18/6/2010
NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

18 JUNE 2010
DATE SIGNATURE

CASE NO: A679/2008

In the matter between:

ZACHARIA TEKA Appellant

and

MALAKIA TEKA Respondent

JUDGMENT

MAKGOKA, J:

[1] This is an appeal against the judgement of the magistrate, Thabamoopo, in terms of which an eviction order was granted against the appellant (as

defendant in the court below) pursuant to an action instituted by the respondent (plaintiff in the court below). For the sake of convenience, I shall in this judgment, refer to the parties as in the court below.

[2] The appeal primarily turns on a narrow issue, namely, whether the respondent had the *locus standi* to bring an action for eviction of the appellant from the premises situated on tribal land, held in trust by a kgoshi. Ancillary to the primary issue, is an issue raised for the first time in evidence, namely, the existence or otherwise, of a partnership between the parties.

[3] The parties are biological brothers. The common cause issues, or which are not disputed, are the following: in 1973 the pliantiff was granted permission by the Ga-Mathabatha Royal Kraal to occupy certain land in the Ga Mathabatha Village, district of Thabamoopo, Limpopo Province. With the Royal Kraal's permission, he built a café, which is the subject of the dispute between the parties. He commenced operating the business, known as Teka Café, in 1974.

[4] At some stage (which is not clear from the evidence) the parties agreed that the defendant would occupy the premises and conduct business from there. This the defendant did for approximately 16 years, until the appellant was requested by the plaintiff to vacate the premises. The defendant refused to vacate the premises which resulted in the action in the magistrate court, giving rise to this appeal.

[5] In the court below, both parties testified in their own cases without calling further witnesses. The cross- examination of the respondent was largely aimed at disputing the plaintiff's *locus standi,* in that the land upon which the business was built, did not belong to the plaintiff, which aspect the plaintiff conceded.

[6] In his evidence-in-chief, the defendant, for the first time, raised the existence of a partnership between himself and the plaintiff. This aspect was not pleaded, nor put to the plaintiff in cross-examination. I shall revert more fully to this aspect later in the judgement.

[7] I now turn to deal with the defendant's main contention, both in the court below and before us, namely, that the plaintiff not being the owner of the land upon which the business premises are situated lacks the necessary *locus standi* to institute an action for eviction of the appellant.

[8] A similar argument was raised in *Vumane and Another v Mkize* 1990 (1) SA 645 (W). In that case the applicants were the registered 99-years leaseholders of certain property, the registered owner at all times being the local authority. It was argued that the local authority, alone, could proceed against the respondent for eviction by way of a *rei vindicatio*. Schabort J in dismissing the argument, held at 467J that the fact that the registered owner of the property at all material times retained its *jus vindicatio* does not abrogate the right against the respondent. It was therefore held that the applicants, although not owners of the property, did have *locus standi* in the proceedings. The court also held, with reference to *Chetty v Naidoo* 1947 (3) SA 13 at 20 A-D, that the respondent bore

the onus to establish a superior right of occupation of the premises against the applicants.

[9] In *Steenkamp v Mienies en Andere* 1987 (4) SA 186 (NC), a case also concerning the *locus standi* of a lessee of a property to claim ejectment of an unlawful occupier of the leased property, it was similarly held that the fact that the owner also had *locus standi* to seek an ejectment order against the trespasser, does not abrogate the right of the lessee to claim the same relief against the trespasser.

[10] On the authorities, it therefore clear that the plaintiff had the necessary *locus standi* to bring the action for the ejectment of the defendant. This should be more stronger in the case of tribal land, where, save for payment of yearly levies, the tribal authority has no real interest in the land allocated to a subject. The defendant's contention in this regard therefore falls to be dismissed.

[11] Turning now to the alleged partnership that came into existence between the parties. As stated in the introduction to this judgment, this aspect was raised for the first time in the defendant's evidence-in-chief. It was not pleaded, nor was it put to the respondent in cross-examination. An aspect that arises therefrom is whether the magistrate was correct in allowing such evidence under the above circumstances.

[12] It has been stated repeatedly that the object of pleading is to clarify the issues between the parties and a pleader cannot be allowed to direct the

attention of the other party to one issue, and then at the trial, attempt to canvass another. In *Robinson v Randfontein Estates Co Ltd* 1925 AD 173 at 198, the position was articulated as follows:

> *"The object of the pleading is to define the issues, and the parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. Both within these limits the Court has a wide discretion. For pleadings are made for the court, not the court for pleadings."*

[13] In *Mastlite (Pty) Ltd v Stavracopoulos* 1978 (3) SA 296 (T) at 299D-E, Le Roux J with whom Eloff J (as he then was) agreed, summarised the approach to be adopted thus:

> *"What must, in my view, be emphasised is that the contemplated departure from the pleadings must not be as to cause prejudice and that the new issue or matter should have been fully canvassed by both parties to the extent that it virtually amounts to a tacit agreement between them to enlarge the scope of the pleadings. Both parties must willingly participate in the effort to canvass the new issue, otherwise the possibility of prejudice must almost inevitably arise which would be fatal to any attempt to depart substantially from the pleadings."*

See also *Kali v Incorporated General Insurances Limited* 1976 (2) SA 179 (D) at 182; *Imprefered (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A).

[14] In the present case, there is no suggestion that the alleged existence of a partnership had been fully canvassed by both parties. The plaintiff had not

participated in the effort to canvass this issue, as it was introduced only during the evidence-in-chief of the defendant. In my view, the possibility of prejudice attendant on the plaintiff arose immediately. As a result, I am of the view that the substantial departure from the pleadings should not have been permitted. The net effect is that the evidence seeking to introduce evidence alleging the existence of a partnership, should have been disallowed.

[18] Finally in his heads of argument before us, counsel for the appellant similarly raised new argument that the plaintiff had failed to prove that the agreement between him and the defendant was cancelled, which entitled him to approach the court for an eviction. Annexure "A" to the particulars of claim, in my view, constitutes a proper cancellation. The relevant parts read as follows:

> *"Our instructions are that during the year 1990 our client allowed you to occupy and use the Café business for your own account. This was the time when you were unemployed and our client sympathised with you as a brother; hence he allowed you to use the Café so that you could maintain your family.*
>
> *During November 2005 our client indicated to you that he would like to take the Café back on the 1st March 2006 since your family is now in a position to raise income in that"*

[19] Regard being had to the totality of all factors in the appeal, I am of the view that there is no merit in the appeal.

[20] I would therefore make the following order:

1. The appeal is dismissed with costs.

T M MAKGOKA
JUDGE OF THE HIGH COURT

I agree

J GOODEY
ACTING JUDGE OF THE HIGH COURT

DATE HEARD	29 APRIL 2010
DATE OF JUDGMENT	18 JUNE 2010
FOR THE APPELLANT	ADV M G BOONZAIER
INSTRUCTED BY	*ESPAG MAGWAI ATTORNEYS*, POLOKWANE, AND *COUZYN HERTZOG HORAK INC*, PRETORIA
FOR THE RESPONDENT	ADV Y COERTZEN
INSTRUCTED BY	*THOMAS GROBLER ATTORNEYS*, POLOKWANE AND *SAVAGE JOOSTE & ADAMS*, PRETORIA