ARTICLE

RULE OF LAW, THE *MANDAMENT VAN SPOLIE* AND THE MISSED OPPORTUNITY: TO SOME THOUGHTS ARISING FROM *NGQUKUMBA V MINISTER OF SAFETY AND SECURITY*

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ABSTRACT

The *mandament van spolie* as a legal remedy is well entrenched in our legal system. So entrenched is this remedy its requirements have crystallised and become well known. It is also beyond doubt that the remedy operates against organs of state where they have wrongfully deprived people of possession. What has always been an interesting debate in our law is whether the true object of the remedy is the protection of possession or the discouragement of self-help. On the back of a recent Constitutional Court judgment, this article revisits this old debate and argues that it appears as if in our current constitutional era the *mandament van spolie* is, first and foremost, compliant with the Constitution. The article further argues that there are serious problems of justification if the *mandament van spolie* is seen only as a remedy which protects possession because in that context courts may very well be compelled to protect the possession of those despoiled possessors who are in law not entitled to possession. This may happen even against the possession of lawful possessors or express prohibition of statutory provisions denouncing possession on the part of the despoiled. This situation would be untenable. To that end this article argues that there is merit in viewing the *mandament van spolie* as a remedy aimed at curbing self-help. The article continues to argue and shows how the remedy vindicates the rule of law by obliging organs of state, the South African Police Service in particular, to always act within the law. The recent Constitutional Court case is further praised for showing how the common law and statute law can coexist in harmony. However, the judgment is criticised for having missed an opportunity to consider if the *mandament van spolie* was in need of development taking into account the clear interests society has in the law not protecting ill-gotten possession as well as the need not to discourage and undermine the efforts of law enforcement agencies in fighting criminal activities.

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1. INTRODUCTION

Our law has a long and rich history of disciplining organs of state, the executive in particular, against engaging in acts of self-help. Self-help is repugnant to the rule of law for the chaos, vigilantism and anarchy it causes and it is for this reason that courts discourage it.[1] This was the case long before the advent of the Constitution and the emergence of the principle of legality as we know it, which enjoins all organs of state to act through the law and perform only those acts and functions properly conferred upon them by the law.[2]

Before the advent of constitutionalism one of the ways in which executive excesses were curbed was through the application of the *mandament van spolie*. The principles relating to the application of the *mandament van spolie* have crystallised over time and become well known. The known principles are to the effect that a litigant seeking to rely on the remedy afforded by the *mandament van spolie* is required to satisfy only two requirements: peaceful or undisturbed possession of the thing forming the subject matter of the *mandament van spolie* and an act of unlawful deprivation of possession on the part of the spoliator.[3] Once these two requirements have been met the number of available defences to the spoliator are very limited indeed.[4] The spoliator, for example, cannot challenge the lawfulness of the despoiled possessor's possession. Put differently, it is not required of the litigant invoking the *mandament van spolie* to prove lawful possession.[5] The lawfulness of the despoiled possessor's possession is irrelevant as the despoiled possessor has to be restored to possession before the merits or the rights of the parties can be argued.[6] This principle was aptly expressed in *Administrator, Cape v Ntshwaqelo* in the following terms: 'the rights or wrongs of the [despoiled possessor's] possession, and the difficulties which the [spoliator] faced, have no bearing on the question whether a spoliation order should [be] granted'.[7]

It is clear therefore that on the known principles of the *mandament van spolie* the lawfulness of the despoiled possessor's possession receives no regard at all. The refusal of the law to consider the lawfulness of the despoiled possessor's possession meant that the ambit of the protection afforded by the *mandament van spolie* was never only limited to lawful possessions or lawful possessors, but also included unlawful possessors who

1 *Chief Lesapo v North West Agricultural Bank* [2000] 1 SA 409 (CC) para 22.

2 *See AAA Investments v Micro Finance Regulatory Council* [2007] 1 SA 343 (CC) para 68; *Minister of Health v New Clicks South Africa* (Pty) Ltd [2006] 2 SA 311 (CC) para 613.

3 *See Nino-Bonino v De Lange* [1906] T.S 120122; *Zulu v Ministry of Works, KwaZulu Natal* [1992] 1 SA 182 (D).

4 *See Ntshwaqela v Chairman, Western Cape Regional Services Council* [1988] 3 SA 218 (C) 226A; *Muller v Muller* [1915] TPD 31.

5 *Nienaber v Stucky* [1946] A.D 1049 1053.

6 *Greyling v Estate Pretorius* [1947] 3 SA 514 (W) 516.

7 [1990] 1 SA 705 (A) 718B.

at the time of invoking the remedy could have been fraudsters, thieves or even robbers.[8] Viewed in this manner the ambit of the protection afforded by the *mandament van spolie* has always been wide. It was this wide ambit of protection that made the *mandament van spolie* a special remedy with far-reaching consequences.

Seemingly, owing to its wide ambit of protection the *mandament van spolie* has been described as the only true possessory remedy in South African law today.[9] This description at times has been interpreted to mean that the *mandament van spolie* exists for the protection of possession regardless of the manner in which that possession may have been acquired. The notion of protecting seemingly ill-gained possession or statutorily prohibited possession through a court order by way of a *mandament van spolie* gives rise to serious problems of justification for courts.[10] By this is meant that it is not easy for courts to justify the restoration of possession to despoiled possessors who are not legally entitled to such possession as in a way that is tantamount to rewarding illegality.[11] The problem becomes even more pressing for courts if there is a statute that expressly prohibits such possession as illegal. In this instance courts appear to be uneasy about issuing orders that defeat the express provisions of the statute. These exact issues were at the core of the dispute between the parties in the case of *Ngqukumba v Minister of Safety and Security*[12] that forms the subject matter of this article.

In *Ngqukumba* the courts were called upon to consider the legality of restoring possession through the application of a *mandament van spolie* to a despoiled possessor who was statutorily prohibited from repossessing the article forming the subject matter of the proceedings. This article aims to provide an analysis of the *Ngqukumba* judgment that will reflect on the principles of the *mandament van spolie* and highlight why and how the judgment could be praised for reaching a correct outcome, but also may be criticised for overlooking a fundamental question presented by the facts of the case. Furthermore, this article will comment on the possible impact such a judgment will have on the South African Police Service (SAPS) crime prevention and crime combating strategies. It is pointed out that the SAPS must ensure at all times that all their actions, including those directed at crime fighting, are lawful and comply with all laws in every possible way – failing this, the action will be declared null and void, no matter how desirable the outcomes may have been.

8 Warren Freedman, 'The Application of the Mandament van Spolie to Constitutional and Statutory Rights: *City of Cape Town v Strumpher* 2012 4 SA 207 (SCA)' (2015) TSAR 198.

9 Duard Kleyn, 'Possession' in Reinhard Zimmerman and Daniel Visser, *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996) 820.

10 Courts must account for their judgments, see *Mphahlele v First National Bank of SA Ltd* [1999] 2 SA 667 (CC) para 12. Courts must give principled judgments, see *Mistry v Interim Medical and Dental Council of SA* [1998] 4 SA 1127 (CC) para 3.

11 See generally J Taitz, 'Spoliation Proceedings and the "Grubby Handed" Possessor' (1981) SALJ 36.

12 [2014] 5 SA 112 (CC) (*Ngqukumba CC*).

2. FACTS OF THE CASE AND THE DECISION OF THE COURT

Ngqukumba involved a taxi operator whose taxi was searched and seized by the SAPS without a warrant of search and seizure. In seizing the taxi the SAPS were acting on unsubstantiated information they had received from a person whom they were interrogating for being in possession of another suspected stolen vehicle unrelated to the seized taxi. Following the warrantless seizure, the SAPS detained the taxi at the police station where they later conducted a search. The search revealed that the chassis and engine numbers of the taxi had been ground off. It should be noted that despite this discovery the SAPS did not institute criminal proceedings against the operator but elected to retain the taxi much to the frustration of the operator who wanted his taxi back. After numerous failed attempts to recover his vehicle from the SAPS, the operator instituted spoliation proceedings for the return of his vehicle in the High Court in Mthatha.[13] The SAPS opposed the spoliation proceedings arguing that the initial seizure and subsequent search of the vehicle, though without a warrant, nevertheless was lawful in terms of the provisions of sections 20 and 22 of the Criminal Procedure Act.[14] These sections empower members of the SAPS to seize articles they believe to be concerned in the commission of criminal offences, and also authorise those seizures to be effected without a search warrant if certain conditions prescribed in the sections are met.

The SAPS further argued that the taxi had a chassis plate that had been tampered with and had a ground off engine number as well as a superimposed manufacturer's tag plate, which made it illegal for the court to order its return as, in so doing the SAPS argued, the court would be perpetuating a violation of section 68 (6) (b) read with section 89 (1) of the National Road Traffic Act.[15] These sections render it a criminal offence to be in possession of a vehicle with engine and chassis numbers that have been tampered with. In so arguing, it appears the SAPS were effectively arguing that the court could not restore possession of the taxi to the despoiled operator because the operator's possession was unlawful. Faced with this opposed spoliation application, the High Court first had to determine if there was an act of spoliation on the part of the SAPS.[16] Concerning this enquiry, the High Court found the seizure of the taxi to have been unlawful and that an act of spoliation had been established. The High Court however refused to order the return of the taxi to the operator on the basis that possessing the taxi would constitute a criminal offence under sections 68 (6) (b) read with 89 (1) of the National Road Traffic Act.[17]

13 *Ngqukumba v Minister of Safety and Security* [2011] ZAECMHC 18 (*Ngqukumba* High Court Judgment).

14 Act 51 of 1977 (CPA).

15 Act 93 of 1996.

16 *Ngqukumba* High Court Judgment (n 13) para 28.

17 ibid order of High Court Judgment

It then appears that in refusing to grant the spoliation order after an act of spoliation had been established, the High Court effectively accepted that the lawfulness of the despoiled possessor's possession could be enquired into in spoliation proceedings. More, in refusing to order the return of the vehicle, the High Court also considered itself bound by the judgments of the Supreme Court of Appeal (SCA). On previous occasions the SCA declined to order the release of motor vehicles with engine or chassis numbers that had been tampered with.[18]The High Court however did grant the operator leave to appeal to the SCA.

The appeal to the SCA was only against the High Court's refusal to restore possession to the despoiled possessor based on the provisions of section 68 (6) (b) of the National Road Traffic Act after an act of spoliation had been established. The SCA dismissed the appeal.[19] In dismissing the appeal the SCA reasoned that ordering the return of the vehicle to the appellant against the clear provisions of section 68 (6) (b) of the National Road Traffic Act would amount to the court compelling the SAPS to perform an illegal act. To that end the SCA held:

> [N]o court will compel a person to perform an illegality. The relief sought by the appellant, namely possession of the vehicle, would have the result of compelling the police to commit an illegality. That a court should and cannot do. In these circumstances, the appellant is not entitled to spoliatory relief.[20]

The fact that the seizure of the vehicle had been unlawful, therefore amounting to spoliation, did not deter the SCA in refusing to restore possession. In fact, the SCA effectively held that the operation of section 68 (6) (b) of the National Road Traffic Act somehow altered the well-known common law position embodied by the *mandament van spolie* that no one is permitted to wrongfully dispossess another, and where there has been a wrongful dispossession the law will summarily restore possession without considering the lawfulness of the despoiled possessor's possession.[21] By considering the lawfulness of the operator's possession, albeit against the provisions of the National Road Traffic Act where there had been an act of spoliation, the SCA impliedly ousted the operation of the *mandament van spolie* without undertaking an enquiry to see if the National Road Traffic Act intended to alter the common law position embodied by the *mandament van spolie* in that way.[22]

Feeling aggrieved by the judgment of the SCA the appellant approached the Constitutional Court where his appeal succeeded and an order for the return of the taxi was made. In granting the restoration order, the Constitutional Court properly viewed

18 id para 37.

19 *Ngqukumba v Minister of Safety and Security* [2013] 2 SACR (SCA) 381 (*Ngqukumba SCA*).

20 ibid para 16 (footnotes omitted).

21 *Mans v Marais* [1932] CPD 352 356; See also *Nino Bonino v De Lange* [1906] TS 120 122.

22 Our law presumes that legislation does not oust the common law unless legislation expressly states that the common law is ousted or altered. See *Seluka v Suskin and Salkow* [1912] (TPD).

the matter as one that raised constitutional questions around the rule of law and statutory interpretation where these impacted on property rights.[23] In arriving at its order the Constitutional Court restated the known purpose[24] and requirements of the *mandament van spolie*[25] against which it interpreted sections 68 (6) (b) and 89 (1) of the National Road Traffic Act. In its interpretation of these sections the Constitutional Court found that there was nothing in the language of these sections that indicated that the sections were intended to oust the operation of the *mandament van spolie* by altering the common law position that no person may take the law into his own hands.[26]

The Constitutional Court further noted that the cited provisions of the National Road Traffic Act did not mean that possessing a vehicle with a tampered engine and chassis numbers was unlawful under all circumstances.[27] The court held that for the prohibitory sections of the National Road Traffic Act to operate it must first be proved that the operator's possession was unlawful, which conclusion can only be reached after an enquiry into the facts surrounding the operator's possession.[28] On the basis of this nuanced, yet unassailable interpretation of the National Road Traffic Act, the Constitutional Court found that the appellant could be restored to his possession of the vehicle.

3. DISCUSSION OF JUDGMENT

Ngqukumba was a sequel to a number of similar cases coming before our courts where goods, vehicles in particular,[29] had been wrongfully seized by the SAPS, which subsequently refused to restore possession on the strength of some legislation[30] that on their interpretation, prohibited the restoration of possession notwithstanding their initial wrongful act in seizing the goods in the first place. Such seizures at common law constituted spoliation for which a *mandament van spolie* was competent. When faced with spoliation proceedings in these cases, the SAPS challenged the lawfulness of the despoiled possessor's possession by relying on a statute like the National Road

23 *Ngqukumba* CC (n 12) para 9.

24 id para 10.

25 id para 13.

26 id para 18.

27 id para 15.

28 id para 21.

29 See *ABSA Bank Ltd v Eksteen* [2011] ZASCA 40; *Marvalanie Development v Minister of Safety and Security* [2007] 3 SA 159 (SCA); *Powel NO v Van der Merwe* [2005] 5 SA 62 (SCA); *Khan v Minister of Law and Order* [1991] 3 SA 439 (T); *Nel v Deputy Commissioner of Police, Grahamstown* [1953] 1 SA 487 (E).

30 In *Schoeman v Chairperson of North West Gambling Board* [2005] ZANWHC 18 and *Ivanov v North West Gambling Board* [2012] 6 SA 67 (SCA) (*Ivanov*) the Legislation in question was the National Gambling Act.

Traffic Act in the case of vehicles with tampered engine or chassis numbers, or the National Gambling Act in the case of gambling machines, which is something they are not permitted to do in spoliation proceedings. This is so because our law has always recognised that the injustice by which the despoiled possessor obtained possession was irrelevant in spoliation proceedings.[31] This legal position is neatly set out by Thirion J in *Zulu v Minister of Works, KwaZulu*[32] where the court correctly held:

> In truth the mandament van spolie is not concerned with the protection or restoration of *rights* at all. [The aim of the mandament van spolie] is to restore the factual possession of which the *spoliatus* has been unlawfully deprived. The question of the lawfulness of the *spoliatus'* possession is not enquired into at all.[33]

Based on this trite principle it is clear that the unlawfulness of the despoiled possessor's possession was never a recognised defence to spoliation proceedings. In *Rosenbuch v Rosenbuch* the court went so far as to hold that:

> A spoliator cannot [even] justify his conduct and avoid the consequences of that conduct, by saying that he was the victim of prior spoliation. If he was, he had a remedy in law, but not the right to take the law into his own hands.[34]

In allowing the SAPS to question the lawfulness of Ngqukumba's possession, the High Court and the SCA had clearly taken their eyes off the established principles. This point will be fully argued elsewhere in this article. For present purposes what should suffice is that the unlawfulness of possession on the part of a despoiled possessor was never a defence to spoliation proceedings and in recognising such a defence, albeit under a statute, the SCA and the High Court unjustifiably muddled established principles.

The only acceptable defences available in spoliation proceedings have ranged from raising a factual argument that the despoiled possessor did not possess the property at the time the alleged spoliation took place, or denying that there had been an act of spoliation.[35]Any party's ownership is also not relevant as the law insists that where spoliation has been proved restoration must first take place before the merits of the case and the ownership of the parties can be considered.[36] For a while the SCA unjustly tinkered with these established principles by allowing the SAPS to raise defences that were never in the province of spoliation proceedings. In so doing the SCA effectively rewarded members of the SAPS for taking the law into their hands, something our law

31 See amongst others *Yeko v Qana* [1973] 4 SA 735 (A) at 739G; *Ngewu v Union Co-Operative Bark & Sugar Masondo v Union Co-Operative Bark & Sugar* [1982] 4 SA (NPD) 394D.

32 [1992] 1 SA 181 (D & CLD).

33 id 187 G–H.

34 [1975] 1 SA 181 (W) 184B.

35 See amongst others *Wocke v Goedhals* [1917] OPD 64; *Hoosen v Bourne* [1962] 3 SA 182 (D).

36 *Greyling v Estate Pretorius* [1947] 3 SA 514 (W) 516.

has never countenanced.[37] The Constitutional Court in *Ngqukumba* goes a long way in not only re-establishing the known principles of the *mandament van spolie* but also it affirms the principle of legality and clarifies the relationship between the common law, statutory law and the Constitution.

Accordingly, the *Ngqukumba* judgment should be welcomed for at least three reasons. Firstly, the judgment serves as a reminder to organs of state, particularly the SAPS, that their actions (especially those that limit the elementary rights of individuals), will be carefully scrutinised for compliance with the applicable laws, and where such action falls outside the parameters of the enabling law it will be declared unlawful and will be set aside, irrespective of how desirable the outcomes may have been. Seen in this light, the judgment represents an affirmation of the principle of legality, a principle that enjoins all organs of state to do and perform only those acts permitted by law.

Secondly, the judgment settles in a constitutional sense the policy reasons for which a *mandament van spolie* exists, namely to discourage people from taking the law into their own hands and in the process breaching peace and order.[38] Seen in this way, the judgment articulates the true nature of the *mandament van spolie*. The judgment also reaffirms the requirements of and available defences against spoliation proceedings, which were in some ways muddled to a point of confusion in a string of earlier cases emanating from the various divisions of our High Courts, which cases were later confirmed by the SCA.

In the last instance, the judgment clarifies the relationship between statutory law and the common law in a system of law underpinned by the Constitution. In many ways the judgment confirms that there is no impenetrable barrier between the two as both derive their force and validity from the Constitution.[39] However, this does not mean that the Constitution displaces the common law or the statutory law. In fact, the judgment shows in clear terms that in many ways the Constitution supplements both the common law and statutory law, except in instances where a particular rule of the common law or a particular statutory provision offends a particular right or value of the Constitution. In that instance the common law rule ought either to be developed to be in line with the Constitution or be declared unconstitutional. On the other hand, a seemingly offending statutory provision should be interpreted in conformity with the Constitution where that is possible, or should be declared unconstitutional and set aside where it cannot be saved by interpretation.[40] For these reasons, the judgment cannot be faulted and it is truly taking our law forward in a progressive manner.

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37 In *Jones v Claremont Municipality* 25 SC 651 the court rebuked the Municipality thus 'I wish to mark my sense of the impropriety of a public body taking the law into its own hands'.

38 See *Painter v Strauss* [1951] 3 SA 307 (O).

39 See *Mabuza v Mbatha* [2003] 4 SA 218 (C) para 32; *South African Human Rights Commission v President of Republic of South Africa* [2005] 1 SA 580 (CC) para 43.

40 See generally *Investigative Directorate: Serious Economic Offences v Hyundai Motor Distributors* [2001] 1 SA 545 (CC) para 24.

Although the judgment, on the whole, is progressive, the only concern that could be raised against it is taking into account the many similar cases that had made their way to the courts, that none of the Constitutional Court justices took the opportunity to consider if the *mandament van spolie* should be developed in such a way that its application is limited to those despoiled possessors whose possession, at the time of the dispossession, was lawful and whose continued possession is or will not in any way be hindered or be prohibited by statute. This consideration was required because, in as much as the *mandament van spolie* for plausible reasons discourages self-help, it can also not be seen to be indirectly protecting the possession of those who ought not to be in possession as this situation creates problems of its own. The situation becomes more desperate if the indirect protection is against the genuine efforts of law enforcement agencies to combat criminal activities. Sadly the Constitutional Court failed to consider if the time has arrived to develop the *mandament van spolie* in light of section 39 (2) of the Constitution so that it responds to this reality.

As a result of this failure to consider whether the *mandament van spolie* should be developed under section 39 (2), the question of law that had arisen before *Ngqukumba* has not been finally settled. The SAPS may very well argue that in failing to consider if the *mandament van spolie* was available only to those despoiled possessors who were lawful in their possession and whose continued possession is not legally prohibited, the Constitutional Court did not completely close the door on their practice of refusing to release wrongfully seized goods, vehicles in particular, on the strength of a statute, like section 68 (6) (b) of the National Road Traffic Act, which prohibits as unlawful the possession of vehicles with engine or chassis numbers that have been tampered with.

In what follows is an in-depth discussion of the reasons why the *Ngqukumba* judgment should be praised and also some comments on how the Constitutional Court missed an opportunity to consider and decide definitively if the *mandament van spolie* should continue to operate in its current form where lawful possessors, on one hand, can indirectly be deprived of their possession and law enforcement agencies, on the other, can be frustrated in their crime-combating efforts in favour of those who, strictly speaking, may be prohibited from possession. In this discussion it will be demonstrated how the judgment vindicates the rule of law, how it articulates in a constitutional sense the nature and purpose for which the mandament *van spolie* exists and how it rationalises our different sources of law. This discussion will be followed by a criticism of the Constitutional Court's failure to consider if the *mandament van spolie* was in need of development.

3.1. Vindicating the rule of law

The rule of law is a founding value of our constitutional order.[41] According to the Constitutional Court, the rule of law constrains all spheres of government to exercise no

41 See s 1 (c) of the Constitution of the Republic of South Africa, 1996.

power or to perform any function beyond that which is conferred upon them by law.[42] Put differently, the rule of law requires all organs of state, the SAPS included, to act within the law no matter the circumstances. *Ngqukumba* confirmed that unlawful means will never justify the ends irrespective of how desirable the ends may seem.

In restoring possession of the vehicle to the despoiled operator the Constitutional Court was not protecting in any way the operator's possession which may or may not have been unlawful, but was merely giving effect to the rule of law and discouraging the SAPS from performing unlawful acts under the guise of fighting crime. Of course, many South Africans are justifiably worried about the high levels of crime, but in a Constitutional state only lawful means may be employed to fight crime. This much was said by the Constitutional Court itself in *Minister for Safety and Security v Van Der Merwe* where Mogoeng J reasoned:

> All law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the police to root out crime or at least to reduce it significantly.[43]

Mogoeng J's sentiments were in line with what the SCA, in a slightly different context, had previously said about the tensions between consistently applying the rule of law and fighting crime in the eyes of the public. In *S v Tandwa* the SCA noted that the public flinches when courts appear to be assisting criminals by excluding unlawfully obtained evidence or, as in this case, by ordering a restoration of a vehicle which may or may not have been stolen. But, so reasoned the SCA,

> what differentiates those committed to the administration of justice from those who would subvert it is the commitment of the former to moral ends and moral means. We can win the struggle for a just order only through means that have moral authority. We forfeit that authority if we condone coercion and violence ... in sustaining order.[44]

In insisting on lawful means as the only way to respond to the fight against crime, the Constitutional Court in many ways is showing that the rule of law is sacrosanct and does not bend to expediency. The court in *Ngqukumba* was saying those who are tasked with the enforcement of the law should not breach the peace by taking the law into their own hands, for when they do that they in turn become criminals. Properly considered the Constitutional Court is heeding the warning made by Justice Brandeis in his dissenting judgment in *Olmstead v United States*, a case that involved the admissibility of evidence obtained through unauthorised wiretapping, where the justice held:

42 See amongst others *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* [1999] 1 SA 374 (CC) para 58; *President of the Republic of South Africa v South African Rugby Football Union* [2000] 1 SA 1 (CC).

43 [2011] 5 SA 61 (CC) para 35.

44 *S v Tandwa* [2008] 1 SACR 613 (SCA) para 121.

> Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites everyman to be a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means – to declare that the government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[45]

The finding of the Constitutional Court in *Ngqukumba* demonstrates that the court resolutely set its face against executive excesses and the lawlessness that could soon follow when the SAPS are allowed to take the law into their hands under the guise of fighting crime. To this end, Madlanga J for the unanimous Constitutional Court remarked:

> Without doubt the police play an important role in combating and preventing crime, . . . 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.[46]

The vindication of the rule of law in *Ngqukumba* by way of the *mandament van spolie* also shows that the rule of law as a sacrosanct constitutional principle not only informs administrative justice but permeates the whole body of our law including the criminal justice system. After all, there are not two systems of law each governed by its own distinct rules and principles, ours is a single unified legal system underpinned by the Constitution which applies to all conduct.[47] Some may even argue, that because of its coercive nature and its ability to limit several rights including the right to liberty, our criminal justice must at all times adhere to the rule of law as the liberty of citizens can only be justifiably curtailed if the curtailment is in accordance with the rule of law. For all these reasons, *Ngqukumba* certainly vindicates the rule of law and must be applauded for that.

3.2. Articulating the true nature of the *mandament van spolie*

Apart from vindicating the rule of law, the Constitutional Court in *Ngqukumba* constitutionalised the *mandament van spolie*. It did this not only by expressly holding that the *mandament van spolie* was compatible with the Constitution, but by restating the true nature and purpose for which the *mandament van spolie* exists. In constitutionalising the *mandament van spolie* Madlanga J reasoned that the *mandament van spolie* was deeply rooted in the rule of law. He expressed himself thus:

45 277 US 438 (1928) 485.

46 *Ngqukumba* CC (n 12) para 20.

47 *Pharmaceutical Manufacturer's Association of SA: in re Ex parte President of the Republic of South Africa* [2000] 2 SA 674 (CC) para 44.

> 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.[48]

In rooting the *mandament van spolie* in the rule of law the Constitutional Court was effectively saying the *mandament van spolie* is compatible with the spirit and purport of the Constitution. In this sense, the *mandament van spolie* was constitutionalised as it was found not to be in conflict with any constitutional right or value.

Going further, the Constitutional Court also impliedly engaged and settled in a constitutional sense a long-raging debate in our law relating to whether the *mandament van spolie* was a possessory remedy whose purpose was the protection of possession or whether it existed solely as a remedy for combating breaches of peace. This question received a lot of attention from academics in the 1980s and gave rise to a difference of opinion between, in particular, Kleyn who saw the *mandament van spolie* as protecting possession[49] and Van der Walt who viewed it as a remedy aimed at protecting the public order against disturbances of peace that necessarily accompany self-help.[50]

Interestingly both Kleyn's and Van der Walt's different conceptions of the true nature of the *mandament van spolie* find some support in case law. In *Stocks Housing v Department of Education and Culture Services,* for example, Rose Innes J gave credence to Kleyn's view and held that '[t]he mandament van spolie is a long established possessory remedy'.[51] A contrary view in support of Van der Walt's conception of the *mandament van spolie* is found in, among other cases, *Mbangi v Dobsonville City Council* where the court held that in spoliation proceedings 'the Court is not protecting a right called 'possession', but that in the interests of protecting society against self help, the self-service undertaken by a spoliator is stopped as being a justiciable wrong'.[52]

The Constitutional Court in *Ngqukumba* wittingly or unwittingly added its conception as to the true nature of the *mandament van spolie*. The proper articulation of the true nature of the *mandament van spolie* was and is not insignificant as it influences the proper application of the remedy. If the remedy is viewed strictly as one for the protection of possession then it follows that many would justifiably struggle with the idea of having to restore or return possession to an unlawful despoiled possessor or a possessor whose possession is prohibited by statute. This difficulty in restoring possession to a despoiled possessor who may not be entitled to possession, was expressed in *Parker v Mobil Oil of Southern Africa (Pty) Ltd* where Van den Heever J remarked:

48 *Ngqukumba* CC (n 12) para 12.

49 Duard Kleyn, 'Die mandament van spolie as besitsremedie' (1986) De Jure 1.

50 AJ van der Walt, 'Defences in Spoliation Proceedings' (1985) SALJ 172; see also CG van der Merwe, *The Law of Things* (Butterworths 1987) 68.

51 [1996] 4 SA 231 (C) 238I.

52 [1991] 2 SA 330 (W) 336D.

> Despite generalizations that even the thief or [a] robber is entitled to be restored to possession, I know of no instance where our Courts, which disapprove of metaphorical grubby hands, have come to the assistance of an applicant who admits that he has no right vis-a-vis the respondent to possession he seeks to have restored to him.[53]

A few years later in *Coetzee v Coetzee* Van den Heever J citing with approval his earlier judgment in *Parker* once again expressed his misgivings about returning possession to an unlawful despoiled possessor. On this occasion he reasoned:

> There are limits to the scope of the remedy... . The cases seem to suggest that, despite lip service to the sweeping statement by *Voet* 41.2.16 that even a despoiled robber will be assisted, possession will not be restored if the applicant has no vestige of a "reasonable or plausible claim"... and the respondent conclusive proof of his ownership of the article in question.[54]

Furthermore, viewing the *mandament van spolie* as a strictly possessory remedy makes it easier for courts to refuse to restore possession in instances where the despoiled property has been destroyed. This much was confirmed in *Rikhotso v Northcliff Ceramics (Pty) Ltd* where Nugent J (as he then was) concluded that:

> [T]he remedy is inappropriate if the property has been destroyed. There is nothing upon which the order can operate, and no possessory entitlement left to be adjudicated upon. It is because it is a possessory remedy that most modern writers hold the view that a spoliation order may not be granted if the property has been destroyed.[55]

At the time *Rikhotso* was decided, the debate, which began with cases like *Zinman v Miller*[56] and *Frederick v Stellenbosch Divisional Council,*[57] was exactly whether the *mandament van spolie* was available in instances where the property had been destroyed. The debate was particularly important because courts had to consider whether they had powers to restore possession by substitution in instances where the despoiled property had been destroyed or demolished. The answer to this question in the argument of this article largely depends on how spoliation proceedings were conceived and viewed in our law.

Viewed as a remedy to address the unlawfulness caused by self-help, restoration by substitution would be entirely understandable and defendable on the basis that the spoliator cannot escape the consequences of his actions merely because the property has been destroyed. Logic would also suggest that the spoliator would have contributed if not caused the destruction of the property in the first place by committing an act of spoliation. In other words the question to be asked would have been: would the property have been destroyed (by whomever) had the spoliator not committed an act of

53 [1979] 4 SA 250 (NC) 255D (*Parker*).

54 [1982] 1 SA 933 (C) 935D.

55 [1997] 1 SA 526 (W) 532J (*Rikhotso*).

56 [1956] 3 SA 8 (T).

57 [1977] 3 SA 113 (C).

spoliation? In those instances equity and fairness would demand that the spoliator do everything possible to correct the injustices caused by the act of spoliation, including supplying substitute or replacement property to the possessor. In *Rikhotso,* however, Nugent J held that:

> Whatever the nature of the remedy may have been in ancient law, it was received into the law of this country as a possessory remedy and not as a general remedy against unlawfulness. In all the cases up to 1947 ... the remedy has been applied to restore possession of extant property.[58]

Rikhotso was later confirmed and approved by the SCA in *Tswelopelo non-profit Organisation v City of Tshwane Metropolitan Municipality,* where Cameron JA for the unanimous SCA held:

> The doctrinal analysis in *Rikhotso* is in my view undoubtedly correct. While the mandament clearly enjoins breaches of the rule of law and serves as a disincentive to self-help, its object is the interim restoration of physical control and enjoyment of specified property - not its reconstituted equivalent.[59]

Like in *Rikhotso*, the dispute in *Tswelopelo* turned on the question of restoring possession of dwellings by substitution in instances where the act of spoliation, which was the unlawful demolition of peoples' dwellings, had totally destroyed the dwellings in question. The total destruction of the dwellings had caused the High Court to dismiss the spoliation proceedings, as there was nothing to restore. At the SCA the applicants argued that the *mandament van spolie* should be developed under the Constitution so that it includes restoration by substitution in instances where the natural consequence of spoliation was the total destruction of the despoiled property. In rejecting the invitation to develop the *mandament van spolie* in this way, Cameron JA said:

> To insist that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives.[60]

Although the Constitutional Court in *Ngqukumba* did not specifically consider these debates, the court expressly held that the nature or the purpose of the *mandament van spolie* is to prevent self-help. Not once did the Constitutional Court characterise the *mandament van spolie* as a possessory remedy. In fact it began the enquiry by stating that the essence of the *mandament van spolie* is the restoration of possession to the possessor before all else, and that the main purpose is the preservation of public order by restraining persons from taking the law into their own hands.[61]

58 *Rikhotso* (n 55) 533I.

59 [2007] 6 SA 511 (SCA) para 24 (*Tswelopelo*).

60 id para 25.

61 *Ngqukumba* CC (n 12) para 10.

In steering so clearly away from characterising the *mandament van spolie* as a possessory remedy whose primary function was the restoration of possession, as previous cases have held, the Constitutional Court impliedly overruled *Tswelopelo* to the extent that *Tswelopelo* emphasised the possessory nature of the remedy and, in the same breath, infused constitutional values into the *mandament van spolie* and thereby constitutionalised it. Madlanga J expressed the infusion of constitutional values into the *mandament van spolie* in the following terms:

> [T]he 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.[62]

There is merit in constitutionalising the *mandament van spolie* in such a way that it is presented as a remedy against self-help as opposed to presenting it as a possessory remedy the main aim of which is the protection of possession irrespective of the manner in which that possession was acquired. The merit lies in justification. It is easier to justify restoring possession to a possessor who may or may not be lawful in his possession on the basis that such restoration seeks to compel the spoliator to resort to law as opposed to self-help. But, it is very difficult to morally justify restoring possession to an unlawful possessor on the basis that his possession though unlawful, nevertheless is protected by the *mandament van spolie* because this is the remedy for the protection of possession. This reasoning seems to be at odds with section 25 (1) of the Constitution[63] to the extent that the true owner may very well be arbitrarily deprived of the property in question. Putting a thief or a robber in possession against a true owner based on nothing other than the fact that the *mandament van spolie* is a possessory remedy that protects possession is unconscionable. Also it goes against the privileged status the common law affords to ownership.

On numerous occasions courts have said possession must be acquired lawfully[64] and that it was inherent in the nature of ownership that possession is to be with the owner.[65] It was probably these reasons of justification that led Langa AJA in the Namibian case of *Horst Kock t/a Ndhovu Safari Lodge v R Walter t/a Mahangu Safari Lodge* to correctly note that in spoliation proceedings what gave rise to controversy was seldom the recognition of the remedy but 'the nature and ambit of the remedy'.[66] After a careful consideration of some of the authorities on the workings of the remedy, Langa AJA concluded thus:

62 id para 21 (footnote omitted).

63 Section provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property.

64 *Brooklyn House Furnishers v Knoetze & Sons* [1970] 3 SA 264 (A) 275B.

65 *Krugersdorp Town Council v Fortuin* [1965] 2 SA 335 (T) 336A; *Chetty v Naidoo* [1974] 3 SA 17 (A) 20B.

66 [2010] NASC (26 October 2010) para 4.

> What one extracts from these decisions, and others … is that the true purpose of the mandament van spolie is not the protection or vindication of rights in general, but rather the restoration of the *status quo ante* where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of.[67]

That *Ngqukumba* is at one with this dictum is undeniable and is one of the reasons why *Ngqukumba* should be celebrated as a progressive judgment.

3.3. Rationalising our sources of law

Until the coming into force of the Constitution, the South African legal system was simply classified as a mixed or a hybrid legal system.[68] This was the case because our legal system shared and continues to share the dual heritage of civil and common law.[69] Within this legal dualism our law also distinguished between the private law which concerned itself with the regulation of private relationships and the public law which concerned itself with curbing excesses of public power. These two branches of law were traditionally kept separate, never to mix.[70] However the coming into force of the Constitution changed this and necessitated a reconsideration of our entire legal system.

The Constitution spearheaded a reconsideration of our entire legal system not only by constitutionally entrenching rights, but also by conferring on the judiciary powers to question laws and set aside executive action, something they did not have under the previous parliamentary sovereignty system. In celebrating this newly acquired power, Harms J remarked:

> No one can doubt the value of a [Constitution]. The ability to scrutinise and declare laws of parliament invalid is awesome. The capacity to develop the common law is priceless. To be able to backchat when the lawgiver speaks – even coherently – is something to treasure. I would never wish to live under another system again.[71]

The Constitution however did not totally obliterate any of the existing laws. All it said was that all laws in existence then would continue to exist provided they did not conflict with the Constitution. It said both the common law and statutory law as known sources of law would be considered in light of the Constitution. The task then to reshape the

67 ibid para 4.

68 Reinhard Zimmerman and Daniel Visser, 'South African Law as a Mixed Legal System' in Reinhard Zimmerman and Daniel Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (Clarendon Press 1996) 2.

69 Elspeth Reid and Daniel Visser, 'Introduction' in Elspeth Reid and Daniel Visser (eds), *Private Law and Human Rights* (Edinburg University Press 2014) 1.

70 O Cherednychenko, 'The Constitutionalization of Contract law: something new under the sun?' (2004) Electronic Journal of Comparative Law 2.

71 LTC Harms J, 'Judging under a bill of rights: Ebsworth Memorial Lecture, 24 January 2007' (2009) PELJ 5.

law in light of the Constitution was left to the judiciary, which had to consider and to apply all existing laws in a constitutionally-compliant manner. This enterprise was not always without difficulty or controversy as some saw it as an unjustifiable invasion of the private law or as an unwarranted colonisation of the common law.[72]

The source of difficulty and controversy emanated from the Constitution itself in that, on the one hand, it expressly proclaimed its supremacy[73] and on the other it also expressly proclaimed that existing rights conferred by any law, be it statutory or the common law, remained valid to the extent that such laws did not conflict with the Constitution.[74] This ambiguity gave rise to problems of application where the interaction of the common law and statutory law under the Constitution was not properly articulated. Courts were not always clear and unanimous on how to balance the common law rights and those rights conferred by statute in light of the Constitution. In some cases, courts would simply apply the Constitution to the total disregard of the common law or statutory law. This misapplication of the Constitution was properly criticised by Harms J in the following terms:

> A [Constitution] does not provide any justification for courts to disregard any legal rule, statutory or common law. On the contrary, it is *the* reason why courts must act within the confines of legal rules. Many judges do not understand this. One finds a bit too often that judges use the [Constitution] as an excuse for ignoring the law.[75]

The point perhaps is better illustrated in the difference of opinion between Vivier ADP in *Van Eeden v Minister of Safety and Security*[76] where, in determining the impact of the Constitution on the common law right to liberty, Vivier ADP was of the view that the Constitutional entrenchment of the right to liberty affords that right a higher status. Nugent JA on the same question in *Minister of Safety and Security v Seymour*[77] took a different view and held that the real import of the Constitution on the common law right to liberty had not been to enhance the inherent value of the right to liberty since

72 See PJ Visser, 'A successful constitutional invasion of private law: *Gardner v Whittaker* 1995 2 SA 672 (E)' (1995) THRHR 745; Gretchen Carpenter and Christo Botha, 'The "constitutional attack on the private law": are the fears well founded' (1996) 59 THRHR 126; D van der Merwe; 'Constitutional colonisation of the common law: A problem of institutional integrity' (2000) TSAR 12; Thulani Nkosi, 'The life and times of the breach of promise to marry and the plight of a betrothed woman: *Cloete v Maritz* 2013 5 SA 448 (WCC)' (2014) THRHR 677.

73 S 2 of the Constitution provides that '[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

74 S 39 (3) '[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.' See also Item 2 (1) of Sch 6 in Constitution.

75 LTC Harms J (n 71) 9.

76 *Van Eeden v Minister of Safety and Security* [2003] 1 SA 389 (SCA) para 12.

77 *Minister of Safety and Security v Seymour* [2006] 6 SA 320 (SCA) para 14.

at common law liberty had always been jealously guarded[78], but to ensure that the incursions of the past on the right to liberty do not recur.

What this difference of opinion shows is that although courts understood that the Constitution impacts on the application of the common law, that impact and the way in which it was to be achieved was not always properly understood. *Ngqukumba* strikes a proper balance in its application of both the common law and statutory law in light of the Constitution without avoiding or disregarding either source of law. In so doing, *Ngqukumba* rationalises and harmonises these sources of law under the banner of the Constitution. It should be borne in mind that the High Court and the SCA in fact had overemphasised the prohibitions of the National Road Traffic Act without penalising the SAPS for self-help, which is what the *mandament van spolie* aims to do. Both the High Court and the SCA had also failed to apply the Constitution. Because of this failure to apply the Constitution and the overemphasis on the prohibitions of the National Road Traffic Act, the judgment of the SCA, taken to its logical conclusion, effectively excused the unlawful action taken by the SAPS on the basis that despite being unlawful under one source of law, namely the Constitution, such an unlawful action nevertheless led to a correct and acceptable outcome, something our law does not countenance.[79]

3.4. Missed opportunity to consider developing the *mandament van spolie*?

Our common law, owing to its Roman-Dutch heritage, has always been recognised as a virile living system of law ever seeking to adapt itself consistently with the increasing complexities of the modern organised society it seeks to regulate.[80] For this reason, courts have always had the power to develop the common law in light of changing societal norms.[81] That power now flows directly from section 8 (3) read with sections 39 (2) and 173 of the Constitution. In *Carmichele v Minister of Safety and Security* the Constitutional Court reasoned that section 39 (2) imposed a positive obligation on courts to develop the common law where this was necessary.[82] Directly cited, the Constitutional Court held:

> It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39 (2) objectives, is not purely discretionary. On the contrary it is implicit in section

78 See *Ochse v King William's Town Municipality* [1990] 2 SA 855 (E) 860 F–G; Thulani Nkosi, 'Balancing deprivation of liberty & quantum of damages' (2013) De Rebus 62.

79 See *AllPay Consolidated Investment Holdings v Chief Executive Officer, South African Social Security Agency* [2014] 1 SA 604 (CC) para 23.

80 *Pearl Assurance v Union Government* [1934] AD 560 563.

81 *S v Thebus* [2003] 6 SA 505 (CC) para 31 (Thebus).

82 [2001] 4 SA 938 (CC).

> 39 (2) read with section 173 that where the common law as it stands is deficient in promoting the section 39 (2) objectives, the courts are under a general obligation to develop it appropriately.[83]

Judging by the growing number of cases coming before our courts involving the SAPS effectively committing acts of spoliation under the guise of fighting crime, there can be no doubt that the ground was fertile for the Constitutional Court, at the very least, to consider the question whether or not the *mandament van spolie* needed to be developed so that it applies only to possession lawfully held in all circumstances. Put in another way, the number of cases coming before our courts justifies a consideration whether the *mandament van spolie* needs to be developed beyond its existing precedent. It is without doubt in the public interest that the question should be considered. This is primarily the case because the High Courts did not appear to have devised any discernible pattern on how to approach these cases. The SCA was itself tentative on this issue, which tentativeness is evidenced by the remark of the Constitutional Court that the SCA had overruled 'one of its judgments in as short a period as only one year to the day'.[84] The judgment overruled by the SCA in less than a year was of course *Ivanov v North West Gambling Board* where Mhlantla JA for the unanimous SCA, which was differently constituted from the one that decided *Ngqukumba,*[85] held that:

> An applicant upon proof of the two requirements is entitled to a mandament van spolie restoring the status quo ante. The first, is proof that the applicant was in possession of the spoliated thing. The cause for the possession is irrelevant – that is why possession by a thief is protected. The second is the wrongful deprivation of possession. The fact that possession is wrongful or illegal is irrelevant as that would go to the merits of the dispute.[86]

Accordingly, it was in the public interest that the question be traversed and, with the High Courts and the SCA seemingly singing from a different hymn sheet on the question, the issue gave rise to extremely important legal questions. Notwithstanding this glaring public interest to consider the question, none of the justices tackled it. In failing to consider the question the Constitutional Court perhaps missed a golden opportunity to present a comprehensive judgment that deals with the issue once and for all. Another reason why the question called for consideration was because *Ngqukumba,* properly considered, met the threshold test applicable when the common law is to be developed, as set out in *S v Thebus*. In this case Moseneke J, with reference to *Carmichele,* held as follows:

> It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional

83 id para 39.

84 *Ngqukumba* CC (n 12) para 9.

85 *Ngqukumba* SCA (n 19).

86 *Ivanov* (n 30) para 19.

> provision. … The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects.[87]

I do not argue that the common-law rule of the *mandament van spolie* was or is in any way inconsistent with any constitutional provision. In fact, as already argued, the *mandament van spolie* was and remains totally compliant with all constitutional provisions for all the reasons already advanced. But can it also be said that the *mandament van spolie* fully accords with the spirit, purport and objects of the Constitution if it compels the SAPS to return possession of prohibited articles to possessors who under a particular statute cannot possess them? Does it accord with the spirit, purport and objects of the Constitution when it clearly limits the rights of true owners in favour of possessors who, at times, are proved to be mala fide in their possession because they are either thieves or robbers? It is after all a rule of our law that 'an owner is *prima facie* entitled to possession and if [another party] is in possession he must give it up unless he can […] advance grounds as to why he should be entitled to retain possession'.[88] It is surely a problem and seems to be unfair if a non-owner is allowed to hold possession as against the true owner for no reason other than the fact that the owner may have committed a prior spoliatory act against that non-owner.

Having said this, it should be stressed that the argument of this article is not that the Constitutional Court ought to have developed the common law of the *mandament van spolie* in *Ngqukumba*. The argument is that the events leading to *Ngqukumba* were such that the Constitutional Court at least should have considered the question of whether or not the *mandament van spolie* needs to be developed so that its application is limited in a way. In considering the question the Constitutional Court could very well have concluded that such development was not necessary and that would have been an acceptable end to the matter if coupled with cogent reasons. If, on the other hand, the two stage analysis showed that the common law was in need of development in light of section 39 (2), the matter would have been easily remitted to the High Court and the SCA for consideration as to how the development should occur. Expecting or requiring the Constitutional Court to have picked up on the possibility of developing the common law rule of the *mandament van spolie* is in line with the dictum of Yacoob J that '[a] court should always be alive to the possibility of the development of the common law in the light of the spirit, purport and objects of the Bill of Rights'.[89] One may venture to say that the Constitutional Court is expected to be more alive to this possibility than all the other courts.

87 *Thebus* (n 81) para 28.

88 *Krugersdorp Town Council v Fortuin* [1965] 2 SA 335 (T) 336A.

89 *Everfresh Market Virginia v Shoprite Checkers* [2012] 1 SA 256 (CC) para 34.

4. CONCLUSION

The judgment of the Constitutional Court in *Ngqukumba* has certainly touched on and decisively dealt with important issues relating to policing and the rule of law, as well as to the *mandament van spolie* as a remedy against high-handedness on the part of those who are tasked with the duty of enforcing the law. In dealing with these issues, the judgement certainly goes a long way to shed light on the powers of the police to investigate and combat crime. In no unambiguous and uncertain terms the judgment told the police what conduct is acceptable and what conduct violates the rule of law. In this regard the judgment serves as a welcome reminder to all the law enforcement agencies of the state that they most certainly have a heightened duty to observe the prescripts of the law when enforcing the law. Further, the judgment settled the uncertainty that surrounded the nature of the *mandament van spolie* and showed how the various sources of our law are to be applied in a constitutionally compliant manner that does not overlook other sources simply because there is a Constitution which is the supreme law. Although the judgment failed to consider whether the *mandament van spolie* needs to be developed under section 39 (2) of the Constitution, such a failure is minimal in light of the overall impact and potency of the judgment. Generally, the judgment serves as a welcomed reminder to the police that no matter the circumstances their actions should always be sourced in law. This is the standard under which the Constitution obliges us to live and the bar of expectations cannot be lowered in the case of the SAPS even though the scourge of crime concerns us all.