16/57

G.P.-S.117539—1954-5—5,000. U.D.J 445.

16/57

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN STRAFSAAK.

1 ALEXA LAGAS,
2 ALEXA CAHENED

Appellant.

versus/teen

JIM QUILN

Respondent.

Appellant's Attorney ~~C Pitt~~ / *Respondent's Attorney*
Prokureur van Appellant / *Prokureur van Respondent*

Appellant's Advocate J. H. Snyman, QC & C. Leveson *Respondent's Advocate* K D M Moodie
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on: Friday, 6th Sept, 1957.
Op die rol geplaas vir verhoor op:

(IPD)
2.5.57 9.11. (A)

Mr. Snyman 9.45 - 12.45
Mr. Moodie 12.45 - 12.55
Mr Snyman 2.15 - 3.30.
C.A.V. 3.30 - 3.45

Woodrichson
e REGISTRAR
6/9/57

Appeal dismissed
Schreiner JCJ, dissent,
Hoexter, Steyn, Price (ag)
& Ogilvie Thompson (ag) JJA.
Regs. 12/11/57.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division) ©

In the matter of :-

MOOSA BAGAS and MOOSA MOHAMED Appellants

and

R E G I N A Respondent

Coram: Schreiner A.C.J., de Beer, Malan JJ.A.; Price et Ogilvie Thompson A.JJ.A.

Heard: 6th September, 1957. Delivered: 12-9-1957

J U D G M E N T

SCHREINER A.C.J. :- It will be convenient at the outset to recite, so far as material, certain provisions of the Group Areas Act (No. 41 of 1950), which I shall call "the Act" -

"1 (ii) 'acquire' in relation to immovable property, means to become the owner of such property in any manner whatsoever;

(xi) 'immovable property' includes any real right in immovable property and any right which would upon registration be such a real right and any lease or sub-lease of immovable property, (other than a lease or sub-lease of immovable property in an area which is a specified area in terms of section eleven).....

(xvii) 'permit' means a permit issued or deemed to be issued under the relevent provision of section fourteen ;

8(1) No person shall, except under the authority of a permit enter into any agreement.....in terms whereof any disqualified person acquires or purports to acquire or would acquire any immovable property situate/.....

-uate in the controlled area.

14(1) The Minister may.....in his discretion on written application made therefor -

(a) direct that a permit be issued.....authorising

(i)the acquisition or holding of immovable property in.....the controlled area."

The appellants were charged in a magistrate's court with having contravened section 8(1), read with section 34(1)(a) (the penalty ~~clause~~ provision), of the Act in that they, being disqualified persons, entered into an agreement on the 21st December 1953 whereby they acquired immovable property in the controlled area, which includes the Transvaal. It is not in dispute that they are disqualified persons and that, having been the lessees of certain premises under a lease for nine years and eleven months granted them in 1944 by the then owner, one Fouche, they, on the date charged, entered into a lease of the same premises for a similar period with Fouche's daughter, one Mrs. de Beer, who had become the owner of the property. The lease was not made conditional on the grant of a permit, as was the case in Corondimas v. Badat (1946 A.D.548).

On the 26th April 1955 the appellants were found not guilty and discharged, the magistrate holding that entering into a lease was not acquiring immovable property. The Attorney-General appealed to the Transvaal/.....

-vaal Provincial Division under section 104 of Act 32 of 1944 and in August 1955 NESER and RUMPFF JJ. allowed the appeal and remitted the case to the magistrate. The latter stated in his judgment that he had overlooked the mention of a lease in the definition of "immovable property" and was satisfied that his decision had been wrong. In giving judgment allowing the appeal NESER J. said "In view of the definition of immovable property, "which included a lease, there is no doubt that the magistrate " is correct in the views which he has set out in his judgment."

In November 1955 the matter was again heard in the magistrate's court and, despite objection by the Crown, evidence was allowed to be led to show that the Minister had in June 1944 granted a permit under section 4(b) of Act 28 of 1939 authorising Fouche to let the premises to the appellants, the argument being advanced that this permit protected also the lease entered into in 1953 with Mrs.de Beer. On the 1st December 1955 the magistrate gave judgment convicting the appellants and imposing on each a fine of £25.

From this conviction the appellants appealed to the Transvaal Provincial Division but before their appeal was heard the Attorney-General set down a summons for review of the November 1955 proceedings in the magistrate's court on the ground that the magistrate had no power to allow

the calling or recalling of witnesses after the decision of NESER and RUMPFF JJ. in August 1955. The review summons came on for hearing in the Transvaal Provincial Division in April 1956 and on the 21st May 1956 the court, LUDORF and KUPER JJ., set aside the magistrate's order allowing further evidence to be led, and the conviction and sentence of the 1st December 1955, and remitted the matter to the magistrate for the second time. The order of LUDORF and KUPER JJ. was, however, brought on appeal to this Court, which in September 1956 set it aside and substituted the order "application for review refused." The report of the appeal to this Court is to be found at 1957 (1) S.A. 53.

The appellants' appeal to the Transvaal Provincial Division was heard by De WET amd CILLIE JJ. and judgment was given on the 11th December 1956 dismissing the appeal. From this order the Transvaal Provincial Division in February 1957 granted leave to appeal to this Court and the appeal is now before us.

Two arguments were advanced by the appellants both before De WET and CILLIE J.J. and in this Court. The first argument as ultimately presented is that the definition of "immova-"ble property" in the Act, when it speaks of "any lease or "sub-lease of immovable property", is referring to an existing

lease/.....

lease or sub-lease, which may be acquired by transfer to a cessionary from the lessee, but does not include a new lease or sub-lease, which is created but not acquired when it is entered into. The second argument is that the permit of 1944 protects the lease of the 21st December 1953.

De WET and CILLIE JJ. disposed of the first argument by holding that the matter was res judicata, the same issue having already been decided by NESER and RUMPFF JJ. adversely to the appellants. In this Court counsel for the Crown supported this conclusion and referred us to certain passages in the judgments in Rex v. Manasewitz (1933 A.D.165). The contention for the appellants was that the magistrate's original judgment of acquittal arose out of his having overlooked the mention of leases in the definition of "immovable property", and that this was the error to which NESER and RUMPFF JJ. gave effect when they set aside the acquittal, but that they did not investigate or give a decision upon the point which the appellants now advance, namely, that the definition, in speaking of leases, only refers to those already in existence. It would certainly be unfortunate if as the result of the principle of res judicata the appellants were debarred from raising an argument which may in a sense be said to be covered by the judgment of NESER and RUMPFF JJ.

but/.....

but which was in fact not raised before or considered by them. It is, however, not necessary to decide whether res judicata operates to debar the appellants from relying upon their first argument, for assuming the res judicata contention to be decided in favour of the appellants their argument on the meaning of "lease" in the definition has been fully canvassed and I am satisfied that it is not sound.

As I have already indicated the appellants contend that one does not acquire that form of "immovable property" which consists of a lease or sub-lease by entering into a lease or sub-lease, but only by taking cession of the rights of the lessee or sub-lessee. From the wording of the definition of "immovable property" it appears that what is included are certain rights to or in respect of immovable property, in the sense of corporeal fixed property i. e. land and buildings. Among these rights are the rights given by a lease or sub-lease, principally the right to occupy the land. In the Act the legislature sought inter alia to restrict the acquisition by disqualified persons in the controlled area of rights in respect of fixed property, including the right to occupy fixed property, and also to restrict the physical occupation of fixed property. Section 8 (1) is the principal provision on the first subject, as section 10(1) is on the second. The definition of "immovable property"/.....

property" is an essential part of the foundation of section 8(1). It is clear that it was intended to restrict inter alia the acquisition of the right to occupy which is granted by a lease or sub-lease, regardless of who might be the physical occupant. It seems to me to be impossible to suppose that the legislature intended to restrict the operation of section 8(1) in respect of leases to cessions of existing leases leaving to disqualified persons an unrestricted right to enter into original leases. Indeed, if it can be imagined that the legislature could have contemplated so restricted an operation of the restriction on leases, even this very limited field of restriction could be made to disappear by a practice of agreeing to cancel the existing lease and entering into a fresh one between the owner of the fixed property and the person seeking to step into the shoes of the lessee.

The inclusion of leases in the restrictions against the acquisition of fixed property by persons of particular races has a history, to part of which I propose to refer. By section 7 of Act 35 of 1932 section 2 of the new sections, which were substituted for section 2 of Act 37 of 1919, included in "fixed property" leases for ten years or longer. In Act 35 of 1943 section 5 restricted the

acquisition/.....

acquisition, in relation to Natal, of land or premises and the right to occupy or to allow another to occupy land or premises for an indefinite period or for ten years or longer. This was the section dealt with in Corondimas v. Badat (supra). Act 28 of 1946 in section 1(1) defines "fixed property" so as to include long leases and section 2 restricts agreements relating to the acquisition of fixed property in Natal. Practically the whole of Act 35 of 1943 including section 5 was repealed by the 1946 Act, but section 2 of the latter together with the abovementioned definition of "fixed property" took its place. It is hardly conceivable that in 1946 there was a change of policy in the direction of limiting the restriction to cessions of existing leases in place of the wider restriction of the 1943 Act which clearly covered agreements of lease themselves. The 1946 Act dealt with the same kind of transactions in relation to leases as did the 1943 Act but the provisions were differently drafted. In 1950 the Act extended the field of restriction to the whole of the controlled area and at the same time took away the protection which short leases had till then enjoyed. In the legislation before 1950 there was no definition of the word "acquire". It may seem that a certain awkwardness is introduced by the 1950 defini-

tion/.....

-tion of "acquire", when applied ~~by~~ to section 8(1), read with the definition of "immovable property", since it is not usual tp speak of becoming the owner of a lease when one enters into it as lessee. But the awkwardness is really slight. One becomes the owner of the right to occupy under the lease and there can in my view be no doubt that it is the acquisition of the right to occupy and to permit occupation of the premises that the legislature was restricting in 1950 as in 1943 and 1946. The first argument for the appellants therefore fails.

The appellants' second argument is that the permit issued in June 1944, which authorised Fouche to let the premises to the appellants, legalised the making of the lease agreement of the 23rd December 1953 with Mrs. de Beer. The permit reads :- "In terms of section 4 (b) of "the Asiatics (Transvaal Land and Trading) Act 1939, (No. 28 "of 1939) the Minister of the Interior has directed the issue "of this permit authorising the holder to let or permit to be "occupied by an Asiatic the undermentioned land or premises." Fouche's name appears as the holder and the appellants' names are given as the Asiatics. The farm Morgenson, No. 232 District Letaba, is named as the land or premises.

Section 3 of Act 28 of 1939 provided inter alia that except on the authority of a permit under section 4 no person should let to an Asiatic and no

Asiatic/.....

Asiatics should hire land or premises in the Transvaal which were not occupied ny Asiatics or coloured persons on a certain date. Section 4 (b) empowered the Minister to issue such a permit.

Section 39 of Sct 28 of 1946 repealed Act 28 of 1939 but, as amended by section 19 of Act 53 of 1949, provided that permits issued under section 4 (b) of the 1939 Act should be deemed to have been issued under section 8 of the 1946 Act which provided for the issue of permits to occupy land despite the restrictions in the 1946 Act.

There is no provision in the Act corresponding to the saving provision of section 39 of Act 28 of 1946. Where under a permit a lease was entered into before the control provisions of the Act came into force (which for the Transvaal was on the 30th March 1951) the lease, which could not lawfully be for as long as ten years, would not be affected, since section 8 (1) only makes it illegal to enter into agreements in the future. But after the 30th March 1951 an agreement of lease giving disqualified persons a right to occupy land in the controlled area might only be entered into if it was authorised by a permit issued under

section/.....

section 14 or deemed to be issued under section 14 (see definition of "permit"). There is one provision of the Act (section 13 (8) (b)) which provides that in certain circumstances an unused permit issued under section 8 of Act 28 of 1946 is to be deemed to have been issued under section 14 of the Act. This provision (section 13(8) (b)) suffices to explain why the definition of "permit" includes permits deemed to be issued under section 14. The effect of this part of the definition is that, a particular type of permit is to be regarded or considered as having been issued under section 14, it is covered by the definition and in the absence of a contrary indication is carried into any provision in the Act where the word 'permit' is used. Normally the fiction could only be created by a provision which, like section 13(8)(b), actually uses the language of deeming, but I assume it to be theoretically possible that other language in the Act referring to some kind of permit might have left it in no doubt that the permit was to be deemed to have been issued under section 14. But there is in fact no provision in the Act which expressly or by necessary implication deems a permit of the kind issued to Fouche to be a permit issued under section 14.

It was argued for the appellants that the permit of 1944 was "issued in respect of the land

"and/.....

"and not in respect of the holder". But even if the permit had been issued, in terms, to "the owner for the time being" and had authorised the granting of leases "from time to time "without limit" this would not in my view have assisted the appellants. The mere fact that the Minister in 1944 intended such a permit to last indefinitely and to be usable again and again by whoever was the owner of the land in favour of any Asiatic could not make it a permit that was deemed to be issued under section 14 of the Act.

We were referred to section 13 (1) (c) of the Interpretation Act (Act 5 of 1910), which provides that unless the contrary intention appears the repeal of a law shall not affect any right or privilege accrued under such repealed law. But what made it unlawful to enter into the lease of the 23rd December 1953 was not the repeal of the prior laws but the positive enactment of section 8 of the Act.

In addition to the permit issued to Fouche there was issued on the same date another permit authorising under section 4 (a) of Act 28 of 1939 the granting of a certificate entitling the appellants to remove their business to the premises leased from Fouche. But there is no ground whatever for holding that this permit protects the

appellants/.....

appellants against the operation of section 8 of the Act.

The appeal is dismissed.

de Beer, J.A.
Malan, J.A.
Price, A.J.A.
Ogilvie Thompson, A.J.A.
} Concur