

SOUTH AFRICA / JUDGMENT

van der Merwe v Tlaping Ranch (Pty) Ltd (CIVAPPFB02/2019) [2019] ZANWHC 57 (12 December 2019) [2019] ZANWHC 57

COURT

North West High Court, Mafikeng

BEFORE

B.R NONYANE, R.D HENDRICKS, T.J DJAJE

CASE / FILE NUMBER

CIV APP FB 02/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
NORTH
WEST DIVISION, MAHIKENG
CASE
NO: CIV APP FB 02/2019
COURT
A QUO CASE NO: M14/2017
In

the matter between:

CAREL
A VAN DER
MERWE
APPELLANT
And
TLAPING
RANCH (PTY) LTD
RESPONDENT
HENDRICKS
DJP, DJAJE & NONYANE AJ.
DATE
OF HEARING
: 11
OCTOBER 2019
DATE
OF JUDGMENT
: 12 DECEMBER
2019

COUNSEL
FOR APPELLANT : ADV NEWTON
COUNSEL
FOR RESPONDENT : ADV JAGGA

JUDGMENT

NONYANE AJ.

INTRODUCTION

[1] This is an appeal to the Full Bench of this Court with leave from the Court a quo per the order of Kgoele J dated 23 November 2018. The appeal is against the judgment and order per Kgoele J delivered on the 26 April 2018.

BACKGROUND

[2] The salient background facts may be summarised as follows:

2.1 The respondent is a registered owner of the Farm Witgatboom No. 232 situated in Mahikeng. It appears from the papers that the sole director of the respondent, Jan Christofel Antonie van Tonder (hereinafter referred to as Jan) allowed his son, Hendrik Oostewald van Tonder (hereinafter referred to as Hendrick), to live on the farm, together with his family, with the specific understanding that he may utilise the farm for farming activities for his and his family's benefit.

2.2 Hendrick and the appellant entered into various lease agreements in respect of the farm whereby the appellant kept his cattle on the farm. The initial lease agreement is said to have been concluded on or about the beginning of May 2014 whereafter the appellant moved about 80 of his cattle to the farm. The lease agreement giving rise to the application started from 1 March 2016 and initially ended on the 28 February 2021 and was subsequently extended to end on the 28 February 2023.

2.3 Jan alleged that he only became aware of the appellant's cattle towards the end of July 2016 when he went to visit Hendrick at the farm. Upon enquiry Hendrick informed him that the cattle do not belong to him and that he had leased the farm to the appellant.

2.4 Jan attempted to have the appellant remove his cattle from the farm but the appellant insisted that he has a valid lease agreement which entitles him and his cattle to be on the farm.

[3] The respondent launched an application on the 19th January 2017 seeking an order declaring the lease agreement between Hendrick and the appellant in respect of the farm null and void and also an ejection order against the appellant from the farm.

[4] The application was opposed by the appellant and the court a quo, at the conclusion of the matter, gave an order in favour of the respondent herein as follows:

“32.1 The agreements between Hendrick Van Tonder and the respondent in respect of the lease of the farm Witgatboom, Mahikeng, and annexed to in the papers respectively as Annexure “A” and “K” are hereby declared null and void;

32.2 The respondent is ordered to forthwith remove all his property and cattle from the said farm 30 days of this Order coming to his knowledge;

32.3 The respondent is ordered to pay the costs.”

ARGUMENTS BEFORE THE COURT A QUO

[5] From the papers it can be gleaned that the respondent placed the following arguments before the court a quo:

5.1 Jan allowed Hendrick and his family to live on the farm with the specific understanding that he may utilise the farm for his and his family's benefit since 2006.

5.2 It was also understood that he could exercise no rights in respect of the farm other than farming thereon.

5.3 Hendrick was not authorised to enter into a lease agreement with the appellant in respect of the farm.

5.4 For reason that Hendrick occupied the farm with the specific understanding that he may utilise the farm for his and his family's benefit, from farming activities, and that he could exercise no rights in respect of the farm, the lease agreement between him and Hendrick was not binding upon the respondent.

5.5 Neither Jan nor the respondent ratified the lease agreement between Hendrick and the appellant.

[6] The salient arguments by the appellant before court may be summarised as follows:

6.1 Hendrick has been allowed, over the years, to deal with the farm fully and openly in all respects relating to ownership and associated activities.

6.2 Hendrick created an impression that he was in all respects fully authorised to deal with the farm and entered into valid contracts with third parties in respect of various business activities conducted on the farm.

6.3 Jan farms on a nearby farm and, at all relevant times thereto, he visited his son, Hendrick, on a regular basis and ought to have been aware of the nature and extent of the various business activities on the farm.

6.4 On a balance of probabilities, the respondent had expressly or impliedly authorised Hendrick to fully utilise the farm in all respects for his personal gain

6.5 The appellant's cattle were distinctively different from Hendrick's cattle, which were sold sometime in 2014 due to the draught in the area.

6.6 The appellant had a meeting with Jan during the winter of 2015 and they discussed the appellant's cattle and that created no doubt or concern to believe that Jan was not aware of the activities on the farm, including the appellant's cattle.

ISSUES FOR

DETERMINATION

- [7] This court is called upon to determine whether or not the court a quo erred in finding that Hendrick was not authorised (either expressly, impliedly or ostensibly) to deal with the farm qua owner in light of established principles per *Makate v Vodacom (Pty) Ltd*[1].
- [8] In order to reach a determination to the above, this court needs to enquire into the following:
- 8.1 Whether Hendrick was authorised (expressly, impliedly or ostensibly) to conclude the lease agreement with the appellant;
- 8.2 Whether or not the respondent may be estopped from denying that Hendrick was in fact authorised to conclude the lease agreement with the appellant.
- [9] In the event that this court finds that Hendrick was ostensibly authorised to do deal with the farm qua owner then that would be end of the enquiry and this court should find in favour of the appellant.
- [10] Should the court find that Hendrick was not authorised to deal with the farm qua owner then the second enquiry should be whether the respondent may be estopped from denying that Hendrick was authorised to enter into the lease agreement with the appellant in respect of the farm.
- [11] In order to answer the above question, this court sees the need to distinguish between estoppel and apparent or ostensible authority.

THE LAW

- [12] In *Makate*, Jafta J (writing for the majority) crisply distinguished between the two principles as follows:

“[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the

principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.

[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law. While this kind of authority may not have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable from estoppel, which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.” (footnotes omitted)

[11] Jafta J criticised[2] the findings in *South African Broadcasting Corporation v Crop and Others*[3] and *NBS Bank Ltd v Cape Produce Co (Pty) Ltd and Others*[4]. He held that the court therein conflated the requirements and tests for estoppel and ostensible authority.

[12] Jafta J went further to closely examine the meaning of the statement by Lord Denning, which was applied into our law in the *NBS Bank Ltd* and other cases that followed it. He stated the following[5]:

“[47] A closer examination of the original statement on apparent authority by Lord Denning, quoted below, reveals that the presence of authority is established if it is shown that a principal by words or conduct has created an appearance that the agent has the power to act on its behalf. Nothing more is required. The means by which that appearance is represented need not be directed at any person. In other words the principal need not make the representation to the person claiming that the agent had apparent authority. The statement indicates the absence of the elements of estoppel. It does not mention prejudice at all. That statement of English law was imported as it is into our law in NBSBank and other cases that followed it.

[48] In the leading case of *Hely-Hutchinson CA*, Lord Denning MR explained the concepts of actual and apparent authority as follows:

“[A]ctual authority may be express or implied. It is express when it is given by express words, such as when a board of directors pass a resolution which authorises two of their number to sign cheques. It is implied when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it. Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual

scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out'. Thus, if he orders goods worth £1,000 and signs himself 'Managing Director for and on behalf of the company,' the company is bound to the other party who does not know of the £500 limitation, see *British Thomson-Houston Co Ltd v Federated European Bank Ltd*, which was quoted for this purpose by Pearson LJ in *Freeman & Lockyer*. Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound. Lord Simonds in *Morris v Kanssen*, envisaged that sort of case, which was considered by Roskill J in the present case." (own emphasis and footnotes omitted).

[13] Of great significance is the dicta by Jafta J where he states that:

"[49] It is significant to note that in the statement, Lord Denning stressed that: "Ostensible or apparent authority is the authority of an agent as it appears to others". This underscores the distinction between it and estoppel. The features of estoppel make this distinction even more noticeable. The essential elements of estoppel in the field of agency are the

following:

[21] The appellant increased the size of his herd of cattle and game stock due to the availability of land as a result of leasing the farm from Hendrick. Therefore this Court finds that Hendrick was ostensibly authorised to enter into the lease agreement with the appellant in respect of the farm. Justice dictates that the bona fide lease agreement between the appellant and Hendrick in respect of the farm be upheld.

[22] What remains is the issue of costs. It is trite that costs should follow the result. The appellant has succeeded in the appeal and thus entitled to costs.

ORDER

[23] Accordingly, the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:

"32.1 The agreements between Hendrick van Tonder and Carel A van der Merwe in respect of the lease of the farm Witgatboom, Mahikeng, and annexed to the papers respectively as Annexure "A" and "K", are valid and hereby upheld.

32.2 The applicant (Tlhaping Ranch (Pty) Ltd to pay the costs.”

3. The respondent (Tlhaping Ranch (Pty) Ltd is ordered to pay the costs of the appeal

B.R NONYANE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

I agree

R.D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

T.J DJAJE

JUDGE OF THE HIGH COURT

ATTORNEYS

FOR THE APPELLANT: LOMBARD KRIEK ATTORNEYS

C/O VAN ROOYEN TLHAPING WESSELS INC.

9 PROCTOR AVENUE

MAHIKENG

2745

FOR THE RESPONDENT : SMIT STANTON INCORPORATED

29 WARREN STREET

- (a) a representation made in words or by conduct, including silence or inaction;
- (b) the representation must have been made by the principal to the person who raises estoppel (the representee);
- (c) the principal must reasonably have expected that her conduct may mislead the representee; and

The appellant outlined various businesses activities carried out on the farm for Hendrick's benefit.[6] The respondent did not dispute those averments.

- [18] In evaluating the facts of the matter a reasonable interpretation is that Hendrick was not authorised to conduct any other business activity on the farm save for farming activities for the benefit of himself and his family. Hendrick conducted various business activities on the farm in addition to farming.
- [19] It thus follows that Hendrick exceeded his authority by engaging in other business activities on the farm. Jan, on behalf of the respondent, did not dispute the allegation by the appellant that Hendrick conducted various business activities on the farm. He merely alleged that he was not aware of the business activities. Knowledge on the part of the principal is not a requirement for ostensible authority
- [20] The appellant, when concluding a lease agreement in respect of the farm, acted on the representation by Hendrick that he was authorised to deal with the deal with the farm qua owner. Therefore this court finds that Hendrick was ostensibly authorised to enter into the lease agreements with appellant in respect of the farm.

CONCLUDING REMARKS

- [21] As stated above, the requirement for ostensible authority is that the agent must have represented or appeared to a third party that he is authorised. It is also possible for an agent to be ostensibly authorised even when he has exceeded the limits of his actual authority.
- [22] The carrying on of various business activities on the farm and the long standing business transactions, in respect of the farm, between the appellant and Hendrick created an impression to the appellant that Hendrick was authorised to utilise the farm qua owner and believed that the lease agreement between them was valid and enforceable.
- [23] Enforcing the lease agreement would not prejudice the respondent's rights of ownership to the farm. Although not the case in casu, our law protects bona fide lease agreements over transfer of ownership.[7] Furthermore, our jurisprudence also recognises the principle of subletting whereby the lessee enters into a lease agreement with

third parties in respect of the leased property.

- [24] The appellant increased the size of his herd of cattle and game stock due to the availability of land as a result of leasing the farm from Hendrick. Justice dictates that the bona fide lease agreement between the appellant and Hendrick in respect of the farm be upheld.

[25] Accordingly, the following order is made:

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced with the following:

[32] The following order is therefore made:-

32.1 The agreements between Hendrick van Tonder and the respondent in respect of the lease of the farm Witgatboom, Mahikeng, and annexed to in the papers respectively as Annexure “A” and “K” are hereby upheld.

32.2 The applicant is ordered to pay the costs.

3. There is no order as to costs.

B.R NONYANE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISIOIN

R.D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

T.J DJAJE

JUDGE OF THE HIGH COURT

[1] 2016

(4) SA 121 (CC).

[2] Makate at paras 50 – 55.

[3] [2009] ZASCA 30; 2006 (2) SA 217 (SCA).

[4] 2002

(1) SA 396 (SCA).

[5] Makate atparas 47 and 48.

[6] Paras 10.2 and 10.3 of the Answering Affidavit.

[7] The “huur gaat voor koop” principle.

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