

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

In the matter between:

AUTO HAUS (PVT) LTD

And

THE NATIONAL COMMISSIONER OF SAPS

Respondent

DELETE WHICHEVER IS NOT APPLICABLE	
CASE No: 32169/11	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
08/02/2013	<i>[Signature]</i>
DATE	SIGNATURE

12/2/2013

JUDGEMENT

MOLOPA-SETHOSA J

Applicant has launched an application against the Respondent for an order in the following terms:

1. Ordering and directing the Respondent forthwith to restore possession to the Applicant or its agent possession of a certain motor vehicle Rolls Royce Ghost with vehicle identification number SCA664S08AUH14637;
2. Costs of the application.

3. Further or alternative relief.

Refer Notice of Motion, p1-2 of the paginated papers.

The application is opposed by the Respondent

The Applicant basis its claim against the Respondent as follows:-

Claim A

That the Applicant is the owner of a certain Rolls Royce Ghost motor vehicle with chassis number SCA664S08AUH14637 (“the vehicle”); and that the servants of the Respondent are in possession of the vehicle which is currently held at the Sunnyside Police Station at 466 Leyds Street, Sunnyside, Pretoria under the control of the Respondent; [the *rei vindicatio*]; refer par. 5 & 6, p6 of the paginated papers.

Claim B

That at all times material hereto and on 9 December 2010, the Applicant was in possession of the vehicle; and that it/the Applicant was

dispossessed of the vehicle by an officer employed by the Respondent, who removed the vehicle to the Sunnyside Police Station where it presently remains under the control of the Respondent.

That the Applicant has a better right to possession of the vehicle than the Respondent; [The possessory action]; refer par. 7, 8 & 9, p6 of the paginated papers.

Claim C

That at all times material hereto and on 9 December 2010, the Applicant was in peaceful and undisturbed possession of the vehicle; and that the Applicant was dispossessed of the vehicle without its consent and without any due legal process by an officer of the South African Police Service. That the vehicle was removed to the Sunnyside Police Station, and the said vehicle currently remains at such police station under the control of the Respondent; [spoliation]; refer par. 10 & 11, p7 of the paginated papers.

The Applicant thus contends that it has three (3) causes of action, viz. the rei vindicatio, the possessory action and spoliation.

The Respondent contends that the motor vehicle in question herein was seized and impounded lawfully because the tow-truck driver of the truck that carried the vehicle in question (one Moses Matlawi) did not only indicate that he was not in possession of the necessary documents but also consented to the search and seizure of the motor vehicle. Further, that Captain N O Mashabela ("Mashabela"), the deponent to the Answering Affidavit ("AA") phoned one Frank Buyanga/Buyana/Sadiqi [the person seem to have three (3) different surnames], to provide him with certain specified documents set out in par. 9.1 of the AA, p44 of the papers before the vehicle could be released, as it was suspected to have been stolen from the Durban port/harbour; and that Buyanga/Buyana/Sadiqi failed to provide such documents.

Common cause facts giving rise to the application are as follows:

On 09 December 2010 and on the N1 North, at the Phumulani toll plaza, one Detective Captain Solly Ngobeni ("Ngobeni"), [mentioned in the papers and in argument as Ngubeni] attached to the Sunnyside Detective branch of the South African Police Service ("SAPS"), in the company of other police officers, seized a maroon/silver Rolls Royce ("the vehicle") with chassis no. SCA664508AUH14637. It must be noted that in the Notice of Motion the chassis no. is said to be SCA664S08AUH14637. I may just mention that from Ngobeni's sworn

statement, p51 of the paginated papers, the surname is spelt Ngobeni (not Ngubeni); hence I refer to him as such.

At the time of seizure the vehicle was in the possession of one Moses Matlawwa ("Matlawwa") who was transporting the said vehicle to Zimbabwe.

At the time of seizure of the vehicle, Matlawwa did not have any documentation whatsoever pertaining to the vehicle, and stated to Ngobeni that he was informed that he would find a person with the vehicle's documents at Beitbridge border gate in Messina [the SA-Zimbabwe border]; refer annexure "NOM1" to the AA, p49-50, and p51-52 of the paginated papers, read with par. 19-21 of the Founding Affidavit ("FA"), p9 of the papers.

Apparently, immediately after such seizure, Mashabela, an investigator at the organised Crime in the service of SAPS, was assigned to conduct an enquiry into the seizure and subsequent impounding of the motor vehicle effected by Ngobeni.

Mashabela states in the AA that from his enquiry, and in his meeting with Ngobeni, he gathered that:

- Ngobeni received information from his informer that there is a syndicate which is stealing luxury motor vehicles from containers at the Durban harbour. That the motor vehicles

from the containers are then kept in Johannesburg for a while and then taken to Zimbabwe for registration, then brought back to South Africa for sale.

- Ngobeni, through information from his informer then stopped a tow truck that was transporting a Rolls Royce to Zimbabwe. The driver of the tow truck, Matlawu, did not have documentation for the vehicle but informed Ngobeni that his manager had told him that he will meet someone at the Zimbabwe border gate with the documents for the vehicle.
- Ngobeni already had information that the motor vehicle in question was associated with the leader of the syndicate that was under investigation, identified at the time as one Frank Buyanga or Frank Sadiqi, a Zimbabwean national who was staying at Sandton.

Mashabela avers that based on the above mentioned information, he traced and contacted Frank Buyanga telephonically and requested him to bring the necessary documents, viz. the import permit, the Bill of entry, proof of purchase and the Certificate of the motor vehicle, in order to release the vehicle in question herein. That Frank Buyanga/Sadiqi/Buyana promised him/Mashabela that he will bring the required documents, but he never provided same. Refer par.2 of the AA, pp39-41 of the paginated papers.

Mashabela avers that despite all efforts to contact Buyanga/Buyana/Sadiqi personally at the address provided, he failed. He thus, on 25 January 2011, applied for a subpoena for Buyanga/Buyana/Sadiqi's detailed billing of incoming calls, outgoing calls, sms's and towers used on his cellphone in terms of Section 205 of the Criminal Procedure Act 51 of 1977, as amended "(The Act)". That the said billing confirmed that on 25 December 2010 the phone was used at O R Tambo International and was never used again.

The high water mark of the Applicant's case, as put by its counsel in argument, is that the Applicant challenges the lawfulness of the seizure. The Applicant contends that Ngobeni unlawfully seized the vehicle without a search warrant as envisaged in the provisions of the Act.

Section 20 of the Criminal Procedure Act, 51 of 1977 provides as follows:

"20 State may seize certain articles

The state may, in accordance with the provision 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."*

Section 22 of the Criminal Procedure Act 51 of 1977 provides as follows:

"22 Circumstances in which article may be seized without search warrant

A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-

- (a) *if the person concerned consents to such search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the article in question; or*
- (b) *if he on reasonable grounds believes-*

- (i) *that a search warrant will be issued to him under paragraph (a) of Section 21(1) if he applies for such warrant; and*
- (ii) *that the delay in obtaining such warrant would defeat the object of the search."*

It is so that in order to make a seizure under S21 lawful, a search warrant must be issued by a Magistrate or Justice of peace. Before issuing a search warrant in terms of ss20 and 21, the Magistrate or Justice of the peace must be satisfied by information on oath, not only that there are reasonable grounds for believing that the article to be searched for and seized is in the possession of or under the control of or upon any specified person or is upon or at any specified premises within his/her area of jurisdiction, but also that the article to be searched for and seized is an article such as is referred to in S20 of the Act; refer *Toich v The Magistrate, Riversdale and others* 2007 (2) SACR 235 (C).

Looking at the facts in this matter, which are not disputed, Ngobeni, as a Detective Captain, had information from his informer about a syndicate [allegedly led by one Frank Buyanga/Buyana/Sadiqi, who is alleged in the Applicant's papers to be a Director of the Applicant], which allegedly stole luxury vehicles from the Durban Harbour and transported same to Zimbabwe to be registered before being brought back to SA to be sold.

The vehicle seized was indeed a luxury vehicle, a Rolls Royce. On the Applicant's own version the vehicle came to SA through the Durban Harbour, and the vehicle was at some stage to be transported to Zimbabwe. Refer FA par.13 & 14, p7 and 8 of the paginated papers.

When the vehicle was seized it was actually en route to Zimbabwe, and as already stated above, Matlawi, the driver of the truck that carried the vehicle, did not have any documentation whatsoever pertaining to the vehicle in question.

On the facts before this court, the vehicle can be said to be an article as envisaged in S20 of the Act. Matlawi, the driver had physical control over the motor vehicle and had the capacity to consent. He himself, in his sworn statement, at p50 of the papers, pertinently states that he voluntarily and without any duress personally surrendered the vehicle to Ngobeni. He was in possession and in control of the vehicle at the time of the search and seizure of the said vehicle, and in my view and on the facts he consented thereto, as envisaged in S22 of the Act. The driver's [Matlawi's] consent is valid in terms of Section 22 (a); refer *Nombembe v The Minister of Safety and Security* 1998 (2) SACR 160 (Tk).

On the facts before this court I am of a considered view that a search warrant would be issued to him/Ngobeni if he applied for such warrant [as envisaged in S22(b)(i)].

The Applicant contends that Ngobeni should have applied for the issue of a search warrant prior to such seizure as he had knowledge of the Syndicate already on 06 December 2010. To this the Respondent contends, correctly so in my view, that even though Ngobeni acted upon information aforesaid, there was not yet certainty as to the accuracy of the information and thus Ngobeni could not have been able to, prior to the seizure, state under oath that reasonable grounds exist for a warrant to be issued. That it was only after it was established, with certainty I may add, after the search, that the motor vehicle in question had no documentation and on Matlawi's statement that he was told that he will meet someone with documents at the border gate that Ngobeni knew with certainty that the information of the police informer was correct. The vehicle was, with certainty, suspect.

Surely Ngobeni had to first verify the information of the police informer. Because of the nature of the information that Ngobeni initially had, he could not apply for a search warrant before the search was effected. On the facts before this court, the search and the seizure of the vehicle was justified in terms of S22. In my view had Ngobeni left the vehicle in order to secure a search warrant, the vehicle would surely have disappeared. Refer in this regard to *National Director of Public Prosecutions v Starplex 47 CC & Others: In re ex parte National Director of Public Prosecutions v Mamadou & Another* 2009 (1) SACR 68 (C).

As already indicated above, the Applicant basis its cause of action firstly on the basis that it is the owner of the vehicle in question. Based on the information the police had pertaining to the syndicate stealing luxury vehicles from the Durban harbour, the Respondent's officials, including Mashabela, who was tasked with investigating this matter after the vehicle had been seized, required certain specified documents to verify the status of the motor vehicle in question. This was first communicated to the tow-truck driver, Matlawi, who informed Ngobeni that he was not in possession of the documents but was told that he will meet someone at the border gate with the documents. Secondly, as already stated, Mashabela avers that he informed/telephoned Frank Buyanga/Buyana/Sadiqi about which documents must be submitted in order to release the motor vehicle. This has not been disputed by the Applicant.

The Applicant merely states in the Replying Affidavit ("RA") that Buyanga/Buyana/Sadiqi met with Ngobeni on 20 December 2010 and gave him the required documents. Certain documents are then annexed to the RA; one assumes that these would be the documents alleged to have been provided to Ngobeni? This aspect is not dealt with at all in the Founding Affidavit ("FA"). I shall deal in detail with the documents annexed to the Applicant's FA and RA below.

From the response of the Respondent in the AA, it is clear that the Applicant has not provided the Applicant with the documents specified in par. 9.1 of the AA; and when the matter was argued before this court

counsel for the Respondent submitted that the Applicant still has not provided the Respondent with the required documents to verify the status of the motor vehicle. And that all that the Applicant has to do is to submit those documents required and the vehicle will be released [obviously if it is shown to belong to the Applicant].

The Applicant does not seem to have valid and authentic documents to prove, on a balance of probabilities that it is the owner of the vehicle in question.

The Applicant further avers that it has a better right to possession of the vehicle than the Respondent. The vehicle was seized on 09 December 2010; from the cellphone statement of Buyanga/Buyana/Sadiqi, who was associated with the vehicle in question, even on Applicant's version, he/Buyanga disappeared from the radar as at 25 December 2010, his last call having been made at O R Tambo Airport at 00:18:19. The Respondent only got communication/letter of demand from the Applicant's Attorneys more than two (2) months after the seizure of the vehicle. On the facts before this court and on the facts set out above the Applicant has not made out a case for dispossession in this regard. In my view, on the facts before this court, the Respondent is in lawful possession of the vehicle.

The Applicant further states that it was in peaceful and undisturbed possession of the vehicle and that it has been dispossessed of the vehicle

without its consent. Matlawwa, the truck driver that carried the vehicle in question herein consented to the seizure of the vehicle.

The Applicant bears the onus to prove on a balance of probabilities that it was in possession and has been unlawfully deprived of such possession; refer Yeko v Qana 1973 (4) SA 735 (A). On the facts alluded to above it cannot be said that the Respondent in anyway acted unlawfully. In fact the Respondent has said to the Applicant and/or Buyanga/Buyana/Sadiqi to bring the specified required documents so that the vehicle can be released; however, the Applicant has failed to produce the required documents.

Counsel for the Applicant submitted that since there are no criminal charges preferred against anyone pertaining to the vehicle, the vehicle should be released to the Applicant in terms of Section 31 of The Act. I do not think that the legislature intended that for as long as there are no criminal charges preferred against anyone pertaining to the seized article, the seized article should be released to anyone who claims to be the owner thereof without proof that such person/entity is indeed the owner and entitled to receipt/possession of the article in question.

In this instance the vehicle was seized by the police on information that there was a syndicate that allegedly steals luxury vehicles from Durban port/harbour and takes the said vehicles to Zimbabwe for registration and brought back to SA to be sold. After the vehicle was seized Buyanga/Buyana/Sadiqi is called by the deponent to the

Answering Affidavit, Mashabela, tasked with the investigation of the matter, and is requested to bring the particular specified documents, including proof of purchase of the vehicle to the police so that the vehicle can be released if everything is on board; this is not done; the required documents are not even annexed to the Applicant's papers.

Buyanga/Buyana/Sadiqi does not independently tell the court his involvement and/or what transpired between him and the Respondent's officials [Mashabela/Ngobeni]; he merely confirms what Chibhanguza, the deponent to the Founding Affidavit and Replying Affidavit states; he does not on his own enlighten the court as to what really transpired pertaining to this vehicle. There is a dispute as to whether he/Buyanga gave documents to the Respondent officials or not. This aspect is only dealt with in the Replying Affidavit, after the Respondent had stated in the Answering Affidavit that the Applicant/Buyanga failed to provide Respondent with the necessary documentation. The documents annexed to the Founding Affidavit and/or Replying Affidavit does not assist the Applicant. The Applicant has failed to produce a simple document like an invoice as proof of purchase. On the facts it cannot be said that the Applicant is entitled to possession of the vehicle without the required documents. The vehicle has been lawfully seized and impounded.

To sum up, the Applicant contends in par.6, p6 of the FA that it is the owner of the vehicle in contention herein. This is disputed by the Respondent. The Respondent states in par. 6, 8, 9, 10 and 14 of the AA, pp43-47 of the paginated papers that the time of seizure of the vehicle in

question the driver of the truck that carried the vehicle did not have any documentation whatsoever relating to the vehicle, no registration document, no import permit, no bill of entry, no border-gate permit, nothing at all.

Counsel for the Applicant contends in his Heads of Argument, also in his submissions in argument before court, that the Respondent **admits** that the Applicant is the owner of the vehicle. This cannot be correct. On a proper reading of par. 6 of the Answering Affidavit, where the Respondent deals with ad par 5 & 6 of Founding Affidavit it is clear that the Respondent disputes the Applicant's ownership of the vehicle; stating that "the alleged owner...."[my underlining], cannot be said to be an admission that Applicant is the owner. In fact the Respondent goes further and states that "the alleged owner failed to provide proof of ownership...."[my underlining]. How can this then be interpreted by the Applicant and/or its Counsel to be and unequivocal admission of the Applicant's ownership of the vehicle?

The Respondent, in my view, and on a proper reading of the papers, only admits par. 6 of the FA, viz. that "the servants of the Respondent are in possession of the vehicle.... held at the Sunnyside Police Station..."

As already stated above, the deponent to the Answering Affidavit, Mashabela, states in par 2.2, p41 of the Answering Affidavit that he contacted Buyanga/Buyana/Sadiqi [alleged to be the owner of the vehicle

according to the truck driver, Matlaw, to bring the necessary documents [which would prove that everything was on board pertaining to the car I guess], and that Buyanga/Buyana/Sadiqi never brought any documents whatsoever.

From the reading of the papers, at the time the Answering Affidavit was deposed to, to wit 25 July 2011, no authentic documents had been provided to the Respondent's officials by the Applicant and/or Buyanga/Buyana/Sadiqi to prove ownership of the vehicle; let alone proof of purchase of the vehicle in question.

The Applicant annexed documents to the Replying Affidavit, having stated in the Replying Affidavit that Buyanga/Buyana/Sadiqi had provided some documents to the Ngobeni. In the Founding Affidavit there is no mention by the Applicant that it and/or Buyanga/Buyana/Sadiqi submitted any required documents to the Respondent's officials to show legality of the vehicle in question, nor do they attach any authentic documents to the Founding Affidavit. It is stated in the Replying Affidavit that the documents were given to Ngobeni on 20 December 2010. As at 25 July 2011 when the AA was deposed to, the required documents set out in par.9 p44 of the AA had not been furnished.

The Applicant deals with this bald allegation, that Buyanga/Buyana/Sadiqi has given documents to Ngobeni, in the

Replying Affidavit; obviously the Respondent has not had an opportunity to deal with this in the Answering Affidavit.

As matters stand, on the papers there is now a dispute of fact. The respondent stated in the Answering Affidavit that it requested certain specific document [par9, p44], that the Applicant has refused and/or neglected to submit such documents.

The Applicant as already stated above had not dealt with the issue that Buyanga submitted the necessary documents to Ngobeni/Respondent. Only in the Replying Affidavit is this brought up, after the Respondent has answered to the Applicant's case the Answering Affidavit. It is trite that the Applicant should make out its case in the Founding Affidavit [not in the Replying Affidavit].

Looking at the documents annexed to the Founding Affidavit starting with Annexure "A", p14 of the paginated papers, it purports to be a certificate of incorporation of the Applicant. The certificate in question is not even signed by the Registrar of Companies in Zimbabwe. The authenticity of this document is thus questionable. Counsel for the Applicant submitted [when this court raised this issue with him] that since the Respondent does not take issue with the document in question, it should be accepted that it is a valid certificate. That cannot be correct; this court cannot simply ignore this fact. After argument judgement was reserved, and the parties undertook to provide the court with bundles of authorities. When the Applicant's bundle of authorities was duly

provided, despite having had time to provide an authentic certificate of incorporation, if any, after the court had pertinently raised this issue, the Applicant did not provide same.

In so far as Annexure “B”, p15 of the paginated papers is concerned, it is stated on the ‘Certificate of Registration as a designated Tourist’ that “the validity of the registration shall expire on the 1st of June 2011”. When the application was issued in this division on 07 June 2011 and when it was argued the said certificate was invalid, the validity thereof having expired on 01 June 2010. The Applicant has legal representatives; they could therefore have required a valid certificate before issuing the Application if they want the court to put any weight on this certificate.

Be that as it may, from the papers before court, the following appears:-

The deponent to the Answering Affidavit states that Buyanga/Buyana/Sadiqi was requested to bring the following documents prior to the vehicle being released:

- the import permit
- Bill of entry
- Proof of purchase [of the vehicle]
- Registration Certificate of the Vehicle

Counsel for the Applicant submitted that an import permit is not required in this case. The Respondent, whose officials deal with these issues [imported goods on a daily basis, say the import permit is required], and counsel for the Respondent submitted that an import permit was required. One cannot begin to imagine what chaos would ensue if the authorities would just allow goods in and out of the country without import/export permits being required.

The fact that the vehicle in question was allegedly en route Zimbabwe does not absolve the Applicant; the first port of entry is South Africa; the truck driver, Matlawi, drives from Johannesburg, carrying the imported vehicle in question herein, he has no documents whatsoever; he informs Ngobeni that he will find the person with the vehicle's documents at Beitbridge (Messina), SA-Zimbabwe border gate. On the Applicant's version the vehicle was taken from the Durban Port/harbour on 8 Dec 2010 and driven to Johannesburg, not to Zimbabwe, because it did not have a cross border permit; yet the truck driver, Matlawi, carrying the said vehicle from Johannesburg to Zimbabwe on 9 December 2010 did not have any documents whatsoever pertaining to the seized vehicle, stating to the police that he was to get the documents at the border. Not even any mention of a cross border permit is made by Matlawi. He simply had no documents at all.

Counsel for the Respondent even said in her submission that if the Applicant was to produce the documents set out in par 9.1 of the Answering Affidavit [P44], they would immediately have the seized

vehicle released, but that has not been done as they seemingly do not have such documents.

Annexure "C" mentions one Ian Frank Properties CC ("Frank") as the consignee, i.e. as the company that received the luxury vehicle in question. There is no affidavit from anyone from Ian Frank Properties CC stating what their role is or was in so far as this vehicle is concerned. This Frank Company is simply silent. Could it be that this Ian Frank Properties belongs to Frank Buyanga/Buyana/Sadiqi, who is also said to be staying in Sandton? Is this Frank Company just a coincidence? Matlawa mentions in his statement aforesaid that he picked up/collected the vehicle in question herein at corner Wert or West Street and Grayston Avenue, Sandton. As already stated this Frank Company is deafeningly silent.

The author of the letter, annexure "C", one Matthew Boka who purportedly instructed Deca Motors International to consign a vehicle to Ian Frank Properties CC, is not mentioned at all in either the Founding Affidavit and/or the Replying Affidavit. There is no mention in annexure "C" of what vehicle specifically is being referred to, i.e. particulars of the said vehicle [colour, chasis/vin no., engine no. etc.].

In the Replying Affidavit, the Applicant annexes a document "L" in which the consignee is now said to be one Susan Simbarasi, no longer Ian Frank Properties as set out in annexure "C". Nowhere is the Applicant itself a consignee! No reason is disclosed and/or stated why the

Applicant is not or cannot be a consignee; or why it has to use an individual like Susan Simbarasi's name and not the Applicant/Company's name/details as consignee if indeed the article was meant for the Applicant,

The alleged seaway bill, annexure "D", p17 of the papers, also does not look authentic as well. There are some blank spaces where some details have not been filled in. as e.g. "place of receipt; shipper's ref; place of delivery". No explanation was given on the papers and in argument why this is so.

On a proper and thorough analysis of the documents before this court, the court noticed that the VIN. No. of the vehicle on annexure "D" is said to be SCA664508AUH1464637 or SCA684508AUH1464637. In the letters of demand, annexures "F" and "G" pp19 and 20, as well as in annexure "O", p84 of the paginated papers, a document purported to have come from Deca Motors, the VIN. No. is stated to be SCA664908AUH14637. I have highlighted the numbers that differ, [i.e. the 5 and the 9] within the VIN numbers set out above. Surely these different VIN numbers cannot relate to one and the same vehicle.

The invoice from First Road, annexure "E" states Frank Buyana, and not the Applicant, as the customer. If First Road was engaged for the Company/Applicant why would it state the name of an alleged director as the customer and not that of the Company/Applicant.

In the letter of demand aforesaid, annexure "F", p19 of the papers, mention is made, amongst others, that the Applicant paid €172 000.00 to Deca Motors International Limited for the purchase of the vehicle. No invoice is attached to the papers before court; the Respondent has amongst others requested proof of purchase and this has not been forwarded to the Respondent. Instead, a letter, alleged to have come from Deca Motors is annexed to the Replying affidavit as annexure "O", p84, stating a different VIN. No., as already mentioned above. The letter, "O" aforesaid is not even under oath; it does not even mention how much was paid by the Applicant for the vehicle, nor does it refer to any invoice and/or authentic proof of purchase. The document in my view is not proof of purchase and is not authentic at all.

In annexure "L", p81 of the papers, the customs declaration form, the consignee is one Susan Simbarasi, as already stated above, an individual, not the Applicant; and the consignee is no longer Ian Frank Properties as was stated in annexure "C". The VIN. No. set out therein [in "L"] differs with the VIN. No. set out in annexures "F", "G" and "O" aforesaid.

Annexure "M" p82 of the papers makes no mention whatsoever of the goods imported. The importer/consignee is said to be Susan Simbarasi, not the Applicant and not Ian Frank Properties, who the deponent stated in the Founding affidavit to be the entity the Applicant had instructed Deca Motors to import/consign to. There is no SARS

stamp on the document; which one would, in my view expect to find on an authentic SARS document.

Annexure "N" p83 of the papers starts by stating that 'the document is not proof of ownership'. It further states the vehicle in contention herein to be a second hand vehicle. Even if an import permit was not required, the Government Gazette no 11630 GN 2582 of 23 October 1988 stipulates, amongst others, that no second (2nd) hand or used goods, including waste and scrap, may be imported without a permit.

The letter alleged to have come from Deca Motors, "O", to confirm purchase of the vehicle cannot thus equate an invoice; as already stated it is not even under oath, the authenticity thereof is suspect.

Annexure "P" is an affidavit by Simbarasi stating that she is employed by the Applicant. Surprisingly nowhere in the founding Affidavit is Simbarasi mentioned. How is the Respondent expected to meet the Applicant's case if the Applicant seeks to make out its case in the Replying Affidavit? I have already dealt with the issue pertaining to Simbarasi, and in my view this affidavit does not take the Applicant's case any further.

In *Khan v Minister of Law and order* 1991 (3) SA 436 (TPD), it was held that the Respondent bears the onus of proving, on a balance of probabilities, that the Applicant was not entitled to the return of the vehicle in terms of the provisions of the Act on the basis that continued

possession of the vehicle would be unlawful. The Applicant has not shown that it is the owner of the vehicle, or that it is on any basis whatsoever entitled to lawful possession of the vehicle. Despite the respondent's request and tender to release the vehicle on production of the specified documents, the Applicant has failed to provide the Respondent with any authentic required document.

On the facts before this Court, therefore, it cannot be said that the Applicant is entitled to the return of the vehicle in question herein. There is just no basis on the facts for such.

In my considered view, the Applicant has failed to prove, on a balance of probabilities that it is the owner of the vehicle, nor that it has been unlawfully deprived of the possession of the said vehicle, as the vehicle was lawfully seized and as a suspected stolen property. Despite Buyanga/Buyana/Sadiqi and/or the Applicant, if indeed the owner thereof, being requested to provide certain specified documents to the Respondent to secure the release of the vehicle in question, the Applicant and/or Buyanga/Buyana/Sadiqi have for more than two (2) years failed to provide valid authentic documents to the Respondent and/or the Respondent's officials.

On the facts before this court, the Applicant thus cannot be said to have made out a proper case for the relief sought.

In the result the application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'L M MoLOPA', written over a horizontal line.

L M MOLOPA – SETHOSA J

JUDGE OF THE HIGH COURT