IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO. 27407/2000

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

15/12/04
DATE

SIGNATURE

In the matter between:

DANFEN MOTORS CC Plaintiff

and

IMPERIAL GROUP (PTY) LTD Defendant

JUDGMENT

C. J. CLAASSEN J

This case concerns the *ex lege* warranty against eviction in successive agreements of sale. The *merx* of the sales was a Mitshubishi Pajero, left-hand drive motor vehicle, maroon in colour. The motor vehicle was the subject of six successive sale agreements involving five intermediate purchasers/vendors.

THE EVIDENCE AND PLEADINGS

The facts which are not seriously in dispute or are common cause are as follows: A certain Mr. G Giannocarro sold the vehicle to the defendant on 13 September 1995[1]; thereafter, during early March 1997, the defendant sold the vehicle to Mr. William Berry, trading as Lucky Wheels[2]; on the same day, Berry sold the vehicle to the plaintiff, represented by Mr. Neil Venter[3]; the

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[1] See Exhibit "A" pages 7 and 29.
[2] See Exhibit "A" pages 1 and 4.
[3] Both Venter and Webber confirmed this fact in evidence.

plaintiff sold the car to W & G Cars CC, t/a Main Street Motors[4]; Main Street Motors obtained a purchaser for the vehicle, a certain Patboen Sibongile Ntshixa who required finance for the transaction. On 9 June 1997, Stannic took cession of the Instalment Sale Agreement dated 26 March 1997 concluded between Main Street Motors and Ntshixa[5].

Plaintiff relies in its particulars of claim on an eviction of the vehicle from the possession of Ntshixa affected by the Department of Customs and Excise. Paragraph 6 of its particulars of claim makes the following allegations:

> "6.1 After issuing a notice on the 6th of January 1999, the Department of Customs and Excise removed the vehicle from the possession of the said Ntshixa, having attached the vehicle on account of the fact that the vehicle had been imported into the Republic of South Africa illegally and without due payment of import duty.
>
> 6.2. The claim by the Department of Customs and Excise to seize the Mitsubishi Pajero motor vehicle because of the failure to pay import duty, is unassailable and no defence to such claim is sustainable in law".

The plaintiff further alleges that Main Street Motors was obliged to repurchase the contract from Stannic and refund Ntshixa the full purchase price. In turn Main Street Motors claimed the full purchase price from the plaintiff, which the plaintiff duly paid[6]. It is further alleged that Lucky Wheels was unable to finance any litigation against the defendant, as a result whereof plaintiff took cession of Lucky Wheels' action against the defendant[7]. Both Venter and Berry testified that they agreed to cede Berry's claim against the defendant to plaintiff. Plaintiff sought rectification of Annexure "B" to its particulars of claim in order to delete the "CC" after the words "W Berry" and by deleting

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[4] The evidence of Venter is to the effect that he drove the vehicle down to East London and that he parked the vehicle at the premises of Main Street Motors with the request that they should sell the vehicle on consignment.

[5] See Annexures "A" and "C " to plaintiff's particulars of claim.

[6] The evidence of Venter disclosed that he settled Main Street Motors' claim for an amount of R100000-00. See Exhibit "A" page 5, which depicts the cheque in such amount paid by the plaintiff to Main Street Motors on the 27th of June 2000.

[7] See the Deed of Cession , Annexure "B" to plaintiff's particulars of claim.

the word "Germiston" and substituting it with the words "Kempton Park". In my view it was unnecessary for plaintiff to seek rectification of this document. Defendant is not party to the deed of cession nor is Berry cited as a party to the present litigation. In any event the evidence of Venter and Berry is clear and uncontroverted that they had agreed to such a cession in order to enable plaintiff to institute action against the defendant. I find as a fact that such cession was duly proved.

Defendant in its plea denies the cession, the eviction and the subsequent events, which took place after the alleged eviction. However, during the trial, Mr. Smit acting on behalf of the defendant, made certain admissions, namely:

1. Defendant admitted the contents of Annexures "A" and "C" to the plaintiff's particulars of claim.

2. Defendant admitted the correctness of the notice issued by the Department of Customs and Excise, dated the 6th of January 1999, Exhibit "B5".

3. Defendant admitted the contents of Exhibit "D".

Exhibit "B5" is the notice addressed by the Controller of Customs and Excise in Port Elizabeth to Stannic dated the 6th of January 1999 in the following terms:

> "Gentlemen
>
> RE: SEIZURE OF VEHICLE IN TERMS OF SECTION 114(1)(aB)
>
> The vehicle mentioned hereunder is hereby seized in terms of section 114(1)(aB) of the Customs and Excise Act No. 91 of 1964 as amended.
>
> 1 x Pajero 2.8 Litre (Maroon) Model 1995.
>
> .....
> The vehicle must be removed to the Customs State Warehouse.
>
> .....

> Your attention is further invited to the provisions of sections 89 and 93 of the said Act. For your convenience a transcript of the relevant sections is attached.
>
> Yours faithfully
>
> CONTROLLER OF CUSTOMS AND EXCISE.
>
> Date: 6/1/1999."

The document was signed by "R Stone".

Exhibit "D" is a computer printout of the current registration and particulars of the motor vehicle. It indicates that on the 3rd of April 2000 the vehicle was transferred into the name of "SA Inkomstediens, Privaatsak X923 Pretoria". It was common cause that the chassis and engine numbers are correctly stated on the previous registration certificate[8] and Exhibit "D". It follows that the chassis number reflected on the invoice issued by the defendant to Lucky Wheels[9], is incorrect.

Venter and Berry further testified that they obtained knowledge of the eviction during May/June 2000. This evidence is also uncontroverted and there is no reason why it should not be accepted. My evaluation of both Venter and Berry is that they were somewhat naïve but very honest witnesses. Their demeanour in the witness box was completely convincing. They answered the questions in a straightforward manner, even to their own detriment. One example of this is their candid admission that they did not keep proper books of account and sometimes failed to issue the necessary invoices when doing business with one another as theirs was a long standing relationship of trust. It was clear from the evidence that they conducted their businesses in a haphazard fashion.

Summons in this matter was issued during December 2000. By that time the vehicle had already been registered in the name of SARS pursuant to the

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[8] See Exhibit "C".
[9] See Exhibit "A", page 1.

provisions of Customs and Excise Act[10]. This fact is of crucial importance as will become evident later in this judgment. Mr. Smit also argued the defendant's plea of prescription, rather faintly I may say, as he was faced with the uncontroverted evidence that Venter and Berry were not informed or aware of the eviction more than 3 years prior to the issue of summons. In my view, the plea of prescription must, therefore, fail.

Plaintiff closed its case after calling Venter and Berry to testify. Thereafter defendant closed its case without calling any witnesses to testify.

At the conclusion of the trial on 19 November 2004, I reserved judgment. During my research in preparing a judgment, I came across the Constitutional Court judgment in the matter of **First National Bank of S.A. Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another** 2002 4 SA 768 (CC). In this matter the Constitutional Court declared the provisions of section 114 of the Customs and Excise Act 91 of 1964 constitutionally invalid subject to a certain proviso. Neither counsel in the matter referred me to this case, as a result whereof I addressed a facsimile to them inviting them to submit further heads of argument as to the effect on the present matter of the aforesaid declaration of constitutional invalidity. Both counsel submitted further heads of argument. Mr. Alberts applied to re-open the plaintiff's case to lead evidence regarding the basis upon which the vehicle was seized. I granted such leave[11].

On 10 December further evidence was lead by the plaintiff who called Mr. R. Stone, the signatory to the notice dated 6 January 1999, to testify. He was a border control officer in Port Elizabeth concerned with illegal importations into the RSA. He and his colleagues acted in terms of the Customs and Excise Act and on behalf of the Department of Trade and Industries. He stated that there was a difference between a "detention" and a "seizure" under the Custom and

[10] Venter testified that he saw the vehicle being driven in Pretoria by another individual.
[11] See my separate judgment handed down on 29/11/2004.

Excise Act. They were telephoned by Stannic in Port Elizabeth to come and investigate a left-hand drive motor vehicle. He knew from experience that all left-hand driven vehicles are imported as none are manufactured within the RSA. When he and Mr. Symes arrived at Stannic's premises, they asked for the necessary import permit and clearance certificate indicating that all duties have been paid[12]. Stannic was unable to produce such documentation, whereupon they seized the vehicle pursuant to the provisions of ss 87 and 88 of the Customs Act, as an item which had been dealt with in an irregular fashion and therefore liable to forfeiture to the State. He stated that they did not act in terms of s 114 of the Act as they did not seek to establish a lien upon the vehicle. The form they used was completed and signed at Stannic's premises. They had no forms available other than the one used on that day to inform Stannic of the basis upon which the seizure took place. The vehicle was then removed to the State Warehouse for safekeeping. Stone produced the entire file[13] in possession of the department concerning the vehicle. It contained no application by anyone claiming ownership or entitlement to the vehicle. Any such claim was to have been submitted within one month after such seizure[14]. The vehicle was thereafter forfeited to the state on instructions of the Minister of Finance and disposed to SARS on 10 February 2000 for use at the Quachas Nek border post[15].

THE LAW RELATING TO THE WARRANTY AGAINST EVICTION

The warranty against eviction has been modified in our law in order to make it more effective to help the buyer. In this regard it was stated in **Lammers and Lammers v Giovannoni** 1955 3 SA 385 (AD) at 391 A-B as follows:

> " Originally there must have been actual eviction before the buyer could sue the seller, but that was held not to be essential in **Nunan v Meyer,** 22 S.C. 203 (and see *Pothier, op. cit.* 2,83. 103). Under the early law, too, the buyer could not recover from the seller unless he had given him notice of the

[12] In terms of s 102(1) of the Customs Act, an officer is entitled to demand such documents from the owner or person in possession of the goods.
[13] See Exhibit "E".
[14] See s 89(1) of the Customs Act.
[15] See Exhibit "E" pages 5, 6A, 9, 11 and 13.

> owner's claim. But the giving of notice has ceased to be a condition precedent to the buyer's claim; he can in his action against the seller free himself from the criticism that he had given no notice to the seller by proving that the latter had no title that could have made resistance to the true owner possible..."

In **Olivier v Van den Bergh** 1956 1 SA 802 (C) at 804 A-C the following was said:

> "It is clear that in the modern law neither notice to the vendor nor actual eviction of the buyer by judicial process are any longer conditions precedent to the buyer's successfully suing his seller upon the warranty against eviction: provided that, in any such action against his vendor, the buyer proves the incontestable title of the true owner to whom he has surrendered the article, the vendor will be liable even in the absence of any prior notice to him or of any actual eviction by legal process of the buyer."

At 805 G to 806 A the following was said:

> "Where, however, in any such action the purchaser in addition proves both that the third party's title is legally unassailable and that he – the purchaser – has duly admitted the demand and legally bound himself to comply with it, no good reason appears to me to exist why the purchaser should not be entitled to succeed even though he has not yet actually complied with the demand made upon him by the third party... In the case postulated above, where the purchaser has duly bound himself to comply with a legally unassailable demand, all the essential elements of the purchaser's action upon the warranty against eviction appear to me to be present."

In **Louis Botha Motors v James and Slabbert Motors (Pty) Ltd** 1983 3 SA 793 (AD), Smuts AJA said at 800 A – C as follows:

> "... a rule that every buyer threatened with eviction **should consider his position very carefully before surrendering the article** concerned or, where he has himself resold and received the purchase price, **should only repay it when it is clear that he has no defence, is accordingly a sound and understandable rule** and one aimed at minimizing the disruptive effect of successful claims between prior buyers and sellers for repayment of the purchase price; that it is only when a claim is made directly on the ultimate buyer or the buyer/seller concerned that one can expect that proper attention will be afforded the question whether such person has a defence to the third party's claim since the person on whom the claim is made will best know whether he has any valid defence and in addition has the right to call upon his vendor to assist him." (Emphasis added)

Smuts AJ approved of the decision in **Olivier v Van den Bergh** and went on to say at 801 B – E as follows:

> "From the fact that a seller is contractually bound, on the implied warranty against eviction, solely to the person who bought from him, it follows that – leaving aside for the moment the assumptions on which I am now dealing with the matter – the liability on the warranty arises only after (a) the purchaser to whom he sold has been evicted and (b) such purchaser has claimed repayment of the purchase price paid by him, with or without an additional claim for damages. As appears from *Voet* 21.2.21, the principles applicable to a case where there has been actual physical eviction of the ultimate purchaser who is in possession of the article concerned, were made applicable to the case of prior or intermediate sellers or purchasers where the article has passed through a number of hands. As between prior sellers and purchasers the restoration of the purchase price by a buyer to the person to whom he sold the article is, in an action by the buyer against the vendor from whom he bought the *merx* to be equated with surrendering the article...."

Where the purchaser can thus prove that the third party's claim is legally unassailable the vendor remains liable whether notice is given or not[16].

Plaintiff's case against the defendant is not based on any notice of any threatened eviction. Its case rests on the alleged unassailability of the Department of Customs and Excise's title to the vehicle. The question for decision is whether or not such title was indeed incontestable resulting in "no defence to such claim" being "sustainable in law".

As indicated earlier, the seizure of the motor vehicle by Customs occurred pursuant to the notice dated the 6th of January 1999. This seizure purportedly occurred pursuant to the provisions of section 114(1)(aB) of the Customs and Excise Act No. 91 of 1964. However, as stated earlier, the Constitutional Court has declared this section to be constitutionally invalid. The provisions of section 114 remained unamended during the period between the 16th of February 1996 and the 6th of January 1999[17]. Section 114 deals with the right to

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[16] See also **Westeel Engineering (Pty) Ltd v Sidney Clow and Co** 1968 3 SA 458 (T).

[17] Certain amendments to section 114 were promulgated pursuant to section 71 of the Revenue Law's amendment Act No. 53 of 1999. However, the latter amending Act only came into operation on the 14th of November 1999. For all intents and purposes the provisions of section 114 as at the date of

"detain" an item, which creates a lien over the property of third parties in favour of the Commissioner even though such third parties are not customs duty debtors. In the present case none of the plaintiff, Berry or defendant are custom debtors. The evidence indicated that the plaintiff and Berry were wholesale speculators in motor vehicles. This does not, however, detract from the character of their pre-existing ownership in the motor vehicle[18].

The Constitutional Court made the following order:

> "2. The provisions of s 114 of the Customs and Excise Act 91 of 1964 are declared to be constitutionally invalid to the extent that they provide that goods owned by persons, other than the person liable to the State for the debts described in the section, are subject to a lien, detention and sale.
>
> 3. The order in para 2 shall not apply
> 3.1 to sales of goods to purchasers, resulting from the application of the provisions of s 114, where such purchasers have been placed in possession of such goods pursuant to sales; or ..." [19]

It is common cause that paragraph 3.1 of the order does not apply to the present matter. There was no "sale" of the vehicle by Customs to a third party.

It is further common cause that Exhibit "D" is proof of the fact that Ntshixa is no longer the **registered** owner of the Pajero. There is, however, a difference between the registered owner and the common law owner. A registered owner might not be the true common law owner[20].

DID CUSTOMS/SARS OBTAIN AN UNASSAILABLE TITLE TO THE VEHICLE?

The question for decision is whether or not Customs/SARS obtained an unassailable title to the Pajero motor vehicle. In order to avoid any misunderstanding it should be remembered that the "Commissioner" in terms

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seizure on the 6th of January 1999 in the present matter, were exactly the same as they were when the Constitutional Court considered them in the **First National Bank** case.

[18] See **First National Bank** *supra* page 796 D.

[19] See **First National Bank** *supra* page 822 E to G.

[20] See **Geoghegan v Pestana** 1977 4 SA 31 (T) at 35 B. This case was criticised in **Diskin v Lester Braun & Associates (Pty) Ltd** 1992 3 SA 978 (T) but on a different point, unrelated to the present enquiry.

of section 1 of the Customs Act means "The Commissioner for the South African Revenue Service".

It will be necessary first of all to establish the true basis upon which SARS obtained possession of the motor vehicle. The notice[21] issued by Stone is somewhat ambiguous. Twice in the notice reference is made to section 114 (1)(aB). Reference to the latter section of the Act in the notice conflicts with the word "seizure" used in the heading and the word "seized" used in the first paragraph. As stated earlier section 114 does not deal with "seizure" of items but with the "detention" of items. The purpose of section 114 is to establish, statutorily, the existence of a debt due to the State arising out of unpaid duties and to secure a statutory lien over goods detained pursuant to section 114. Section 114 contains its own remedial provisions for any person or the owner affected by such detention. In section 114(1)(d) such a person can pay the debt due to the State within three months in order to release the detained goods from the attachment and lien. This provision is to be read together with the provisions of section 93 of the Act which allows for the remission or mitigation of penalties.

The reference in the notice to section 89 is not consistent with a detention under section 114 of the Act. Section 89 expressly deals with the "seizure" of goods. It reads as follows:

> "89(1) Any ship, vehicle, ... which have been **seized** under this Act, shall be deemed to be condemned and forfeited and may disposed of in terms of section 90 unless the person from whom such ship, vehicle, ... have been **seized** or the owner thereof or his authorised agent gives notice in writing, within one month after the date of the **seizure**, to the person **seizing** or to the Commissioner or to the Controller in the area where the **seizure** was made, that he claims or intends to claim the said ship, vehicle, ... under the provisions of this section." (Emphasis added)

The aforesaid sub section refers to the concept of seizure no less than five times. Nowhere is any reference made to the "detention" of any goods.

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[21] See Exhibit "B" page 5 or Exhibit "E" page 1.

Section 89(1) should also be read in the light of the provisions of sections 87 and 88. Section 87 expressly deals with any goods imported contrary to the provisions of the Act. It regards such goods as having been dealt with "contrary to the provisions of this Act" and therefore "shall be liable to forfeiture wheresoever and in possession of whomsoever found". Section 88 deals expressly in sub-section (1)(d) with the Commissioner's entitlement to "seize any other ship, vehicle, plant, material or goods liable to forfeiture under this Act". Stone expressly testified that the importation of a left-hand drive vehicle without paying the necessary importation duties results in the vehicle having been dealt with irregularly and therefore liable to forfeiture. Such forfeiture can be prevented if the owner or possessor gives notice in writing within one month after the date of seizure to the Commissioner or Controller in possession of the item. Failing such notice the Commissioner is entitled to dispose of the goods pursuant to the provisions of section 90. Stone expressly testified that such disposal took place pursuant to the provisions of section 90(b). This sub section reads as follows:

> "90(b) The Controller shall, after condemnation thereof, cause the thing in question to be sold by public auction or in any other manner which the Commissioner may deem suitable: Provided that the Commissioner may direct that, in lieu of being sold, any such thing shall be destroyed or shall be appropriated to the State....."

It seems clear to me that the intention of the Legislature was to distinguish between the seizure of goods tainted with some illegality and the mere detention of goods in terms of a statutorily created lien in order to secure payment of any amounts due to the Commissioner. In the light of this interpretation of the aforesaid provisions of the Act, one must then interpret the ambiguity arising from the notice issued by Stone on 6 January 1999. At least two ambiguities arise: (i) the usage of the word "seizure" and "seized" together with the reference to section 89 are all inconsistent with the reference to section 114; and (ii) reference to section 114(1)(aB) is entirely inconsistent with any intention to seize goods. This latter sub-section refers to capital goods in respect of which any surcharge has been withdrawn in terms of a permit issued

by the Director General: Trade and Industry which will become subject to a lien as security for such surcharge withdrawn. The evidence is quite clear that this sub-section is entirely inapposite to the facts of the present case.

In the light of the aforegoing and the evidence of Stone, it seems abundantly clear to me that the purpose of issuing the notice on 6 January 1999 was to seize the goods as having been illegally imported with the ultimate purpose of forfeiting it to the State in the event of no-one challenging the seizure upon notice in writing within one month after such seizure. The reference to section 114(1)(aB) is clearly a mistake. However, even if I am wrong in this interpretation it would seem to me that the evidence of Stone settles the issue. If the seizure was indeed pursuant to section 88(1)(d) as he testified, then no notice was required. Sections 87, 88, 89 and 90 do not require any notice in writing issued by a Customs officer stating the basis upon which goods dealt with irregularly are seized. Any seizure by Stone of the particular vehicle without having issued any written notice would still have been valid pursuant to the aforesaid sections of the Act. His evidence is clear and uncontroverted that he used the particular form because he had no other forms for seizure under section 88 available. That being the case I come to the conclusion that the seizure of the particular vehicle was indeed not under section 114 but indeed under section 88(1)(d) as read with the provisions of sections 87, 89 and 90. The declaration of invalidity of section 114 of the Act does not, therefore, affect the present matter.

The next question for decision is whether or not the aforesaid seizure constituted eviction. Mr. Smit relied on the decision in **Lavers v Hein and Far BK** 1997 2 SA 396 (T), a decision by Eloff JP and Grober AJ. In that case the question arose whether or not a seizure by the Police in terms of section 20 as read with section 31 of the Criminal Procedure Act No. 51 of 1977 of a vehicle reasonably suspected of having been stolen, constituted eviction under the common law. It was held that the lawful attachment of the vehicle pursuant to section 20 of the aforesaid Act did not relate to a defect in

the title of the seller and was not the exercise of a real or other right in respect of the motor vehicle. It was held to constitute *vis maior* as against both the purchaser and the seller and that a seller does not, by operation of law, indemnify the purchaser against *vis maior* by way of the warranty against eviction. It was held that the warranty related to the rights which the seller had transferred to the purchaser. The judgment in **Laver's** case did not, however, make any reference to the Appeal Court judgment in the case of **Vrystaat Motors v Henri Blignaut (Edms) Bpk** 1996 2 SA 448 (AD) where, at page 458 I – 459 B, Van Heerden JA held as follows:

> "'n Koper van 'n voorwerp waarop ingevolge art 20 as 'n vermoedelik gesteelde voorwerp beslag gelê word, word klaarblyklik nie deur die blote beslaglegging uitgewin nie. Die voorwerp mag immers aan hom terug-besorg word. Net so klaarblyklik is so 'n koper wel uitgewin indien die voorwerp volgens óf art 31(1)(b) óf art 32(2) óf art 34(1)(c) aan die Staat verbeur word, of aan iemand anders – gewoonlik die eienaar – terugbesorg word. Maar moet die koper nou vir 'n onbepaalde tydperk na die beslag legging, wat jare mag wees, wag aleer hy op grond van uitwinning teen sy verkoper kan optree omdat sodanige verbeuring of terugbesorging geskied het? Ek meen van nee. So gou dit blyk dat die voorwerp nie aan die koper – of aan iemand wat deur hom 'n reg op besit van die voorwerp verkry het – terugbesorg sal word nie, is die koper immers reeds uitgewin aangesien sy tydelike verlies aan besit van die voorwerp weens die beslaglegging nou 'n permanente een geword het. Anders gestel, is hy nou in effek permanent die saak ontneem, óf deur die Staat óf deur die persoon aan wie die voorwerp terugbesorg staan te word."

The aforesaid conclusion is in line with the decision in **Moyo v Jani** 1985 3 SA 362 (ZH). I am bound to follow the conclusions in the Appeal Court which in my view flies directly in the face of the conclusion arrived at in **Laver's** case. In the present instance there is more than merely a temporary loss of possession of the goods resulting from the seizure by Customs and Excise. There is now permanent loss of possession due to the State's seizure of the vehicle. In my view the facts of the present case constitute a clear case of eviction.

Mr. Smit also submitted that plaintiff supplied no documentary proof of the existence of the required importation and clearance documents. In my view there is no substance in this argument. According to Stone, Stannic was

unable to supply these documents. In addition, the defendant was the person who bought the vehicle from the original seller Giannocarro. It was for the defendant to enquire from Giannocarro whether such documents exist. In my view the plaintiff was quite entitled to assume that a large concern such as the defendant would have ensured that the necessary documentation for the importation of the motor vehicle was in place. But even if these documents did exist, they were not produced within the statutory time period of one month after the seizure as provided for in section 89 of the Customs Act. Such failure, to my mind, closed the door on any potential challenge to the lawful seizure of the motor vehicle by Customs.

Finally Mr. Smit submitted that the notice issued by Stone on 6 January 1999 is invalid because it refers to an incorrect section under the Customs and Excise Act, namely section 114(1)(aB). As indicated above such a notice was not a statutory prerequisite for a valid seizure pursuant to the provisions of section 88(1)(d). To the extent that the notice may have been defective, I am of the view that the evidence of Stone rectified the position adequately.

CONCLUSION

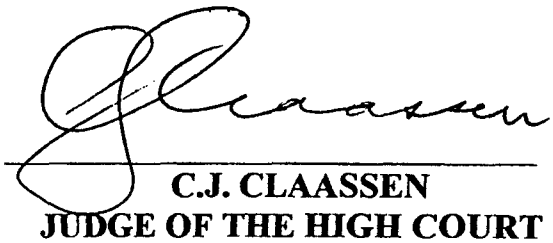
I have come to the conclusion that the plaintiff has succeeded on a balance of probabilities in establishing its case against the defendant. It is not in dispute that if the plaintiff is successful it should be entitled to the refund of the purchase price. I therefore make the following order:

1. Defendant is ordered to pay the plaintiff the sum of R130 000-00.

2. Interest on the aforesaid sum at the legal rate calculated as from March 1997 to date of payment.

3. Costs of suit.

DATED AT JOHANNESBURG ON THIS 15th DAY OF DECEMBER 2004



C.J. CLAASSEN
JUDGE OF THE HIGH COURT

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Counsel for the defendant:
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Attorneys for the defendant:
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The trial was conducted on 18 and 19 November and 10 December 2004.