CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 87/13

In the matter between:

ANELE NGQUKUMBA Applicant

and

MINISTER OF SAFETY AND SECURITY First Respondent

STATION COMMISSIONER,
MTHATHA CENTRAL POLICE STATION Second Respondent

COMMANDING OFFICER-VEHICLE SAFE
GUARD UNIT: GROUP 46, MTHATHA Third Respondent

Neutral citation:	*Ngqukumba v Minister of Safety and Security and Others* [2014] ZACC 14
Coram:	Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Madlanga J, Mhlantla AJ, Nkabinde J, and Zondo J
Heard on:	14 November 2013
Decided on:	15 May 2014

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Eastern Cape High Court, Mthatha):

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds.
4. The order of the Supreme Court of Appeal is set aside.
5. Paragraphs 2 and 3 of the order of the Eastern Cape High Court, Mthatha (High Court) are set aside and substituted with the following order:

   > The respondents are ordered to return the motor vehicle with the registration BTR 190 EC to the applicant.

6. The respondents must pay the applicant's costs, including the costs of two counsel, in this Court, the Supreme Court of Appeal and the High Court.

JUDGMENT

MADLANGA J (Moseneke ACJ, Skweyiya ADCJ, Cameron J, Dambuza AJ, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, and Zondo J concurring):

Introduction

[1] Section 68(6)(b) of the National Road Traffic Act[1] (Traffic Act) prohibits possession "without lawful cause" of a motor vehicle of which the engine or chassis number has been falsified or mutilated. This matter concerns the question whether this section entitles the police to withhold a vehicle which they have seized unlawfully. The Eastern Cape High Court, Mthatha (High Court), following Supreme Court of Appeal authority,[2] held – against the applicant – that it does.[3] An appeal to the Supreme Court of Appeal failed.[4] The applicant comes before us by way of an application for leave to appeal.

Background

[2] On 10 February 2010 a suspect who was under investigation by the police in connection with a stolen vehicle volunteered unrelated information. The information was that he had previously been involved in the theft of another vehicle. He told the police that this vehicle was at a certain taxi rank in Mthatha. The police took him there. He pointed out the vehicle to them. This was the applicant's vehicle. The police instructed the applicant's driver to take the vehicle to a police station. There they discovered that its chassis number had been tampered with and appeared to have been removed from another vehicle and placed in the applicant's vehicle; there was no engine number as the original engine number had been ground off; and the

[1] 93 of 1996.

[2] Below n 10.

[3] *Ngqukumba v Minister of Safety and Security and Others* [2011] ZAECMHC 18 (High Court judgment).

[4] *Ngqukumba v Minister of Safety and Security and Others* [2013] ZASCA 89; 2013 (2) SACR 381 (SCA) (Supreme Court of Appeal judgment).

manufacturer's tag plate had been removed from another vehicle and placed on the applicant's vehicle. The police retained the vehicle. During all this the police were without a search and seizure warrant.

[3] The applicant subsequently instituted proceedings in the High Court for the return of the vehicle. The cause of action was the *mandament van spolie*,[5] the essence of which is explained below. It was not contested that the applicant had been in possession of the vehicle prior to the seizure. In the main, the police contended that, because the engine and chassis numbers of the vehicle had been tampered with, it was legally incompetent to order its return to the applicant. This stance was based on the provisions of section 68(6)(b)[6] read with section 89(1)[7] of the Traffic Act. The substance of the argument was that, if the Court were to order restoration of possession, it would effectively be assisting the applicant in the commission of a criminal offence.

[5] A remedy aimed at reversing unlawful deprivation of possession, also known as a spoliation order.

[6] Section 68(6)(b) reads:

> "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."

I refer to a vehicle with the defects set out in this section as a "tampered vehicle".

[7] Section 89(1) provides:

> "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."

[4] The High Court found the seizure to have been unlawful. However, it refused to order the return of the vehicle to the applicant because his possession of it would constitute a criminal offence in terms of section 68(6)(b) read with section 89(1) of the Traffic Act. Instead, it ordered the retention of the vehicle by the police until it had been re-registered in accordance with the Traffic Act. It granted the applicant leave to appeal to the Supreme Court of Appeal. That culminated in the appeal that did not succeed. The respondents[8] did not appeal against the declaratory order that the seizure had been unlawful.[9]

[5] The Supreme Court of Appeal – following a number of its previous decisions[10] – held that it was not competent to order the return of the vehicle to the applicant. The basis was the prohibition on possession of a tampered vehicle "without lawful cause".[11] It held:

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[8] The first respondent is the Minister of Safety and Security. The second respondent is the Station Commissioner of the Central Police Station, Mthatha. The third respondent is the Commanding Officer-Vehicle Safe Guard Unit, Group 46, Mthatha.

[9] The High Court order reads:

> "The following order is therefore made:
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> 1. The seizure of the motor vehicle, described as Toyota Hilux with registration letters and number BTR 190 EC is declared unlawful and is set aside;
>
> 2. The retention of the same motor vehicle by the members of the South African Police Service in Mthatha is declared lawful until such time the police clearance certificate is issued and the vehicle reregistered under the National Road Traffic Act 93 of 1996;
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> 3. Each party is ordered to pay its own costs."

The seizure is done and complete and cannot be undone. It is difficult to comprehend how the order can set it aside. I need say no more about this because this part of the order is not on appeal before us.

[10] *Pakule v Minister of Safety and Security and Another, Tafeni v Minister of Safety and Security and Another* [2011] ZASCA 107; 2011 (2) SACR 358 (SCA); *Absa Bank Ltd and Another v Eksteen* [2011] ZASCA 40; *Basie Motors Bk t/a Boulevard Motors v Minister of Safety and Security* [2006] ZASCA 35; and *Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and Another* [2006] ZASCA 18; 2007 (3) SA 159 (SCA).

[11] Section 68(6)(b) of the Traffic Act.

> "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. In fact, when counsel 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."[12] (Footnote omitted.)

[6] Before us, the applicant persists in seeking restoration of possession.[13] The respondents remain adamant in their opposition.

Issues

[7] The issues that arise are whether: (a) leave to appeal should be granted; and (b) in proceedings for a spoliation order section 68(6)(b) read with section 89(1) of the Traffic Act precludes restoration of possession.

Condonation

[8] Before dealing with the issues, let me dispose of an application for condonation brought by the applicant. The application for leave to appeal to this Court was filed out of time. The respondents do not oppose. They made it clear during oral argument that they too stand to benefit from a judgment of this Court on the merits. It is not

[12] Supreme Court of Appeal judgment at para 15.

[13] I must state that by the time the matter came before us the police had returned the vehicle to the applicant. These were the circumstances. The police had serious overcrowding and safety problems with their vehicle storage facilities. As a result, they returned some vehicles, including the applicant's, to the people from whom they had been seized "strictly for safekeeping pending the outcome of . . . investigations". Thus the return was encumbered and in essence amounted to no more than an extension of the police storage facilities.

necessary to set out the factors that have informed my decision on this issue. Suffice it to say, on balance I take the view that condonation should be granted.

Leave to appeal

[9] This case raises issues that are firmly rooted in the rule of law, a founding value of the Constitution.[14] It also involves an important issue of statutory interpretation relating to possession, a subset of the right to property, in a manner consonant with the provisions of section 39(2) and (3) of the Constitution.[15] At the centre of it all is the spoliation order in the context of statutory provisions which, on their face, appear to preclude restoration of possession; a vexing subject which has seen the Supreme Court of Appeal overruling one of its judgments in as short a period as only one year to the day.[16] Needless to say, these legal issues are constitutional in nature. They are complex and of great import. Without doubt, it is in the interests of justice for this Court to pronounce on them. Leave to appeal must be granted.

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[14] Section 1 of the Constitution reads:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the constitution *and the rule of law*.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness." (Emphasis added.)

[15] Section 39(2) provides that "[w]hen interpreting any legislation, 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". Section 39(3) provides that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

[16] The judgment in *Ivanov v North West Gambling Board and Others* [2012] ZASCA 92; 2012 (6) SA 67 (SCA) was delivered on 31 May 2012 and the Supreme Court of Appeal judgment in *Ngqukumba*, which overruled it, was delivered on 31 May 2013.

Do sections 68(6)(b) and 89(1) preclude a spoliation order?

[10] 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).[17] The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law.[18] Its underlying philosophy is that no one should resort to self-help to obtain or regain possession.[19] The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.[20]

[11] This applies equally whether the despoiler is an individual or a government entity or functionary. In *Vena*[21] the then Appellate Division, now the Supreme Court of Appeal, endorsed *Sithole*:[22]

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[17] In *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality and Others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) (*Tswelopele*) at para 21, the Supreme Court of Appeal said:

> "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 courts will decide competing claims to the object or property."

This Court cites *Tswelopele* with approval in *Schubart Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* [2012] ZACC 26; 2013 (1) SA 323 (CC); 2013 (1) BCLR 68 (CC) at para 23. In proceedings for a spoliation order one does not have to reach the question whether the person deprived of possession is in fact a fraud, thief or robber for the simple reason that this is not at issue. That the person might turn out to be one is irrelevant.

[18] *Tswelopele* id.

[19] Joubert et al (eds) *LAWSA* first reissue (Butterworths, Durban 2007) vol 27 at para 265.

[20] Id.

[21] *George Municipality v Vena and Another* 1989 (2) SA 263 (A) at 271H-272B (*Vena*).

> "The Court came to the conclusion that the section was not worded so clearly as to detract from the general principle of law '. . . that there shall be no spoliation by any person, be it an individual, *or a government department or a municipality or any similar body*'. . . . What the learned Judge said at 117D-F bears repetition:
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> > '[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.'
>
> That this is a fundamental principle of our law admits of no doubt." (Emphasis added.)

[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert.[23] The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

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[22] *Sithole v Native Resettlement Board* 1959 (4) SA 115 (W).

[23] *Vena* above n 21.

[13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law.[24] Surely then, it should make no difference that, in dispossessing an individual of an object unlawfully, the police purported to act under colour of the search and seizure powers contained in the Criminal Procedure Act.[25] Non-compliance with the provisions of the Criminal Procedure Act in seizing a person's goods is unlawful. This unlawfulness, plus the other requirement for a spoliation order (namely, having been in possession immediately prior to being despoiled) satisfy the requisites for the order. All that the despoiled person need prove is that—

(a) she was in possession of the object; and

(b) she was deprived of possession unlawfully.[26]

[14] The obvious conclusion is that the *mandament van spolie* is available even against the police where they have seized goods unlawfully. The central question is:

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[24] *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 49 and *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC) at para 56.

[25] 51 of 1977. Section 20 reads:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—
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> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;
>
> (b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or
>
> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[26] *Yeko v Qana* 1973 (4) SA 735 (A) at 739E.

are sections 68(6)(b) and 89(1) of the Traffic Act[27] to be read in a manner that alters this position? Do they stand in the way of restoration of possession of the vehicle in terms of a spoliation order in this matter? I think not.

[15] It seems to me that on this subject the Supreme Court of Appeal proceeds from the premise that a tampered vehicle is no different from an article the possession of which would be unlawful under all circumstances. That is an erroneous premise because possession of a tampered vehicle will be unlawful only if it is "without lawful cause".[28] That leads me to a crucial point of departure. It is that in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the *mandament van spolie* might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that *may be possessed quite lawfully* makes all the difference. On the assumption that an individual can never possess heroin lawfully, the Supreme Court of Appeal's heroin example is not apt.[29] At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.

[16] With this in mind, I take the view that sections 68(6)(b) and 89(1) of the Traffic Act must, as far as possible, be read in a manner that is harmonious with the *mandament van spolie*. This is in accordance with the principle that, to the extent

[27] Above n 6 and n 7.

[28] Section 68(6)(b) of the Traffic Act.

[29] Supreme Court of Appeal judgment above n 4 at para 15 quoted at [5] above.

possible, statutes must be read in conformity with the common law.[30] Of course, where a harmonious reading is not possible, statutes must trump the common law.[31]

[17] Specifically on self-help and thus more on point, in *Vena*[32] Milne JA expressly approved a statement by Friedman J in the court of first instance, which read as follows:

> "It is a fundamental principle of our law that a person may not take the law into his own hands and a statute should be so interpreted that it interferes as little as possible with this principle."

[18] Nothing tells me that sections 68(6)(b) and 89(1) are plainly intended to alter the common law. There would be disharmony between these sections, on the one hand, and the availability of the *mandament van spolie*, on the other, only if section 68(6)(b) did not have the phrase "without lawful cause". Thus the sections must be read not to oust the normal operation of the *mandament van spolie*. This reading promotes the spirit, purport and objects of the Bill of Rights and, therefore,

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[30] In *Dhanabakium v Subramanian and Another* 1943 AD 160 at 167 it was held:

> "As was stated in *R v Morris* 1 CCR 95 in a passage quoted with approval by Solomon J in *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 823:
>
> > 'It is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law.'"

See also *S v Collop* 1981 (1) SA 150 (A) at 164A-B. Of course, the application of this principle is now subject to the Constitution. See *Fedlife Assurance Ltd v Wolfaardt* [2001] ZASCA 91; [2002] 2 All SA 295 (A) at para 16. This principle is consonant with section 39(3) of the Constitution quoted above n 15.

[31] See *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 69.

[32] Above n 21 at 271D-E.

conforms to the provisions of section 39(2) of the Constitution.[33] This I say because possession is closely associated with and is often an incident of ownership. In some instances the protection of possession will guarantee wholesome enjoyment of the right to property. Not surprisingly, 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.[34]

[19] This reading of the two sections does not unduly thwart effective policing. Rather it enjoins police to act not only in accordance with the Criminal Procedure Act, but with the Constitution as well. In the face of the privacy right as also the right to dignity, which are closely linked,[35] it is not overly restrictive to require of police to comply strictly with search warrant requirements.[36] Where there is a need for swift

[33] Above n 14.

[34] Id.

[35] *Gaertner and Others v Minister of Finance and Others* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at para 86.

[36] Section 21(1) of the Criminal Procedure Act provides:

> "Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—
>
> (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or
>
> (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings."

Section 22 reads:

> "A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—
>
> (a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or
>
> (b) if he on reasonable grounds believes—

action, the police can always invoke section 22 of the Criminal Procedure Act.[37] Strict compliance with the Constitution and the law will not hamper police efforts in stemming the scourge of crime.

[20] Without doubt the police play an important role in combating and preventing crime, conducting criminal investigations, maintaining public order, protecting and securing the inhabitants of South Africa and their property and upholding and enforcing the law.[38] Their endeavours in this regard should not be interfered with unduly. However, they, like everyone else, are subject to the Constitution, in particular – for present purposes – the rule of law. A failure to hold them to the Constitution strictly may have negative consequences: it may encourage them to be a law unto themselves. After all, police excesses are not unknown. Reading 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. That is at odds with constitutionalism.

[21] Possession of the vehicle by the applicant pursuant to its return in terms of a court order would only be unlawful if it were established that he did not have lawful cause to possess it. That is a conclusion that can only be reached after an enquiry into the facts surrounding the applicant's possession. Before that enquiry, one is not in a position to say the applicant's possession of the vehicle will be unlawful – it may or

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(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[37] Id.

[38] Section 205(3) of the Constitution.

may not be, depending on the result that the enquiry would yield. The question that arises is: in proceedings for a spoliation order, is it proper to hold that enquiry? I say not. That would be enquiring into the merits of the lawfulness of the applicant's possession. Those merits are 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.[39] Earlier I made the point that restoration of possession may even be to a person who might eventually be shown to be a thief or robber.[40] The return to the applicant of the tampered vehicle, which may be possessed lawfully, is no different.

Costs

[22] Unlike in the High Court, where his success was partial, before us the applicant succeeds outright. I see no reason to depart from the general principle that costs must follow the result.[41]

Order

[23] In the result, the following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal succeeds.

[39] This, of course, is subject to whether an enquiry into the unlawfulness of possession may be held at all in instances where the article concerned may not be possessed lawfully under any circumstances.

[40] Above n 17.

[41] *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC); 2010 (1) BCLR 1 (CC) at paras 91-3.

4. The order of the Supreme Court of Appeal is set aside.

5. Paragraphs 2 and 3 of the order of the Eastern Cape High Court, Mthatha (High Court) are set aside and substituted with the following order:

> The respondents are ordered to return the motor vehicle with the registration BTR 190 EC to the applicant.

6. The respondents must pay the applicant's costs, including the costs of two counsel, in this Court, the Supreme Court of Appeal and the High Court.

For the Applicant:	Advocate S Mbenenge SC, Advocate A Da Silva and Advocate N Mnqandi instructed by Mvuzo Notyesi Inc.
For the Respondents:	Advocate N Dukada SC and Advocate M Matyumza instructed by the State Attorney.