VASCO DRY CLEANERS v TWYCROSS 1979 (1) SA 603 (A)

Citation 1979 (1) SA 603 (A)

Court Appellate Division

Judge Rumpff CJ, Rabie JA, Corbett JA, Kotzé JA and Hoexter AJA

Heard August 28, 1978

Judgment November 16, 1978

Annotations

Flynote : Sleutelwoorde

Contract - Interpretation of - True nature of - Sale or pledge - Simulated contract alleged by defendant - Onus of proof on plaintiff - But onus on defendant to rebut prima facie case raised by production of contract admittedly signed by parties thereto.

Sale - Movables - Ownership in - When it passes - Vindicatory claim by purported purchaser of movables subsequently sold by seller to defendant - Defendant averring contract between plaintiff and seller really one of pledge - Onus of proving passing of ownership on plaintiff - But onus resting on defendant to rebut prima facie case raised by production of contract signed by seller and plaintiff - Circumstances showing that such prima facie *case amply displaced - Plaintiff failing to discharge* onus of proving contract one of sale and that he was owner.

Pledge - How constituted - When valid - Essentials of - Pledged article remaining with pledgor to be used by him for his own benefit - No room for application of process of constitutum possessorium in creation of valid pledge.

Pledge - Sale or pledge - Vindicatory claim by purported purchaser of movables subsequently sold by seller to defendant - Defendant averring contract between plaintiff and seller really one of pledge - Onus of proving passing of ownership on plaintiff - But onus resting on defendant to rebut prima facie case raised by production of contract signed by seller and plaintiff - Circumstances showing that such prima facie case amply displaced - Plaintiff failing to discharge onus of proving contract one of sale and that ownership had passed.

Headnote : Kopnota

In our law a contract of sale gives rise simply to personal rights, and conclusion of the contract itself does not, without more, result in the transfer of real rights in the thing sold to the buyer. For the transfer of real rights pursuant to a contract of sale our law requires the observance of further formalities. For ownership to pass in the case of a movable it is necessary that there should take place some form of delivery, whether actual or constructive, of the subject-matter of the sale.

The only effective method of constituting a pledge is by agreement accompanied by delivery

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of possession of the article to the pledgee. Without such delivery of possession, while the pledge may be good as between the parties, the pledgee will lose his preference if a third party *bona fide* obtains real rights in the article pledged, or if a judgment creditor of the pledgor attaches the article pledged; or, should the pledgor be sequestrated, in a *concursus creditorum*. Essential not only to the valid constitution of a pledge but also to its effective retention by the pledgee is natural possession of the article pledged by the pledgee. From this it follows that although constructive delivery in the form of *traditio brevi manu* may suffice - subject to clear evidence that the transaction is *bona fide* - to constitute a valid pledge, there is no room for the application of the process of *constitutum possessorium* in the creation of a valid pledge in a situation in which the pledged article is to remain with the pledgor, to be used by the pledgor for his own benefit.

During 1967 one C sold his dry cleaning business, called Vasco Dry Cleaners, to A C (Pty) Ltd. It was a term of the contract of sale that, in respect of the dry cleaning machinery included in the sale, the passing of ownership would be suspended

until the purchase price had been paid in full. At the end of June 1972 the balance still due to C was R4 650. One D, who was in control of A C (Pty) Ltd, was in financial difficulties and, in order to avoid the repossession of the machinery by C, sought and obtained financial assistance from the respondent, his brother-in-law. A C (Pty) Ltd and respondent accordingly entered into a written agreement on 28 June 1972 in terms of which respondent was to pay the balance still due to C in consideration of which the ownership in the machinery would pass to respondent who agreed to sell the machinery to A C (Pty) Ltd for a purchase price of R4 700 payable on or before 30 June 1973. Ownership in the machinery would not pass from respondent to A C (Pty) Ltd until the purchase price had been paid in full. Should the purchase price not be paid, respondent would be entitled to obtain the return and repossession of the machinery. Plaintiff thereupon paid the balance of R4 650 still due to C. In November 1972 A C (Pty) Ltd sold the business, including the machinery, to appellant and in the deed of sale A C (Pty) Ltd warranted that it was the owner of the machinery. Appellant was not aware of the contract between respondent and A C (Pty) Ltd. As A C (Pty) Ltd failed to pay the respondent the sum of R4 700, respondent instituted a vindicatory action in a Local Division against the appellant. The appellant denied that respondent was the owner of the machinery, contending that, although the financial arrangements between respondent and A C (Pty) Ltd had been cast in the mould of a sale and a re-sale, the outward form of the contract was misleading and that the true substance of the contract was one of pledge rather than one of sale and re-sale. Appellant invoked the maxim *plus valet quod agitur quam quod simulate concipitur*. The trial Court held that respondent had discharged the *onus* of proving his ownership and granted judgment in his favour. In an appeal, the Appellate Division, in determining whether the contract between respondent and A C (Pty) Ltd was one of pledge or sale and re-sale, had regard to the cumulative effect of the following features revealed by the evidence: (*a*) that D did not wish

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to dispose of the machinery; (*b*) that respondent did not require the machinery; (*c*) that D required financial accommodation which respondent was to advance temporarily against security of the machinery and that this was the real object of the arrangement, ie a secured loan to D; (*d*) that the purchase price was not a serious one and that it was likely that D considered the machinery to be worth far more than such price; (*e*) that the contract was silent as to the means whereby A C (Pty) Ltd would effect transfer of ownership to respondent - the only process by which it could be effected was *constitutum possessorium*, a process which could have no application where a pledged article was to remain with the pledgor to be used by him for his own benefit; and (*f*) that D subsequently warranted to appellant that A C (Pty) Ltd was the owner of the machinery.

Held, that the question to be decided was not so much whether, if the contract were a genuine agreement of sale, transfer of ownership of the machinery could be effected by means of a *constitutum possessorium*, but rather whether, having regard to all the attendant circumstances, the true transaction between respondent and A C (Pty) Ltd was one of sale or pledge.

Held, further, since respondent's action was a vindicatory one, that the *onus* of proving his ownership lay with the respondent, but, since the contract purported to be one in terms whereof, *inter alia*, A C (Pty) Ltd sold the machinery to respondent, the appellant, who asserted that the contract was really a pledge, had the burden of rebutting the *prima facie* case of respondent resting on the production of the contract admittedly signed by respondent and D on behalf of A C (Pty) Ltd.

Held, further, on the facts, that it was doubtful whether the respondent really intended to acquire ownership in the machinery.

Held, further, even assuming respondent had such an intention, that, having regard to the cumulative effect of features (*a*) to (*f*) above, the *prima facie* case raised by proof of a document in the form of a contract of sale between respondent and A C (Pty) Ltd was amply displaced thereby.

Held, accordingly, that the respondent had not discharged the overall burdent of proof which rested upon him and that the trial Court should have ordered absolution from the instance.

The decision in the Witwatersrand Local Division in *Twycross v Vasco Dry Cleaners*, reversed.

1979 (1) SA p605

Case Information

Appeal from a decision in the Witwatersrand Local Division (TRENGOVE J). The facts appear from the judgment of HOEXTER AJA.

S A Rosenzweig for the appellant: On the facts, the respondent had failed to discharge the

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onus that it was the intention of both Air Capricorn and himself to enter into a genuine transaction of purchase and re-sale. Respondent failed to discharge the *onus* of proving that it was the intention of both the said Air Capricorn and himself to pass ownership to him of the said machinery and equipment. The agreement was to provide a form of security for the loan made by the respondent to Air Capricorn. The effect of the agreement was to dress up this transaction to take the form of a sale in order to achieve a pledge of the machinery and equipment without depriving Air Capricorn of the use and possession thereof. None of the elements of a genuine transaction of purchase and sale were present. The element of delivery, which is necessary in order to pass ownership, was entirely lacking. In this regard, the Judge *a quo* held that the mode by which delivery had taken place in this case was by virtue of a *constitutum possessorium*. See *Goldinger's Trustee v Whitelaw and Son* 1917 AD at 84. It was improbable, having regard to the evidence as to value, that Air Capricorn would have been prepared to transfer ownership in terms of a genuine sale of the machinery and equipment when all it required was a loan of money in an amount which bore no resemblance on the respondent's own evidence to the true value of the machinery and equipment. On his own evidence Air Capricorn (through Duff) considered the machinery and equipment to be worth more than the so-called purchase price. Cf *Zandberg v Van Zyl* 1910 AD 302. The true nature of the transaction was accordingly a money lending transaction coupled with the provision of security. To speak of the giving of ownership as security for a money lending transaction constitutes a contradiction in terms. As to the effect of a *pactum commissorium*, see Wille *The Law of Mortgage and Pledge in South Africa* 2nd ed at 79 - 80. See also *Voet* 20.1.25; *National Bank v Cohen's Trustee* 1911 AD at 242; *Mapenduka v Ashington* 1919 AD 343. Whenever one has to deal with an allegation that ownership vests in someone other than the person in possession and who has apparent unfettered control over the object in question, the Courts should exercise the utmost circumspection in assessing the claim by another person that he is nevertheless the owner thereof. This appears to be the approach taken in cases such as *Zandberg v Van Zyl* (*supra*). Accordingly the evidence of the respondent as to his intention is not sufficient material upon which to have assessed the correctness of his assertion that Air Capricorn intended ownership to pass to him by way of a *constitutum possessorium*. As the intention of both the transferor and transferee are the vital factors in regard both to the passing of ownership in general (see *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369) and more particularly so where *constitutum possessorium* is relied upon as the alleged mode of delivery (see *Zandberg v Van Zyl* (*supra*); *Goldinger's Trustee v Whitelaw and Son* (*supra*); *Myat v Mall* 1959 (3) SA at 813; *Boland Bank Bpk v Joseph and Another* 1977 (2) SA at 88). Duff should have been called by the respondent on whose assertion in an agreement in a suspect transaction he in fact relied. An inference should have been drawn against the respondent for his failure to call his own brother-in-law.

It is not possible as a matter of law to pass ownership (meaning full *dominium*) for the

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purpose of securing an indebtedness. If ownership as such has been passed pursuant to a valid agreement of sale, there would be no need to talk about security at all. Moreover, in the case of a transaction in *securitatem debiti*, the creditor has the right to execute against the debtor's property (especially the security given) in the event of default by the debtor. If it were possible to pass ownership "as security" the creditor would be executing against his own property in realising such security. Furthermore, normally the debtor is entitled to receive the benefit of the proceeds realised as a result of such execution over and above the amount of his indebtedness. This would not occur if the giving of ownership "as security" were permissible. Finally, if the Court were to uphold a transaction in which the giving of ownership "as security" were permissible, an unconscionable penalty might well be sanctioned as also an effective evasion of the provisions of the Limitation and Disclosure of Finance Charges Act 73 of 1968. Cf *S v H Friedman Motors (Pty) Ltd and Another* 1972 (3) SA 421.

P E Streicher for the respondent: Alhoewel die woorde wat in 'n skriftelike ooreenkoms gebruik word dié is wat in 'n koopooreenkoms gebruik word, mag dit wees dat die wese van die ooreenkoms tussen die partye soos uitgedruk in die skriftelike ooreenkoms, nie 'n koopooreenkoms is nie maar 'n ander transaksie. In so 'n geval sal 'n hof gevolg gee aan die werklike transaksie tussen die partye en nie die transaksie wat die vorm daarvan voorgee te wees nie. Sien *Zandberg v Van Zyl* 1910 AD te 309. In die skriftelike ooreenkoms verskyn al die *essentialia* van eerstens 'n koopooreenkoms ingevolge waarvan die respondent die masjinerie van Air Capricorn (Edms) Bpk koop en tweedens 'n koopooreenkoms ingevolge waarvan respondent die masjinerie herverkoop aan Air Capricorn (Edms) Bpk onderhewig aan die voorwaarde dat eiendomsreg eers oorgaan nadat die koopprys betaal is. Die skriftelike ooreenkoms bevat geen bepaling op grond waarvan geargumenteer kan word dat die wese van die transaksie tussen die partye iets anders as die voormelde kooptransaksies is nie en dit word ook nie deur die appellant betoog dat dit die geval is nie. Indien die appellant nie erken het dat die respondent en Air Capricorn (Edms) Bpk die bedoeling gehad het om hulle te verbind teenoor mekaar ooreenkomstig die strekking van die skriftelike ooreenkoms nie, sou hy wel by wyse van mondelinge getuienis kon aanvoer dat die werklike ooreenkoms tussen die partye iets anders is as in die skriftelike ooreenkoms weergegee. Sien *Cohen v Commissioner for Inland Revenue and Another* 1948 (4) SA te 624. Weer eens sal 'n hof dan gevolg gee aan die werklike en nie die voorgegewe transaksie tussen die partye nie. *Prima facie* moet vermoed word dat 'n transaksie is wat dit voorgee om te wees en die bewyslas is op hom wat beweer dat dit iets anders is om dit te bewys. *Zandberg v Van Zyl* 1910 AD te 314. Wat die appellant dus moes bewys was "that there is a real intention, definitely ascertainable, which differs from the simulated intention". Sien *Zandberg-* saak *supra* te 309. As die partye werklik bedoel het dat die skriftelike ooreenkoms op hulle bindend moes wees ooreenkomstig sy strekking, dan sal 'n hof gevolg gee aan die terme van die skriftelike ooreenkoms. Sien *Zandberg-* saak *supra; Randles, Brothers and Hudson Ltd v Commissioner of Customs and Excise*

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1941 AD te 395. Die feit dat die respondent en Air Capricorn (Edms) Bpk die skriftelike ooreenkoms aangegaan het om sodoende sekuriteit te verkry ten opsigte van geld wat die respondent tot die beskikking van Air Capricorn (Edms) Bpk wou stel, of die feit dat dieselfde resultaat op 'n ander wyse bereik kon word, is irrelevant as die partye werklik bedoel het dat die regsverhouding tussen hulle moes wees soos uiteengesit in die skriftelike ooreenkoms. Sien *Zandberg-* saak *supra; Commissioner of Customs and Excise-* saak *supra; Ralph Brothers v Hurry's Insolvent Estate* 1911 WPA te 25; *S v Friedman Motors (Pty) Ltd and Another* 1972 (1) SA te 80G.

Die respondent voer aan dat lewering geskied het by wyse van *constitutum possessorium*. Die vereistes vir hierdie vorm van lewering is opgesom deur SOLOMON AR in *Goldinger's Trustee v Whitelaw and Son* 1917 AD te 84.

Rosenzweig in repliek.

Cur adv vult.

Postea (November 16).

Judgment

HOEXTER AJA: This is an appeal from a judgment and an order granted in the Witwatersrand Local Division in a vindicatory action in respect of movables. The appellant (defendant in the Court below) was in possession of certain movable machinery ownership wherein was claimed by the respondent (plaintiff in the action). The trial Court came to the conclusion that the plaintiff had discharged the *onus* of proving his ownership of the machinery and that he was therefore entitled to delivery thereof. Accordingly, judgment was granted in favour of the plaintiff with costs. Against the whole of the above order the defendant appeals to this Court.

The main facts of the matter may be outlined as follows. For some five or six years a certain Basil Carides conducted at 99 Commissioner Street in Kempton Park a drycleaning business called Vasco Dry Cleaners. The business was carried on in premises belonging to one Peter Carides but the business itself belonged to Basil Carides. Basil Carides had bought the machinery necessary for the business for cash and he was the owner of such machinery. In 1967 or 1968 Basil Carides sold the business to Air Capricorn (Pty) Ltd, to which company I shall refer as "Air Capricorn". It was a term of the contract of sale that in respect of the machinery included therein passing of ownership from Basil Carides to Air Capricorn would be suspended until the full balance of the purchase price had been paid by Air Capricorn to the seller. At the end of June 1972 and in respect of the balance of the purchase price there remained due and owing by Air Capricorn to Basil Carides the sum of

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R4 650. The controller of Air Capricorn was a man called Duff. Duff was in financial difficulties and, fearing that Basil Carides might seek to regain possession of the machinery whereof Carides was still the owner, Duff sought and obtained financial assistance from the plaintiff who was his brother-in-law.

The arrangements concluded between Duff and the plaintiff were cast in the form of a written memorandum of agreement between the plaintiff and Air Capricorn, to which agreement I shall refer as "the contract".

The contract was signed on 28 June 1972 at Nelspruit by the plaintiff and Duff, the latter acting on behalf of Air Capricorn. In the contract reference is made to the plaintiff as "Twycross" and to Air Cparicorn as "the said company". The preamble to the contract recites certain facts relating to the purchase of Vasco Dry Cleaners by Air Capricorn from Basil Carides and then proceeds to say:

"And whereas in terms of clause 7 of the deed of sale entered into between the said company and the said Carides it was specifically agreed that until such time as the full balance of the purchase price in terms of that agreement had been paid to the seller the passing of ownership in the machinery and equipment (which are set out in annexure 'A' hereto) would remain suspended;

And whereas there is an amount not exceeding R4 700 due by the said company to the said Carides;

And whereas the said Twycross has agreed to purchase the machinery and equipment as set out in annexure 'A' hereto for the sum of R4 700;

And whereas the said Twycross has further agreed to re-sell the said machinery and equipment to the said company upon certain terms and conditions:

Now therefore it is agreed as follows:"

The body of the contract then follows. It consists of seven paragraphs whereof the first six are in the following terms:

"1. **The said Twycross shall pay to the said Carides the balance owing to the said Carides on the purchase price of the aforesaid business such sum not exceeding R4 700.**

2. **That in consideration of the aforegoing ownership in the machinery and equipment referred to in annexure 'A' hereto shall pass to the said Twycross.**

3. **The said Twycross does hereby agree to sell to the said company who hereby**

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agrees to purchase from the said Twycross the machinery and equipment referred to in annexure 'A' hereto for the sum of R4 700. Payment shall be made by the said company to the said Twycross in respect of the purchase price of the machinery and equipment aforesaid on or before 30 June 1973.

4. **It is specifically agreed that until such time as the purchase price of R4 700 aforesaid has been paid by the company to the said Twycross, ownership in the said machinery and equipment shall remain vested in the said Twycross and ownership thereof shall only pass to the said company upon all amounts due in terms hereof having been paid in full.**

5. **Should the company fail to effect payment of the purchase price aforesaid on due date, the said Twycross shall have the right to obtain the return and re-possession of the said machinery and equipment.**

6. **The said company undertakes to maintain the said machinery and equipment in good order and condition throughout the term of this agreement or any extension thereof at its own cost and expense."**

In addition the contract incorporated an undertaking of suretyship, signed by Duff, whereby the latter bound himself as surety and co-principal debtor in favour of the plaintiff for the due and punctual payment of all monies due by Air Capricorn to the plaintiff.

On 29 June 1972 the plaintiff's attorney sent a registered letter to Peter Carides informing the latter that the plaintiff had purchased the machinery in question (which was described in a schedule annexed to the letter) and that the plaintiff:

"is the owner thereof and that your tenant Air Capricorn (Pty) Ltd has the use thereof."

On 4 July 1972 Duff handed to Basil Carides a cheque drawn by the plaintiff for the sum of R4 650 representing the balance of the purchase price owing by Air Capricorn to Basil Carides. Basil Carides deposited the cheque which some days thereafter was duly paid.

After the conclusion of the contract on 28 June 1972 the machinery remained on the business premises of Vasco Dry Cleaners and Air Capricorn

carried on business as before. In particular Air Capricorn continued, free from any restriction, to make full use of the said machinery in the conduct of the business.

By a deed of sale concluded on 6 November 1972 Air Capricorn sold the business of Vasco Dry Cleaners as a going concern to one Butcher in his capacity as a trustee for a company yet to be registered. The deed of sale was signed by Duff on behalf of Air Capricorn and by

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Butcher in his capacity aforementioned. The sale included the machinery used in the business. Butcher was quite unaware of the contract concluded between the plaintiff and Air Capricorn. In terms of para 23 of the deed of sale Air Capricorn warranted that it

"is the owner of all the equipment in the said business and that no amounts whatsoever are outstanding in respect of the purchase price thereof."

Pursuant to the deed of sale Butcher took occupation of the premises of the business and possession of the machinery in question. In due course the defendant company was registered and it proceeded to carry on the business of Vasco Dry Cleaners.

Air Capricorn failed to pay the plaintiff the sum of R4 700, or any part thereof, either before or on 30 June 1973 or thereafter and, in due course, the plaintiff became aware of the fact that Air Capricorn had disposed of the business to the defendant and that the latter was in possession of the machinery in question. Hence the action by the plaintiff in the Court below, which was resisted by the defendant, and the present appeal.

In his particulars of claim the plaintiff alleged that he was the owner of the machinery in question and that the defendant was in possession thereof. In its plea the defendant admitted possession by it of the machinery but denied that the plaintiff was the owner thereof. The defendant further pleaded in the alternative that, even if the plaintiff were to establish ownership, the plaintiff was by his own conduct estopped from asserting such ownership against the defendant. The alternative plea was abandoned at the trial and at the end of the evidence the sole issue which fell for determination by the Court *a quo* was whether or not the plaintiff had established that he was the owner of the machinery.

In our law a contract of sale gives rise simply to personal rights, and conclusion of the contract itself does not, without more, result in the transfer of real rights in the thing sold to the buyer. For the transfer of real rights pursuant to a contract of sale our law requires the observance of further formalities. For ownership to pass in the case of a movable it is necessary that there should take place some form of delivery, whether actual or constructive, of the subject-matter of the sale.

In the present matter plaintiff's claim to ownership of the machinery rests upon a contention that Air Capricorn sold the machinery to him, and that pursuant to such sale Air Capricorn made delivery of the machinery to the plaintiff. Actual delivery involves the physical handing over of a thing by one person to another. Since Air Capricorn never gave the plaintiff actual delivery of the machinery the question in the case is whether transfer of ownership to the plaintiff was validly effected by some form of constructive delivery.

The wording of the contract concluded between the plaintiff and Air

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Capricorn on 28 June 1972 suggests that we are here concerned with two forms of constructive delivery in each of which a change of ownership is effected by a mere change of mental attitude. These two forms of constructive delivery are respectively *traditio brevi manu* (delivery by the short hand) and *constitutum possessorium. Traditio brevi manu* takes place where the thing to be delivered is already in the possession of the person to whom it is to be transferred. *Constitutum possessorium* is the converse of *traditio brevi manu.* In the case of *constitutum possessorium it is the transferor who retains physical control of the thing to be transferred. The plaintiff's case is that the contract comprehends the following juris ic acts:*

(1) A transfer of ownership in the machinery from Basil Carides to Air Capricorn upon payment of the plaintiff's cheque, by means of *traditio brevi manu.* Before payment of the cheque Air Capricorn, as hire-purchase buyer, was already in possession of the machinery. Upon payment of the cheque Air Capricorn continued to possess the machinery, but thenceforth as the owner thereof.

(2) Either simultaneously with, or immediately after, the transfer of ownership mentioned in (1) above there took place a further transfer of rights of ownership from Air Capricorn to the plaintiff. Such transfer took place pursuant to that part of the contract whereby Air Capricorn sold the machinery to the plaintiff, and was effected by means of a *constitutum possessorium.* In other words, Air Capricorn as transferor retained physical possession of the machinery but resolved thenceforth to possess it on behalf of the plaintiff as the owner thereof.

(3) Either simultaneously with, or immediately after, the sale of the machinery by Air Capricorn to the plaintiff mentioned in (2) above, there took place a re-sale of the machinery by the plaintiff to Air Capricorn. Such re-sale was at the same price, which was payable on or before 30 June 1973 and, subject to the condition that ownership in the machinery would pass to Air Capricorn only upon payment of the price by Air Capricorn to the plaintiff on or before 30 June 1973.

In general any assertion that ownership of a movable has passed upon a mere change of mental attitude is carefully scrutinised by the Courts. In the present case the defendant does not challenge the proposition that upon payment of the plaintiff's cheque Air Capricorn became the owner of the machinery, and indeed this is hardly open to challenge. The admitted facts permit of no doubt that the hire-purchase agreement concluded between Basil Carides and Air Capricorn in 1967 or 1968 was a genuine agreement of sale which truly contemplated the result that upon payment of the balance of the purchase price Air Capricorn would become the owner of the machinery. What the defendant does challenge is the further assertion advanced on behalf of the plaintiff that there took place between Air Capricorn as transferor and the plaintiff as transferee some act of delivery effective to invest the plaintiff with rights of ownership in the machinery.

The contract provides for a sale of the machinery by Air Capricorn to the plaintiff at a price

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of R4 700 and for a re-sale of the machinery by the plaintiff to Air Capricorn at the same price. But although the plaintiff

and Air Capricorn cast the financial arrangements between them in the mould of a sale and a re-sale, as indicated above, the defendant contends that the outward form of the contract is misleading and that the true substance of the transaction between the plaintiff and Air Capricorn is one of pledge rather than one of sale and re-sale. The defendant, in short, seeks to invoke the following maxim of our law: *plus valet quod agitur quam quod simulate concipitur.* The scope and limitations of the principle enshrined in the maxim just cited appear from an oft-quoted passage in the judgment of INNES J in *Zandberg v Van Zyl* 1910 AD 302 at 309:

"Now, as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the agreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape which it assumes is what they meant it should have. Not infrequently, however, (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is; not what it in form purports to be. The maxim then applies *plus valet quod agitur quam quod simulate concipitur.* But the words of the rule indicate its limitations. The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For, if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be. The inquiry, therefore, is in each case one of fact, for the right solution of which no general rule can be laid down. Perezius *Ad Cod* 4.22.2 remarks that these simulations may be detected by considering the facts leading up to the contract, and by taking account of any unusual provision embodied in it."

Before considering the nature of the evidence led at the trial a few general observations may be helpful. Whatever the true nature of the contract it is clear that the essence of the arrangement between the plaintiff and Air Capricorn was that until Air Capricorn had repaid the sum of R4 700 advanced on its behalf by the plaintiff the machinery in question should serve as security to the plaintiff. Now in the case of a pecuniary debt when the parties wish movable property belonging to the debtor to serve as security for the debt, a common device is the form of mortgage known as pledge. This confers a real right over the article

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pledged in favour of the creditor while the debtor retains his ownership over the article. If the debt is not repaid when due the pledgee has the right to sell the article pledged and to recover the amount due to him from the proceeds of the sale. On the other hand a *pactum commissorium* or agreement that if the debt is not paid by a certain due date the pledgee may keep the security as his own property is illegal and unenforceable.

The only effective method of constituting a pledge is by agreement accompanied by delivery of possession of the article to the pledgee. Without such delivery of possession, while the pledge may be good as between the parties, the pledgee will lose his preference if a third party *bona fide* obtains real rights in the article pledged, or if a judgment creditor of the pledgor attaches the article pledged; or, should the pledgor be sequestrated, in a *concursus creditorum*. Essential not only to the valid constitution of a pledge but also to its effective retention by the pledgee is natural possession of the article pledged by the pledgee. From this it follows that although constructive delivery in the from of *traditio brevi*

manu may suffice - subject to clear evidence that the transaction is *bona fide* - to constitute a valid pledge (see *O'Callaghan's Assignees* v Cavanagh (1882) 2 SC 122; *Insolvent Estate of Vice v Chernotysky and Levy* 1914 CPD 100; *Meintjies v Wilson* 1927 OPD 183) there is no room for the application of the process of *constitutum possessorium* in the creation of a valid pledge in a situation in which the pledged article is to remain with the pledgor, to be used by the pledgor for his own benefit. The matter is stated thus by INNES CJ in *Lighter & Co v Edwards* 1907 TS 442 at 445:

"I have examined the cases and authorities quoted during the argument, and the conclusion to which they lead me is that by our law the doctrine of *constitutum possessorium* can have no place in a case of pledge where the pledged articles are to remain with the pledgor to be used by him for his own benefit. And for this simple reason - that such a doctrine would in practice destroy the wholesome rule of the Roman-Dutch law that for a pledge to be effectual against third parties there must be retention of possession by the pledgee. It would make the rule quite unworkable, and would open the door to frauds innumerable. Every debtor who was allowed to retain pledged property would say that he was holding it with a new intention; and that, though using it for his own benefit, his idea was to hold it for the creditor, and not for himself."

See further *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66 at 79. Since actual possession of the article pledged is vital to an effective exercise by the pledgee of his rights of pledge it is not uncommon in practice for a debtor and creditor to disguise what is in truth a pledge as a contract of sale. This has long been recognised. In *Hofmeyer v Gous* (1893) 10 SC 115 DE VILLIERS CJ remarked (at 117):

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"There is not a more common device than that by which a pledge of goods is effected under the guise of a sale. The pledgor purports to sell the goods for the amount of a debt owing by him, and actually delivers them to the pledgee, but at the same time it is understood that the goods are to be re-delivered to the pledgor, until the creditors or any of them assert their right to attach them, when the pledgee is to come in as the owner by virtue of the alleged contract of sale. Rightly or wrongly our law refuses to recognise such an arrangement as a sale, but treats it as what it really is, a pledge."

I turn to the evidence in the present case. Only three witnesses testified at the trial. For the plantiff Basil Carides and the plaintiff himself gave evidence. The sole witness for the defendant was Butcher. Duff did not testify. Little turns on the evidence of Basil Carides and Butcher. The case hinges largely on the testimony of the plaintiff himself and it becomes necessary to examine his evidence in some detail. In the course of his evidence-in-chief, which was brief, the plaintiff said that Duff had told him that he was in financial trouble; Duff still owed money on the equipment of a dry cleaning works bought by him and unless he paid the seller the latter would repossess the equipment. The plaintiff said that he helped Duff

"by giving him R4 700, and in turn, for security on that, I took an hire-purchase on the equipment that was in his possession at the time."

The plaintiff went on to say that, as far as he was concerned, when the cheque for R4 700 drawn by him was paid "the machinery then belonged to me." A month or six weeks after the conclusion of the contract on 28 June 1972 the plaintiff visited the premises of Vasco Dry Cleaners where, for the first time, Duff showed him the machinery. In re-examination the plaintiff said that the contract reflected the true agreement between him and Air Capricorn.

In cross-examination the plaintiff conceded that he had neither need nor use for this sort of machinery. He agreed that the whole purpose underlying the contract was to afford him security for the R4 700 which he had

advanced to Duff. How the plaintiff viewed the transaction and what his intentions were may be gleaned from the following passages in his evidence:

"And this was really going to be a loan to him? - Well, call it a loan if you like, but the whole purpose as far as I was concerned was the fact that had I not given him the money, he stated that the machinery would have been repossessed by the person from which he bought it.

You never intended to become the owner of this machinery? - I never intended to go into the dry cleaning business, if you want it that way.

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Ja, but you... never intended to be the owner of this? - I was the owner until such time as I was paid back." And again:

"I put it to you, Mr Twycross, that there was never really any intention that you became the owner of this machinery and plant? That all you were aiming at was securing a loan which you had made to your brother-in-law? - Quite correct."

During cross-examination there was also expored with the plaintiff his notions regarding the value of the machinery:

"Now, if you hadn't seen the goods you weren't in a position to place any value on the goods, is that correct? - Yes, I presume that would be correct. I don't know that I was in a position to place any value on them after having seen them in any case."

The plaintiff went on to explain that in arriving at the figure of R4 700 as the purchase price he had taken Duff's word that the machinery was worth more than that. The plaintiff made quite plain that in concluding the contract he had not entertained the slightest intention of making any profit out of the transaction; and that no benefits to him would accrue therefrom. He said that he would not have entered into such an agreement with anybody other than a relative. I quote again from the evidence:

"It was a transaction to accommodate Duff and to secure your loan? - That's right."

And later:

"I didn't go into this to make money out of it, I went into it to help somebody."

A passage in the plaintiff's cross-examination suggests that on his understanding of the contract the person from whom he was buying the machinery was Basil Carides rather than Air Capricorn. But in response to a later question by the Court *a quo* the plaintiff assented to the proposition that Air Capricorn bought from Basil Carides and that the latter in turn sold to the plaintiff. The plaintiff was also asked by the learned Judge whether, as far as he was concerned, he could have obtained security for the money advanced by him to Duff in any other way. The plaintiff answered:

"I really don't know. I didn't ask for any other security. He (Duff) suggested that it be done like this, against the machinery which he had in his possession in the business."

So much for the evidence. In the assessment of the trial Court the plaintiff was an intelligent man of considerable business experience, and at the same time an honest and frank witness. Having reviewed his testimony the learned Judge said:

"The plaintiff, quite clearly, did not appreciate all the legal niceties of the distinction between the various forms of security. My overall impression of his evidence, however, is that, although he was prepared to accommodate or assist Mr Duff, he was

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prepared to do so only on condition that the would become the owner of the goods and remain the owner of the goods until the money was repaid, and, in order to achieve that purpose, it was decided that Air Capricorn would sell the goods and that ownership would pass to the plaintiff who would then re-sell the goods to Air Capricorn subject to the suspensive condition set out in the agreement."

In support of the above conclusion the trial Court cited, *inter alia*, the following considerations:

(1) There was no suggestion that the parties had any ulterior motive to disguise the true nature of the transaction; and there was no evidence that creditors had been prejudiced.

(2) Despite some suggestion in cross-examination by the defendant's counsel that the purchase-price of R4 700 was far below the true value of the machinery no reliable evidence to establish the value of the machinery at the date of the contract had been adduced.

(3) Some of the unusual provisions in the contract and certain curious features in the transaction (purchase by the plaintiff of machinery which he himself did not require, and whereof Air Capricorn would retain possession, coupled with simultaneous re-sale thereof at the same price to Air Capricorn) were satisfactorily explained by the plaintiff's desire to assist his brother-in-law.

(4) The *bona fides* of the plaintiff was further evidenced by the letter dated 29 June 1972 in which the plaintiff's attorneys informed Peter Carides of the purchase by the plaintiff of the machinery in the possession of Basil Carides.

The learned Judge proceeded to say:

"Now, all these facts and circumstances appear to me to confirm that what the plaintiff wanted, in this instance, was to secure himself by obtaining nothing less than the ownership of the goods in question until the money advanced to Mr Duff and Air Capricorn had been repaid in full. I have no doubt, in this regard, of the *bona fides* of the plaintiff. There is no direct evidence, or any other evidence for that matter, that the agreement did not also correctly reflect Mr Duff's intention."

An argument by the defendant's counsel that an inference adverse to the plaintiff should be drawn from the latter's failure to call Duff as a witness was rejected by the Court *a quo*. The learned Judge pointed out that there was no evidence to show that Duff had been available as a witness:

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"and in any event, the agreement, which is admitted, *prima facie* reflects his intention... "

On the evidence before it the trial Court came to the conclusion that the contract correctly reflected the true nature of the transaction between the plaintiff and Air Capricorn. Having so found the learned Judge embarked on the following inquiry:

"The next question is whether the ownership of the machinery and equipment passed to the plaintiff in terms of that agreement. The plaintiff relies on the fictitious form of delivery known as... *constitutum possessorium*."

The trial Court stressed the need for extreme caution in scrutinising *constitutum possessorium* as a process whereby delivery might be effected, but nevertheless concluded that on the facts before it there had been satisfied the four requisites summed up by *Schorer* (Note 258) and set forth by SOLOMON JA in *Goldinger's* case *supra* at 85. In regard to the second of these requirements, namely that the grantor (Air Capricorn) should cease to possess in its own name and begin to possess for another (the plaintiff), the learned Judge observed:

"It is clear from the agreement... that it was agreed between the parties that, as from the date on which the money was paid to Carides and the ownership vested in Air Capricorn, Air Capricorn would cease to possess the goods in its own name and begin to possess the goods on behalf of the plaintiff."

In connection with the fourth requisite mentioned by *Schorer* ("some *causa* or *justus titulus*") the learned Judge said:

"In the present case the *causa* or *justus titulus* is clearly stated in the contract."

While expressing regret that the defendant should have to be penalised for what appeared to it to be "a misrepresentation as to the ownership

of the goods by Mr Duff" the trial Court found, in relation to the second inquiry undertaken by it, that

"the plaintiff has also established that the ownership of the goods passed to him in terms of the contract entered into with Air Capricorn in June 1972."

In determining the issue before him the learned Judge *a quo* embarked successively on two separate and distinct inquiries. He inquired first into the genuineness or otherwise of the contract. Having answered this question in favour of the plaintiff he turned to the matter of delivery and considered whether ownership had passed to the plaintiff by means of a constitutum possessorium. It seems to me, with respect, that to approach the problem in the

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present case in this piecemeal fashion is unhelpful and indeed somewhat misleading. There was, so I consider, but a single inquiry. The question here was not so much whether, if the contract were a genuine agreement of sale, transfer of ownership of the machinery could be effected by means of a *constitutum possessorium*. The question was rather whether, having regard to all the attendant circumstances, the true transaction between the plaintiff and Air Capricorn was one of sale or pledge. And in this single inquiry not the least important circumstance was the suspicious feature that the contract was so framed that in terms thereof the only way in which ownership of the machinery could have been transferred to the plaintiff was by the device of *constitutum possessorium.* The trial Court, so it seems to me, attempted an answer to the question of the genuineness or otherwise of the contract without reference to this most salient feature of the case. And having determined the first inquiry upon which it embarked in favour of the plaintiff the result of the second inquiry was really a foregone conclusion. For purposes of considering the applicability of a *constitutum possessorium* the trial Court had already decided that the contract meant what it said. The true inquiry, I think, was whether, despite the clear warning signal conveyed by a *constitutum possessorium* as a vital cog in the machinery of the contract, the underlying transaction was one of sale or pledge. As part of the second inquiry the trial Court examined the provisions of the contract, which it had already decided were to be taken at face value, in order to see whether it embodied a *justus titulus*, which is one of the requisites for the operation of a *constitutum possessorium.* The real question, however, was not whether the contract bore a label, but whether the label displayed by it was the correct one. For the above reasons I consider that the trial Court misconceived the nature of the inquiry which it was required to undertake.

This was a case in which, as the learned Judge in the Court *a quo* fully appreciated, the overall *onus* was on the plaintiff to establish that he was the owner of the machinery in question. In our law the possession of a movable creates a presumption of ownership in the possessor (*Zandberg v Van Zyl* (*supra* at 308)); and since the plaintiff's action was a vindicatory one it is clear that the *onus* of proving his ownership lay with the plaintiff (*K & D Motors v Wessels* 1949 (1) SA 1 (A) at 11). But in regard to a subsidiary or intermediate issue within the trial the defendant attracted a burden of adducing evidence in rebuttal - a "weerleggingslas". See *South Cape Corporation* (*Pty*) *Ltd v Engineering Management Services* (*Pty*) *Ltd* 1977 (3) SA 534 (A) . Since the contract purported to be one in terms whereof, *inter alia*, Air Capricorn sold the machinery to the plaintiff, the defendant,

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who asserted that the agreement was really a pledge, had the burden or rebutting the *prima facie* case of the plaintiff resting on the production of the contract admittedly signed by the plaintiff and by Duff on behalf of Air Capricorn (*Zandberg v Van Zyl* (*supra per* SOLOMON JA at 314); *Schneidenberger v Pearce and Allen Ltd* 1927 SWA 93 at 98; *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 *per* DE WET CJ at

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381).

I proceed to consider whether the learned Judge *a quo* was right in deciding that the contract correctly reflected the true nature of the transaction between the plaintiff and Air Capricorn, and to examine the contention advanced on behalf of the defendant that there existed a real and definitely ascertainable intention differing from the intention expressed in the contract. The trial Court's finding was based on an acceptance of the plaintiff's evidence that the contract did reflect the true agreement between him and Air Capricorn. I should say at once that a close reading of the plaintiff's evidence tends strongly to confirm the trial Court's assessment of the plaintiff as a frank and honest witness. That, however, is not the end of the matter. Without in any way impugning the honesty of the plaintiff I point out in passing that it is open to doubt whether, even on the plaintiff's own version, the contract truly mirrors the arrangement between the parties thereto; and whether they really intended it to operate according to its tenor. Upon a literal construction of the contract the position is as follows. If Air Capricorn makes default in payment the plaintiff has the right not only to take possession of the machinery but presumably also, in the exercise of his rights of ostensible ownership, to sell the machinery and to retain for himself the full proceeds of such sale. Such a consequence, I think, was no part of the real arrangement and understanding between the parties. Throughout his evidence the plaintiff was insistent that there was to be no profit for him in the entire transaction. Let it be assumed, for example, that, upon Air Capricorn's failure to pay R4 700 in terms of the contract, the plaintiff takes possession of the machinery and sells it for R14 700. The question arises to whom the balance between the price of R4 700 stipulated in the contract and the sum of R14 700 realised by the sale of the machinery must accrue. This question was not in fact put to the plaintiff. But having regard to the whole tenor of his evidence it is probable, I consider, that his answer would have been that he himself should retain no more than the amount of his advance (R4 700), and that the full balance should be repaid to his brother-in-law. Such an answer would tend to show that, despite the express purport and apparent effect of the contract, the real object underlying the transaction was not to invest the plaintiff with ownership of the property. And if the object was not genuinely that the plaintiff should acquire such ownership then there was here no purchase and sale but a pledge.

So much for the evidence of the plaintiff. The inquiry cannot be limited to considering what sort of rights the plaintiff intended to acquire and what sort of agreement he imagined he was entering into. The actual meaning of the parties is to be gauged from all the circumstances of the case including an assessment of the probable state of mind of the other party to the contract and an examination of such unusual provisions as are to be found in the contract. The other signatory to the contract was

Duff, who was not called as a witness. Apart from being the other signatory Duff's intention

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is also of crucial importance because on the plaintiff's version it was Duff who suggested the form of the transaction. In the course of his judgment the learned Judge in the Court *a quo* remarked that there was no evidence that the contract did not correctly reflect the intentions of Duff. In my opinion this was too narrow a view of the admitted facts. It seems to me that the fact that, less than five months after the conclusion of the contract between the plaintiff and Air Capricorn, Duff signed a deed of sale wherein he warranted to Butcher that Air Capricorn was the owner of the machinery and that no part of the purchase price thereof remained unpaid, *prima facie* represents some evidence that in signing the contract with the plaintiff Duff may in fact have harboured intentions wholly at variance with what was outwardly professed by its express terms. It is doubtless quite possible that when Duff signed the later deed of sale with Butcher his firm and genuine belief was that by virtue of the contract the plaintiff was the owner of the machinery, and that in respect of its purchase price Air Capricorn was indebted to the plaintiff in the sum of R4 700, in which case para 23 of the deed of sale could hardly be construed otherwise than as containing two fraudulent misrepresentations. As indicated earlier the trial Court was disposed to the view that by the warranty in the deed of sale Duff had made a misrepresentation to Butcher concerning the ownership of the machinery. I do not overlook the consideration that whether he regarded his transaction with the plaintiff as a sale or a pledge Duff's delivery of the machinery to Butcher was in breach of Duff's contractual obligations to the plaintiff. But since Duff was not heard, and as it is an established principle that fraud is not lightly to be inferred, I consider that the trial Court's view that Duff made a misrepresentation affecting the ownership of the machinery to Butcher is open to criticism. The inference that Duff so misrepresented the position is certainly a possible one, but it seems to me that it is neither the only permissible inference nor even the readiest one. Another possible inference is that on Duff's understanding of the transaction it was a loan by the plaintiff against security of the machinery under the guise of a sale. A factor which to some extent militates against the possibility that Duff had any real intention of making the plaintiff the owner of the machinery by selling it to him is the general improbability that an owner of a commodity would be prepared to sell it at a figure appreciably below what he conceives its market value to be. The trial Court correctly pointed out that no reliable evidence as to the value of the machinery was led. But according to the plaintiff Duff told him that the machinery was worth more than R4 700; and the evidence as a whole points to the conclusion that Duff considered the machinery to be worth far more than R4 700. Basil Carides, who sold Vasco Dry Cleaners to Air Capricorn as a going concern, recalled a figure of about R22 000 as the purchase price of the "machinery, fixtures and fittings". When in November 1972 Air Capricorn sold the business to Butcher the total purchase price was R35 000 and the deed of sale recorded an agreement that the value of the machinery and equipment was the sum of R14 709.

I deal next with the provisions embodied in the contract and the circumstances surrounding its signature. The subject-matter of the contract

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was machinery which the plaintiff had never seen, which the plaintiff did not need, and about whose value the plaintiff himself had no real inking. The conclusion of the contract was not preceded by any negotiations affecting the purchase price of the machinery and the price mentioned therein was not a serious price. It was determined by reference not to what either party considered to be the market value thereof but solely by reference to the amount of a debt owed by Air Capricorn to Basil Carides. The sale by Air Capricorn to the plaintiff was coupled with a simultaneous re-sale by the latter to the former at exactly the same price. While the plaintiff did not need the machinery, Air Capricorn did; and Air Capricorn remained in possession of it.

In *Goldinger's* case *supra* the doctrine of *constitutum possessorium* was unsuccessfully invoded. On the facts of that case this Court held that the transaction concerned, though a sale in form, was essentially a pledge. In weighing the facts of the matter presently under consideration the following remarks of INNES CJ (at 79) are instructive:

"No doubt the parties thought that by going through the form of a sale they could secure the benefits of a pledge. But in that they were mistaken. The doctrine of *constitutum possessorium*, though it may in certain cases have the same effect as actual delivery, can have no operation to validate a pledge where the pledged article remains in the possession of the pledgor under such circumstances as are present here."

In the instant case the plaintiff and Duff went through the form of a sale. But if the essentials of a sale were not present the parties could not make the transaction a sale simply by calling it such. See *Commissioner of Inland Revenue v Saner* 1927 TPD 162 at 172.

It has already been mentioned that one of the considerations relied upon by the trial Court in support of its conclusion that ownership in the machinery passed to the plaintiff was the absence of any

"suggestion that the parties had any ulterior motive to disguise the true nature of the transaction".

However, in the context of a case such as the present, the possible existence of an ulterior motive requires little imagination. In *K & D Motors v Wessels* (*supra*) - also a case involving an alleged purchase and re-sale - the respondent had lent money to her brother, one Dormeh1, and the inquiry was likewise directed to the question whether a contract purporting to embody a hire-purchase agreement with the respondent as seller and Dormeh1 as the buyer was a disguised contract of loan and pledge. At 13 - 14 GREENBERG JA remarked:

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"... it appears to me that some confusion of thought is evidenced by the question which the Provincial Division asked itself as to why she should not have entered into a *bona fide* hire-purchase agreement. If in fact the April transaction was a contract of loan and pledge and not of sale, then, when the respondent wished to allow Dormeh1 to remove the machinery and use it, the obvious way to try to ensure that such removal did not destroy her security was to pretend that there had been a sale in April and, based on and in support of such pretence, to enter into a fictitious hire-purchase agreement."

At 14 of the same report the learned Judge proceeded to say that, though these were not decisive factors in the investigation, nevertheless:

"in deciding whether an agreement which purports to be a contract of sale is not a disguised contract of loan and pledge, it is certainly relevant to inquire whether the so-called purchaser requires the goods said to be bought either for use or for re-sale, and whether the seller wishes to dispose of the goods or whether the seller merely requires financial accommodation, which the purchaser is prepared temporarily to advance but not without some form of assurance of repayment other than the financial stability of

the seller. If the latter is the case, and not the former, it is some indication that the transaction is one of loan and pledge."

In the present case the learned Judge in the Court *a quo* was satisfied as to the *bona fides* of the plaintiff and he accepted that the plaintiff wished to acquire ownership of the machinery. In connection with the problem of intention in the field of simulated contracts it is convenient here to deal briefly with two further judgments of this Court. The first is *McAdams v Fiander's Trustee and Bell NO* 1919 AD 207. That was a case in which one of the parties had been advised that he could not enter into an agreement of pledge while at the same time retaining possession of the pledged articles; but that he could enter into a contract of sale with the right to re-purchase. On the evidence this Court held that the transaction was one of pledge disguised as a sale. In the course of his judgment Mr Justice DE VILLIERS made the following observations (at 223 - 4) which have often been quoted since:

"... the question in cases of this kind always is what is the true nature of the transaction and this is not necessarily determined by what the party may conceive the contract, which he enters into, to be. Parties may honestly think that they are entering into a contract of purchase and sale, which turns out to be one of pledge. To go back to first principles. There can be no contract of purchase and sale without the *animus emendi* on the part of the purchaser, and the *animus vendendi* on the part of

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the seller. And it must be a genuine *animus* of the one to sell and of the other to buy. *It is not enough for the parties to think that they have the intention, the intention must be proved as a fact apart from what they thought.*"

(I italicise). The second case is *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* (*supra*) in which the question was whether, as a result of certain transactions between the defendant, an importer of goods, and the manufacturers to whom the defendant supplied the goods, ownership in the goods passed to the manufacturers. If ownership remained with the defendant it was liable to pay duty to the plaintiff. The answer to the question depended on whether or not the transactions involved were genuine sales. The trial Judge, who was amply satisfied as to the *bona fides* of the defendant, came to the conclusion that the transactions challenged by the Commissioner of Customs were sales, both in substance and form, and that upon delivery *dominium* had passed to the manufacturers. On appeal to this Court the decision of the trial Court was upheld by a majority of three (WATERMEYER, FEETHAM and CENTLIVRES JJA) to two (DE WET CJ and TINDALL JA). References to that portion of the judgment in the *McAdams'* case which I have italicised in the quotation above are to be found both in the dissenting judgment of DE WET CJ and in the judgment of WATERMEYER JA, as he then was. In the course of his dissenting judgment the CHIEF JUSTICE remarked at 383:

"I think the learned Judge intended to emphasise in the last sentence that, if the Court on a consideration of all the circumstances comes to the conclusion that the transaction was in fact not what it purported to be, it follows that, however honestly the parties thought that their intention was in accord with the simulated transaction, that was not their real intention."

In the course of his judgment WATERMEYER JA pointed out (at 395 - 6) that a disguised transaction is in essence

"a dishonest transaction: dishonest, inasmuch as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties."

Dealing with the facts of *Zandberg v Van Zyl* (*supra*) the learned Judge remarked that the basis of that decision

"is that the Court did not accept the statement of the parties that they honestly meant to contract in the terms which they purported to contract." And in reference to the concluding sentence of the relevant passage from the *McAdams'* decision WATERMEYER

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JA had the following to say (at 399):

"I have some difficulty in appreciating what idea the learned Judge intended to convey by that remark. Whenever an act is voluntarily done with the expectation that a consequence will follow, that consequence is intended (see Austin *Jurisprudence* Lecture 19). So when a person makes an agreement thinking that he is buying, he intends to buy, and it is difficult to see how he can think that he has the intention to buy without having it.

But whatever was meant by that remark, it is clear that it was an *obiter dictum* and that it cannot be accepted as derogating from the principles aid down in the following year by the majority of Judges in this Court in *Dadoo's* case..."

The conflicting viewpoints of DE WET CJ and WATERMEYER JA indicated above raise the interesting question whether in the present matter, assuming an honest intention on the part of the plaintiff to acquire ownership in the machinery, there would be any room in our law for a finding that the contract was a simulated one. Looking at the totality of the evidence, however, and bearing in mind the burden of proof, I consider it unnecessary, for purposes of this appeal, to embark upon any such further inquiry. Accepting that the plaintiff was completely *bona fide*, and taking his own version of the transaction at face value, I entertain doubts - for the reasons stated earlier in this judgment - as to whether the plaintiff reallyintended to acquire ownership in the machinery. But, even if it be assumed, for the purposes of argument, that the plaintiff in fact had such an intention, then, for the reasons which follow, the appeal should in myview succeed in any case.

Counsel for the plaintiff strenuously submitted that the appeal was bound to fail unless this Court could be satisfied that the plaintiff and Duff shared a real intention, definitely ascertainable, which differed from the intention proclaimed in the contract. I am unable to accept that argument which overlooks, I think, the incidence of the *onus* in this case. As to the subsidiary issue in regard whereto the defendant had a burden of adducing evidence in rebuttal it seems to me that the *prima facie* case raised by proof of a document in the form of a contract of sale was amply displaced by the cumulative effect of the following features in the evidence discussed earlier in this judgment:

(*a*) Duff did not wish to dispose of the machinery said to be sold.

(*b*) Twycross did not require the machinery said to be sold.

(*c*) Duff required financial accommodation which Twycross was prepared to advance temporarily against security of the machinery. This was the real object of an arrangement which Twycross conceded was in effect a secured loan to his brother-in-law.

(*d*) The purchase price stated in the contract was not a serious one, and it is furthermore likely that Duff considered the machinery to be worth far more than

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such price.

(*e*) The contract is silent as to the means whereby Air Capricorn would effect transfer of ownership in the machinery to Twycross. The only process by which transfer of ownership could be effected was *constitutum possessorium* - a process which can have no application

where a pledged article is to remain with a pledgor to be used by him for his own benefit.

(*f*) Subsequent to the contract Duff warranted to Butcher that Air Capricorn was the owner of the machinery.

In order successfully to resist the plaintiff's claim it was not necessary for the defendant to establish on a balance of probabilities that the contract relied upon by the plaintiff was a *negotium simulatum*. In order to obtain judgment against the defendant it was necessary for the plaintiff to establish on a balance of probabilities that the contract was a genuine contract of sale; and more particularly that in the matter of the transfer of ownership there existed the concurrence and intention of *both* contracting parties (*Dig* 44,55). Having regard to the evidence as a whole it cannot be said, in my judgment, that the plaintiff has discharged the overall burden of proof which rested upon him.

For these reasons I am of the opinion that the plaintiff failed to prove the existence of the rights on which his claim to the machinery was based, and that the trial Court erred in not decreeing absolution from the instance. The appeal is allowed with costs and the order in the Court *a quo* is altered to one of absolution from the instance with costs.

RUMPFF CJ, RABIE JA, CORBETT JA and KOTZÉ JA concurred.

Appellant's Attorneys: *Civin, Miller, Goodman & Schwartz*, Johannesburg; *Israel & Sackstein*, Bloemfontein. Respondent's Attorneys: *Wessels & Gillis*, Johannesburg; *Siebert & Honey*, Bloemfontein.

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