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Circulate to Judges	YES / NO
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IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE DIVISION, KIMBERLEY]

CASE NO: 1696/2011

In the matter between:

ABEL DANIEL FERREIRA

APPLICANT

And

THE MINISTER OF SAFETY AND SECURITY
LT-COL CHRISTO PETRUS HORAK

FIRST RESPONDENT
SECOND RESPONDENT

Dates of hearing: 20 May 2013; 28 April 2015

Date of Judgment: 04 September 2015

Coram: Phatshoane J et Mamosebo AJ

JUDGMENT:

Phatshoane J

Introduction and the Relief Sought:

1. On 05 October 2010 Lieutenant-Colonel Christo Petrus Horak, the second respondent, acting in terms of s 31(1) of the Criminal Procedure Act, 51 of 1977 (the Act), declared forfeited to the State an International Eagle 9700i Truck manufactured by Navistar, with registration letters and number [...] (the vehicle),

registered in the name of Mr Abel Daniel Ferreira, the applicant. This is an application to review and set aside this decision. The applicant also seeks an order substantially in the following terms and further ancillary relief:

- 1.1 That Lt-Col Horak issue, for the vehicle, a South African Police Vehicle Identification Number (SAPVIN);
- 1.2 That Lt-Col Horak clear the vehicle pursuant to the provisions of Regulations 56(5)(b) of the National Road Traffic Regulations 2000, published in the Government Notice R225 of 2000 (GG20963 of 17 March 2000);
- 1.3 That Lt-Col Horak supply the applicant with all the necessary documents, including a clearance certificate, to allow the applicant to register the vehicle pursuant to the provisions of Regulation 56(7) of the National Road Traffic Regulations; and
- 1.4 That Lt-Col Horak only releases the vehicle to the applicant on proof of its registration with its SAPVIN.

The issue, the delay, and the twists and turns

2. This matter turns on a narrow yet problematic issue of whether the vehicle is identifiable. Consequently, the resolution of this problem was protracted by a series of events leading up to this application and/or attendant thereto. The applicant initially filed an application on 26 October 2010 against the Minister of Safety and Security (corrected by the respondents to be the Minister of the Police), the first respondent in this case, and W/O CG Tiedt of the South African Police Service (SAPS) under Case No 1831/2010 and sought substantially the same relief set out in paras 1.1 to 1.4 above. In that application the respondents questioned the applicant's *locus standi* because the vehicle had already been forfeited to the State. It was contended that until the decision to forfeit the vehicle was reviewed and set aside the prayers

sought could not be granted. That application was postponed *sine die* and is still pending.

3. The present application was filed on 14 October 2011. It was argued before me and Lacock J on 20 May 2013. Following argument, it was postponed *sine die* to allow the filing of a further affidavit by Mr David Edwin Loakes, a product manager of Navistar International Trucks SA (Pty) Ltd, and to afford the parties the opportunity to resolve or settle the dispute. Loakes deposed to an affidavit in which he stated that he had access to the files and records of Navistar which are kept worldwide. He intimated that he is able to determine the original details of all the Trucks and vehicles that were manufactured by Navistar including the chassis and engine numbers, irrespective of where on the globe the vehicles were located.
4. On 27 May 2013 Loakes submitted to us his affidavit in which he had still not addressed the key issue with regard to whether the vehicle was identifiable or not. Accordingly, we advised the parties that we considered referring the matter for the hearing of oral evidence, in particular to adduce Loakes' *viva voce* evidence. An invitation was extended to them to submit concise heads by no later than 28 June 2013 why the matter should not be referred for oral evidence. We subsequently reserved our reasons and ordered that:
 - "1. The matter is postponed to a date to be arranged with the Registrar.
 2. It is directed that oral evidence be heard to determine whether the vehicle presently described as International 9700i Eagle Truck with registration letters and numbers HCF 082 NW, is identifiable as a specific truck manufactured by Navistar International.
 3. The deponent [Mr David Edwin Loakes] is ordered to appear in person and to be present in Court on the resumption of this matter to be examined and cross-examined as a witness for purposes of resolving the aforesaid issue.
 4. Costs will stand over for later determination."

The application was set down before me and Mamosebo AJ on 28 April 2015.

The point in limine

5. A point *in limine* on *lis pendens* was taken by Adv Botha, for the respondents, who argued that the previous application (Case No 1831/2010) and the present traverse the same subject-matter, being the release of the same vehicle. He contended that until such time that the previous application was withdrawn the prayers similar to the order sought in the present applications are *lis alibi pendens* and the applicant cannot ask the Court to hear him on the issues. He therefore moved for the dismissal of the replicated relief.
6. Adv Killian, for the applicant, to the contrary, contended that the *lis pendens* defence cannot avail the respondents because the *causae agendi* in both matters differ materially. She argued that in the first application the return of the truck was brought on the premises that its seizure in terms of s 20 of the Criminal Procedure Act, 51 of 1977 (the Act) was unlawful and so was its continued possession whereas the present application concerns the unlawful forfeiture of the truck in terms of s 31 of the Act.
7. In *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA) para 16 Nugent AJA pronounced:

'The defence of *lis alibi pendens* shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (*res judicata*). The same suit, between the same parties, should be brought only once and finally.'

8. The *lis alibi pendens* defence would arise when four requirements are met. These are that: (a) there is litigation pending, (b) between the same parties, (c) based on the same cause of action, and (d) in respect of the same subject-matter. See *Keyter NO v Van Der Meulen and Another NNO* 2014 (5) SA 215

(ECG) at 217E-J para 10 and authorities cited therein. Save for an order to review and set aside the decision to forfeit the vehicle to the State, the order sought in the previous application is repeated in the present application. To my mind, the final determination of this application may render the previous application effectively moot and *res judicata*. Therefore, I am of the view that the requirements of *lis alibi pendens* were established. Be that as it may, a Court is vested with a discretion to stay the proceedings or to hear the matter despite the earlier pending proceedings. In *Loader v Dursot Bros (Pty) Ltd* 1948 (3) SA 136 (T) at 138 the Court held:

"It is clear on the authorities that a plea of *lis alibi pendens* does not have the effect of an absolute bar to the proceedings in which the defence is raised. The Court intervenes to stay one or other of the proceedings, because it is prima facie vexatious to bring two actions in respect of the same subject-matter. The Court has a discretion which it will exercise in a proper case, but it is not bound to exercise it in every case in which a *lis alibi pendens* is proved to exist"

9. The discretion to stay the proceedings or to hear the matter is determined with reference to what is just and equitable as well as the balance of convenience. In view of the fact that the later proceedings are presumed to be vexatious, the party who instituted those proceedings bears the onus of establishing that they are not vexatious. He or she does so by satisfying the court that despite all of the elements of *lis alibi pendens* being present, justice and equity and the balance of convenience are in favour of the subsequent proceedings being adjudicated upon. See *Keyter NO* supra at 218 para 12.
10. This matter has been delayed for far too long. At the heart of the contestations is the right not to be deprived of property without good cause or compensation or to have its possession seized arbitrarily. In my view, considerations of both justice and equity and the balance of convenience favour the holistic determination of the disputes. It serves no purpose to consider this matter on piecemeal basis by determining the review and thereafter stay or defer the replicated relief when the issues raised are clearly intertwined. I can conceive of no prejudice.

Consequently, the point on *lis alibi pendens* stand to be dismissed.

11. Section 31(1)(a) and (b) of the Act which is relevant here provides that:

“(1) (a) If no criminal proceedings are instituted in connection with any article referred to in section 30 (c) or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may lawfully possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.

(b) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.”

12. The respondents bear the onus to discharge on the balance of probabilities that the applicant is not entitled to the return of the vehicle in terms of s 31 on the basis that continued possession will be unlawful. See *Minister van Wet en Orde en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk* 1989 (1) SA 926 (A). This decision was not followed in the later decisions of the SCA only insofar as it held that, where a criminal prosecution does not ensue, or is unsuccessful, after the seizure of property suspected to have been involved in the commission of a crime, the property must be returned to the person from whom it was seized¹.

Some historical background

13. The applicant purchased the vehicle in question on 07 December 2007 for an amount of R159 000.00 at a public auction conducted by Mitchell's Auctioneers. The copy of the invoice for the sale is Annexure “ADF1” to the founding

¹ See *Marvanic Development (Pty) Ltd and Another v Minister of Safety and Security and Another* 2007 (3) SA 159 (SCA) at 162 paras 9 and 10

affidavit. The vehicle bore the following identification numbers and letters on the date of purchase: SMG 162 GP; Engine No: 11086117; and Chassis No: JH570998. It had no factory tag or sticker but displayed a tag with the words: "Econotest". The Econotest tag carried the same chassis and engine numbers referred to hereinbefore. The applicant established later on that Econotest operated as a private test station in Port Elizabeth during 1993 to 2000. He obtained the affidavit of Mr Erol Roberts (Annexure "ADF2"), a manager of Dekra Auto Motors t/a Dekra Neave (previously Econotest).

14. Roberts stated that Econotest manufactured VIN (Vehicle Identification Number) tags on a regular basis for vehicles presented for clearance in circumstances where such vehicles' original VIN tags were either damaged or lost. Econotest would only replace such VIN tags if, on proper examination of the vehicle, it was established that the chassis number embossed by the manufacturer and the information on the registration certificate corresponded. Each of the International Eagle 9700 vehicles had a document in the inside pillar of the left door wrapped in a plastic cover reflecting the engine and chassis numbers, but these documents were often damaged. Econotest, at that time, would replace and verify the information by attaching a VIN tag to the vehicle with the name Econotest appearing thereon.
15. The applicant intimated that he later realized that the engine of the vehicle was defective and needed to be overhauled. He delivered it to Choice Diesel Centre CC, Rustenburg, to inspect and assess the extent of the damage. He was advised that the engine was irreparable and needed replacement. He could not afford a new engine and instructed that a reconditioned engine be installed, which was done. He attached the invoice from Choice Diesel confirming the purchase of the substituted engine. This fitted reconditioned engine block displayed its manufacturer's engine number: 10928871. The vehicle was tested and cleared by the appropriate authority whereafter he registered it with the new engine number (10928871) and its existing chassis number (JH570998) into his name. The certificate of registration appears at Annexure "ADF4" to the founding papers.

16. On 12 October 2009 the investigating officer, W/O Clive Gordon Tiedt, stationed at the Vehicle Identification Section of SAPS, Upington, seized the vehicle and its trailer, then being driven along the Keimos/Upington Road by the applicant's driver, Mr Mishack Mothepu. The seizure of the trailer, with its own legal problems, is not in issue here. Mothepu was issued with a Notice informing him *inter alia*, that:

16.1 The vehicle was seized because its engine and/or chassis number had been tampered with;

16.2 This was a vehicle contemplated in s 68(6)(a)(b) of the National Road Traffic Act, 93 of 1996 (the National Road Traffic Act);

16.3 That the seizure was effected in terms of s 20 of the Criminal Procedure Act, 66 of 1977, (the Act) which provides that:

"The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)-

- (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."

16.4 Mothepu would be required to submit valid reasons within 30 days why the engine and/or chassis numbers were tampered with; and

16.5 In the event of Mothepu's failure to comply with the admonition referred to in para 16.4 (above) s 31 of the Act which provides for the forfeiture of the vehicles to the State will be invoked.

17. In response to the Notice the applicant deposed to an affidavit on 13 October 2009, a day after seizure of the vehicle, which he handed over to W/O Tiedt on the same date. He, amongst others, informed Tiedt that he had no knowledge of the change to the chassis number or the VIN tag. He did not examine the validity of the VIN tag because he never gained the impression that it was not original. Tiedt informed him that the manufacturer of the vehicle would be required to examine the vehicle to determine its model year, engine number and chassis number in order to establish if these details were not falsified.
18. The applicant carried out his own investigative work to ascertain the history of the vehicle. On 02 December 2009 he was accompanied by his attorney to the offices of Capt. De Klerk of the National Vehicle Unit, Pretoria. De Klerk informed them that the vehicle was imported to South Africa and all its import documents were to be found at Somerset West Traffic Department. The vehicle was registered in Kuilsrivier in 1996. Despite his best efforts the applicant did not succeed in obtaining its original import documents.
19. In his continued quest the applicant established that the vehicle had previously been seized by the South African Police (SAPS) in 2005 and inspected by Detective Westmaas from Assen (Brits) SAPS. The previous owner of the vehicle, Mr Henry John Teitge, consequently signed a confirmatory affidavit attached as Annexure "ADF5" to the founding papers in which he stated that he purchased this second-hand vehicle in 2000 from Mr Hennie Botes and Mr Du Plessis of T H Plant Hire, Brits. It was financed and inspected by ABSA Bank, who also obtained its police clearance. At the time it still bore the Econotest tag. In 2005 one of his employees laid a false charge with the police that he had stolen the vehicle. Three branches of SAPS examined the vehicle and returned it to him when they were satisfied that he acquired it lawfully. Tietge states that the vehicle travelled across the borders to the neighbouring countries. The police had no quibbles with it at any given time. In later years when he decided to dispose of the vehicle Mitchell Auctioneers sold it for him.
20. The applicant afforded W/O Tiedt time to conduct his investigation. A year later, on 13 September 2010, Van Velden-Duffey, the applicant's Rustenburg

attorneys, directed a letter to Tiedt requesting him to issue the SAPVIN number and the police clearance certificate for the vehicle. On 05 October 2010 Lt-Col Horak replied to the attorneys' letter and informed them that:

20.1 No obligation rests on SAPS to issue a SAPVIN number;

20.2 The vehicle could not be identified at the completion of the investigation;

20.3 The manufacturer's representative is not in a position to determine the identity of the vehicle;

20.4 The vehicle remains unidentified and no one may be in possession thereof in terms of s 68(6)(a)(b) of the National Road Traffic Act; and

20.5 Consequently, the vehicle is forfeited to the State in terms of s 31(1)(b) of the Criminal Procedure Act, 51 of 1977.

The above is the impugned decision now sought to be reviewed and set aside.

21. For purposes of the identity of the vehicle the applicant refers to some documents contained in the SAPS 430 enquiry docket which was filed by the respondents in terms of Rule 53(1)(b). One of these documents is the statement obtained by W/O Tiedt on 10 November 2010, post forfeiture, from Capt Leketi, the I/O of Rustenburg when the vehicle was seized from the previous owner in 2005. Leketi states at para 5 thereof, amongst others, that the vehicle was not reported or circulated as stolen on 14 February 2005 when he examined it. At para 7 he intimated that according to his recollection the factory report matched the truck Job number, chassis number, make of the truck and engine number. At para 10 he went on to say:

"According to my observations, the vehicle engine and chassis numbers were original when the vehicle was seized the chassis and engine number plates were original and not tampered with... there were no visible tampering and/or alterations done on the stamp engine and chassis numbers".

Leketi further states that he received a factory report which matched the chassis number, engine number, and JOB number. This factory report is not part of the documents before us.

22. In his grounds of review the applicant submits that Lt-Col Horak acted unlawfully in forfeiting the vehicle prematurely to the State; that he has advanced no explanation for the unreasonable delay between the seizure and forfeiture of the vehicle; that he did not reasonably and diligently establish the absence of the identity of the person who may lawfully possess the vehicle at the time he declared it forfeited; that he did not establish in any manner that the vehicle was and remained stolen at the time of the forfeiture; and that he did not acquaint himself with the requirements set out in s 31(1)(b) of the Act.
23. Lt-Col Horak, the respondents' deponent, states that in his 28 years of service in the Vehicle Identification Section as commander and investigating officer he gained invaluable experience and attended various training offered by SAPS and different Manufacturers of vehicles. He has personal knowledge of the nature; form; and placing of unique tag numbers by various manufacturers, including Navistar, on their vehicles. He considers himself an expert in this regard. He is of the view that the vehicle's VIN tag and chassis numbers were tampered with and changed. Therefore, the vehicle is unidentifiable. He intimates that since the seizure of the vehicle the applicant has not given any lawful reason why he should be in lawful possession thereof. He says that it is impossible to determine the original chassis number which was allocated by the manufacturer to the vehicle. In his view, the possibility exists that the vehicle was stolen, its chassis number changed, and registered with its current number.
24. Horak maintains that Econotest had no authority in terms of the repealed Road Traffic Act, 29 of 1989, and its Regulations to alter or duplicate and/or replace the damaged or lost VIN tags of the vehicle. According to him the SAPVIN system was already in place in 1993 in terms of which only the SAPS could issue a SAPVIN to a motor vehicle if the original chassis number or VIN tag was lost or damaged. Horak emphasized that, by issuing a tag which made the

chassis number appear to be legitimate and official, Econotest allowed the vehicle into the trading sector and obfuscated its identity and hence ought to be forfeited and destroyed.

25. On the face of it, a tag not affixed by a manufacturer to the vehicle raises a suspicion and potentially points to some act of criminality. It was certainly not in Econotest's province to put its VIN tag to the vehicle. This is, however, not the end of the enquiry because the applicant can hardly be blamed for the intervention.
26. Regard being had to the photos taken by W/O Tiedt, Horak states that the first two letters of the chassis, "JH", and the first digit, "5", are not in the same line as the last five digits "70998". The "JH5" appears to be double stamped or punched. Tiedt etched the numbers for better legibility. According to Horak, following this process, the chassis number appears to have been tampered with. He says Roberts of Econotest or any of the employees of Econotest ought to have brought the observable discrepancy to the attention of SAPS. What is remarkable is that it also escaped Leketi's trained eye that the chassis number was tampered with when he did the investigation in 2005. How then can the applicant be blamed for this oversight.
27. Loakes informed W/O Tiedt that from the enquiries he made at Navistar USA a vehicle had been manufactured on 18 December 1987 whose chassis number was 1HSRKGUR4**JH570998** whereas its engine was 11442295. What is inexplicable is that from the vehicle's traceable registration history dating as far back as 1996 the chassis number bore only the last 8 digits, **JH570998**.
28. Regulation 56 of the Regulations promulgated in terms of the National Traffic Act, 93 of 1996 published under GNR 225 of 17 March 2000 sets out a procedure to be followed by an applicant before a SAPVIN could be allocated to a vehicle. The Regulations also prescribe the procedure to be followed if the engine of the vehicle is replaced. Horak says that the engine number: 10928671, appearing on the vehicle, was not issued in accordance with the procedure set out in the Regulations and cannot be a number that was

allocated by SAPS. Had the procedure being followed the engine number would have been composed of 11 characters (digits and letters) whereas the SAPVIN number has 17 characters, he contended. Horak maintains that by not following the process the applicant acted unlawfully and for this additional reason alone the respondents are entitled to refuse to return the vehicle to him.

29. There is no indication from Horak that the police conducted an investigation with regard to the manner in which the new engine number came to be embossed on the vehicle's engine. The applicant, to the contrary, proffered an explanation for the change in the engine number of the vehicle. In addition, he produced the registration documents to demonstrate that the change was not brought about clandestinely so as to conceal the true identity of the vehicle. The applicant obtained police clearance as a result of which the new engine number was accordingly registered.
30. Counsel for the applicant contended that the existing chassis number was enhanced or reinforced resulting in the double tapping of the number thereon. She argued that there is nothing in the Act that forbids the reproduction of the same number except in an instance where there is an intention to deceive or falsify the existing chassis number. Mr Botha countervailed that the vehicle remains unidentifiable because no one can say how the "JH5" was superimposed over the original chassis number and what characters were underneath these visible three characters.
31. Section 68(6)(a)(b) of the Road Traffic Act provides that:
 - "(6) No person shall-
 - (a) with intent to deceive, falsify, replace, alter, deface, mutilate, add anything to or remove anything from or in any other way tamper with the engine or chassis number of a motor vehicle; or
 - (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.

32. Loakes responded as follows to our enquiry:

“The Court: what I want to establish from you is, the “JH5”, can it be traced to a single vehicle in the whole world=== Yes, yes my lady, built by Navistar, yes you can identify the JH5 and the rest of the series of numbers, appear in our database as 9700 6x4 setback axle truck tractor built by Navistar in December 1987 from a company called Rider Fleet Rental in the United States of America.”

33. The JH570998 is a Navistar unique number issued to the vehicle in question. Loakes’s evidence runs counter to Horak’s stance that the vehicle remained unidentifiable and has therefore to be forfeited.
34. The applicant maintains that the forfeiture was premature because when the vehicle was forfeited on 05 October 2010 the investigation was incomplete and remained on-going until 12 December 2011. In this regard the applicant refers to the e-mails exchanged between W/O Tiedt and Loakes wherein, on 27 October 2010 and therefore, post the forfeiture, Tiedt requested Loakes to comment on the authenticity of the data plate and the place where it had been removed. The applicant further refers to the affidavit obtained by SAPS on 09 November 2010 from Tietge, the previous owner of the vehicle, and to other investigations that were conducted after the forfeiture of the vehicle. Horak explained that he had enough information at his disposal to forfeit the vehicle to the State. He says that the basis for further investigation after the forfeiture was to find support for the facts he already had when he forfeited the vehicle because the applicant had filed an application with the Court.
35. There is a legitimate trade history, contained in the docket, on how the vehicle exchanged hands from one owner to the other. The extract from the National Traffic Information System (eNaTIS) (Annexure RA1) confirms the history of ownership of the vehicle. From this history the chassis and the engine number remained the same. The vehicle has never been proven to have been stolen. The plethora of statements from various previous owners of the vehicle,

obtained following the forfeiture of the vehicle, points to nothing sinister in the ownership of the vehicle. Clearly, Horak did not satisfy himself on the identity of the vehicle before the forfeiture thereof to the State hence the *ex post facto* further investigations. There can be no question that the applicant acquired the vehicle *bona fide* in the normal course of business.

36. On a conspectus of the objective facts, it cannot be said that the only reasonable inference to be drawn is that the chassis number was tampered with the intention to deceive or to falsify. That intention is not apparent in this case. I also do not believe that Econotest would, if there was anything untoward, go as far as putting their name to the VIN tag risking reputational damage. What is further to the advantage of the applicant is that he bought the vehicle at an auction sale after it had gone through several previous owners over many years and was cleared countless times by the relevant authorities, including the police.

To my mind, there had been in this case a premature forfeiture declaration of the vehicle; without any proper prior investigation; at the time the vehicle could hardly have been labelled unidentifiable. It follows that the decision by Lt-Col Horak stands to be reviewed and set aside.

37. What then remains is whether the applicant, having acquired lawful ownership of the vehicle, had lawful cause to possess it in circumstances where there was an enhancement or tampering with the chassis number. The answer to this question is to be found in *Ngqukumba v Minister of Safety and Security and Others* 2014 (5) SA 112 (CC). That case concerned whether s 68(6) precluded an order in spoliation proceedings for the restoration of possession of a tampered-with motor vehicle which had been unlawfully seized by the police. At 120F – 122D (paras 18-21) the Court decided:

[18] Nothing tells me that ss 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 s 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, conforms to the provisions of s 39(2) of the Constitution. 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, s 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.

[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, it is not overly restrictive to require of police to comply strictly with search-warrant requirements. Where there is a need for swift action, the police can always invoke s 22 of the Criminal Procedure Act. 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. 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 ss 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 be unlawful only 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.**” (Emphasis added)

38. The “enquiry into the facts surrounding the applicant’s possession” has already been made in this matter. The conclusion can therefore be justifiably reached that the applicant is entitled to own and possess the vehicle. Regulation 56 of

the National Road Traffic Regulations 2000 set out the procedure to be followed for a vehicle owner to obtain from the police the new engine or chassis numbers where these have been tampered with. Therefore, the proper cause to follow is compliance with Regulation 56. The secondary relief sought by the applicant must also succeed.

39. I am satisfied that costs of the application should include the reserved costs of 20 May 2013.

In the result I make the following Order:

1. The decision of Lt-Col Christo Petrus Horak, the second respondent, taken on 05 October 2010, to declare forfeited to the State the International Eagle 9700i motor vehicle with registration letters and numbers HCF 082 NW, is reviewed and set aside.
2. That the second respondent, or in his absence a substitute police officer, issue a South African Police Vehicle Identification Number (SAPVIN) to the International Eagle 9700i motor vehicle with registration letters and numbers [...]("the vehicle")
3. That the second respondent or his substitute clear the vehicle pursuant to the provisions of Regulation 56(5)(b) of the National Road Traffic Regulation 2000, published in the Government Notice R225 of 2000 (GG20963 of 17 March 2000) and issue a Clearance Certificate for it.
4. That the Second respondent or his substitute issue to Mr Abel Daniel Ferreira, the applicant, all the necessary documents, including, but not limited to, the Clearance Certificate to allow the applicant to register the vehicle pursuant to the provisions of Regulation 56(7) of the National Road Traffic Regulations;
5. That the second respondent or his substitute comply with paragraphs 2, 3, and 4 of this order within 30 days from date of the order;

6. That the second respondent or his substitute release the vehicle into the possession of the applicant immediately upon delivery of proof of the registration of the vehicle with its SAPVIN;
7. The first and second respondents are to pay costs of the application including the reserved costs of 20 May 2013, jointly and severally, the one paying the other to be absolved.

PHATSHOANE J
NORTHERN CAPE DIVISION

I concur

MAMOSEBO AJ
NORTHERN CAPE DIVISION

<i>Appearance for the applicant : Adv E. Killian Instructed by Van Der Wall & Partners</i>
<i>Appearance for the first and second respondents: Adv C.H. Botha Instructed by the State Attorney</i>