(P) I 54/98

V C GRIFFITHS vs MOTOR VEHICLE ACCIDENT FUND

LEVY, AJ 2000/05/10

PRACTICE

SUMMARY JUDGMENT - Meaning of ownership in terms of the Motor Vehicle Act analysed.

Failure to call a witness merely a factor to be considered in weighing up the evidence.

CASE NO.: (P) I 54/98

In the matter between:

V C GRIFFITH **PLAINTIFF**

versus

MOTOR VEHICLE ACCIDENT FUND **DEFENDANT**

CORAM: LEVY, **A**.J.

Heard on: 2000.02.29; 2000.03.01 & 02

Delivered on: 2000.05.10

JUDGMENT

U.: In this matter Adv H Geier appears for Plaintiff and Adv **L** C Muller SC for Defendant.

On 25 October 1996 summons was issued out of the High Court by the Plaintiff who is a widow and who sues in her personal capacity and in her capacity as mother and natural guardian of her five minor children claiming that Defendant pay her a total of N$479 333.00 arising from an accident involving a motor vehicle N36661W which occurred on

22 September 1994. The Defendant is the Motor Vehicle Accident Fund of Namibia established in terms of Section 2 of the Motor Vehicle Accident Act, 30 of 1990.

The Particulars of Claim have been amended on several occasions and the matter has previously been set down for hearing on 10 March 1998, 14 December 1998, 20 September 1999 and on each occasion postponed without any evidence having been led.

Different counsel have acted for Plaintiff from time to time and due to her impecuniosity different attorneys as well. Plaintiffs present counsel has informed this Court that once again an amendment of the pleadings will be moved but he says that this amendment has no bearing on the present issue. In any event as at this stage the application for the amendment was not moved.

As can be expected, in the circumstances of this case, the particulars of claim have become a clumsy and inelegant document.

In an effort to expedite this matter and for convenience, the parties have agreed that this Court should decide the issue of ownership of the vehicle involved in the accident at a hearing separate from the other issues. For a decision in this respect the Court must have regard to the pleadings and to the evidence placed before it. It is, however, unnecessary to analyse all the pleadings. It will suffice to set out a resume of such pleadings which are applicable including Defendant's plea. The letters FNB are used to denote the First National Bank.

In her particulars of claim, plaintiff alleges *inter alia* **that:-**

"(4)........on 22 September, 1994, First National Bank of Namibia Ltd (hereafter FNB) was the owner of the motor vehicle, N36661W,.............alternatively..........Mr R Vogt, alternatively, one Jakkals Pretorius.

(5) On 22 September 1994, the plaintiffs husband Clive Gareth Paul Griffiths was the driver of Mercedes Benz registration number N36661W driving on the main road between Otjiwarongo and Kalkfeld when the motor vehicle............

(a) tore apart in two pieces and left the road, alternatively,

(b) commenced and/or developed tearing and/cracking and/or commenced breaking up and left the road and collided with a tree, alternatively,

(c) left the road and collided with "a tree"

Plaintiff thereafter alleges that

"6........The aforesaid accident was caused by the negligence of the owner of the motor

vehicle. In so far as the owner...........was FNB, it is averred that:-

(a) at all relevant times hereto, one J. Kaufmann and/or one Pikkie Louw and/or another employee or employees of FNB was/were by act or omission negligent, which negligence caused the accident;"

In terms of further particulars subsequently supplied, Plaintiff alleged that the said Kaufmann was the manager of the finance branch of FNB, alternatively, the Manager of Wesbank, trading as FNB.

Plaintiff alleges further that the aforesaid persons were employees of FNB acting in the course and scope of their employment.

Insofar as this Court does not have to decide on the issue of negligence, it is unnecessary to dwell on the allegations made thereanent by Plaintiff save to say that there is a further allegation that the owner was negligent in that it handed the motor vehicle to others for the purpose of sale to third parties, or, permitted the vehicle to be auctioned to third parties particularly to her husband, whilst the owner knew or ought to have known that the vehicle contained defects and was in a dangerous state of disrepair and was unsafe and unfit to be used on the public road.

The vehicle as a fact was wrecked on the public road on 22 September 1994 and Plaintiffs husband was killed. Plaintiff says she has complied with the provisions of Motor Vehicle Act No. 30 of 1990 and that she is entitled to be paid the claim to which I have already referred.

In reply to a question from Defendant, Plaintiff said that the vehicle was sold to her husband at an auction by one Mr Vogt acting on behalf of FNB alternatively Mr Vogt sold such vehicle on his own behalf or alternatively sold it on behalf of one Mr Jakkals Pretorius. The vehicle was handed to Plaintiffs husband by Mr Vogt after the auction but Plaintiffs husband was killed before he could pay the purchase price.

Defendant filed a comprehensive plea the effect whereof was to deny all the relevant allegations made by Plaintiff and in particular it denied that FNB or any of the other persons alleged by Plaintiff in the alternative, was "the owner of the said vehicle at the time of the accident in terms of the provisions of Act No. 30 of 1990, or otherwise." Thereafter Defendant alleges in its plea that Plaintiffs husband became "the legal owner of the said vehicle by virtue of the auction sale and delivery to him of the said motor vehicle."

During the hearing of this part of the case a further possible owner appeared on the scene namely Motor House CC by whom Jakkals Pretorius was employed but no amendment of the pleadings was

asked for although an application to amend had been filed.

The Motor Vehicle Accidents Act 1990 in terms whereof Defendant was established contains a definition clause, wherein a number of words used in the Act are defined. Section 1 provides:-

"1. In this Act, unless the context indicates otherwise -"owner" in

relation to,

(a) a motor vehicle which a motor dealer has in his or her possession during the course of his or her business and which may in terms of any law on the licensing of motor vehicles not be driven or used on a public road except under the

authority of a motor dealer's licence of which the motor dealer concerned is the holder, means that motor dealer;

a) **a motor vehicle which has been received by a motor transport licence holder in the course of his or her business of delivering new motor vehicles and which has not yet been delivered by him or her, means that motor transport licence holder;**

b) **a motor vehicle which is the subject to a hire purchase agreement, means the purchaser under the hire purchase agreement concerned;**

c) **a motor vehicle under an agreement of lease for a period of at least 12 months, means the lessee concerned;"**

It is clear from the words "in relation to ", at the commencement of the definition that the legislator wished to create the persons to whom the circumstances in (a)(b)(c) and (d) applied, "owner" for the purpose of the Act. But for the provisions in these subsections those persons would not or may not have been owners. The Legislator did not wish to provide that the Act applied only to those persons in the definition clause. This contention is supported by the fact that the so-called definition makes no mention of ownership of a motor vehicle acquired by a cash sale, or by a simple credit sale (not the type referred to in the definition clause), or donation, or by inheritance or by barter or by a prize

won in some contest or lottery.

In Nkosane v Rondalia Assurance of S.A. Ltd 1976 (4) SA 67 (T) in respect of similar legislation in South Africa, the Court held that there was no basis for finding that the words "owner" or "ownership" bore any meaning other than the meaning ordinarily

ascribed to these words in accordance with the common law apart from the particular context referred to in the definition of owner.

Accordingly in so far as it may be necessary so to do, I hold that the definition of owner in Section 1 of the Motor Vehicle Act, Act 30 of 1998, is not intended to be exhaustive and has no application to the present inquiry.

The present inquiry is directed at establishing who the owner at Common Law was of the Mercedes Benz 200 which Plaintiffs husband drove on 22 September 1994 when he was killed.

The Minutes of Rule 37 Conference held on 21 February 2000 were handed into Court. Item 4 of the Minutes relates:

"The Defendant admits that First National Bank, Wesbank Branch Windhoek, was the owner of the 1988 Mercedes Benz, from the time it was repossessed from Mr A Kandolf on or about 25 July 1994 until it subsequently left the repossession yard of Wesbank."

The Plaintiffs first witness was Johannes Jakobus Pretorius (also known as Jakkals Pretorius) who testified that he had been the manager of Motor House CC, used car division, in 1994 and that the owner of the company was one Theo Kleynhans. He said that "all the used car dealers, go to all the banks, look at their repossession yards. If there

are vehicles that they are interested in, they either buy it (sic) or the bank asks them to sell it on their behalf." (that is, on behalf of the bank concerned)

During 1994, he frequently went to the repossession yard of FNB, Wesbank division and there in or about the middle of 1994 he saw a Mercedes Benz 200 which had a dark blue metallic colour. Subsequently when he was shown a colour photograph of the Mercedes Benz which features in this case, he corrected himself and said it was a copper brown colour. In this judgment, I bear it in mind that he first said that the Mercedes Benz he saw was dark blue and that he blamed the lapse of time some six years ago, for his mistake.

It is well known in the commercial world and certainly among lawyers that banks including FNB and its Wesbank division, finance the purchase of motor vehicles by way of hire-purchase agreements or installments sale agreements wherein they have a clause which gives them the right to repossess as owner, the sold vehicle under certain circumstances. It is common cause and was never in issue that in the present case FNB had repossessed the Mercedes Benz 200, N36661W, and that for a certain period of time in 1994, it was in the repossession yard of the Bank (see Minute of Rule 37 meeting). It is this vehicle which Pretorius, in or about the middle of 1994, saw in the yard. Any doubt was removed when he testified that the right hand back door of the vehicle did not fit evenly into the frame, that is, the body of the vehicle. There were places, he said, where the door was close to the frame and there were other places where the door was further away. He said any person in the motor trade could see that the vehicle had been

involved in a collision. The ill-fitting door was photographed prior to the collision by an engineer, Harry Regri. Pretorius looked at the photograph and confirmed that this was a photograph of the door of the car he had had in his possession in mid 1994.

When Harry R-egai, an expert, testified, he confirmed the evidence of Pretorius and added that the left rear door, also fitted badly in that it was further from the frame than it should have been.

This indicated, he concluded, that the vehicle had been hit on the right side towards the rear. Harry Riegel was a highly qualified engineer and had examined this vehicle on 19 July 1993, and took colour photographs thereof. These were handed into Court and supported the evidence that he and

Pretorius gave. It was one these photographs that Pretorius looked at when he identified the vehicle as the vehicle which he removed from the repossession yard of FNB. I am satisfied that for these reasons, and for reasons which will become apparent later in this judgment, the Mercedes Benz seen by Pretorius in the repossession yard of FNB and which Pretorius from there was the same Mercedes Benz examined by Harry Riegel on 19 July 1993.

Pretorius says that he asked FNB if he could sell the vehicle "on their behalf and they agreed. He testified that the vehicle was taken from the yard to the premises of Motor House CC where it was for sale on behalf of FNB. At the time he dealt with one Kaufmann and "Pikkie" Louw both of whom were employees of FNB, the former being the manager of the second-hand car division of that Bank and Wesbank, and the latter,

the manager of the repossession yard of Wesbank. He says the agreement was that he would hold and sell the car "on consignment" for FNB and he understood thereby that if he made a profit, that is sold it above the reserve price, such profit was to the credit of Motor House C.C.

Pretorius says he was unable to sell the vehicle and it remained on the floor of Motor House C.C until it was taken to Gerry's Auction and Car Sales in Independence Avenue to be auctioned for and on behalf of FNB. It was taken there with six or seven other cars one to three weeks before the auction sale was held on 15 September 1994. In reply to a question concerning payment of the purchase price obtained at the auction he said "payment should be made to the original owner of the car" which he maintained was FNB.

Pretorius was subjected to a vigorous and searching cross-examination by Mr Muller who amongst other points he put to the witness, contended that Motor House CC could reasonably have acquired ownership of the motor vehicle from FNB and that the vehicle could have been put on the auction for and on behalf of Motor House CC. Pretorius with equal vigor denied this. Mr Muller contended that the production of the books of Motor House CC would have removed any doubt. This may well be. Entries in a person's books of account may certainly be used in evidence against such person but

Pretorius' attitude was that he did not have nor does he have now custody of the books of the company. It would have been permissible for Mr Muller or Mr Geier to have subpoenaed the appropriate person *duces tecum* to give evidence concerning entries in the books of Motor House C.C. Neither Mr Muller nor Mr Geier did this.

In his cross-examination Mr Muller tried a further attack. He put it to Mr Pretorius that Mr Louw, the person in charge of the repossession yard of FNB and with whom Pretorius spoke concerning this vehicle when he removed it from the yard, that Mr Louw had apparently indicated (it is not clear from the questioning to whom the indication may have been made) that the policy of FNB in 1994 was not to put its own cars on auction. Specifically Mr Muller put the question fhus:-

"Well, when Mr Louw is called, I will ask him that, but my understanding is that at that stage, the cars were not sold on auction..."

Pretorius replied to this curtly,

"I wouldn't know if they sold cars on auction."

(It should be observed that the question was not "If Mr Louw is called "but", <u>when</u> Mr Louw is called")

Despite this form of questioning, Mr Muller did not call Mr Louw to testify and nor did Mr Geier call him.

Pretorius was further cross-examined as to whether he told FNB that the vehicle had been taken to "Gerry's Auction and Car Sales" to be auctioned. He said he personally had not done so but he believed that Mr Kleynhans (the manager of Motor House CC), had done so. Insofar as the answers of Mr Pretorius in this regard may be hearsay, they were obtained by Mr Muller by his cross-examination. It was then put to Mr Pretorius that if Louw and Kaufmann (the manager of Wesbank) testified that they knew nothing of the car being transferred for auction, what would Pretorius say.

Pretorius shrugged the questions off and did not retract his statement.

Neither Mr Louw nor Mr Kaufmann was called to testify by either Plaintiff or Defendant.

Consequently, the evidence of Mr Pretorius that Motor House CC endeavoured in or about the middle of the year 1994, to sell this particular Mercedes Benz for and on behalf of FNB and that when Motor House CC, failed to do so, the vehicle was taken to Gerry's Auction and Car Sales to be auctioned on behalf of FNB, stands uncontradicted.

Mr Muller argued that an adverse inference should be drawn against Plaintiff because Plaintiff failed to call these (and other) witnesses and that the onus rests squarely on the Plaintiff.

In *SOS Kinderdorf International* v *Effie Lentin Architects* 1993 (2) SA 481 (Nm) at 489, the Court considered the question relating to the failure to call certain witnesses and made the following observation:

"Failure to produce a witness who is available and who is clearly capable of giving relevant evidence can lead to an adverse inference."

The Court then referred to certain decided cases in support of that proposition.

Clearly the witnesses referred to by Mr Muller were equally available to either side and none of the witnesses were parties to the action.

A litigating party is not obliged to call every person, who may support his case to testify. The fundamental question in litigation is whether at the conclusion of the evidence, the party who bears the *onus*, has discharged that *onus* on a balance of probabilities, and the absence of a witness, for one or other side, is no more than a circumstance which may be taken into account when arriving at a decision.

In this case the absence of any of the witnesses has not played any part in my thinking. While their evidence, had they testified, may well have influenced me, their absence has not.

Mr Pretorius says that a week or three weeks before the auction, this Mercedes Benz with other vehicles, was taken to Gerry's Auction and Car Sales, to be sold by public auction.

The scene now shifts to Gerry's Auctions and Car Sales.

Mr Rolf Ludwig Vogt was called to testify. This witness said he had been an auctioneer and car dealer since 1st June 1994. He testified that on 8 September 1994, he purchased with Mr Theo Kleynhans (who was owner of Motor House CC) the business known as Gerry's Auction and Car Sales and he said he held the firm's first auction involving motor cars on 15 September 1994.

On that day Mr Vogt auctioned the Mercedes Benz which features in this case. He said it was knocked down to Plaintiffs husband, Mr Griffiths, for N$45 000,00. At first he said he thought that that was the price but was not certain. Subsequently he said there was a reserve of N$45 000,00 on the car that it was sold to Griffiths for that price.

Mr Vogt said that at auctions, he only sold for cash or bank guaranteed cheques. He added that where a customer is financed by a bank that customer usually entered into a hire-purchase, or, instalment sale agreement, with the bank but that had nothing to do with the auctioneer. As between the auctioneer and the customer, it would still be a cash sale but the bank would pay the auctioneer on behalf of the purchaser whatever was due to him as a result of the sale.

Mr Voigt recalled that after the Mercedes Benz had been knocked down to Griffiths the latter had told him that he had already arranged finance with the Wesbank branch of FNB. After the sale occurred, it was too late that evening to ascertain from FNB if this were so, but the following day, Griffiths telephoned Wesbank from his office and he, Vogt, spoke to Ms Angela Dreyer, a person in the employ of Wesbank. Obviously,

unless Ms Dreyer was called to testify and supported Vogt, this evidence by Vogt of his conversation with Ms Dreyer, lacked probative value and would be hearsay as between Plaintiff and Defendant.

Mr Vogt testified that Ms Dreyer said to him "You can give the customer the vehicle, the hire-purchase is okay. We will give you your money. You can give the customer the vehicle."

Mr Vogt who was an excitable and loquatious witness claimed to have difficulty with the English language and did appear at times to look for an appropriate word but I have no doubt that he understood the questions put to him and when he looked for a word, it was as a rule, merely to enlarge upon an answer.

The Defendant called Ms Angela Dreyer. She said she had worked for Wesbank since May 1992 and in 1994 she was a "financing consultant" and dealt with applications for finance. Her superior was Mr Johnny Kaufmann who was the manager of Wesbank.

She explained to the Court the routine followed when a client applies for financial assistance to enable the client to purchase certain movable property. A form is completed the client providing relevant information. Mr Kaufmann would see the form and approve or disapprove, after Ms Dreyer had verified certain information. The client and the dealer are then advised that the application for finance had been approved. The next step is to obtain an invoice appertaining to the goods being sold and if it is a vehicle the particulars
of the vehicle, such as engine number, chassis numbers and the price obtained for the vehicle, are taken from the invoice. She would then draw an instalment sale contract (or hire-purchase) and a delivery receipt.

The client is then required to sign all these documents and provides the bank with proof of insurance, his ID number and his drivers licence. If there is no insurance, the bank can provide such insurance. When all this is completed the client takes the delivery note from the bank to the dealer. There he signs the delivery note and removes the vehicle. The dealer then gives the delivery note duly signed by the client to the bank and

the bank pays the dealer.

Ms Dreyer remembered that on 13 September 1994, Mr Griffiths filled in a form and applied for finance. This form was handed into Court.

Therein he described the vehicle which he wanted to purchase as a Mercedes Benz 200 and that the supplier or dealer was Gerry's Car Sales. The price was given at N$50 000 but the trade price was to be N$45 000. On the document it appears that the client was prepared to pay a deposit of N$10 000 00. She said she remembered that Griffiths had a small piece of paper with him and gave her the details from this paper.

It was formally admitted by Mr Geier on behalf of Plaintiff that the deceased had completed the form and applied for finance on 13th September 1994 and that Mr Kaufmann approved thereof.

It appears from this document as read with the evidence of Ms Dreyer that she was under the impression at that stage, that the deceased was buying the car from "Gerry's Car Sales". Ms Dreyer testified that she informed Griffiths and Mr Vogt, whom she knew, that the finance had been approved. This was on the 13,h or 14 September 1994. Thereafter, Ms Dreyer says she received an invoice which was defective. It had written thereon the word "rebuilt". The policy of the bank in those circumstances required that the Bank be informed in which respects the vehicle was rebuilt. She therefore returned the invoice so that it could be amended. Before doing so she drew up the hire-purchase contract taking the necessary particulars from the invoice to enable her to do so. She also drew up the delivery note in anticipation of Griffiths signing the hire-purchase agreement. The note he would have to take to the dealer, in this instance the auctioneer, to get delivery of the vehicle. The delivery note related that the car came from "Auction Car Sales" not "Gerry's Car Sales". She said this information she obtained from the faulty invoice. "Auction Car Sales" was regarded by Ms Dreyer as the business of Mr Vogt and she must have received the invoice from him because she testified that "Mr Vogt took it (the invoice) back".

Ms Dreyer said that she has the authority to tell a client and a dealer that the vehicle which has been purchased, can be removed from the dealer's premises by the purchaser, but she says she would not do so

unless all the documents including the hire-purchase agreement or instalment contract were duly completed and on file. She says she most definitely did not tell Griffiths nor Vogt, that Griffiths could remove the vehicle concerned from the premises of Vogt. The hire-purchase or instalment sale agreement had not been signed by Griffiths. He had not brought to her the documents which he had agreed to bring so that she could finalise the matter and she had not issued, and given Griffiths a delivery note. This conflicts with the evidence of Vogt who said she had told him he could give Griffiths the car and that Griffiths could remove it from his premises.

At one stage Ms Angela Dreyer said that FNB did not sell cars by nor have them sold by public auction. She was not convincing in this regard. She did, however, say that FNB financed purchasers who had vehicles knocked down to them at public auctions. Mr Muller conceded during his argument that the vehicle was knocked down to Griffiths at the auction on the 15th September 1994. It is also common cause that Griffiths never paid Vogt the purchase price for the vehicle and never completed the documents with the bank to pay Vogt the purchase price. It is also common cause that Vogt permitted Griffiths to remove the vehicle on the day after the auction. In the light of Ms Dreyer's denial that she authorised the removal of the car, Vogt's statement that he obtained her permission to permit the removal must be ignored. Ms Dreyer said that she did telephone Vogt in respect of the car namely to inform him that finance had been approved. There is evidence that after the sale she telephoned to his firm in respect of the invoice. She complained that the invoice recorded that the vehicle had been rebuilt and she wanted the invoice to be more specific and to state in what respect it had been rebuilt. It is possible that Vogt misunderstood Ms Dreyer. There is no doubt that the documentation concerning the vehicle had not been completed and that if Ms Dreyer gave Mr Vogt permission as alleged by Mr Vogt, she had no authority nor the right to do so.

It is common cause that Griffiths removed the vehicle from the premises of Gerry's Auction and Car Sales.

Vogt says that Griffiths wanted to show the car to his wife and wanted to take it to M&Z Motors for a service. Therefore when Ms Dreyer told him that Griffiths could remove the car from his premises he had no objection. To enable Griffiths to drive on the public road he gave him permission to use his garage number plates as the vehicle did not have number plates at the auction. Vogt says Griffiths had to return the

vehicle to enable Vogt to get a road-worthy certificate and to give back the garage number plates.

The vehicle was not given by Vogt and nor was it received by Griffiths with the intention of constituting Griffiths the owner thereof.

Where a sale is for cash, then despite delivery, ownership in the goods does not pass to the purchaser until the seller has been paid. Where the sale is a credit sale, ownership passes with delivery. In the latter case delivery must be made pursuant to the sale agreement with the intention of constituting the purchaser, owner. ***Lendalease Finance Limited v Corp de Mercadeo Agricola*** 1976 (4) SA 464 (A) at 489G to 490G.

In deciding whether a sale is for cash or on credit, the sale is presumed to be for cash unless it is proved that it was on credit.

Laing v ***South Africa Milling Co Ltd*** 1921 AD. 387 at 389/399

In any event, in the present case, Mr Vogt repeatedly said that the sale was a cash sale. I accept his evidence in this regard. He also said that it was sold for and on behalf of FNB. I accept his evidence in this regard too. In any event, the only evidence appertaining to credit was that of Angela Dreyer and I accept her evidence that the instalment sales contract providing for credit was never signed and completed. This instalment sale agreement proclaimed FNB as the owner and seller but inasmuch as it was not completed, it has no application to this case.

Furthermore the vehicle was not handed to Griffiths pursuant to the unsigned and incompleted instalment sale agreement.

I believe Ms Angela Dreyer that she did not give Mr Vogt permission to allow Griffiths to remove the vehicle from his premises.

An auctioneer is the agent of the seller but he does not have implied authority to vary the cash transaction once the vehicle is knocked down at the auction.

Mackeurtan Sale of Goods in South Africa 5th Ed. p. 248 ***Marcus*** v

Stamper and Zautendjik 1910 AD 58 at 82

SWA Amalgameerde Afslaers (Edms) Bpk v ***Louw*** 1956 (1) SA 346 (A) at 355 A.

In any event Vogt does not claim to have done so. Griffiths wanted to show his wife the vehicle and have it serviced. This was the reason Vogt gave him the vehicle and permitted him to use his (Vogt's) garage numbers. Vogt did not intend to vary the terms of the auction sale and did not do so.

I am therefore of the view that Griffiths did not acquire ownership of the vehicle when he removed it, still with Vogt's number plates.

The uncontroverted evidence of "Jakkals" Pretorius is that the Mercedes Benz was the property of FNB when he took possession thereof. This is confirmed by the minute of the Rule 37 meeting. Pretorius said the vehicle was removed from the premises of Motor House CC to be sold on auction for FNB. Mr Vogt then had possession and he said he sold the vehicle for and on behalf of FNB.

Mr Vogt also testified that shortly after the accident on 22 September 1994 wherein Griffiths was killed, Mr Kaufmann, the manager at the time of the Wesbank Branch of FNB, sent for him.

It is hearsay evidence what Mr Kaufmann said to Mr Vogt but Mr Vogt says he maintained that he was not liable to pay FNB damages but he said as a gesture and in settlement for several reasons he agreed to pay the equivalent of the purchase price. He says that he gave Kaufmann three cheques totaling N$43 000 00, two of them being postdated as his business had only recently started and he was in need of money and he wanted time to pay. The purchase price of the vehicle at the auction was N$45 000 and

Mr Vogt only paid N$43 000 00. Mr Vogt said he received a reduction from Mr Kaufmann made on behalf of FNB.

It is only the owner who can reduce the price of an article unless his agent has specific or implied authority to do so. The fact that a reduced price was accepted by FNB, is certainly indicative that FNB was the owner.

"Where a number of independent circumstances point to the same conclusion, the cogency of such evidence increases according to a geometrical rather than arithmetical progression." (per Leon J in ***New Zealand Construction Pty Ltd v Carpet Craft*** 1976 (1) SA 345 at 350G)

In this case I have referred to the independent circumstances and all of them point to First National Bank Ltd as the owner of the vehicle which Plaintiffs husband drove when he was killed.

During the case I made the observation to counsel that neither the First National Bank nor anyone else other than the Motor Vehicle Accident Fund had been joined. Mr Muller responded by pointing out that relief is only being asked from the said Fund and that a judgment concerning ownership was necessary and competent. I accept this.

The Court was asked to make an order whichever way the judgment went, in respect of costs incurred not only for this stage but in the various steps up to this appearance. It was

thereupon agreed that when this judgment is given, the parties will address the Court as to costs in respect of the previous appearances. The judgment in respect of costs of all the other stages therefore stands over for decision after hearing counsel in respect thereof.

The order of this Court is therefore:-

d) Ownership of the Mercedes Benz 200, N36661W driven by Plaintiffs husband on 22 September 1994, when Plaintiffs husband was killed, vested at that time, in First National Bank Ltd., and First National Bank Ltd was the owner thereof as required by Act No. 30 of 1990,

e) Costs of this hearing to be paid by Defendant.

ON BEHALF OF THE PLAINTIFF: **ADV H GEIER**

Instructed by: **Olivier's Law Office**

ON BEHALF OF THE DEFENDANT: **ADV L C MULLER SC**

Instructed J»y: **Government Attorney**