

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

29/3/17

CASE NO: 27524/13

(1)	REPORT ABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
.....29/3/17.....	-----
DATE	SIGNATURE

In the matter between:

NIEUCO PROPERTIES 1005 (PTY) LTD

Plaintiff

(Registration Number: 2001/017985/07)

JACOBUS JOHANNES BOSHOFF

Second Plaintiff

and

TRUSTEES FOR THE TIME BEING OF

THE INKULULEKO COMMUNITY TRUST

First Defendant

(Master's Reference: IT490/63)

MINISTER OF THE DEPARTMENT OF RURAL

DEVELOPMENT AND LAND REFORM,

REPUBLIC OF SOUTH AFRICA

Second Defendant

and

SIPHO LEVY MASEKO

Third Party

(Id No: [...])

JUDGMENT

PETERSEN AJ:

INTRODUCTION

[1] This is a stated case for determination of liability of the second defendant for damages to the plaintiff's properties. The matter comes before me pursuant to an agreement between the plaintiffs' and second defendant to separate the issue of liability from quantum in terms of Rule 33(4) of the Uniform Rules of Court.

THE STATED CASE

[2] The stated case is phrased as follows:

"Do the provisions of the Act and more particularly the duties imposed on an owner referred to in the various sections apply in relation to State land where the Minister of the Government Department (the Second Defendant) concluded a lease agreement with a third party whereby possession and control of such land are given and made over to the lessee in terms of the provisions of the lease agreement including clauses 11.6 and 11.16 of the lease agreement?"

THE AGREED FACTS

[3] The first plaintiff is the owner of the remaining extent of Portion 1 of the Farm Glengarry 652, Registration Division J.T., Mpumalanga as well as Portion 10 of the same farm which adjoin each other ("the plaintiffs' properties"). The second defendant is the owner of Portion 1 of the Farm Hanging Stone 636, Registration Division J.T., Mpumalanga as well as the remaining extent of the same farm 636, Registration Division J.T., Mpumalanga ("the second defendants' properties"). The Farm Hanging Stone adjoins the Farm Glengarry. On or about 20 April 2011, Mr Elleck Sam Nkosi the delegated representative of the second defendant ("the lessor") and Mr Sipho Levey Maseko ("the lessee") concluded a written agreement of lease in terms whereof the second defendant's properties were leased to Mr Maseko for a period of five (5) years commencing on 1 April 2011. Mr Maseko henceforth enjoyed the beneficial occupation and use of the leased properties (i.e. the "possession *and control*" in terms of and in accordance with the terms and provisions of the lease agreement). The lease agreement was still in effect on 7 June 2012. In terms of clause 11.6 of the lease agreement Mr Maseko had the obligation to keep all firebreaks on the border between Hanging Stone and Glengarry open and free from any combustible material. In terms of clause 11.16 of the lease agreement Mr Maseko had the obligation to make firebreaks and firearm belts on the boundaries of the adjoining properties and within the boundaries of the Farm Hanging Stone, where necessary, to protect the second defendant's properties against internal fires. Mr Maseko was also under obligation to

comply with any statutory fire protection requirements or conditions imposed by any competent Fire Protection Authority.

[4] On 7 June 2012 a veld fire started on the Farm Rietvley (which adjoins the Farm Hanging Stone and the Farm Glengarry, spread from Rietvley to the Farm Hanging Stone, and from Hanging Stone to the Farm Glengarry. On 8 June 2012 a fire re-ignited *inter alia* on Portion 1 of the Farm Glengarry, spread and caused damage to the Plaintiffs' macadamia orchard which lies partly on Portion 1 and partly on Portion 10 of the Farm Glengarry.

[5] The general public and neighbours of the second defendant's properties are aware that the second defendant is the owner of the said properties. The second defendant did not inform the plaintiffs' and neighbours that it leased the property to Mr Maseko and had purported to contract out of its statutory obligations in terms of the **National Veld and Forest Fire Act, Act 101 of 1998 ("the National Veld and Forest Fire Act")** and that it purported to delegate all its duties and responsibilities in terms of the Act to Mr Maseko. The second defendant relinquished possession, use and enjoyment of its properties to Mr Maseko and did not relinquish its right to dispose of the property to Mr Maseko. The lease agreement did not oblige or require Mr Maseko to physically live (stay on) the second defendant's properties.

ISSUE OF COMMON CAUSE

[6] The second defendant is both the admitted registered owner and common law owner of the leased properties, which is "*State land*" as defined in the National Veld and Forest Fire Act¹.

THE ISSUE

[7] The meaning of common law owner; comprehensively researched and dealt with by Swain J in ***Mondi South Africa Ltd v Martens and Another***² is apposite and needs no further exposition for purposes of this stated case. The lessee was in possession and control of the leased property and enjoyed the benefits of occupation and use of the leased properties in accordance with the terms and provisions of the lease agreement at the time of the fires which gave rise to the plaintiffs' damages.

[[8] The central issue calling for determination is whether the lease agreement which deals with only two clauses relevant to veld fires absolved the second defendant, as the owner of State land, from its statutory duties imposed on it in the Act, and consequently from liability for the plaintiffs' damages.

¹ "...land which vests in the National or Provincial Government - (a) including land held in trust by the Minister of Land Affairs or the Ingonyama referred to in the KwaZulu Ingonyama Trust Act (KwaZulu Act No. 3 of 1994); ..."

² 2012 (2) SA 469 (KZP) at paras [8] to [16]

ISSUES RAISED BY THE PARTIES

THE "EXTENDED" DEFINITION OF OWNER

[9] In section 2(1)(xiii) of the National Veld and Forest Fire Act, other than the common law owner, eight other categories of owners are defined. For purpose of the stated case, the only owner of relevance, other than the common law owner, is "*a lessee who controls the land in terms of a contract*".

DUTIES OF AN OWNER IN THE ACT

[10] The duties imposed on an owner are set out mainly at Chapters 4 and 5. The duties relevant to the agreed facts include the duty to prepare and maintain firebreaks³, the procedure to be adopted in the event of a fire⁴ and the duties in relation to adjoining owners and fire protection associations⁵. The duties relevant to the second defendant, as owner of State land are contained in section 4(8)⁶.

[11] Membership of a fire protection association, although not obligatory for owners other than owners of State land, provides a measure of protection as is evident in the presumption of negligence in Section 34 of the National Veld and Forest Fire Act:

34 Presumption of negligence - (1) If a person who brings civil proceedings proves that he/she suffered loss from a veldfire which -

(a) the defendant caused;

(b) started on or spread from land owned by the defendant,

The defendant is presumed to have been negligent in relation to the veld fire until the contrary is proved, unless the defendant is a member of a fire protection association in the area where the fire occurred.

(2) The presumption in subsection (1) does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful."

³ Section 12 provides that "every owner on whose land a veld fire may start or burn or from whose land it may spread must prepare and maintain a firebreak on his/her side of the boundary between his/her land and any adjoining land".

⁴ Section 17 provides that "every owner on whose land a veld fire may start or burn or from whose land it may spread must -

...Ensure that in his/her absence responsible persons are present on or near his/her land who, in the event of fire, will -

Extinguish the fire or assist in doing so; and

Take all reasonable steps to alert the owners of adjoining land and the relevant Fire Protection Association, if any.

⁵ Section 18 provides that "any owner who has reason to believe that a fire on his/her land or the land of an adjoining owner may endanger life, property or the environment, must immediately -

Take all reasonable steps to notify -

The Fire Protection Officer or failing him/her, any member of the Executive Committee of the Fire Protection Association, if one exists for the area; and

The owners of adjoining land and;

Do everything in his/her power to stop the spread of the fire."

⁶ Section 4(8) : the owner in respect of State land must join any fire protection association registered in the area in which the land lies.

THE MEANING OF THE WORD OWNER IN THE ACT

[12] The meaning of the word "owner" in the definition of the National Veld and Forest Fire Act, with specific reference to the effect of the use of the words "*and includes*", is at issue. It is trite that, in determining the plain, ordinary grammatical meaning of word "owner" with reference to the words "*and includes*", the context in which it has been used is paramount. In the leading case of ***Jaga v Donges NO and Another; Bhana v Donges NO and Another***⁷ Schreiner JA remarked as follows at 662G:

'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context'.

This dictum in the dissenting judgment of Schreiner JA, often followed, has recently been approved by the Supreme Court of Appeal in ***Natal Joint Municipal Pension Fund v Endumeni Municipality***⁸ and ***South African Property Owners Association v Council of the City of Johannesburg Metropolitan Municipality***⁹. It has also mustered constitutional approval in ***Sato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others***¹⁰, where the approach to statutory interpretation was at issue.

[13] In ***De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others***¹¹, Langa DCJ as he then was set out the approach to the interpretation of the word "*includes*" as follows:

"The correct sense of 'includes' in a statute must be ascertained from the context in which it is used...If the primary meaning of the term is well known and not in need of definition and the items in the list introduced by 'includes' go beyond that primary meaning, the purpose of that list is then usually taken to be to add to the primary meaning so that 'includes' is non-exhaustive. If,..., the primary meaning already encompasses all the items in the list, then the purpose of the list is to make the definition more precise. In such a case 'includes' is used exhaustively..."

[14] The Department of Water Affairs and Forestry as it was known in 2005 in a publication titled **"Guide to the Interpretation and Implementation of the National Veld and Forest Fire Act No. 101 of 1998, 6 January 2005 VERSION 3"** published under the auspices of its Chief Directorate: Forestry, Legislative Project, so as to guide the interpretation of the Act to those affected by its provisions, proposed the following interpretation of the word "owner":

"66. Note that "owner" means any landowner with title deed as well as (my emphasis): a lessee or other person legally controlling land, a community, the manager of State land, and the chief executive officer of any local authority, or their duly appointed agents in the cases of State land (including SANDF land) and local authorities (section 2(1)(xiii)). Note also that section 2(5)

⁷ 1950 (4) SA 653 (A)

⁸ 2012 (4) SA 593 (SCA)

⁹ 2013 (1) SA 420 (SCA)

¹⁰ (2004) ZACC 15; 2004 (4) SA 490 (CC) at [72], [89]- [91]

¹¹ 2004 (1) SA 406 (CC) at para [18]

allows for the case where there may be more than one owner of the land, and thus where one of the several owners may take on the duties imposed by the Act."

According to the Shorter Oxford Dictionary Volume 2 Fifth Edition, the ordinary meaning of "as well as" is: 'in addition to'.

[15] Having regard to the aforesaid judicial authority, when the definition of "owner" is holistically interpreted by according the words their ordinary grammatical meaning, in their contextual setting, the word 'includes' is non-exhaustive. Liability can therefore attract either to the common law owner or the lessee subject to the terms of the contract of lease with the determinant factor being the "control" of the land. The word "control" traverses the definition of "owner" like a golden thread. In this regard I align myself with Swain J where he states at para [22] of **Mondi South Africa Ltd v Martens and Another** *supra* that:

"the other meanings accorded to the definition of 'owner' in s 2 of the Act, are instructive. Paragraph (a) refers to a lessee 'or other person who controls the land in question' in terms of a contract, testamentary document, law or order of a High Court. The issue of control of the land is repeated as the criterion in respect of a community, as well as State land, respectively, in paras (b) and (c)...".

CONTROL AS AN INCIDENT OF OWNERSHIP

[16] Whilst ownership constitutes the most comprehensive real right over property, it has never been regarded as absolute in the common law.¹² Absoluteness of ownership does not necessarily imply that an owner is always able to exercise full and absolute control over his property. Ownership of immovable property can be limited in a number of ways, with such limitations often imposed by the owner himself. In concluding a lease agreement with Mr Maseko, the second defendant limited his ownership by transferring possession with the entitlements of use, control and encumbering of the property, to Mr Maseko.

[17] Possession ordinarily constitutes the physical control (*corpus*) of a thing by a person and that person's mental attitude (*animus*) towards the thing. In general these requirements need to exist to constitute possession. However, the exact nature of the possession depends on the context in which and the purpose for which it is used. In the context of the stated case the terms of the lease agreement dictates the exact nature of the possession.

[18] The rights and duties of the second defendant as lessor and Mr Maseko as lessee in respect of the leased properties are regulated by a contract of lease. A careful reading of clauses 11.6 and 11.16 shows that it is designed at the protection of the interests of the second defendant in his land and touches on provisions in the Act designed at protecting those interests.

¹² *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N) at 6101

[19] The issue of the presence of the owner on the land was raised, with the plaintiff and defendant putting forward conflicting submissions. The dispute can safely be laid to rest when regard is had to section 17 of the Act which envisages the absence of an owner and thus recognising absence of physical control but still placing a duty on such owner to ensure the presence of responsible persons to extinguish any fires or to assist in doing so and to take all reasonable steps to alert the owners of adjoining land and the relevant fire protection association, if any. There was thus in terms of the lease no obligation placed on Mr Maseko to physically control the land but to have someone present in his absence to comply with his duties in terms of the Act.

[20] The vexing question, however, remains whether there was an obligation on the second defendant to comprehensively (or at least effectively) prescribe Mr Maseko's duties and obligations to neighbouring landowners in the lease agreement. According to the common law the intended use of the leased property is of real and substantial importance. The subject matter of a lease agreement is not the leased property itself but the use and enjoyment of the property. *Pothier* in his *Treatise on the Contract of Lease* thus says:

"It is of the essence of the contract of lease that there be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract." (my underlining and emphasis)

[21] The lease agreement makes it plain that the leased properties of the second defendant were to be used by Mr Maseko for farming purposes. The terms of the lease agreement holistically considered, inclusive of clauses 11.6 and 11.16, makes it clear that its main object was to regulate the use and enjoyment of the property and the protection of the second defendant's interest in its property, as the substance of the contract.

[22] The submission that the second defendant should have comprehensively or at least effectively set out Mr Maseko's duties and obligations in the Act, could lead to the absurd result that contracts of lease should set out every conceivable statutory obligation which impacts on a lessee. There is no such requirement as an essential requirement of a lease agreement.

[23] Mr Maseko leased the properties to engage in the specialised sphere of farming. It would therefore have been required of him to acquaint himself with any legal obligations which impact on this chosen sphere and the dictum of the Appellate Division as it was then known in *S v De Blom*¹³ is accordingly apposite:

"... But the approach that it can be expected of a person who, in a modern State, wherein many facets of the acts and omissions of the legal subject are controlled by legal provisions, involves himself in a particular sphere, that he should keep himself informed of the legal provisions which are applicable to that particular sphere, can be approved." (Extracted from the Headnote)

¹³ 1977(3) SA 513 (A) at 532 E-H

[24] The duties and obligations in the Act referred to *supra* with the presumption of negligence did not apply to the second defendant.

RESULT

[25] In the result, the stated case is answered in favour of the second defendant.

ORDER

[26] The plaintiffs' claim is dismissed with costs, including the costs of two Counsel.



AH PETERSEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances:

On behalf of the Plaintiff: Advocate AC Ferreira SC

Instructed by Tim du Toit Attorneys

On behalf of the Defendant: Advocate FJ Becker SC with Advocate HOR Modisa

Instructed by THE STATE ATTORNEY, PRETORIA

DATE HEARD: 17 October 2016

DATE OF JUDGMENT: 29 March 2017