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LL

Case No 343/1987

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BOOMPRET INVESTMENTS (PROPRIETARY) LIMITED — First Appellant

VASILIOS PROKOPOS — Second Appellant

and

PAARDEKRAAL CONCESSION STORE (PROPRIETARY) LIMITED — Respondent

CORAM: HOEXTER, VAN HEERDEN, NESTADT, MILNE *et* F.H. GROSSKOPF JJA

HEARD: 15 MAY 1989

DELIVERED: 1 JUNE 1989

JUDGMENT

VAN HEERDEN JA:

During 1972 one Cronje sold and transferred to Rustenburg Platinum Mines Ltd ("Rustenburg") a portion of the farm Paardekraal, district Rustenburg, reserving to himself a portion of that portion for use as a trading site. In the Deed of Transfer it was stipulated that the property transferred was subject to the following condition:

> "THE Transferor hereby reserves to himself, his heirs, Executors, Administrators or Assigns the right to use a portion of the land, in extent not exceeding 5000 (Five Thousand) Square Metres, for the purpose of carrying on the business of general dealer, butcher or keeper of an eating house for coloured persons or Bantu, the exact location of which portion shall be determined by the Transferee or its duly authorised representative or its successors in Title."

The location of the trading site was subsequently determined by Rustenburg and during August 1972, in terms of a notarial agreement, Cronje let the trading site to one Gien in his capacity as trustee for a company to be registered. After its incorporation the respondent adopted the agreement and it is at present not in dispute that all the requirements of s 71 of Act 46 of 1926 were complied with. The lease was for a period of 10 years from a defined commencement date but the lessee was granted an option to renew the lease for a further period of 9 years and 11 months. This option was later exercised by the respondent and it is common cause that the extended period of the lease has not come to an end.

On 24 April 1974 the respondent entered into a deed of lease ("the sublease") with one Friedman. In terms of this agreement the respondent, with the consent of Cronje, let to Friedman the trading site for a period of 9 years and 11 months from the date on which 2 500 Blacks would be housed or resident in the Paardekraal compound of Rustenburg. Subsequently the respondent, Friedman and the first appellant entered into a further agreement whereby the latter was substituted for Friedman as lessee under the sublease. Pursuant to this agreement the first appellant was given occupation of the trading site by the respondent and thereafter the former carried on business on the site. The affairs of the first appellant were conducted by its director, the second appellant, who was in physical occupation of the trading site.

On 29 April 1986 the respondent's attorneys addressed a letter to the first appellant, stating that the sublease had commenced on 1 June 1976 and would expire on 30 April 1986, and requiring the first appellant to vacate the trading site on the latter date. The appellants' attorneys responded by way of telex and averred, inter alia, that the date of commencement of the sublease was 30 June 1976 and that the expiry date was consequently 31 May 1986. In reply the respondent's attorneys advised the appellants' attorneys that the respondent was prepared to accept that the sublease had commenced on 30 June 1976. Hence, so it was contended, the first appellant was obliged to vacate the trading site by 31 May 1986.

There followed a further telex from the first appellant's attorneys, the material part whereof read as follows:

> "This serves to notify you that Boompret Investments (Pty) Limited is no longer in possession of the premises referred to in your telex.
> Mr V Procopos, our client, has now been put in possession. Our client disputes, on a number of grounds, your client's rights to obtain occupation of the premises. Moreover our instructions are that our client obtained a new lease from the rightful owners of the premises."

This telex led to the institution of motion proceedings by the respondent against the appellants in the Transvaal Provincial Division. In the notice of motion the respondent claimed ejectment of the appellants "and all persons claiming occupation through or under them or either of them" from the trading site, as well as the costs of the application. The appellants opposed the application, the second appellant being the author of their opposing affidavit. He admitted that he was still (in July 1986) in physical occupation of the trading site and that he was carrying on business thereon on behalf of the first appellant. He denied, however, on a number of grounds that the respondent was entitled to the relief claimed. Some of these were not persisted in and the appellants' allegations and contentions which are still material may be thus summarised:

1) Cronje's right to use the trading site lapsed when he died in 1982. Thereafter Rustenburg was free to deal with the site as it pleased.

2) In January 1986 Cronje's daughters and the second appellant concluded a written agreement whereby they let to him the trading site for a period of 5 years from 1 June 1986.

3) In May 1986 Rustenburg and Cronje's daughters entered into a written agreement of lease in terms of which Rustenburg let the trading site to them for a period of 9 years and 11 months from 1 June 1986.

4) Because Cronje's rights were personal

to him, the right to occupy and use the trading site, which vested in the respondent on adoption of the notarial agreement, lapsed when Cronje died. By virtue of the 1986 agreements the appellants are, however, entitled to occupy the site and there is consequently no question of an unlawful holding over.

5) By reason of their interest in the litigation Rustenburg and Cronje's daughters should have been joined as respondents.

It was not contended in the court _a quo_ that the appellants had failed to prove the averments set out in (2) and (3) above. The court consequently proceeded from the premise that the second appellant had obtained a right to occupy the trading site from Cronje's daughters (who in turn had leased the site from Rustenburg). The court found, however, that the appellants could not rely upon this contractual right as against the respondent. The basis of this finding was that on a proper construction of the material condition in the Deed of Transfer, Cronje's right to occupy and use the trading site was not personal to him and therefore did not come to an end at his death. Hence the respondent's rights under the notarial lease were still extant and could be enforced against the appellants.

The court also found that Rustenburg and Cronje's daughters did not have a legal interest in the relief sought by the respondent and consequently rejected the contention that they ought to have been joined as parties to the proceedings. In the result the court granted the prayer for ejectment and also ordered the appellants jointly and severally to pay the costs of the application. With the leave of this court the present appeal is directed against that judgment.

On appeal counsel for the appellants repeated the contention that the application should have failed because of non-joinder. There would have been merit in this contention had it been necessary to consider the question whether Cronje's rights were of such a personal nature that they could not be alienated or transmitted to his heirs. I say so because at least Rustenburg's legal interests could have been prejudicially affected by a decision that those rights did not perish with Cronje; in other words that Rustenburg's ownership of the property bought from Cronje remained restricted because of the rights created by the relevant condition in the Deed of Transfer (cf Home Sites (Pty) Ltd v Senekal 1948 (3) SA 514 (A) 520-1). As will be seen, however, the appeal can be disposed of without arriving at a decision on that question.

Before considering a submission made on appeal by counsel for the respondent it should be pointed out that, although the agreement of January 1986 was concluded between Cronje's daughters and the second appellant, it was not suggested in the opposing affidavit or on appeal that as from 1 June 1986 the second appellant had been in independent occupation of the trading site. On the contrary, it seems clear that the first appellant continued to do business as a general dealer on the site and that in so far as the second appellant physically occupied the property and carried on business, he did so on behalf of the corporate entity. It would therefore appear that the second appellant entered into the January 1986 agreement with a view to safeguarding the first appellant's future occupancy of the trading site.

Counsel for the respondent submitted that the appeal must fail even if there was proof of the conclusion of the January and May 1986 agreements, and even if Cronje's rights under the Deed of Transfer lapsed at his death. In particular it was contended that the sublease had terminated before the application was launched; that in terms of the sublease the lessee was obliged "to hand the premises over to the lessor on the termination of this tenancy ...", and that when sued for ejectment after the termination of a lease a tenant may not dispute the title of his lessor. In support of the latter proposition counsel relied upon the decisions in Hughes v Anglia and Co 1912 EDL 242; Hillock and Another v Hilsage Investments (Pty) Ltd 1975 (1) SA 508 (A) 516, and Ebrahim v Pretoria Stadsraad 1980 (4) SA 10 (T).

It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property. See Loxton v Le Hanie 22 SC 577, Kala Singh v Germiston Municipality 1912 TPD 155, 159-60 and Ebrahim, supra, at p 14. But what is the position if, as in the present case, the lessee not only disputes the lessor's title but claims to be entitled to occupy the property by virtue of a right acquired dehors the lease?

With reference to C 4.65.25, Groenewegen, <u>De Legibus Abrogatis</u>, says that a lessee must restore the property before he can litigate about its ownership (presumably in a case where the lessee alleges that he has become the owner of the property and that as such he is entitled to remain in possession thereof). Groenewegen proceeds as follows (translation of Beinart and Hewett, vol 3, p 227).

> "But this is so if the defence of ownership is rather indefinite and requires deeper investigation; but, if the ownership of the lessee is clear, then he easily defeats the lessor who brings an action against him. But if the lessor brings an interdict for recovery of possession (complainte), it scarcely is the position that temporary possession (restablissement) must not be judged to him."

In dealing with the <u>actio</u> <u>locati</u> brought to enforce restoration of the property at the termination of a lease, Voet goes a shade further than Groenewegen. Book 19.2.32 reads as follows (Gane's translation, vol 3, p 447):

> "Nor can the setting up of an exception of ownership by the lessee stay this restoration of the property leased, even though perhaps the proof of ownership would be easy for the lessee. He ought in every event to give back the possession first, and then litigate about the proprietorship. Especially is that so if the lessor proceeds not by this ordinary action on letting, but by the interdict for the recovery of possession."

Voet relies on C 4.65.25, Groenewegen, Neostadius, Decisiones, no 87, and Wassenaar, Praktyk Judicieel, 7.10. Not much can be gleaned from Neostadius' cursory report of case 87 since it is not spelled out whether the lessor brought the actio locati or a possessory remedy. In regard to the former remedy Wassenaar, however, supports Groenewegen rather than Voet. He says that although a lessee must ordinarily restore the property to the lessor before he can question the lessor's title, a defence that the lessee is the owner of the property will succeed if the lessee's ownership is "klaar en blykelyk". But should the lessor institute possessory proceedings ("complainte tot de possessie") the lessee cannot rely upon such a defence since it is notorious "<u>quod spoliatus ante omnia sit restituendas</u>".

Reference may also be made to Van der Keessel, <u>Praelectiones</u>, Th 672, which reads (Gonin's translation, vol 5, p 21):

> "Hoewel die huur van ŉ eie saak nie geldig is nie, verdien die persoon tog nie om aangehoor te word nie wat ŉ saak gehuur het en wat wanneer hy na afloop van die huurtermyn deur die verhuurder aangespreek word, weier om die saak terug te gee, omdat hy beweer dat dit sy saak is; hy moet inteendeel die saak laat vaar en die saak d.m.v. ŉ eiendomsvorderings-aksie opeis."

Since Van der Keessel relies upon <u>inter alia</u> Groenewegen and Wassenaar (but not on Voet) it seems safe to accept that he intended his remarks to apply to a case in which the lessor brings a possessory remedy against the lessee. It would therefore appear that the weight of authority in Roman-Dutch Law favoured the view that when sued for ejectment the lessee could raise the defence that he had an independent title to the property if the lessor brought the <u>actio</u> <u>locati</u> (at least if that title was susceptible of easy proof), but not if the lessor based his claim upon a possessory remedy (probably the <u>mandament van complainte</u>). The lessee's continued occupation of the property was apparently treated as a form of spoliation, and he therefore had to vacate before he could assert his independent claim to occupation, for instance that he was the owner of the property. See also <u>Crause v Ryersbach</u> 1 SAR 50.

Roman-Dutch Law recognised various possessory remedies, including the <u>mandament van spolie</u>. But although the maxim <u>spoliatus ante omnia restituendus est</u> often appears in the books, its use actually predates the recognition of that <u>mandament</u> which, in any event, never attained much practical significance: Price, <u>Possessory Remedies in Roman-Dutch Law</u>, pp 22, 24 and 60-1. The other possessory remedies of Roman-Dutch Law - notably the <u>mandament van maintenue</u> and the mandament van complainte - have, of course, fallen into disuse and in South African law the mandament van spolie has become the most important such remedy. It can be brought if the claimant has been unlawfully deprived of the possession of a thing. It does not avail the spoliator to assert that he is entitled to be in possession by virtue of, e g, ownership, and that the claimant has no title thereto. This is so because the philosophy underlying the law of spoliation is that no man should be allowed to take the law into his own hands, and that conduct conducive to a breach of the peace should be discouraged. See Nino Bonino v De Lange 1906 TS 120, 122; Muller v Muller 1915 TPD 28, 31 and Yeko v Qana 1973 (4) SA 735 (A) 739.

When a lessor has given occupation of property to a lessee, there is, of course, no question of an unlawful deprivation of possession. If, at the expiration of the lease, the lessee refuses to return the property to the lessor, his continued possession thereof may or may not be unlawful, depending on whether he has acquired an independent title to the property. In any event, in such a case it cannot be said that the lessee is taking the law into his own hands or that he is committing a breach of the peace. Having regard to the fundamental principle of the <u>mandament van spolie</u> there must consequently be considerable doubt whether the remedy is at all apposite when a lessee is sued for ejectment at the termination of the lease. The views of the Roman-Dutch authorities referred to above may consequently not be in accordance with the development of the law of spoliation in South Africa. For reasons which follow I find it unnecessary, however, to express a firm view on this point and I shall assume, in favour of the appellants, that a lessee may refuse to vacate leased property if the lessor has no title thereto and the lessee has acquired an independent right to remain in occupation thereof.

Counsel for the respondent also contended that the appellants failed to prove that they had acquired, through Rustenburg, a right to occupy the trading site. As regards the May 1986 agreement the main submission was that there is no proof that the person who purported to sign it on behalf of Rustenburg was authorised to do so. And in regard to the January 1986 agreement it was submitted that its operation depended upon the fulfilment of a suspensive condition which was not shown to have been fulfilled.

The counter-argument of counsel for the appellants was that the respondent was not entitled to advance the above submissions on appeal. In order to appreciate this argument it is necessary to give a brief summary of the relevant averments in the affidavits and of certain steps taken during the course of the proceedings in the court *a quo*.

In the opposing affidavit the second appellant made a bald allegation that a lease had been concluded between Rustenburg and Cronje's daughters in May 1986. A copy of the agreement was annexed to the affidavit as annexure F1. This purported to be signed by Cronje's daughters and by somebody on behalf of Rustenburg. The appellants did not procure supporting affidavits from Cronje's daughters or Rustenburg, but their attorney, Zietsman, did make an affidavit stating, with reference to annexure F1, that he had been given a mandate by Cronje's daughters "to negotiate an agreement with Rustenburg Platinum Mines Ltd which agreement was reached on the 30th of May ...".

The only reference to the January 1986 agreement is to be found in the second appellant's opposing affidavit. He said that he had entered into an agreement of lease with Cronje's daughters and annexed a copy of the alleged agreement as annexure G. It purported to be signed by the second appellant and Cronje's daughters.

In the replying affidavit the respondent objected to the averments relating to the May 1986 agreement on the ground that they were hearsay. Subsequently the respondent went further and also attacked the allegation concerning the conclusion of the January 1986 agreement. It did so by giving notice that at the hearing of the matter application would be made for an order striking out Annexure F1 as well as the above allegation and averments "on the grounds that such matter constitutes hearsay and inadmissible evidence, or is otherwise irrelevant and vexatious".

Prior to the filing of the replying affidavit the respondent had called on the appellants to produce for inspection the originals of Annexures F1 and G. Some three weeks later the appellants' attorney complied with the request and it then transpired that the original of Annexure F1 had not been signed by Cronje's daughters. In consequence Zietsman made a supplementary affidavit. In regard to Annexure F1 he said (I have deleted his references to numbered paragraphs in his original affidavit):

> "I received instructions from the Lessees [Cronje's daughters] mentioned in the agreement to procure an agreement on their behalf with Rustenburg Platinum Mines Ltd to let the property mentioned in that agreement, to the Lessees. As a result of a telephonic discussion I had with the relevant official at the mine, I addressed a telex to the offices of the Mine containing the agreement as mentioned. I was thereafter advised that the agreement had been signed by the Mine and indeed I received the document back, bearing a signature of a Director of the Mine.
>
> Thereafter I forwarded the document to the Lessees for their signature, and assumed that such was done.
>
> Upon forwarding this document to my Pretoria Correspondent as a result of a request by the Applicant to inspect the document, I noticed that the Lessees had not yet signed. Since an agreement was reached between myself on behalf of the Lessees and the Mine, orally, and since at that stage, the proceedings in this matter was already far gone, I did not wish to tamper with the document and I left the matter as it was.
>
> On Tuesday the 2nd of September I was however advised by Advocate [?] that it is essential for the document to be signed. I thereafter collected the document from Pretoria and presented it to the Lessees for signature,

which has now been done."

It is apparent from the judgment of the court *a quo* that at the hearing the respondent did not proceed with its application to strike out the aforesaid matter. Nor was it argued that the averments concerning the conclusion of the two agreements were inadmissible. This appears from the following extract from the judgment:

> "For present purposes it is not in dispute that a lease exists between the Mine [Rustenburg] and Mesdames Olivier and Faber [Cronje's daughters] and also between Mesdames Olivier and Faber and the second respondent [the present second appellant]."

I now revert to the aforesaid counter-argument advanced in this court on behalf of the appellants. Senior counsel for the appellants, Mr Bizos, did not appear in the court *a quo* but informed us that according to his junior, Mr Coetzee (who did appear at the hearing of the application), counsel for the respondent, when informing the court that he was not proceeding with the application to strike out, conceded that the two leases "existed". On the strength of this alleged concession, the abandonment of the applicaton to strike out and the quoted excerpt from the judgment, Mr Bizos contended that the respondent was precluded from questioning on appeal the conclusion or efficacy of the January and May 1986 agreements.

Neither senior nor junior counsel representing the respondent on appeal appeared in the court _a quo_. By virtue of instructions received from the respondent's attorney it was disputed, however, that the alleged concession was made at the hearing of the application. The dispute as to precisely what was said by counsel for the respondent in the court _a quo_ can obviously not be resolved by this court, but for the purposes of this appeal I am prepared to accept that the concession on which Mr Bizos relied was in fact made.

Mr Bizos submitted that the concession falls to be equated with a factual admission. I have some doubt whether this submission is well founded. For it appears to me that if, at the hearing of an application, counsel makes a concession, albeit one relating to factual averments, he may well not intend to cure a deficiency in those averments. Put differently, the only purpose of such a concession may be to inform the court that in his view the averments suffice to establish the proposition to which they relate. Be that as it may, I shall assume in favour of the appellants that the concession in question amounted to a factual admission that the leases - i e the January and May agreements - "existed". On this assumption it was not open to counsel for the respondent to raise in the court *a quo* the argument that the conclusion of the agreements had not been properly proved, unless, of course, the admission had been withdrawn with the leave of the court. Nor, obviously, can such an argument be advanced on appeal.

As regards the January 1986 agreement counsel for the respondent did not, however, contend in this court that proof of its conclusion was lacking. The submission was that the appellants failed to prove that it ever became operative. This argument was based on clause 1 of the agreement, the material part whereof reads as follows:

> "In the event of the LESSORS [Cronje's daughters] becoming the cedents [presumably cessionaries] of certain rights as would more fully appear from Annexure "A" hereto, the LESSORS lease to the LESSEE [the second appellant] the trading site which is as per Annexure "A", which shall be hired by the LESSEE for the purpose of conducting thereon the business of a general dealer and Cafe Owner and for no other purpose whatsoever unless with the written consent of the LESSORS."

Annexure "A", however, contains no more than a diagram of the trading site and tables of distances, directions and co-ordinates pertaining thereto. It certainly does not set out any rights of which Cronje's daughters had to become the cedents or cessionaries. Hence, although it is clear that clause 1 of the agreement created a suspensive condition, it is impossible to determine the ambit of that condition. And in the absence of any reference in the papers to clause 1 it is likewise impossible to resolve whether the condition, whatever its import may have been, has been fulfilled.

Counsel for the appellants suggested, albeit rather faintly, that the parties to the agreement intended that it should become operative if and when Cronje's daughters obtained a lease of the trading site from Rustenburg, and that the condition was consequently fulfilled in May 1986. However, the phraseology of clause 1 appears to rule out an inference that such may have been their intention. A lease granted by Rustenburg to Cronje's daughters would have conferred on the latter a right to occupy and use the trading site, but by no stretch of language would have involved a cession of rights. In any event, even if the conditional event contemplated by the parties was the conclusion of a lease between Rustenburg and Cronje's daughters, one does not know whether the May 1986 agreement embodied the terms and conditions which the parties had in mind in January 1986; in other words, whether the rights accruing to Cronje's daughters from that agreement coincided with the rights referred to in clause 1 of the January 1986 agreement and which should have appeared from Annexure "A" to that agreement. So, for instance, the conditional event may have been the procuring of a lease for a period of 15 years whereas the May 1986 agreement made provision for a period of 9 years and 11 months.

A further submission of counsel for the appellants was that the aforesaid concession also precluded the respondent from relying on lack of proof of the fulfilment of the suspensive condition. I cannot agree. The concession related to the existence of the two 1986 agreements; not to their efficacy. It should be borne in mind that the concession was made when counsel for the respondent notified the court *a quo* that he was not proceeding with the application to strike out. The main basis of that application was that the averments concerning the conclusion of the agreements were hearsay and as such inadmissible evidence. Read in context the concession therefore amounted to no more than an admission that the conclusion of the agreements had been proved by admissible evidence. It cannot in my view be construed as an admission that the agreements were properly concluded and that they had become operative. And in the final analysis the point under consideration is not that the evidence as to the existence of the agreements is inadmissible, but that there is no evidence that the January 1986 agreement became unconditionally binding on the parties.

Assume that in terms of some statutory

provision a lease of a trading site on mine property only becomes of force and effect when the consent of the Mining Commissioner has been obtained, and that counsel for the respondent in the court a quo only became aware of this provision after the concession had been made. I find it difficult to understand why the concession would have precluded him from raising the point that the appellants failed to prove that such consent had been obtained. And in my view it can make no difference that in the postulated case the absence of proof related to the fulfilment of a statutory condition whilst in casu the appellants failed to establish that a contractual condition had been fulfilled. In short, the concession did not constitute an admission of the fulfilment of any condition or requirements suspending the operation of the 1986 agreements.

The final submission of counsel for the appellants was that it would in any event be unfair to dismiss the appeal on a point not raised in the court _a quo_ by the respondent. He argued that had the point been taken the appellants might have filed supplementary affidavits proving the ambit and fulfilment of the contractual condition. The possibility that they might have done so may be conceded. They would, of course, have required the consent of the court to introduce supplementary affidavits and it would have been incumbent on them to show cause why the court's discretion should be exercised in their favour.

However, the mere notional possibility that had the point been argued in the court _a quo_ it may have been met by supplementary evidence, cannot preclude the respondent from raising the issue on appeal. So much is borne out by the decision of this court in _Morobane v Bateman_ 1918 AD 460. In that case the defendant disposed of stock belonging to the plaintiff. In an action in the magistrate's court the plaintiff claimed from the defendant the return of the stock or payment of its value. In his plea the defendant alleged that he had acquired the stock from a Black man in satisfaction of a debt owing by the latter. The magistrate held that the defendant received and disposed of the cattle without knowledge that the Black man was not the owner thereof and that consequently the defendant was not liable to account for their value to the plaintiff. On appeal this decision was confirmed by the Transvaal Provincial Division. In a further appeal to this court the plaintiff relied upon a point which was raised in the Transvaal Provincial Division but had not been taken at the trial, viz, absence of proof that the terms of s 29 of Ordinance 6 of 1904 (Tvl) had been complied with. That section prohibited the acquisition of stock by purchase, barter or in any other way from "a coloured person" without a prescribed certificate attesting that the transferor was entitled to transfer the stock. The defendant urged that the argument that he failed to prove the obtaining of such a certificate could not properly be advanced for the first time at the appeal stage since, had it been raised in the trial court, a certificate might have been produced. This submission was rejected in the following terms by Innes CJ (at pp 464-5):

> "The question whether the transaction here relied upon was a valid transaction is a question of law. And any such question may be advanced for the first time on appeal, if its consideration then involves no unfairness to the party against whom it is directed. No such unfairness is here involved. It was for the respondent to establish the validity of the transaction by which he claimed to have acquired these cattle, and he could only do so by proving the certificate which was essential to its legality. So that the onus was upon him to produce it. And having failed to do so, he cannot object to his opponent now taking advantage of that failure ... Had the document been in existence, and its absence from the record been due to an oversight, which the respondent was desirous to remedy, an opportunity of so doing would doubtless have been afforded him. But no application of that nature was made either to the Provincial Division or to this Court."

In casu the appellants relied upon a right to occupy the trading site derived through Rustenburg. In order to establish that right they had to show, _inter alia_, that the January 1986 agreement was enforceable. That agreement was subject to a suspensive condition and as a matter of law it could only become operative on fulfilment of the condition. The _onus_ was therefore clearly on the appellants to prove such fulfilment, just as in _Morobane_ the _onus_ was on the defendant to establish fulfilment of the statutory requirement. The appellants failed to discharge the _onus_ resting upon them and cannot, in the words of Innes CJ, "object to ... [their] ... opponent now taking advantage of that failure ...". And, as in _Morobane_, no application was made to this court for leave to supplement the record. This was not due to an element of surprise since the point under consideration was made in the respondent's heads of argument which were filed as long ago as November 1988.

The appeal is dismissed with costs, including the costs of two counsel. It is also recorded that during the hearing of the appeal the appellants were ordered to pay the costs occasioned by their application for condonation.

H.J.O. VAN HEERDEN JA

HOEXTER JA

MILNE JA CONCUR

F.H. GROSSKOPF F.H.

79a/89

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/CCC

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(APPELLATE DIVISION)

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BOOMPRET INVESTMENTS (PROPRIETARY)
LIMITED FIRST APPELLANT

VASILIOS PROKOPOS SECOND APPELLANT

and

PAARDEKRAAL CONCESSION STORE
(PROPRIETARY) LIMITED RESPONDENT

CORAM: HOEXTER, VAN HEERDEN, NESTADT, MILNE
et F H GROSSKOPF JJA

HEARD: 15 MAY 1989

DELIVERED: 1 JUNE 1989

J U D G M E N T

NESTADT, JA:

In my opinion, the issue of whether Cronje's rights lapsed on his death should not have been decided without

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the joinder of at least Rustenburg as a respondent to the application for ejectment. I respectfully refer, in this regard, to the discussion of the point appearing at pages 8 - 9 of the judgment of VAN HEERDEN JA.

This being so, the next issue that arises for consideration is whether respondent is entitled to rely on the rule that a tenant may not dispute his landlord's title. VAN HEERDEN JA poses the question whether it applies where, as in the present case, the tenant not only disputes the lessor's title, but claims to be entitled to occupy the property by virtue of a right acquired dehors the lease. In my view, the authorities that he refers to and his commentary on them justify the conclusion that it does not apply in casu. As my learned Colleague points out, in a situation such as the present, there is no question of a spoliation having taken place. In any event, respondent's claim for ejectment is based on the actio locati. In these circumstances, appellant's alleged independent title, being susceptible of relatively easy proof, may be raised as a defence. This is a satisfying conclusion seeing that it accórds with considerations of practical convenience. It is also supported by the statement of SPOELSTRA AJ in Pretoria Stadsraad vs Ebrahim 1979(4) S A 193(T) at 196 B to the effect that if a tenant can show a stronger right to the premises than his landlord, such right will enjoy protection. On appeal, this view was approved of (Ebrahim vs Pretoria Stadsraad 1980(4) S A 10(T) at 13 H).

The remaining and critical issue is whether appellants established the January and May 1986 leases. In the court below, respondent's counsel made a concession which ESSELEN J noted in the following terms:

> "For present purposes it is not in dispute that a lease exists between the Mine and Mesdames Olivier and Faber and also between Mesdames Olivier and Faber and the second respondent".

In my opinion, this was a concession which went beyond a mere casual one made by counsel during argument. It constituted a formal, factual admission which, in the absence of any attempt to withdraw it, was binding on respondent (LAWSA, Vol 14, para 261; see, too, Phipson on Evidence, 13th ed, para 20.40). It is true that the word "admission" is not used, but that is the effect of "not in dispute". And I do not think that the qualification of "for present purposes" is of significance.

But what is the ambit of the admission? This involves its interpretation. In this regard the caveat of DE VILLIERS JA in Rance vs Union Mercantile Co Ltd 1922 AD 312 at 315 must be borne in mind, viz:

> "This shows that it is not always safe to build further upon the mere admission of a contract. The fact of the matter is the party making the admission is bound by it to the extent to which the admission goes. To press it against him beyond that, under all circumstances, may lead to inequitable results."

This means that the admission is not to be taken to extend to anything which cannot fairly be regarded as an inevitable consequence or a necessary implication thereof (AA Mutual Insurance Association Ltd vs Biddulph and Another 1976(1) S A

725(A) at 735 E). Plainly, the admission precluded respondent from persisting in its original contention that the leases had not been proved. On its behalf, however, Mr Zulman sought to persuade us that he was entitled to attack their efficacy on certain other grounds which, so it was said, fell beyond the scope of the admission. They were: (i) (in effect) that the agreements were not genuine; (ii) that there was no proof that the person who represented Rustenburg in entering into the May 1986 agreement had authority to do so; and (iii) that the operation of the January 1986 agreement was subject to a suspensive condition which was not shown to have been fulfilled.

In my opinion, (i) must fail for two reasons. Whilst there are certainly a number of suspicious, unexplained features which lend force to counsel's suggestion, I do not think that it can be decided on the papers that the agreements are bogus or that they were entered into ex post facto. The danger of deciding factual disputes purely on affidavit, even where the probabilities may seem to favour one party, has often been stressed. In any event, the admission that the agreements existed covers the point.

Argument (ii) has a firmer, factual foundation. The only evidence relevant to the capacity of the person who signed the May 1986 agreement on behalf of Rustenburg was that of appellants' attorney who, in his supplementary affidavit (referred to at pages 21 - 22 of my Brother's judgment) says that he "received the document back bearing a signature of a director" (of Rustenburg). I would not have thought that that sufficed to prove such official's authority. However, here too, so it seems to me, the admission of the existence of the lease debars reliance on this point. The lease could not exist unless the person who signed it on behalf of Rustenburg was authorised to do so. "Exist" means <u>inter alia</u> "to be in present force, activity or effect at a given time, as in speaking of 'existing contract'" (Black's <u>Law Dictionary</u>, 5th ed, 515). And the fact, as would appear from the judgment a quo, that the point was not argued, serves as some confirmation of the conclusion that the admission was intended to cover this point as well.

It remains to consider argument (iii) above. I do so on the basis that despite the meaning of "exist" referred to in the previous paragraph, the admission cannot be construed as going to the length of preventing respondent from now saying that the May 1986 lease never became operative (because the suspensive condition in question was not fulfilled). Even so, I do not think that the argument can be sustained. No doubt clause 1 is clumsily worded and appellant's affidavits are inadequately, indeed badly, drafted. I think, however, that if one has regard (as one should) to the document as a whole, it sufficiently appears that the condition relates to the May 1986 agreement. The preamble to the lease reads:

> "WHEREAS the LESSORS are to become entitled to a certain Trading Site in terms of the Mining Rights Act 1967 as would more fully appear from Annexure 'A' hereto, in terms of an agreement between themselves and

> Rustenburg Platinum Mines, the LESSORS are to obtain the right to use a portion of the land described in Annexure 'A' in extent not exceeding 0,500 square hectare for the purpose of carrying on the business of a General Dealer and Cafe Owner and certain other types of businesses;
> AND WHEREAS the LESSORS are desirous of granting to the LESSEE an option to rent such right as they may receive;
> AND WHEREAS the LESSEE is desirous of hiring from the LESSORS the right should such right be granted to the LESSORS;"

Both from these provisions, and clause 1 itself, "Annexure A" would seem to embrace two different documents. Be this as it may, there is reference in the first preamble to an agreement between the daughters and Rustenburg which it was contemplated would give the daughters "the right to use a portion of the land...for the purposes of carrying on the business of a General Dealer..." It is this right which, according to the second paragraph of the preamble, the daughters "are desirous of" leasing to second appellant. And it is obviously this right which has to be acquired by them for the suspensive condition referred to in clause 1 to be fulfilled. It could, of course, be that the reference to an agreement in the first paragraph of the preamble is to one different to the May 1986 agreement, but I think to so hold would be to adopt an artificial, insufficiently robust approach. It is true that the preamble does not refer to an agreement of lease. But both the May 1986 agreement and the one referred to in the preamble involve a trading site, the right to use which accrues to the daughters. Also, it is inherently unlikely that the operation of the January 1986 agreement would have been suspended pending the conclusion of any agreement other than the May 1986 one. If, as I have found, that agreement was admittedly concluded, the suspensive condition contained in clause 1 of the January 1986 agreement was fulfilled. I should add that, in terms of the May 1986 agreement, the premises and "the rights which vest in the company regarding the conducting of a general dealer" are leased. This explains the reference to "rights" in clause 1 of the January 1986 agreement.

I would therefore allow the appeal. This being a minority judgment I do not propose to specify the exact form of the order I would have made and, in particular, whether the order for ejectment should be set aside and the application stayed until the necessary joinder has taken place or whether final judgment on the merits of the appeal should stand over to enable respondent to file consents by the parties in question to be bound by the judgment. For the same reason, it is unnecessary to deal with costs.

NESTADT, JA