

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

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**SUMMARY**

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

**KEYWORDS:** property, remedies, constitutional development.

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