

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

Case No.HCA10/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

DATE: 15/11/2019

A LAMMINGA

In the matter between

MOHLAUME MOSES BOPAPE

Appellant / Plaintiff

and

**LESHIBA MASHATOLE t/a TSWELOPELE CWJ TRADING
ENTERPRISE POLISH SHOP**

Respondent / Defendant

Case no: 560/2016

THOMAS MAROKANE t/a FISH AND CHIPS SHOP

Respondent / Defendant

Case no: 561/2016

JUDGMENT

LAMMINGA AJ

INTRODUCTION:

[1] This matter came before us on appeal from the Magistrate's Court. For ease of reference the Appellant shall be referred to as the Plaintiff and the Respondents shall be referred to as the Defendants.

[2] This appeal concerns a lease agreement in respect of a property situated on communal land administered by a tribal authority, but the central issue is whether there is a lease agreement between the parties.

BACKGROUND

The Pleadings

[3] The Plaintiff sued out summons against each of the two Defendants on case numbers 560/2016 and 561/2016, in the Magistrate's Court, Mankweng for payment of arrear rental in respect of business premises situated at Nobody Coal Yard site 50 Nobody Mothibaskraal (the 'Coal Yard'). The two cases were consolidated and determined in one trial before the court a quo.

[4] In the particulars of claim the Plaintiff sets out his cause of action in that he is the owner and lessor of the Coal Yard and that he or his predecessor entered into an oral lease agreement with the Defendants allowing the Defendants temporary use of the premises against payment of a monthly rental. He continues to aver that the Defendants were in arrears with payments in terms of the lease.

[5] In their pleas the Defendants allege that they entered into oral lease agreements with one Mr Molepo in 2010 and 2011 respectively, that these lease agreements were never terminated and that they never entered into any agreement with the Plaintiff.

[6] The Plaintiff replied that from April 2016 he is the legal possessor of the property and entitled to rent the property out and collect the rent on the property. He further states that

he was awarded possession and use of the property by the Mothiba Traditional Council in 2016, that he paid the arrear levies due to the said council for the period 2001 to 2016 and that he informed the Defendants that he is now entitled to possession and use of the property and the rental payable. He made a general averment that the lease of the property by the Defendants would continue on the same terms as before, without pleading that it was agreed to by them.

[7] In rejoinder the Defendants reiterated that they did not enter into a lease agreement with the Plaintiff and that the Plaintiff did not have any document constituting a Permission to Occupy.

In the court a quo

[8] When the matter came before the magistrate for trial it was placed on record by the Plaintiff's legal representative that the parties agreed to the following:

- (a) That it is common cause that the Coal Yard was allotted to Michael Bopape (Mr Bopape), the father of the Plaintiff and that the Defendants rented the Coal yard from the owner¹.
- (b) That the parties agreed that:
 - (i) customary law applies;
 - (ii) the Defendants will start and call Mr Rapaledi and Mr Molepo to prove ownership; and
 - (iii) the Defendants would pay rent to whomever the court decides is entitled to it.
- (c) The question to be determined is who is entitled to the Coal Yard.

[9] The legal representative for the Defendants confirmed what was placed on record, but qualified it by indicating that the parties agreed that Mr Rapaledi testify first since he is making funeral arrangements. This was thus a practical consideration to assist the witness to be excused early.

Evidence for the Defendants

[10] Mr Rapaledi testified under oath and his evidence essentially was the following:

He bought the Coal Yard in 1986 for R5000-00 from Michael Bopape and Tytha Bopape (the parents of the Plaintiff and Mr Rapaledi's in-laws) when they had financial difficulties. They went to the Chief's kraal where they informed the Chief that Mr Rapaledi now owns the site and he was given documents – a letter of occupying the site from the Chief - and he now had to make payments to the Chief's kraal in respect of the Coal Yard. When he started to use the site there were no buildings on the site. He changed the sign at the site from Bopape's Coal Yard to Kgasani Coal Yard and built 2 rooms on the property. In 1994 he decided to relocate to Raseleka village and sold the site to Mr Molepo for R10000-00. He took Mr Molepo to the Chief's kraal where Mr Molepo was required to pay an amount for being an outsider and the handover of the site to Mr Molepo was made. Mr Molepo made various improvements to the property. Mr Rapaledi did not keep the documents confirming the transfer from the Bopapes as he did not foresee he might need them after he made the transfer to Mr Molepo. When he sold the site to Mr Molepo, both Mr Bopape and his wife were still alive and they would not have allowed him to sell the site if they only gave him permission to temporarily use it. He contends that if they did not want him to sell it, they would have offered his money back to take back their property. Mr Bopape passed away in 2005 and it was only on the day after the burial of Mr Rapaledi's wife in 2015, that her family (the Bopapes) had their own meeting and demanded the

papers for the Coal Yard from Mr Rapaledi. He then informed them it was sold to Mr Molepo. In 2016 when the Plaintiff laid claim to the Coal Yard the matter was to be discussed at the Tribal Council, but Mr Molepo was in Gauteng and they proceeded to allow the Plaintiff to pay the arrears without hearing Mr Molepo. The Tribal authority made a mistake in allowing the Plaintiff to pay the arrear levies, since neither Mr Molepo nor Mr Rapaledi had been approached about the arrear levies. The Plaintiff waited for the wife of Mr Rapaledi, being the person who witnessed the arrangement to buy the Coal Yard from Mr Bopape and who was sent to pay the money to Mr Bopape for the purchase, to die and then lay claim to the property.

[11] Mr Molepo also testified under oath and his evidence is summarised as follows:

He bought the site from Mr Rapaledi in 1994 for R10 000-00. They went to the chief and then to the Tribal Council where Mr Rapaledi explained to the council that he sold the site to Mr Molepo. The tribal authority gave the go-ahead but due to Mr Molepo not being a resident, he had to pay R510-00 to be allowed to be considered a resident there and to be able do business there. Due to the changes in government and the structures responsible for issuing the Permission to Occupy, he never received the paperwork pertaining to the transaction. He made various improvements to the property and continued to pay the levies to the tribal authority until 2009. He misplaced the receipts after a previous court attendance, however. He confirmed he entered into lease agreements with the Defendants. The tribal authority was fully aware of the transfer as he once rented to a person without informing the tribal authority and he was summoned for doing so and fined R200. If the Plaintiff paid arrear levies he did so on behalf of Mr Molepo, but there was no agreement between them to that effect. The tribal authority was not entitled to accept payment from the Plaintiff for the arrears owed by Mr Molepo. When Plaintiff told the tenants to pay the rent to

him instead of Mr Molepo, they went to the tribal authority and he was requested to provide the documents indicating that he was paying the levies. He was unable to attend at the Tribal Council when he was called for a subsequent meeting and requested a different date but was never given another date for the meeting. The tribal authority giving the Plaintiff a recommendation in 2016 to carry on business on the site was a mistake as they were fully aware that he occupied the site. Plaintiff's residence is across the street from the site, would thus have been aware of the activities at the site, but in all the years since 1994 he was never approached by the Bopapes regarding the site. It was only in 2016 when he was called by a person saying he is Bopape who said he wanted to discuss the site. He disputes the validity of the Plaintiff having been allocated the site in question.

[12] Mr Malatji testified under oath as follows:

He was involved part time at the traditional authority before 2000 and has been a member of the Traditional Council since 2000. He became chairperson of the headmen of Kgoshi Mothiba in 2013. Before 2000 he attended meetings of the council whenever he was available. He knows the Plaintiff and the Defendants very well and he is aware of the fact that Mr Rapaledi took over the site from Mr Bopape and later transferred it to Mr Molepo. The site was not sold, but rather the business conducted there. Mr Molepo was called to the tribal authority when Plaintiff wanted allocation of the site due to the fact that the tribal authority was aware that Mr Molepo was the person using that site. The whole point of attending at the tribal authority was to inform the authority that the site has now been 'moved from this one to another'. He confirmed that Mr Molepo was charged for being an outsider to enable him to use the said site.

Evidence for the Plaintiff

[13] The Plaintiff testified under oath and his evidence was essentially as follows:

His father, Mr Bopape, was granted a Permission to occupy the site known as the Coal Yard. When his father became ill a family meeting was held where Mr Bopape told his children that he would give Mr Rapaledi permission to use the site to provide for his family. In 2016, when the Plaintiff wanted to reclaim the site, Mr Rapaledi told him that he had sold the site to Mr Molepo. Upon enquiring at the Tribal Authority he was told that the site is still allocated to Mr Bopape and that there were outstanding fees. He paid the fees and the family resolved that he should be allocated the site as he is the youngest born son. He was issued a receipt and a letter recommending to the Polokwane Municipality that Plaintiff be allowed to use the site for a coal yard business. He did notice improvements being made to the site in the past, but assumed the people worked for Mr Rapaledi. The estate of Mr Bopape was never reported and no executor had been appointed to date. Mr Molepo only rented the site from Mr Rapaledi. The Plaintiff and his family made no enquiries about the site until 2015 after the death of the Plaintiff's sister who was the wife of Mr Rapaledi. Mr Rapaledi left the village after he allowed Mr Molepo to take over the site. Since 2005, after the death of Mr Bopape, the family made efforts to get the Coal Yard site back but only informed the tribal authority of the passing of Mr Bopape and not of the dispute regarding occupation of the site as no-one was interested in using the site.

[14] Mr Mothiba testified under oath and his evidence is summarised as follows:

He has been involved with the traditional council from 1982 to 2013. He knew the late Mr Bopape and that the Coal Yard was allocated to Mr Bopape in the seventies. He was not aware of any change in the allocation of the said site up to 2013. He was however not the only person dealing with the allocation of sites as it was done collectively by the council. He cannot admit or deny that Mr Bopape and Mr Rapaledi came to the office of the

tribal authority to document their agreement as he did not see documents to that effect, although he would have.

[15] Mr M S Bopape also testified under oath and stated essentially as follows:

The Plaintiff is his younger brother. In 1988/9 he was approached by his father first and later it was said in a meeting that he intended to give the site to Mr Rapaledi to use until Mr Bopape's children may decide to use it. Before Mr Bopape passed away he told the witness he was trying to get his site back from Mr Rapaledi, but the latter was avoiding him. He confirmed that in 1985/6 Mr Bopape was involved in a court case and he even had to sell cattle due to the financial difficulty at the time. He was not aware of the Plaintiff being approached to provide financial assistance. He conceded that he could not deny that Mr Bopape and Mr Rapaledi visited the tribal office to document the transfer of the site to Mr Rapaledi.

[16] Ms Kotho testified under oath but her evidence did not contribute to the case as she has no knowledge of the allocation of business sites or the change in allocation of such sites. She only noticed that after Mr Bopape passed away, that Mr Rapaledi was using the site.

Heads of Argument

[17] After evidence was heard the court requested written heads of argument from the legal representatives and specifically raised the question of jurisdiction of the Magistrate's Court to make a declaratory order in respect of the rights of the parties and whether the court could grant relief not pleaded nor prayed for. The heads filed in the Magistrate's Court are not included in the papers on appeal even though it was included as annexures to the

magistrate's written judgment. The record before this court is thus incomplete however this is not in my view a case where the appeal could not be properly determined unless the relevant part of the record is made available.

Judgment of the court a quo

[18] The learned magistrate found that there was no amendment of the pleadings and that the order as to who is the owner of the property could not be granted since Mr Molepo had not been joined as a party to the action. He further found, after consideration and evaluation of the evidence that the probabilities favoured the version of the Defendants and that there was no lease agreement entered into between the Plaintiff and the Defendants.

Before this court

[19] In this appeal the Plaintiff submitted that: (a) the trial court erred in its finding that declaratory order was being sought; (b) no relief was being claimed against Mr Molepo and therefore the court erred in finding that he should have been joined; (c) Mr Molepo should have intervened if he felt his rights were in issue; and (d) the trial court made errors in its factual findings that the plaintiff did not prove he was the owner of the site and thus entitled to the rental.

[20] In opposition of the appeal it was submitted by the Respondents that: (a) the Plaintiff requested the court to make a finding as to who is entitled to receive rental for the property as the rightful holder of occupational rights to the property which would constitute a declaration of rights and falls outside the jurisdiction of the magistrate's court; (b) there is no evidence of any lease agreement between the Plaintiff and the Defendants; (c) there was

no onus on the Defendants and that the Plaintiff failed to prove he is the rightful holder of any rights in respect of the said property.

[21] During argument before this court the parties were in agreement that the issue could not be ownership of the immovable property known as the Coal Yard, since it is situated on communal land and therefor none of the persons claiming to be or have been owners were ever conferred individual ownership. This is also the reason why the parties agreed before the trial in the court a quo that the entitlement to rental payments in respect of the Coal Yard should be determined by the application of customary law. The undisputed evidence is that sites could not be sold, but in the case of business sites, the business conducted on the site could be sold.

[22] It is clear that from the outset the Plaintiff and the Defendants' legal representatives incorrectly identified the point in issue to be determined by the court as being that of ownership of the Coal Yard or that the Defendants should pay rent to whoever is found to be entitled to charge rent in respect of the Coal Yard. This is simply so due to the cause of action as pleaded and the fact that the Plaintiff relies on an agreement entitling him to rental from the Defendants.

[23] The pleadings were never amended as there was neither any application to amend nor any other indication that the parties agreed to amend the pleadings. It cannot be said that the issue to be determined is who the owner of the property is as that was never the cause of action. In any event, in the light of the disputes in respect of ownership and allotment of the site and the fact that Mr Rapaledi and Mr Molepo had an interest in respect of such and order, the court could not have granted any such order or make any

determination which would affect their rights. As per Nkabaninde ADCJ in *Matjhabeng Local Municipality v Eskom Holdings Ltd and Others 2018 (1) SA 1 (CC)* at para 92:

'No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it.'

The order was not sought on the pleadings and there was no amendment to that effect. The agreement between the litigants that the court had to determine ownership was only made known on the date of trial. It could not have been expected of Mr Rapaledi or Mr Molepo to have intervened in the circumstances.

[24] On a proper reading of the pleadings and in the light of the admissions as stated before the trial commenced, the cause of action is clearly that there was a lease agreement entered into between the Defendants and the Plaintiff and or his predecessor and that in terms of that lease agreement, the defendants owe rental to the Plaintiff.

[25] The Plaintiff seems to want to have his cake and eat it too. On the one hand he pleaded that he is entitled to receive the rental from the Defendants in terms of a lease agreement entered into between him and or his predecessor and the Defendants. The evidence that the Defendants entered into lease agreements with Mr Molepo is not in dispute and the Plaintiff's legal representative placed on record before commencement of the trial in the court a quo that if the court were to find that the Defendants entered into a lease agreement with Mr Molepo as landlord, and the landlord changes, 'they would have to abide by that'. This point was reiterated during argument before this court in that it was submitted that that the Plaintiff stepped into the shoes of Mr Molepo in terms of the common-law principle of 'huur gaat voor koop', when he was allocated the site in 2016.

[26] In *Genna-Wae Prop (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) ([1995] ZASCA 42) at 939 A-C the operation of this principle was summarised as follows:

'The purchaser (new owner) is substituted ex lege for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease, provided that he (the lessee) continues to pay the rent and otherwise to observe his obligations under the lease. The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract. This is the impact of *huur gaat voor koop* in our modern law.'

The court also confirmed that the principle applies to successors in title such as purchasers, usufructaries, legatees, donees and the like².

[27] This argument may have assisted the Plaintiff if it was a matter where Mr Molepo transferred rights to the Plaintiff. It is however common cause that there was no agreement of any nature between the Plaintiff and Mr Molepo and therefore Plaintiff did not step into the shoes of Mr Molepo in respect of the lease agreement between Molepo and the Defendants since Mr Molepo did not transfer any right or title to the Plaintiff. The reliance in the '*huur gaat voor koop*' principle is thus misplaced.

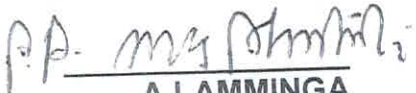
[28] On the other hand the Plaintiff submitted that the court should apply customary law to determine who is entitled to rent out the site and to collect rental for use of the site. That person, so it was submitted, must be found to be the Plaintiff since Mr Bopape could not have alienated his allocation of the Coal Yard site in terms of custom. The Plaintiff, in contradiction of the admission and the essence of his pleadings adduced evidence that Mr Molepo could not have acquired any rights in respect of the property since Mr Bopape did not transfer his allotment to Mr Rapaledi and thus Mr Rapaledi could not transfer any such

rights to Mr Molepo. The Plaintiffs assertion that in terms of customary law there could not have been any lawful alienation would negate the operation of the 'huur gaat voor koop' principle which presupposes alienation and an agreement between the initial lessor and the lessee. The evidence of the Plaintiff and his witnesses are that the site was never allocated to either Mr Rapaledi or Mr Molepo and was transferred from the deceased Mr Bopape to the Plaintiff. It is common cause that neither Mr Bopape nor the Plaintiff had entered into any agreement for lease of the Coal Yard at any stage with the Defendants. On this construction of the Plaintiff's case, the 'huur gaat voor koop' principle does not find application.

[29] Having found as stated above that it was not for the court a quo to determine ownership in respect of the site or who was entitled to possession of the site I deem it necessary, in the light of the submissions made and the grounds for the appeal to deal with issue of the onus. The Plaintiff submitted that the onus was on the Defendants due to a plea of confession and avoidance. This is not correct. The Plaintiff alleged that there was a lease agreement between him and the Defendants, either because they contracted with each other or because he stepped into the shoes of the person who initially entered into a lease agreement with them. The Defendants denied having entered into an agreement with the Plaintiff or that the Plaintiff succeeded Mr Molepo and they do not admit to the facts alleged in the claim. Their plea is not one of confession and avoidance merely because they alleged that Mr Molepo was the owner of the site. The Defendants did not agree that there was a shift in the onus either. It was stated that the Defendant's witness would testify first due to practical considerations to release Mr Rapaledi to attend to funeral arrangements.

[30] In the result I propose the following order:

That the appeal is dismissed with costs.


A LAMMINGA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

I agree, and it is so ordered


E M MAKGOA

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

Date heard: 16 August 2019

Date delivered: 15 November 2019

APPEARANCES:

For the Appellant : C Nel of Corrie Nel and Kie, Polokwane

For the Respondents : R P Tloubatla on instruction of Richard Mahopo Attorneys,
Polokwane

¹ In the Heads of argument in the appeal the legal representative for the Appellant/Plaintiff states specifically that it was common cause that the Defendants rent from the "owner" of the Coal Yard and that they entered into a rental agreement with Mr Molepo. This is not exactly what was placed on record at the start of the trial – See p4 Vol 1 of the transcribed record.

² *Genna-Wae Prop (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* at p936 C-D