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CALEDON & SUID-WESTELIKE DISTRIKTE EKSEKUTEURS-KAMER BPK. v. WENTZEL AND OTHERS.

(APPELLATE DIVISION.)

1971. *September* 10; *October* 1. RUMPFF, J.A., WESSELS, J.A., JANSEN, J.A., TROLLIP, J.A. and MULLER, J.A.

Vindication.—Ownership.—Delivery.—Declaration of intention by possessor of movable corporeal property to hold it on behalf of future cessionary when cessionary obtains cession of the right of ownership.—Delivery takes place on date of cession.—Cessionary thereafter entitled to claim property.

Although the so-called "attornment" of the English law corresponds to the application of the Roman-Dutch legal concept of delivery of possession, the view that it is a form of *traditio brevi manu* should not be subscribed to without qualification. When a movable corporeal article is in the possession of a non-owner, namely a third party, it cannot be accepted that the owner can only have possession conferred upon the acquirer of the property by what is understood in English law by "attornment". When a possessor makes a declaration of intention to hold on behalf of a future cessionary when the cessionary receives cession of the right of ownership, then delivery takes place on the date of cession, and the cessionary is thereafter entitled to claim the article from the person who is in possession.

The decision in the Transvaal Provincial Division in *Caledon & Suid-Westelike Distrikte Eksekuteurskamer* v. *Wentzel and Another*, 1971 (2) S.A. 466, overruled.

Appeal from a decision in the Transvaal Provincial Division (HIEMSTRA, J.). The facts appear from the judgment of RUMFF, J.A.

H. C. J. Flemming, for the appellant.

G. A. Alexander, S.C. (with him *A. J. Horwitz*), for the respondent.

Cur. adv. vult.

Postea (October 1st).

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RUMPFF, J.A.: Appellant in this case instituted action in the Transvaal Provincial Division against the defendants (respondents in this Court) claiming the return of a motor vehicle, a Volkswagen Fastback, which was in the possession of one or other of the defendants, and of which appellant claimed to be the owner. Defendants denied appellant's ownership and after the hearing of evidence the claim was dismissed with costs. Appellant now appeals against this order by the trial Court.

From the evidence submitted to the trial Court it appears that appellant carries on business as a financing company at Caledon, Cape

Province, and has entered into a written contract with a company De Vries Holdings (Southern Cape) (Pty.) Ltd., hereinafter called De Vries, with an office at Riversdale. In terms of the said written contract appellant has agreed to discount from time to time De Vries's rights in, *inter alia,* hire-purchase contracts and to obtain possession (*sic*) of the merchandise forming the subject of those contracts. On such discounting De Vries, in terms of clause 1 of this contract, had to cede those hire-purchase contracts and all his rights under them to appellant. Clause 2 of the contract reads as follows:

"as it is the intention of the parties that the company will, on discounting, become the owner of the merchandise forming the subject of those contracts, the trader agrees that the company will be entitled to inform the person in possession of such merchandise of such cession and of the change of ownership in respect of such merchandise. The trader further agrees to cede and deliver, should the debtor's estate be sequestrated, all such rights to the merchandise as the trader may have or acquire in terms and by virtue of sec. 84 of the Insolvency Act, as amended."

On 25th March, 1969, De Vries entered into a hire-purchase contract for the sale of seven motor vehicles to one Mayoss of Vereeniging, Transvaal, for an amount of R5 670, payable by way of six instalments of R945 each, the first being due on 1st May, 1969. Clause C of the hire-purchase contract reads as follows (stamps rendered the Afrikaans version illegible in part): "....."

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Clause 3 of the hire-purchase contract reads:

"Ownership shall not pass to the buyer until all amounts which may be due in terms of this contract have been settled in full."

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In terms of clause 5 (*a*) the buyer undertakes to hold the property on behalf of the owner at the address mentioned in the contract or at such other place as the seller may approve of in writing, while the contract is still in force or while any amount is still owing in terms thereof. Clause 8 reads as follows:

"(*a*) The seller shall have the right to sell, transfer or cede any of his rights under this contract to any person and in such a case the buyer undertakes:

(i) To accept such cessionary in place of the seller, to acknowledge his acceptance in writing, and to hold the property on behalf of the cessionary.

(ii) To pay the cessionary all amounts which may be due in terms of this contract. Should he nevertheless effect any payments to the seller, such payments shall not be considered as having been made to the cessionary, but the seller shall be considered as the buyer's agent for the purpose of effecting payment to the cessionary whose receipt shall be the only proof that the buyer has met all his commitments in terms of this contract.

(*b*) (i) The buyer shall not have the right to transfer or cede his rights or obligations under this contract.

(ii) Any reference in this contract to the seller shall, unless the contrary appears from the context, be deemed to be a reference to a cessionary, buyer or person to whom the seller's rights have been ceded in terms of this clause."

The hire-purchase contract between De Vries and Mayoss was discounted by appellant and a receipt by De Vries for the amount paid by appellant was dated 25th March, 1969. The hire-purchase contract and an accompanying letter were sent to the appellant with a document dated 15th April, 1969. On 23rd April, 1969, appellant forwarded a letter, with a copy thereof, to the address of Mayoss in Vereeniging informing him of the fact that the hire-purchase contract had been discounted by appellant and stressing, *inter alia,* that appellant had become the owner of the vehicles. Mayoss was requested in the letter to sign the copy and to return it to the appellant. Mayoss signed the copy on a date unknown and returned it. Appellant received it during May, 1969.

During the second half of April, 1969, the first defendant decided to buy one of the vehicles which Mayoss had bought from appellant on hire-purchase and which Mayoss offered for sale in Vereeniging. The sale was effected on 24th April, 1969, with the aid of the Nasionale Industriële Kredietkorporasie Beperk, hereinafter called N.I.K.K., which bought the vehicle directly from Mayoss and then immediately delivered it to second defendant on hire purchase. N.I.K.K. as well as the defendants took it for granted that Mayoss was entitled to sell the vehicle. In terms of the hire-purchase contract between N.I.K.K. and first defendant, dated 24th April, 1969, N.I.K.K. was considered to be the owner of the vehicle by the parties to the contract. The second defendant, first defendant's father, took possession of the vehicle.

On the facts as set out above it must be accepted that Mayoss delivered the vehicle in question to the first defendant prior to receiving appellant's notice, dated 23rd April, 1969, and therefore also prior to signing and returning the copy of the notice to appellant.

In the trial Court respondent relied on a form of delivery which meets

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with all the requisites of delivery of immovable property in Roman-Dutch Law, but which has a special name in English law, viz. "Attornment", and which has been applied in our law under that label. In his *Law of Sale of Goods in South Africa,* 3rd ed., p. 100, Mackeurtan, in dealing with *traditio brevi manu,* states with reference to certain cases: "....."

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See also *Hearn & Co. (Pty.) Ltd.* v. *Bleiman,* 1950 (3) S.A. 617 (C).

In applying this principle the trial Judge came to the conclusion that there was no mental concurrence in the present case between De Vries, the appellant and Mayoss while Mayoss still had possession of the motor vehicle and that ownership therefore did not pass to appellant. This is stated in the judgment as follows.:

"According to the basic principles of the law of contract acceptance of declaration of intention can only take place if one is aware of the declaration. In my view the triple *consensus* could not have arisen without communication between Mayoss and the third party, viz. plaintiff. De Vries Holdings was not compelled to cede. Clause C is merely a notice of intention to cede. Mayoss could therefore not have known when cession took place, if at all. That the parties theselves realised this, appears from the fact that plaintiff in fact thought it necessary not only to send exh. D but, also to require it to be signed and returned as an acknowledgment of receipt. At the bottom just above the dotted line for 'Signature of purchaser' the following appears prominently printed: 'VERY IMPORTANT. Please sign the attached copy as an acknowledgment of receipt and return it to us.' The acknowledgment of receipt is, in my opinion, an indispensable part of the triple *consensus*. It is Mayoss's declaration of intention to possess in future on behalf of plaintiff. As indicated above, it is only effective while he still has *detentio* or the right of control, and according to the evidence he had neither the one nor the other."

Although the so-called "attornment" of the English law corresponds to the application of the Roman-Dutch legal concept of delivery of possession, I do not subscribe to *Mackeurtan's* view that it is a form of *traditio brevi manu* without qualification and I also do not accept that when a movable corporeal article is in the possession of a non-owner, namely a third party, that the owner can only have possession conferred upon the acquirer of the property by what is understood in English law by "attornment". I would like to refer in this connection to a series of articles by J. Drion in the *Weekblad voor Privaatrecht, Notaris-Ambt en Registratie,* 73rd year No. 3771, 1942 dealing with the Dutch law in this respect and which, although codified, consists of a crystallisation of Roman and Roman-Dutch Law, and to which I shall again refer later. There articles are often cited by Dutch authors.

It was contended in the present case on behalf of respondent that transfer of possession was only effected when Mayoss received notice of the cession by De Vries to appellant and thereupon formed the intention to possess on appellant's behalf, and not prior to this. When

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he manifested his change of intention, he was no longer in possession of the vehicle. It was contended that while Mayoss was unaware of the cession, he could not exercise an intention to possess on behalf of the appellant. In my opinion this view, and therefore also the view of the trial Court, is incorrect. At the conclusion of the hire-purchase contract Mayoss accepted in clause C that De Vries would cede all his rights under the contract, including the right of ownership, to appellant immediately after the signing of the contract and he accepted the intended cession and undertook to acknowledge the rights of the future cessionary and to hold the sold property on behalf of the appellant. At the time of the cession the cessionary knew and accepted that Mayoss held the property on his behalf. The provisions of clause C, read with clause 8, in terms of which the buyer repeats his undertaking and in terms of which he also undertakes to notify his acceptance in writing, cannot in my view be construed as a suspensive condition in terms of which Mayoss undertook to hold the vehicle on behalf of appellant only after

receiving notice of the cession and acknowledging his acceptance in writing. Notice to the buyer is necessary, *inter alia,* to ensure payment after receipt of the notice to the cessionary in terms of the undertaking in clause 8 (*a*) (ii). In view of the wording of clause C the written acknowledgment in my view amounts to no more than a confirmation in writing by the buyer to the cessionary of what has already taken place and whereof the cessionary is, because of the cession, already aware. What happened here originally, was that Mayoss stated that he was prepared to hold on behalf of De Vries and that after the cession he would continue to hold and to acknowledge appellant's rights. His knowledge of the date of the cession is not important. What is of importance is his declaration of intention to hold the vehicle for the future cessionary. That a person who holds a thing on behalf of someone else, may undertake to hold it on behalf of a future owner, also appears from Dutch law.

In the articles mentioned above Drion refers to an important decision by the Hooge Raad on 1st November, 1929, and to the fact that prior to that decision the contemporary Dutch authors were unanimously of the opinion that the requisite of delivery was complied with should the holder of movable property on behalf of the *tradens* declare that he would in future hold on behalf of the acquirer. The author then continues:

"Prior to the decision of 1st November, 1929, the authors considered this to be the *only* possible way in which movable property, held by a third party, could be delivered. In this connection reference was usually also made to the delivery of property stored in a warehouse or transported by ship, by handing over the list of goods or bill of lading, as the holder of the property had already at an earlier stage declared himself prepared to hold on behalf of any owner of the list of bill of lading."

We do not materially have to deal here with a contract between the possessor and the cessionary, but with a fact. Because no change in the factual situation by handing over or returning the vehicle, is envisaged in a case of cession of ownership like the present, a declara-

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tion of intention instead of factual delivery is expected from the possessor to the effect that he will hold on behalf of the future cessionary. Where the buyer suffers no prejudice as a result of a cession, one may even raise the question whether the possessor may refuse to change his intention and whether notice of the cession to the buyer ought not to suffice for delivery. Such a cession and notice would enable the cessionary to exercise the same power over the property as the owner had. Indeed, "delivery" amounts to enabling a person to exercise such power. It is, however, unnecessary to philosophise about this any further because in the present case we do in fact have to deal with a declaration of intention to hold on behalf of the cessionary when ownership is ceded to the latter.

In my opinion delivery took place in the present case on the date of cession and the appeal should succeed with costs.

One Louis Jacobus Coetzee signed the contract between Mayoss and the first defendant as co-buyer. He merely intended to act as surety and has no interest in the vehicle. Appellant's counsel applied to have him formally joined as defendant. There is an affidavit by Coetzee in which he, *inter alia,* states that he will abide the decision of this Court. The application for Coetzee's joinder is allowed, but it is ordered that he should not be held responsible for any costs incurred in the Court *a quo* or in this Court

The order of the Court *a quo* is set aside with costs and substituted for an order reading:

Defendants are ordered to deliver the Volkswagen Fastback, engine No. 0427874 to plaintiff as owner. Defendants, except Coetzee, are to pay the costs of the case.

WESSELS, J.A., JANSEN, J.A., TROLLIP, J.A. and MULLER, J.A., concurred.

Appellant's Attorneys: *van der Merwe & Gildenhuys,* Pretoria; *Siebert & Groenewald,* Bloemfontein. Respondent's Attorneys: *Roseman & Heunis,* Pretoria; *Horwitz, Arvan & Lewis,* Bloemfontein.