a person is rendered unlawful (par 13). The police's argument that restoration of a tampered vehicle to the applicant would amount in assisting him in the commission of a criminal offence is therefore unfounded (par 3).

As mentioned above, the question whether the person deprived of possession is a thief or a fraudster, is irrelevant in spoliation proceedings. The *rationale* behind this finding is that it is possible for one to possess a tampered vehicle lawfully. The law should therefore not exclude this possibility. It is also possible that the person opposing the spoliation order can be wrong with the applicant's right to possess the property. Failure to protect possession as required by the *mandament van spolie* can result in the abuse of authority by the police, and this has to be prevented. Dispossession can be allowed only if it can be established that the applicant for the *mandament van spolie* did not have a lawful cause to possess the vehicle. This involves an investigation into the merits of the case and can only be allowed upon following due Court process.

In cases where a person cannot possess an object "with lawful cause" under any given circumstances, the *mandament van spolie* is not applicable. The relevant provisions of criminal law regulate matters of this nature. The Judge did not deal with cases where despoilment took place on lawful grounds as it was not a matter that had to be decided in this case.

4 Conclusion

The aim of this note was to analyse the applicability of the *mandament van spolie* in cases of a statutory conflict with reference to the judgment of *Ngqukumba*. The judgment provided a definitive answer on the applicability of the *remedy* by providing that a spoliation order is available even when the provisions of section 68(6)(b), read with section 89(1) of the Traffic Act, provides otherwise. The decision was based on the legal purpose of the remedy that a person must be restored of possession before any other matter or facts can be considered (in this case, s 68(6)(b) and s 89(1); *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality supra* par 21).

This judgment correctly applied the principle of the *mandament van spolie* to the facts before the Court, and sets a good precedence to the lower courts. Its constitutional approach and interpretation conform to the purpose of the *mandament van spolie* as a remedy firmly rooted in the rule of law that no one should be allowed to take the law into their own hands. The *mandament van spolie* is a temporary relief that can be applied for on an urgent basis, and its purpose is to restore lost possession that has been taken unlawfully. Ultimately the correct legal position will be determined by the Court of law when due legal process has been followed. A party who believes that an applicant for the remedy is not entitled to be in possession of the property, must follow the correct legal procedure in obtaining possession of the property from the applicant rather than being law unto

himself. The Court, in reasoning correctly, held that strict compliance with the Constitution and the law will not hamper police effort in preventing crime. Therefore, the police have to comply with the law in the execution of their duties.

The decision of the Court was motivated by the need to ensure protection to the Constitutional right to privacy, dignity and also the right to property. The decision displayed due regards to the rule of law (both the procedural and the substantive component) and provided clarity as to the applicability of the remedy where Constitutional rights are at stake. The *Ngqukumba* judgment must be seen as strengthening the principle of legality by encouraging the police to ensure due compliance with the rule of law rather than taking the law in their own hands. In conclusion, the *Ngqukumba judgment* to my mind is welcomed.

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