eiser gegee vir R23 696,82, synde die gedeelte van sy eis wat uit die basiese huurgeld bestaan het (sonder addisionele heffings), met ooreengekome gevolglike bevele oor rente en koste.

Na my mening was die geleerde Verhoorregter aan die einde van die verhoor in geen beter posisie om die dubbelsinnige kontrak uit te lê as na aanhoor van die betoë *in limine*.

Om die voorafgaande redes is ek van mening dat die appèl gehandhaaf moet word, en dat die vonnis van die Hof *a quo* tersyde gestel behoort te word (behalwe die vonnis aangaande die koste van 'n uitstel, waarteen geen appèl aangeteken is nie).

Die vraag wat nou oorweeg moet word gaan oor die bevel wat in plaas van die tersyde gestelde bevel gemaak behoort te word. Aan die een kant is die oorweging dat die eiser geen getuienis aangebied het ter stawing van die uitleg van die dubbelsinnige kontrak wat hy in sy besonderhede van vordering uiteengesit het. In die normale loop sou die bevel wat gevolglik gemaak moes gewees het, absolusie van die instansie met koste gewees het.

Daarteenoor bestaan daar die oorweging dat dit die verweerder was wat voorgestel het dat die uitleg van die kontrak *in limine* betoog en besleg moes word; dat die verweerder daardeur veroorsaak het dat die kontrak sonder getuienis uitgelê is, en dat die eiser gevolglik geen getuienis met betrekking tot die uitleg van die kontrak aangebied het nie. Op daardie benadering sou absolusie nie teenoor die eiser billik wees nie, en behoort die aangeleentheid na die Verhoorhof terugverwys te word vir aanhoor van sodanige verdere getuienis as wat die partye mag aanbied.

Na verdere oorweging kom dit my voor dat die verweerder se voorstel dat die uitleg van die kontrak *in limine* en sonder getuienis betoog word, nie as die enigste, en selfs nie as die belangrikste, oorsaak van die mislukking van die verhoor beskou behoort te word nie. Die eiser self het daarmee ingestem. Die eiser het selfs toegegee dat die verweerder se benadering meriete in gehad het en dat die kontrak gedeeltelik nietig was. Dit is 'n sterk aanduiding dat die eiser ook nie die dubbelsinnigheid van die kontrak ingesien het nie, en dat hy nie voorberei het om getuienis te lei ter stawing van 'n uitleg wat hom sy hele eis sou laat toekom nie. Indien hy wel voorbereid was om sulke getuienis aan te bied, kom dit my voor dat die uitspraak na die betoog *in limine* hom geensins verhoed het om met sodanige getuienis voort te gaan nie. Die punt *in limine* is van die hand gewys. Die eiser het self verkies om toe te gee dat sy kontrak gedeeltelik nietig was en om nie sy getuienis ter stawing van sy uitleg van die dubbelsinnighede in die kontrak aan te bied nie. Hy moet dus self verantwoordelikheid vir die mislukking van die verhoor aanvaar.

'n Verdere oorweging is dat die oudste gedeelte van die eiser se eis in Februarie 1985 opeisbaar geword het. Dit is dus nog nie deur verjaring uitgewis nie. Absolusie van die instansie sal gevolglik nie in die eiser se pad staan as hy 'n verdere poging wil aanwend om die afdwingbaarheid van sy dubbelsinnige kontrak te bewys en om enige verskuldigde bedrae van die verweerder te verhaal.

Na my mening is absolusie van die instansie, met koste, gevolglik die aangewese bevel.

Wat die koste van appèl betref het die verweerder wesenlike sukses behaal, al is dit op 'n grondslag wat hom aan 'n verdere eis blootstel.

Om die voorafgaande redes, en met alle eerbied vir die sienswyse van die meerderheid van die Hof, is die bevel wat ek geregverdig ag die volgende:

1. Die appèl word met koste (insluitende die koste van twee advokate) gehandhaaf; en paras 1, 2, 3, 4 en 5 van die vonnis van die Hof *a quo* word tersyde gestel.
2. Die vonnis van die Hof *a quo* word vervang met absolusie van die instansie, met koste, insluitende die koste van twee advokate.

Appellant se Prokureurs: *Hartman & Vennote*. Respondent se Prokureurs: *Van der Merwe, Du Toit & Fuchs*.

BARCLAYS WESTERN BANK LTD v ERNST

APPELLATE DIVISION

RABIE ACJ, JOUBERT JA, BOTHA JA, JACOBS JA and NESTADT JA

1987 August 21; September 22

Ownership—Movable property—Transfer of—By attornment—Re quirements of—Person who is to hold article on behalf of intended new owner must be in control thereof or have the right of control thereof when owner cedes his rights to intended new owner—Agreement of lease of vehicle ceded and discounted to appellant (a bank)—Master discounting agreement between the bank and trader providing that payment by bank to trader 'shall constitute an acceptance by (the bank) of the trader's offer to sell that agreement' (of lease)—Vehicle delivered by trader to lessee on day lease signed—Bank paying trader five days later—Cession accordingly taking place on date of such payment—Ownership of vehicle not passing by attornment to bank—Claim by bank for delivery of vehicle by respondent (who obtained it from lessee) failing.

In terms of an agreement of lease, signed on 21 May 1981, MK (a company, 'the trader') leased a vehicle to one Van Coller ('the lessee'). The lease was discounted by the trader with the appellant in terms of a master discounting agreement between the trader and the appellant. Clause 2.2 of the master agreement provided that the delivery by the trader to the appellant of the relevant agreement and other documents 'shall constitute an offer by the trader to the bank (the appellant), to sell and to cede to the bank . . . 2.2.1 all the trader's rights, title and interest into and under the agreement (the lease); 2.2.2 the ownership of the goods described therein . . .'. Clause 2.3 of the master agreement provided that the appellant 'shall in respect of each agreement delivered to it . . . either: . . ., or 2.3.2 pay to the trader the purchase 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'. Clause 15 provided that '(N)o variation of any of the terms of this agreement shall be of any force and effect unless in writing and signed by both parties'. Two days before the lease was signed, the relevant documents were sent by the trader to the appellant which drew up the lease and returned it to the trader for signature. On 21 May 1981 the lease was signed by the trader and the lessee, the vehicle was delivered to the lessee and the lessee handed the vehicle over to the respondent's husband. On 26 May 1981 the appellant sent the trader its cheque for the amount agreed upon between them as the price payable upon discounting of the lease. The appellant had subsequently instituted an action against the respondent (in whose name the vehicle had been registered) in a Provincial Division for delivery of the vehicle, alleging that it was the owner of the vehicle in that ownership had passed to it by attornment. The Provincial Division held that ownership had not passed by attornment and granted an order of absolution from the instance. In an appeal,

Held, that, to enable ownership to pass in a case such as the present, the law required that the person who was to hold the article concerned on behalf of the intended new owner had to be in control thereof (or at least have the right of control thereover) when the owner of the article ceded his rights in respect thereof to the intended new owner.

Held, further, that the lessee was not in possession of the vehicle on 26 May 1981 when the appellant had paid the trader in terms of clause 2.3.2 of the master discounting agreement in that he had allowed the respondent's husband to take possession of the vehicle on 21 May 1981.

Held, further, as to the appellant's contention that, despite the wording of clause 2.3.2, the cession had in fact occurred when the lease was signed and not when payment was made by appellant to the trader and that the appellant and the trader had by their conduct invested the master agreement with a new content, that such contention was untenable for the following reasons:

(a) there was no evidence that the appellant and the trader had agreed in writing to any variation of the terms of the master discounting agreement as required by clause 15 thereof and that it could not be argued therefore that the terms thereof had been varied;

(b) that the issuing and delivery of the documents by the trader to the appellant, and the appellant's preparation of the agreement of lease which was to be signed by the trader and the lessee, could not be said to afford evidence of a departure from the terms of the master agreement concerning the cession of the trader's rights to the appellant: they seemed to have been merely practical and administrative measures relating to the preparation of documents;

(c) that the appellant's witnesses (the sales manager of the trader and an employee of the appellant) had not testified that their conduct constituted a departure from the terms of the master agreement, and 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 agreement; and

(d) that, according to the evidence, which was in conflict with the appellant's contention, 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, ie on 26 May 1981.

Held, accordingly, that the Provincial Division's decision was correct and that the appeal should be dismissed.

The decision in the Transvaal Provincial Division in *Barclays Western Bank Ltd v Ernst* confirmed.

Appeal from a decision in the Transvaal Provincial Division (Flemming J). The facts appear from the judgment of Rabie ACJ.

W G Muller SC (with him *P Boruchowitz*) for the appellant: The 'vehicle invoice' made out by Midway Killarney ('the trader') on 19 May 1981 constituted the act of cession. The appellant (the cessionary) and the trader followed a course of conduct which evolved since February 1981 when they concluded the master discounting agreement. Thereafter, the

duly completed lease agreement was signed by Van Coller (the lessee), who paid the initial amount due in terms thereof on 19 May 1981. After signature of the agreement of lease, the vehicle was pointed out to Van Coller and the keys thereof handed to him—on 19 May 1981. The handing over of the keys constituted symbolical delivery of the vehicle to Van Coller. Thereafter, the keys were made available to respondent's husband (Ernst), who took possession of the vehicle (on 19 May 1981). The handing over by Van Coller of the keys to respondent's husband does not derogate from Van Coller's acceptance of applicant as owner. Whatever fraud he perpetrated on Ernst and his wife, and whatever he said to them, does not alter the legal position. Whatever the intentions of Mr and Mrs Ernst were, Van Coller did not intend to hold for Mrs Ernst as owner, or to make her 'owner'. On 26 May 1981, appellant effected payment to the trader of the discount value. This inevitable delay in 'processing' the discounted agreement and issuing the cheque to the trader does not derogate from the cession on 19 May 1981. As the agreement with Van Coller was one of *lease*, he did not become owner and did not intend to make Mrs Ernst an owner. Van Coller obtained possession and control of the vehicle by receiving the keys from the trader. Thereafter, the vehicle was handed over to the possession of Ernst by Van Coller on 19 May 1981, and the registration of the vehicle (in respondent's name) took place probably elsewhere than in Johannesburg on or about 22 May 1981. Such registration does not effect, or vest, ownership in Ernst or his wife. *S v Levitt* 1976 (3) SA 476 (A) at 482C; *Akoojee v Sibanyoni* 1976 (3) SA 440 (T) at 442C–D; *Nkosana v Rondalia Assurance Corporation of SA Ltd and Others* 1976 (4) SA 67 (T) at 69F–G. Payment in respect of the trader's rights to the appellant took place on 26 May 1981. This was a mere formality because appellant *approved* the transaction on 19 May 1981. The cession and attornment occurred on 19 May 1981 with the approval of the whole transaction by appellant (and agreement with the trader as to discount value) and Van Coller received control and possession of the vehicle *pari passu* (simultaneously) on that day.

At the date of the conclusion of the agreement of lease on 19 May 1981 between the trader 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: all these elements coincided on 19 May 1981. The 'saaklike ooreenkoms' and '*traditio*' coincided. As at the date of the appellant's approval and conclusion of the agreement of lease, on 19 May 1981: (1) the appellant had verbally approved the transaction on 19 May 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; (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; (3) Van Coller, who received possession on 19 May 1981, agreed to hold for appellant and to acknowledge appellant as owner. Despite the wording of clause 2.3.2 of the master discounting agreement, the cession in fact occurred at the time of the conclusion of the agreement of lease on 19 May 1981 and not when payment was made by the appellant

to the trader on 26 May 1981. By their conduct, and for practical reasons, the two parties could invest the master agreement with a new content. *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 516B. Cession is an act of transfer accomplished by means of an agreement of transfer between the cedent and cessionary. Cession need not occur in writing. As the transaction was one of lease, the intentions of the trader and appellant only were decisive. They both intended transfer of ownership. At this crucial time, Van Coller received possession and agreed to hold on behalf of appellant. This completed transfer of ownership by attornment. For the nature and requirements of cession, see *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 767A and *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 331F–H. The trader and the appellant could waive the provisions of the master agreement and effect cession orally on 19 May 1981. The master agreement does not require written or formal cession. The effect of clause 2.3.2 was merely to delay, until payment, the efficacy of the completed cession. 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 Coller was in control of the vehicle (as he was) at the date of such cession, namely 19 May 1981. The evidence discloses that, immediately after signature of the agreement of lease on 19 May 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 the appellant as owner.

Alternatively, the evidence discloses that the appellant and the trader verbally and/or by their conduct waived the implied or tacit term of the master agreement that cession takes place upon payment of the discount price by the appellant to the trader. The master discount agreement is not by law required to be in writing and does not contain a no-waiver clause. Accordingly, the appellant and the trader were at liberty to waive the provisions of clause 2.3.2 of the master agreement by their conduct: it affected only their legal relationship. See *Venter v Birchholtz* 1972 (1) SA 276 (A) at 286F; *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704F–H and *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 278A–B. In terms of the agreement of lease, Van Coller agreed to recognise the appellant as cessionary of the trader's rights and as the new owner of the vehicle, and to hold the said vehicle as bailee on behalf of the appellant on 19 May 1981. See *Hearn & Co (Pty) Ltd v Bleiman* 1950 (3) SA 617 (C) at 625H, 626A. In *Caledon & Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel en Andere* 1972 (1) SA 270 (A) at 274H–275B it was laid down that, for purposes of transfer of ownership by way of attornment, it was sufficient for the possessor (Van Coller), *in advance*, to consent to hold on behalf of the acquirer (appellant), if and when cession takes place. Here such acknowledgment occurred when Van Coller signed the lease. He received possession of the vehicle only minutes later. *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 924A–925A. Accordingly, the trial Court should have

found that ownership of the motor vehicle was acquired by the appellant from the trader by way of attornment on 19 May 1981 and *before* payment was effected on 26 May 1981.

H van R Woudstra for the respondent: Die *onus* is deurgaans op die appellant om eienaarskap van die motorvoertuig te bewys. Om eienaarskap te bewys moet appellant die Hof oortuig dat lewering plaasgevind het tesame met 'n bedoeling aan die kant van die oordraer om eiendomsreg aan die oordragontvanger oor te dra. Sien *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 op 398. Die Hof *a quo* is korrek met die bevinding dat die enigste praktiese uitvoerbare metode om eiendomsreg oor te dra aan die appellant in die gegewe geval, by wyse van 'attornment' plaasvind. Die appellant steun hoofsaaklik op twee ooreenkomste, naamlik die hoofverdiskonteringsooreenkoms (bew E) gesluit tussen Midway Killarney (Pty) Ltd (hierna verwys as 'Midway') en die appellant, en die huurkontrak (bew D) gesluit tussen Midway en P E van Coller. Na ondertekening van die huurooreenkoms is dit aan die verteenwoordiger van die appellant oorhandig. Stein getuig, na aanleiding van klousule 2.2 van bew E, dat die lewering van die dokumente waarna verwys word in klousule 2.1 van bew E, naamlik '(the) documents forming the subject-matter of the sale or the lease', 'n aanbod daarstel aan die appellant om al die regte van Midway in die ooreenkoms te verkoop en te sedeer aan die appellant. Stein getuig vervolgens dat die betrokke dokumente aan die bank gelewer is en dat Midway 'n paar dae later betaling ontvang het. Stein getuig verder dat ná betaling ontvang is deur die bank, het Midway geen verdere belangstelling in die aangeleentheid gehad nie. In die lig van die appellant se eie getuienis dat appellant en Midway deurgaans die bepalings van bew E nagekom het; dat die lewering van die dokumente aan die appellant tussen 19 en 22 Mei 1981 'n aanbod was aan die appellant deur Midway, soos bedoel in para 2.2 van bew E; dat betaling van die tjek deur appellant aan Midway op 26 Mei 1981 neerkom op die aanname deur die appellant van Midway se aanbod om die ooreenkoms te verkoop, soos bedoel in klousule 2.3.2 van bew E, daar hoegenaamd geen getuienis bestaan dat appellant óf Midway op enige stadium, hetsy uitdruklik of stilswyend, afstand gedoen het van die bepalings van hulle ooreenkoms. Daar is geen getuienis aangebied tot die effek dat dit ooit die bedoeling van òf die appellant òf Midway was, dat die lewering van die faktuur, bew C, effektiewelik 'n sessie sou wees van Midway se regte ingevolge die huurooreenkoms aan die appellant. Op die waarskynlikhede was die huurooreenkoms op daardie stadium nog nie eers geteken nie. Sessie het inderdaad plaasgevind op 26 Mei 1981. Voor sessie plaasgevind het, was Midway steeds die eienaar van die voertuig en eiendomsreg kon eers oorgaan op 26 Mei 1981. Volgens Stein se getuienis het Van Coller die sleutels van die voertuig oorhandig aan die plaasbestuurder (Ernst) en het daardie persoon die voertuig verwyder. Daar is geen getuienis dat Van Coller ooit weer in besit van die voertuig was nie. Dit is gevolglik onbetwisbaar dat Van Coller, indien hy *detentio* gehad het van die voertuig op 21 Mei 1981, afstand daarvan gedoen het ten gunste van Ernst en dat hy dan nie op datum van sessie, naamlik 26 Mei

1981, *detentio* of die reg op *detentio* gehad het nie. Inteendeel, na aanleiding van Ernst se getuienis, het Van Coller nooit die bedoeling gehad om *detentio* ten aansien van die betrokke voertuig te hê nie.

Van Coller, as die huurder van die voertuig, moes in besit van die voertuig gewees het op datum van die sessie, naamlik op 26 Mei 1981. Die belangrikheid van effektiewe besit is beklemtoon in die sake van *Heydenrich v Saker en 'n Ander* 17 SC 73 op 77 en *Meintjes v Wilson* 1927 OPD 183 op 189. In die saak van *Hearn & Co (Pty) Ltd v Bleiman* 1950 (3) SA 617 (K) is bevind dat dit noodsaaklik is vir die werking van 'n 'attornment' dat die derde *detentio* van die artikel moet hê, of ten minste die reg van beheer daaroor moet hê ten tyde van die 'attornment'. Hierdie beginsel is aanvaar in *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) op 924D, waar bevind is dat die vereiste, naamlik dat die houer ten tyde van 'sessie' daadwerklik beheer moet uitoefen, steeds van krag is en dat daar nie daarvan afgewyk is in die saak van *Caledon & Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel en 'n Ander* 1972 (1) SA 270 (A). Die vereiste van *detentio* ten tyde van sessie om 'attornment' te bewerkstellig, is ook deur 'n aantal skrywers ondersteun. Sien in dié verband D S P Cronje 'Eiendomsoorgang en Verdiskontering' 1976 *THRHR* 245 op 249 en 256; Silberberg en Schoeman *The Law of Property* 2de uitg (1983) op 281; June Sinclair 1972 *Annual Survey of South African Law* op 178; C G van der Merwe en J Neethling 1973 *THRHR* op 91; H C J Flemming *Krediettransaksies* (1982) op 402 en 403; Diemont *The Law of Credit Agreements and Hire-Purchase in South Africa* 5de uitg op 228 n 42; en, in die algemeen, die artikel van I en L T C Harms in 1966 *THRHR* op 234 ev. Een van die vernaamste redes vir die vereiste van besit op die oomblik van oordrag, is die feit dat vóór oordrag die appellant bank nog geen regte *vis-à-vis* die motorhawe Midway verkry het nie. As Van Coller op die stadium tussen die aanbod en die aanname, dit wil sê tussen ongeveer 21 Mei 1981 en 26 Mei 1981, nie *detentio* gehad het nie, hy nooit die soort effektiewe beheer oor die voertuig gehad het wat tot 'n 'attornment' sou kon lei nie. Die Hof sal ook gevra word om te bevind dat daar in elk geval ook nie voldoen is aan die tweede vereiste om eiendomsreg te bewerkstellig nie, naamlik 'n bedoeling aan die kant van die oordraer (Van Coller) om eiendomsreg aan die appellant oor te dra. Sodanige bedoeling is ook nie deur die appellant bewys nie.

Muller SC in reply.

Cur adv vult.

Postea (September 22).

Rabie ACJ: 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 (hereinafter referred to as 'the vehicle') of 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 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', 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 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 determined by the bank and 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.'

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 in the appellant's employ. (Engelbrecht testified that she was employed as a 'business development officer'.) The application 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', ie 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, the trader had no further interest in the matter.

According to the agreement of lease Van Coller hired the vehicle from the trader. The 'principal debt including finance charges' which Van Coller had to pay in terms of the agreement was R8 958,24. The amount was payable in monthly 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 Coller's account with a bank in Cape Town. (The evidence shows that 12 instalments 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 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 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 affected by way of attornment. (As to what attornment involves, see eg *Hearn & Co (Pty) Ltd v Bleiman* 1950 (3) SA 617 (C) at 625C–G; *Caledon & Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel en Andere* 1972 (1) SA 270 (A) at 273A–C; *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein en 'n Ander* 1980 (3) SA 917 (A) at 923B–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 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 of 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, 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 May 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 As at the date of the appellant's approval and conclusion of the agreement of lease, on 19 May 1981:

7.2.1 The appellant had verbally approved the transaction on 19 May 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 May 1981, agreed to hold for appellant and to acknowledge appellant as owner. . . .

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 May 1981 and not when payment was made by the appellant to the trader on 26 May 1981. By their conduct, and for practical reasons, the two parties could invest the master agreement with a new content.

. . .

7.3.3 The trader and the appellant could waive the provisions of the master agreement and effect cession orally on 19 May 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 Coller was in control of the vehicle (as he was) at the date of such cession, namely 19 May 1981.

7.6 The evidence discloses that, immediately after signature of the agreement of lease on 19 May 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 Van Coller 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 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 para 7.5 of counsel's heads of argument, quoted above.) The concession was rightly made. To enable ownership 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 625H); *Air-Kel (Edms) h/a Merkel Motors v Bodenstein en 'n Ander* (*supra* at 924D–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 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 the transaction between the trader and Van Coller 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 Coller, 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 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 *SA Sentrale Ko-op Graanmaatskappy 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', ie 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 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 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 you to look at exh 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?—This 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 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, ie 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 aforegoing 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, 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.

Joubert JA, Botha JA, Jacobs JA and Nestadt JA concurred.

Appellant's Attorneys: *Hack, Stupel & Ross*, Pretoria; *Israel & Sackstein*, Bloemfontein. Respondent's Attorneys: *Haasbroek & Boezaart*, Pretoria; *Symington & De Kok*, Bloemfontein.

GUARDIAN NATIONAL INSURANCE CO LTD v WEYERS

APPELLATE DIVISION

RABIE ACJ, CORBETT JA, BOTHA JA, NESTADT JA and BOSHOFF AJA

1987 August 17; September 29

Insurance—Compulsory Motor Vehicle Insurance Act 56 of 1972—Claim under prescribed—Application for relief in terms of s 24(2)(a)*(i)—'Special circumstances' as required by s 24(2)*(a)*(ii)—What constitutes—Central requirement for section to operate is that failure to serve MVA 13 or summons must not be due to* culpa *or blameworthy conduct of third party or person instructed to act on his behalf—Where an attorney employed, a higher standard required than a lay person—Incorrect information furnished to respondent's attorney as expired MVA sticker displayed on windscreen and not current token—Police report giving wrong information—Attorney sending MVA 13 form to S company on day before two-year prescriptive period expired—Appellant, and not the S company, the current insurer—Court a* quo *finding this constituted special circumstances as envisaged by the Act—Reversed on appeal—In not checking veracity of report and sending MVA 13 when no more time left if information wrong, attorney taking unwarranted risk—Attorney negligent and special circumstances not established.*

The central requirement for s 24(1)*(a)* of the Compulsory Motor Vehicle Insurance Act 56 of 1972 to operate is that the failure to serve the MVA 13 form (or summons) must