

ANSWERS – ANTWOORDE: STUDY UNIT / STUDIE – EENHEID 5

Question 4 pg 136 / Vraag 4 bl 137

ANSWER:

S can only succeed with the *rei vindicatio* if he can prove that X and Y in fact transferred ownership to him by means of *traditio longa manu* (1). Here transfer of the thing is not possible because of its size or weight (1). In this case the article to be transferred is pointed out ($\frac{1}{2}$) to the transferee in the presence ($\frac{1}{2}$) of the thing. The transferee is placed in a position enabling him/her to exercise physical control. It is not sufficient merely to point out the thing. The transferee must be placed in a position to take control (1) of the thing to the exclusion of others.



In *Groenewald v Van der Merwe* (1) (1917 AD 233 239), Innes CJ described delivery with the long hand as follows:

But physical prehension is not essential if the subject-matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at his pleasure (1). In that way the physical element is sufficiently supplied; and if the mind of the transferee contemplates and desires so to deal with it, the transfer of possession (1), --- that is the delivery --- is in law complete. ... When this deposit of the subject matter in the presence and at the disposition of the new possessor takes the place of physical prehension, the delivery is said to be made *longa manu* ... It is most appropriate to transactions where owing to the weight or bulk of the article concerned, actual delivery is difficult. (*Our emphasis.*)

In *Eskom v Rollomatic Engineering (Pty) Ltd* (1) (1992 (2) SA 725 (A)) the court confirmed this principle.

For S to acquire ownership by means of delivery with the long hand (*traditio longa manu*) **he had to be in the position that he and he alone (1) could deal with the thing at his pleasure (1) in order to comply with the physical element of control (by, for example, placing someone at the windmill until he removes it, or putting up a notice or, as in the case of *Groenewald*, by informing the workers that they would henceforth be using the machinery for his account).** S should also comply with the mental element of control – the intention to receive ownership from X and Y (1).

S did not comply with the physical element of control and did therefore not acquire ownership through delivery with the long hand (*traditio longa manu*). S will not succeed with the *rei vindicatio* (1).

ANTWOORD:

S sal net suksesvol wees met die *rei vindicatio* indien hy kan bewys dat X en Y eiendomsreg aan hom oorgedra het by wyse van lewering met die lang hand (*traditio longa manu*) (1). In hierdie geval is oordrag van die saak, as gevolg van die grootte en gewig daarvan, nie moontlik nie (1). Die saak wat oorgedra word, word aan die oordragnemer uitgewys ($\frac{1}{2}$) in die teenwoordigheid ($\frac{1}{2}$) van die saak. Die oordragnemer word in 'n



posisie geplaas wat hom in staat stel om fisiese beheer uit te oefen. Dit is nie voldoende om net die saak uit te wys nie. Die oordragnemer moet in 'n posisie geplaas word om beheer (1) oor die saak te neem tot uitsluiting van andere.

In Groenewald v Van der Merwe (1) (1917 AD 233 239) het Innes HR lewering met die lang hand soos volg beskryf:

But physical prehension is not essential if the subject-matter is placed in presence of the would-be possessor in such circumstances that he and he alone can deal with it at his pleasure (1). In that way the physical element is sufficiently supplied; and if the mind of the transferee contemplates and desires so to deal with it, the transfer of possession (1), --- that is the delivery --- is in law complete. ... When this deposit of the subject matter in the presence and at the disposition of the new possessor takes the place of physical prehension, the delivery is said to be made *longa manu* ... It is most appropriate to transactions where owing to the weight or bulk of the article concerned, actual delivery is difficult. (*Ons beklemtoning.*)

In Eskom v Rollomatic Engineering (Pty) Ltd (1) (1992 (2) SA 725 (A)) het die hof hierdie beginsel bevestig.

S kan eiendomsreg wyse van lewering met die lang hand (traditio longa manu) oor die windpomp gekry het indien hy met die saak kon handel soos hy wou (1) en tot uitsluiting van ander (1) ten einde te voldoen aan die fisiese element van beheer (byvoorbeeld deur iemand by die windpomp te laat totdat hy dit verwyder, of deur 'n kennisgewing op te plak of, soos in die geval van Groenewald, deur die werkers in kennis te stel dat hulle voortaan die masjinerie vir sy rekening sal gebruik). S moet ook die bedoeling (1) om eiendomsreg van X en Y te verkry gehad het ten einde te voldoen aan die wilselement van beheer.

S het nie voldoen aan fisiese element van beheer van die saak nie en het dus nie eiendomsreg by wyse van lewering met die lang hand (traditio longa manu) verkry nie. S sal dus nie slaag met die rei vindicatio nie. (1)

Question 7 pg 148 / Vraag 7 bl 143

ANSWER:

Attornment can be defined as a derivative method (1) of transferring ownership where the transferor, (1/2) the transferee (1/2) and a third party (who is in control of the thing and will continue to control it), (1) agree (1) that the third party will control (1) the thing on behalf of the transferee (1) as owner. There are two requirements for attornment to take place, namely:

- (i) A tripartite agreement (1) between the transferor, the transferee and the third party holder in terms of which the holder will continue to hold for the transferee and no longer for the transferor. (1) All three parties therefore consent to the transfer of ownership.
- (ii) The holder should exercise physical control at the moment of transfer (1) from the transferor to the transferee (*Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* (1) 1980 (3) SA (917 (A) 922—924)).

In *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* (1) (1972 (1) SA 270 (A)) the law relating to attornment was altered and a method of transfer of ownership analogous to attornment was recognized.(1) By this method the third-party holder makes a prior declaration of intention,(1) to the effect that he/she will hold the thing on behalf of a future transferee to whom the owner may transfer ownership. This declaration can take place at a stage when transfer to the transferee has not yet taken place and may, possibly, never take place.(1) When transfer eventually takes place (by means of cession and notice to the transferee), the third party holder may even no longer be in control of the thing. (1)
(Maximum 10 marks)

ANTWOORD:

Attornment kan gedefinieer word as 'n afgeleide wyse (1) van eiendomsoordrag waar die oordraer (½), die oordragnemer (½) en 'n derde party (wat in beheer van die saak is en sal aanhou om beheer daaroor uit te oefen) (1) ooreenstem (1) dat die derde party die saak namens die oordragnemer (1) as eienaar sal beheer.(1) Daar moet aan die volgende twee vereistes voldoen word voordat attornment kan plaasvind:

- (i) *Daar moet 'n drieledige ooreenkoms (1) wees tussen die oordraer, die oordragnemer en 'n derdepartyhouer ingevolge waarvan die houer sal aanhou om beheer oor die saak uit te oefen namens die oordragnemer, maar nie meer namens die oordraer nie (1) - al drie partye stem dus toe tot eiendomsoordrag.*
- (ii) *Die houer moet fisiese beheer uitoefen van die oomblik van oordrag (1) van die oordraer na die oordragnemer (Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein (1) 1980 (3) (SA 917 (A) 922—924)).*

*In Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel (1) (1972 (1) SA 270 (A)) is die reg ten aansien van attornment verander, en is 'n metode van eiendomsoordrag wat vergelykbaar met attornment is, erken.(1) Volgens hierdie metode maak die derdepartyhouer vooraf 'n verklaring (1) van bedoeling tot die effek dat hy/sy fisiese beheer oor die saak sal uitoefen namens 'n toekomstige oordragnemer aan wie die eienaar eiendomsreg mag oordra. Hierdie verklaring kan gemaak word in 'n stadium waar oordrag na die oordragnemer nog nie plaasgevind het nie, en dit dalk nooit sal plaasvind nie.(1) Dit is moontlik dat oordrag kan plaasvind (by wyse van sessie en kennisgewing aan die oordragnemer) wanneer die derde party dalk nie meer in beheer van die saak is nie. (1)
(Maksimum 10 punte)*

Question 4 pg 143 / Vraag 4 bl 143

ANSWER:

In order to succeed with the *rei vindicatio*, Y and Y must prove that they are the owners of the machinery.(1) The facts of the question are similar to the facts in *Vasco Dry Cleaners v Twycross* (1) (1979 (1) SA 603 (A)). The question here is whether X and Y became owners through *constitutum*



possessorium, because, as the facts reflect, they never took physical control of the machinery.(1)

It has been held in the *Vasco* case that *constitutum possessorium* is the opposite of *traditio brevi manu* (delivery with the short hand). In the case of *constitutum possessorium* the transferor retains physical control of the thing to be transferred. Since this form of delivery creates the possibility of fraud, any assertion that ownership of a movable has passed upon a mere change of mental attitude is carefully scrutinised by the courts.(1)

It has further been held that the real object of the transaction between S and X and Y was not a sale to X and Y which would have entitled them to become owners of the machinery on delivery, but rather that a pledge should be created in their favour.(1) The transaction (sale) between S and X and Y was referred to as a simulated transaction, because it did not reflect the true intention of the parties.(1)

Furthermore, the court held that no pledge was created since *constitutum possessorium* does not constitute delivery for purposes of creating a valid pledge, because the pledged thing remains with the pledgor.(1) This creates ample opportunity for fraud.

The only effective method of constituting a pledge is by an agreement and transfer of control by delivery of the thing to be pledged to the pledgee.(1)

S and X and Y therefore clothed their agreement in the guise of a sale and re-sale. However, the court decided that the true substance of the contract was one of pledge. Therefore X and Y cannot claim the machinery back, because they are not the owners of the machinery.(1)

ANTWOORD:

Ten einde te slaag met die rei vindicatio moet X en Y bewys dat hulle die eienaars van die masjiene is. (1) Die feite in die vraag is soortgelyk aan die feite in Vasco Dry Cleaners v Twycross (1) (1979 (1) SA 603 (A)). Die vraag hier is of X en Y eienaars van die masjiene geword het deur constitutum possessorium, omrede hulle, soos aangedui in die feite, nooit fisiese beheer van die masjiene geneem het nie. (1)



In die Vasco-saak is beslis dat constitutum possessorium die teenoorgestelde van traditio brevi manu (lewering met die kort hand) is. In die geval van constitutum possessorium behou die oordraggewer fisiese beheer van die saak wat oorgedra word. Aangesien hierdie vorm van lewering geleentheid vir bedrog skep, word enige bewering dat die blote verandering van bedoeling eiendomsreëoordrag tot gevolg gehad het, deeglik deur die howe ondersoek.(1)

Daar word verder beslis dat die ware oogmerk van die ooreenkoms tussen S en X en Y nie was dat X en Y eienaars van die masjiene by wyse van 'n koop-ooreenkoms en constitutum possessorium sou word nie, maar eerder dat 'n pand gevestig moet word.(1) Die ooreenkoms (koop) tussen S en X en Y is na verwys as 'n gesimuleerde regshandeling omdat die ooreenkoms nie die partye se ware bedoeling weerspieël het nie.(1)

Verder beslis die hof dat 'n pand nie gevestig het nie, aangesien constitutum possessorium nie lewering met die doel om 'n pand te vestig, daarstel nie. Voorts bly die pandgewer ook in beheer van die pandsaak.(1) Die enigste effektiewe metode om 'n pand te vestig is deur 'n ooreenkoms en oordrag van die beheer van die pandsaak deur lewering deur die pandgewer aan die pandhouer.(1)

X en Y kan dus nie die masjiene opeis nie, aangesien hulle nie eienaars van die masjiene is nie.(1)

Question pg 150 / Vraag bl 150

ANSWER:

S did not become owner of the property (1) **because registration did not take place**. Ownership of **immovable property** (1) can only pass from X and Y to S if X and Y have the intention to transfer ownership to S (1) and if S has the intention to receive ownership (1) (real agreement) and **registration** (1) of the property in S's name takes place.



ANTWOORD:

S het nie eienaar van die grond geword nie,(1) omdat registrasie nog nie plaasgevind het nie. Eiendomsreg van 'n onroerende saak (1) kan slegs van X en Y aan S oorgedra word, indien X en Y die bedoeling het om eiendomsreg aan S oor te dra (1) en S die bedoeling het om eiendomsreg te ontvang (1) (saaklike ooreenkoms) en registrasie (1) van die onroerende saak, in S se naam, plaasvind.

Additional Question / Addisionele vraag

Distinguish between delivery with the short hand and *constitutum possessorium* and illustrate the difference between the two with reference to examples. (6)

Onderskei tussen lewering met die kort hand en constitutum possessorium en verduidelik die verskil tussen die twee aan die hand van voorbeelde. (6)

ANSWER:

In the case of delivery with the short hand no transfer (1) of physical control takes place, because the **transferee is already in control** (1) of the thing although not as owner of the thing.

For example if a transferee holds a thing as a lessee and thereafter purchases it; or if a transferee is a buyer in terms of an instalment sale agreement he/she acquires ownership by means of delivery with the short hand on payment of the last instalment. [1 mark for any example]

Constitutum possessorium takes place when the **transferor retains (1) physical control** over the thing in which he/she has agreed to transfer ownership to the transferee. Only the intention (1) towards the thing undergoes a change.

For example X buys a watch from a jeweller, but leaves it with the jeweller for cleaning. [1 mark for any similar example]

ANTWOORD:

By die sogenaamde "korthandmetode" vind geen oordrag (1) van fisiese beheer plaas nie, aangesien die **oordragnemer reeds in beheer** (1) van die saak is, alhoewel nie as eienaar nie. Die oordragnemer kan die saak byvoorbeeld as huurder hou, en dit daarna koop. Die oordragnemer kan ook 'n koper ingevolge die afbetalingstelsel wees, en by betaling van die laaste paaiement dan eiendomsreg verkry deur lewering met die kort hand. [1 punt vir enige voorbeeld]

By constitutum possessorium **behou (1) die oordraer fisiese beheer** oor die saak ten aansien waarvan hy/sy ooreengekom het om eiendomsreg aan die oordragnemer oor te dra. Dit is slegs die bedoeling (1) ten aansien van die saak wat verander. Byvoorbeeld, X koop 'n horlosie by 'n juwelier en laat dit by die juwelier om skoongemaak te word. [1 punt vir enige voorbeeld]