

Bib 91/87

Case No 158/86

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BARCLAYS WESTERN BANK LIMITED ..... Appellant

and

IRENE ERNST ..... Respondent

Coram: RABIE ACJ, JOUBERT, BOTHA, JACOBS et

NESTADT JJA.

Heard:

21st August 1987.

Delivered:

22 September 1987

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J U D G M E N T

RABIE ACJ:

This/.....

This appeal arises from an action in the Transvaal Provincial Division in which the appellant claimed an order against the respondent for the delivery to it of a certain Hilux Toyota light delivery vehicle of (hereinafter referred to as "the vehicle"/which it claimed to be the owner. The respondent, who was in possession of the vehicle, denied that the appellant was the owner thereof. The Court (Flemming J) granted an order of absolution from the instance with costs, and the appeal is against that order.

The vehicle was in May 1981 the subject matter of a written agreement of lease entered into between Midway Killarney (Pty) Ltd and one Van Coller. Midway Killarney (Pty) Ltd, the owner of the vehicle, discounted/.....

discounted the agreement of lease with the appellant in terms of a master discounting agreement. The preamble to this agreement, which was concluded on 28 February 1981 and in which the appellant is referred to as "the Bank" and Midway Killarney (Pty) Ltd as "the Trader",

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reads as follows:

"It is contemplated that the Bank shall in its sole discretion from time to time purchase the Trader's rights, title and interest in Credit, Instalment Sale and Suspensive Sale Agreements and Leases ('the Agreements' or 'Agreement') and thereby acquire ownership in and to the subject matter of such agreements ('the Goods')".

Clauses 1 and 2 of the agreement provide as follows:

"1. The terms and conditions hereof shall apply to each and every transaction as contemplated in the preamble hereof.

2.1 In every instance after the date of signature hereof in which the Trader

wishes/.....

wishes to sell to the Bank the rights title and interest in any Agreement and the ownership in and to the Goods which form the subject matter of such Agreement, the Trader shall deliver to the Bank the relevant Agreement and all documents of the nature referred to in 2.2.3 below.

2.2 The delivery of the documents referred to in 2.1 shall constitute an offer by the Trader to the Bank, to sell and to cede to the Bank upon and subject to all the terms and conditions contained herein and at such price as may be agreed between the Trader and the Bank;

2.2.1 all the Trader's rights, title and interest into and under the Agreement;

2.2.2 the ownership of the Goods described therein;

2.2.3 .....

2.3 The Bank shall in respect of each Agreement delivered to it under 2.1 either:

2.3.1 return the Agreement to the Trader if it declines to purchase same, or

2.3.2 pay to the Trader the purchase price/.....

price determined by the Bank and the Trader in respect of such Agreement, which payment shall constitute an acceptance by the Bank of the Trader's offer to sell that Agreement."

Two further clauses of the Agreement should also be

noted, viz:

"3. In respect of every Agreement purchased by the Bank from the Trader in terms hereof, the Trader warrants in favour of the Bank:

.....

3.6 That immediately before the purchase thereof by the Bank hereunder, the Trader was the owner of such Agreement and of the Goods....., and that upon the purchase thereof, the Bank will become the owner of all rights under the Agreement and also the owner of the Goods, the subject matter of such Agreement."

"15. No variation of any of the terms of this agreement shall be of any force and effect unless in writing and signed by both parties."

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The relevant provisions of the agreement of lease will be set out later in the judgment.

The appellant's main witness at the trial was Mr. K.L. Stein, who was the sales manager of Midway Killarney (Pty) Ltd (hereinafter referred to as "the trader") during May 1981. His evidence was to the following effect. During May one Van Coller came to the trader's place of business and stated that he wished to purchase the vehicle. When Van Coller indicated that he could not pay for the vehicle in cash, Stein asked him to sign a "credit application form" which was to be submitted to the appellant. The signed form was handed to one Lee Engelbrecht, who was <sup>in</sup> the appellant's employ. (Engelbrecht testified that she was employed as a "business development officer".) The application was/.....

was approved by the appellant. Engelbrecht then asked Stein for "a vehicle invoice" in respect of the vehicle, and he drew such an invoice on 19 May 1981. The invoice was addressed to "Wesbank Bramley" and stated that the vehicle was "to be delivered on your behalf to Professor Van Coller". (Engelbrecht testified that she delivered the invoice to the appellant "in order for the admin (sic) department to draw up the documents", i.e. the "lease agreement document".) A few days later (it appears from evidence given at the hearing that it was on 21 May) Van Coller returned to the trader's place of business and on that occasion he concluded the aforesaid agreement of lease in respect of the vehicle with the trader.

The agreement had been prepared by the appellant and delivered by Engelbrecht to the trader.

Mr. Leonard Skok, one of the trader's directors

signed the agreement on behalf of the trader, and Stein witnessed the signatures of Skok and Van Coller. After the agreement had been signed, Stein said, he, Skok and Van Coller went to where the vehicle was parked. When they got there, he gave Van Coller the vehicle's keys, the service manual and various other documents, including the "change of ownership papers." While they were standing next to the vehicle, Stein said, Van Coller called over a man who was standing nearby. He told them that this man was his farm manager and that he would drive the vehicle to the farm. Van Coller then left. The signed agreement of lease was delivered to the appellant, and on 26 May the appellant sent the trader its cheque for R6 720-43. Thereafter, Stein said,

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the trader had no further interest in the matter.

According to the agreement of lease Van Collier hired the vehicle from the trader. The "principal debt including finance charges" which Van Collier had to pay in terms of the agreement was R8 958-24. The amount was payable in montly instalments of R248-84 over a period of two years, and the lessee could, at the end of that period, purchase the vehicle at the "money value" thereof as determined by the lessor. The instalments were (save for the first, which was to be paid by cheque on the conclusion of the agreement) to be paid by way of debit orders against Van Collier's account with a bank in Cape Town. (The evidence shows that twelve instalments/.....

ments were paid to the appellant in this way and that no further payments were made thereafter.)

Clause 1.1 of the agreement of lease provides as follows:

"1.1 The Lessee is aware that all the Lessor's rights in this Agreement are to be ceded and together therewith ownership of the Goods transferred. In contemplation thereof, the Lessee:  
1.1.1 agrees to recognise the cessionary of the Lessor's rights as the new owner and to hold the Goods as bailee on behalf of the new owner subject to the terms of this Agreement;"

Clause 3 of the agreement reads as follows:

"The Goods shall remain the property of the Lessor and nothing in the Agreement shall be construed as conferring on the Lessee any right or interest in the Goods other than as Lessee.....".

Leonard Skok, mentioned above, testified that, after the agreement of lease had been signed, Van Coller requested him to leave the registration documents relating to the vehicle blank because he intended registering the vehicle "in the name of the farm", which was in the Orange Free State. He agreed to do so, Skok said, and gave Van Coller the papers "for him to fill out in the name of the farm".

Mr P.F. Ernst, a farmer in the Lichtenburg district, testified on behalf of the respondent, who is his wife. He explained how it came about that the respondent was in possession of the vehicle. About 15 months prior to the above-mentioned events of 21 May 1981, he said, his neighbour, Mr J.G. Terblanche, told him that Van Coller (who was Terblanche's stepfather)

could/.....

could buy motor vehicles at bargain prices, and he asked him (Ernst) whether he would be interested in buying a vehicle cheaply. Ernst replied that he would like to buy a light delivery vehicle. Terblanche informed him that the price would be about R3 700, and he gave Terblanche a cheque for the required amount. Thereafter there was a long delay, but finally, on 21 May 1981, Terblanche and he accompanied Van Coller to the trader's premises in Johannesburg. When they arrived there, Van Coller went inside. He came out again after a few minutes and called him and Terblanche into Stein's office. Van Coller introduced them to Stein and then left. Stein, he said, handed him the registration documents relating/.....

relating to the vehicle. He could not dispute, he said, that Stein handed the vehicle's keys to Van Coller, for he found them in the vehicle when he drove it away from where it was parked. He registered the vehicle in his wife's name in Lichtenburg on the next day (22 May 1981).

Terblanche corroborated Ernst's evidence. He also told the Court that he had heard that Van Coller had died.

In the particulars of its claim, as supplemented by further particulars, the appellant alleged that it became the owner of the vehicle on 19 May 1981. As to the manner in which it claimed that ownership in the vehicle had passed from the trader to it, the appellant's case at the trial was that it was effected by way of

attornment/.....

attornment. (As to what attornment involves, see e.g. Hearn & Co (Pty) Ltd v. Bleiman 1950(3) SA 617 (C) at 625 C-G; Caledon & Suid-Westelike Distrikte Eksekuteurskamer Bpk v. Wentzel en Andere 1972(1) SA 270 (A) at 273 A-C; Air-Kel (Edms) Bpk h/a Merkel Motors v. Bodenstein en 'n Ander 1980(3) SA 917 (A) at 923 B-G; C.G. van der Merwe, Sakereg, at 220.) Ownership in the vehicle passed to it, the appellant contended, when Van Coller, who had been placed in possession of the vehicle by the trader and held it on behalf of the trader as owner, agreed with the trader that he would thereafter hold it on behalf of the appellant as the new owner thereof. The trial Court, referring to authority which is to

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the effect that ownership in a movable in the hands of a third party can be transferred by attornment only while such third party is in possession of the article, held that Van Coller, who gave up possession of the vehicle almost immediately after its keys had been handed to him by Stein on 21 May, did not have the necessary control, or power of control, over the vehicle so as to allow of its delivery to the appellant by way of attornment. The Court held, with reference to clauses 2.2 and 2.3/<sup>of</sup>the master discounting agreement, that cession of the trader's rights under its agreement with Van Coller and of its ownership of the vehicle to the appellant took place on 26 May 1981, and that the trader could/.....

could, therefore, not have lost its ownership of the vehicle before that date.

In this Court counsel for the appellant, contending that the trial Court's decision was wrong, submitted in his written heads of argument that -

"at the date of the conclusion of the agreement of lease on 19.5.1981 between the Appellant and Van Coller, there were present all the essential ingredients for the transfer of ownership of the vehicle from the trader to the Appellant by way of attornment."

(In his oral argument counsel accepted that the agreement of lease, although dated 19 May 1981, was signed on 21 May 1981.) The submission is developed in the following way in counsel's written heads of argument:

"7.2/....."



"7.2 As at the date of the Appellant's approval and conclusion of the agreement of lease, on 19.5.1981:

7.2.1. The Appellant had verbally approved the transaction on 19.5.1981 and prepared the necessary documentation for signature, agreed to purchase the trader's right, title and interest in and to the agreement of lease and to acquire ownership of the vehicle.

7.2.2 The trader had verbally and by conduct in submitting an invoice.... to the Appellant, agreed to cede its rights under the agreement of lease and to transfer ownership of the vehicle to the Appellant. No formal or written cession was required by the Master Agreement.

7.2.3 Van Coller, who received possession on 19.5.1981, agreed to hold for Appellant and to acknowledge Appellant as owner.....

7.3/.....

7.3 It is respectfully submitted that, despite the wording of clause 2.3.2 of the master discount agreement, the cession in fact occurred at the time of the conclusion of the agreement of lease on 19.5.1981 and not when payment was made by the Appellant to the trader on the 26th May 1981. By their conduct, and for practical reasons, the two parties could invest the master agreement with a new content.

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7.3.3 The trader and the Appellant could waive the provisions of the master agreement and effect cession orally on 19.5.1981. The master agreement does not require written or formal cession.

7.4 The effect of clause 2.3.2 was merely to delay, until payment, the efficacy of the completed cession.

7.5 It is submitted that the verbal and/or tacit agreement of cession, despite the delay in its efficacy, was sufficient for the transfer of ownership by way of attornment provided that Van Collier was in control of the vehicle (as he was)

at the date of such cession, namely  
19.5.1981.

7.6 The evidence discloses that, immediately after signature of the agreement of lease on 19.5.1981, Van Coller received possession of the keys of the vehicle and, accordingly, was in control thereof at the time of the verbal and/or tacit cession, and, when he signed the lease, he acknowledged Appellant as owner."

In his argument in this Court counsel  
accepted, as stated above, that the agreement of lease  
between the trader and the appellant was signed on 21  
May 1981, although it bears the date 19 May 1981. As  
to the cession of the trader's rights in respect of the  
vehicle to the appellant, counsel stood by the submission  
made in his written heads of argument, viz. that the

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date of the cession was 19 May 1981. His submission was, if I understood it correctly, that the agreement to cede came into being on 19 May 1981 when the trader's employee, Stein, issued the above-mentioned invoice when requested to do so by the appellant's employee, Lee Engelbrecht, but that the cession became effective on 21 May 1981. Counsel conceded that if the cession took place only on 26 May 1981, as found by the trial Court, the appellant's claim that it acquired the ownership of the vehicle from the trader must fail. (See also the proviso in paragraph 7.5 of counsel's heads of argument, quoted above.)

The concession was rightly made. To enable ownership

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to pass in a case such as the present, the law requires that the person who is to hold the article concerned on behalf of the intended new owner must be in control thereof (or at least have the right of control thereover) when the owner of the article cedes his rights in respect thereof to the intended new owner. (See Hearn & Co. (Pty) Ltd v. Bleiman, supra, at 625 H; Air-Kel (Edms) h/a Merkel Motors v. Bodenstein en h Ander, supra, at 924 D-E.) Van Coller was not in possession of the vehicle on 26 May 1981. As shown above, the evidence was that the keys of the vehicle were handed to him on 21 May 1981, but that he allowed the respondent's husband to take possession of the vehicle almost immediately/.....

immediately thereafter. In the circumstances it is vital to the success of the appellant's claim that it is the owner of the vehicle to establish, as its counsel endeavoured to do, that the trader's rights in respect of the vehicle were ceded to it while Van Coller was in control of the vehicle.

I proceed now to consider counsel's argument. The master discounting agreement was intended to apply to all agreements concluded by the trader in respect of which the appellant wished to purchase the trader's rights and to acquire the ownership of the subject matter of such agreements. (See the preamble to the agreement and clause 1 thereof.) If

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the transaction between the trader and Van Collier is governed by the terms of the master discounting agreement, it is clear from the provisions of clauses 2.2 and 2.3 thereof that the cession of the trader's rights to the appellant, including the right to acquire ownership of the vehicle, was effected on 26 May 1981 when the appellant, after receiving the agreement of lease concluded by the trader and Van Collier, sent its cheque for R6 720-43 to the trader. The argument is, however, as pointed out above, that the parties' conduct shows that they chose to depart from the provisions of the master discounting agreement relating to the question of the cession of the trader's rights to the appellant.

As/.....

As stated above, it is submitted that the issuing of the invoice by Stein at the request of Engelbrecht on 19 May amounted to a cession which became effective on 21 May when the agreement of lease was concluded.

I consider the whole of counsel's argument to be untenable. I do not propose to discuss it in detail, and find it sufficient to say the following:

(a) Clause 15 of the master discounting agreement provides that no variation of the terms of the agreement shall be of any force or effect "unless in writing and signed by both parties." There is no evidence that the parties agreed in writing to any variation of the terms of the agreement. Consequently it cannot be argued that they were varied. (See S.A. Sentrale Ko-op Graan



maatskappy Bpk v. Shifren en Andere 1964(4) SA 760 (A).

(b) The issuing of the invoice by Stein at the request of Engelbrecht, and Engelbrecht's preparation of the agreement of lease which was to be signed by the trader and Van Coller, cannot be said to afford evidence of a departure from the terms of the master discounting agreement concerning the cession of the trader's rights to the appellant. They seem to have been merely practical and administrative measures relating to the preparation of documents. It is relevant to note in this regard that Engelbrecht testified that she delivered the invoice to the appellant "in order for the admin (sic) department to draw up the documents",

i.e./.....

i.e. the agreement of lease. Her evidence contains no suggestion that the invoice was, as was argued on behalf of the appellant, a document which provided evidence of a cession.

(c) Neither Stein nor Engelbrecht testified that their conduct constituted a departure from the terms of the master discounting agreement. There was, also, no evidence that they had been authorised by their respective employers to adopt a practice which was in conflict with the provisions of the master discounting agreement.

(d) Finally, the appellant's case in the Court a quo was that the cession of the trader's rights to

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the appellant was effected in the manner described in clauses 2.1, 2.2 and 2.3 of the master discounting agreement. This appears clearly from the following extract from Stein's evidence-in-chief:

"MR BORUCHOWITZ: What is that document? --- This is the Master Discount Agreement between Killarney Toyota and Barclays Western Bank.

When was it concluded between the parties? --- It was dated 28 February 1981.

Now in terms of Clause 2.2 - M'Lord I beg leave to hand up to Your Lordship the original of that document. In terms of clause 2.2 it proves that delivery of the documents referred to in clause 2.1, these are the documents forming the subject matter of the sale, of the lease, constitute an offer to the bank to sell and to cede to the bank all the rights of Midway Killarney and to the agreement. --- Yes. Now did you deliver - you have already given evidence that you delivered those documents? --- That is correct.

To/.....

To the bank. Now did Midway Killarney have any further interest in this particular matter after you delivered the documents to the bank? --- No, none whatsoever.

When did you receive payment? --- We received payment a couple of days later.

I would like <sup>you</sup> to look at EXHIBIT A.  
What is that document? --- This is a cheque made by Barclays Western Bank to Killarney Toyota.

At which branch, which bank does Killarney Toyota bank? --- We bank at Standard Bank, Killarney. That is their rubber stamp on the cheque.

The cheque appears to bear this. Does it bear the stamp of the bank where you bank? --- That is correct.

(Speaking simultaneously). --- That is correct.

Was that cheque in fact received by Killarney Toyota? --- Yes, it was. We have a rubber stamp on the back which we do, as soon as we receive a cheque.

Now after payment was received, did Killarney Toyota have any further interest in this matter? --- No."

According/....

According to this evidence, which is in conflict with the argument advanced by counsel, cession of the trader's rights to the appellant took place when the appellant, having received the agreement of lease from the trader, sent its cheque to the trader, i.e. on 26 May 1981. As stated above, it was rightly conceded by counsel that if the cession was effected on that date, Van Coller could not have held the vehicle on behalf of the appellant as the owner thereof.

In view of all the foregoing I am of the opinion that the trial Court's decision was correct. In the circumstances it is unnecessary to discuss the question whether Van Coller ever held, or intended to hold,

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the vehicle on behalf of the appellant as the new owner thereof, and whether the intended cession could validly have been effected if Van Coller did not genuinely intend to hold the vehicle on behalf of the appellant.

The appeal is dismissed with costs.

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P J RABIE

Acting Chief Justice

JOUBERT      JA  
BOTHHA      JA  
JACOBS      JA  
NESTADT      JA

Concur.