rights which the owner of such a stand had as regards letting the property, and therefore secs. 130 and 131 of Act 35 of 1908 did not affect a stand outside a township, which had been created by a prior Gold Law. Under such circumstances the owner could let freely to a coloured person, and of course the coloured person could occupy. It would be absurd to say that the owner had a right to let to a coloured person, but if the coloured person went on to the premises which the owner had a right to let, the coloured person was to be subjected to all these penalties.

Then Mr. *van Heerden* tried to make a distinction between residing and trading. I really could not follow that argument at all, because I do not know on what it was based. There are certain laws which have been interpreted to mean that an Asiatic may not reside at a certain place but that the prohibition does not affect his trading at the place. But I do not see how the interpretation would apply to the provisions of the Gold Law so as to permit an Asiatic to trade on proclaimed ground but not to reside on it. As far as *Tamblin's* case is concerned, I see no distinction between a coloured person residing and a coloured person trading. I think the appeal must be allowed.

Appellant's Attorney: *H. H. Jordan.*

[A. D.]

SANDENBERGH v. MOGALE, N.O.

1915. *August* 5, 6, 10; *September* 10. DE VILLIERS, J.P., and CURLEWIS, J.

*Natives.—Contract for lease of land.—Approval of Executive.—Ignorance of all the facts.—Validity.—*Law 3 of 1898, sec. 3.*

The Chief of the Bapo tribe of natives entered into a contract under which he let a portion of the farm K to the plaintiff. The site so leased proved to be a portion of the farm K belonging to the Bakwena tribe, but there was nothing in the lease to show this. The Executive Council acting under sec. 3 of Law 3 of 1898 formally approved of the said contract, but the said approval was given in ignorance of the fact that the site leased was not on Bapo ground, *Held,* that sec. 3 of Law 3 of 1898 contemplated an approval by the Executive

* Sec. 3 of Law 3 of 1898, reads :—"No obligation or contract . . . . entered into by coloured persons or their chiefs, shall be valid unless approved of by the Executive Council, acting in consultation with the Superintendent of Native Affairs."

Council with full knowledge of the facts and that as such approval had been given under the misapprehension that the site was on Bapo ground the contract was invalid.

Action for damages for breach of contract.

The declaration alleged that in October, 1910, the plaintiff leased from the defendant a trading site on the farm Karreepoort, district Rustenburg, at an annual rental of £30 for a period of eight years. In December, 1914, the plaintiff was ejected from the ground leased by the Bakwena tribe, and as a consequence thereof plaintiff had sustained damages to the extent of £650, which he now claimed.

The plea, while admitting the lease, alleged that the site in question occupied by the plaintiff was never leased by the defendant.

On the case being called the defendant filed a further plea to the effect that the lease was void under sec. 3 of Law 3 of 1898 as it had not been approved of by the Executive Council, and, alternatively, that the lease was not binding because the defendant had no authority to bind the tribe by such a lease.

T. J. Roos, for the plaintiff, argued on the merits.

B. A. Tindall, for the defendant: Under sec. 3 of Law 3 of 1898 no contract with a native chief is binding unless approved of by the Executive Council acting in consultation with the Superintendent of Native Affairs. The approval must be given with a knowledge of the facts: see *Davis* v. *Corporation of Leicester* (1894, 2 Ch. 208); *Bergtheil* v. *Crowley and Another* (17 N.L.R. 199); *Digest* (27, 9, 1); *Voet* (27, 9, 9, 10 and 11).

The *onus* is on the plaintiff to prove that this is a binding contract. There may be hardships on the plaintiff, but this is a risk that people have to take in dealing with natives.

The contract is *ultra vires*: *Hermansberg Mission Socy.* v. *Mogale* (1906, T.S. 135). If the Chief's Council authorised it, they acted beyond their functions.

T. J. Roos, in reply: Law 3 of 1898 is intended to protect the tribe against the Chief, not against third persons.

Cur. adv. vult.

Postea, (September 10).

DE VILLIERS, J.P.: This is an action for damages for breach of contract. On 14th October, 1910, the defendant, in his capacity as Chief of the Bapo tribe of natives, let a portion of the farm

Kareepoort on behalf of the tribe to the plaintiff. By clause 1 of the deed of lease the defendant purports to let to the plaintiff "portion of the aforesaid farm Kareepoort in extent 100 feet adjoining the Railway Siding on the main road to be used for trading purposes." As a matter of fact the site in question proved to be on the Bakwena portion of Kareepoort, and not on the Bapo portion. The defendant and his witnesses say that they did not know the boundary between the two portions and told the plaintiff so, and that he undertook to ascertain the boundary from Manning, the Sub-Native Commissioner. But I have no hesitation in rejecting their evidence and accepting the evidence of plaintiff that the defendant told him the boundary was the spruit, and that the site was selected and built upon with the full knowledge and approval of the Chief and his Council. Under these circumstances the plaintiff would at first sight appear to be entitled to succeed if he is able to prove damages. But, for the defendant, strong reliance was placed on the terms of Law 3 of 1898, which requires the approval of the Executive Council of any such contract. In the present case the formal approval of the Executive Council was given, but it was argued that as the approval was given in ignorance of the fact that the site was not on Bapo ground, the approval was not such as contemplated by the law. Further it was contended that the approval was given in error, and that it would never have been given if the true facts had been brought to the knowledge of the Executive Council. In my opinion this contention is fatal to the plaintiff's case. That the Executive Council in approving of the lease was under the misapprehension that the site was on Bapo ground, is, I think, clear upon the evidence, and that the Council would never have approved of the lease had they known that it purported to dispose of land not belonging to the Bapo tribe is equally obvious. That being the case it is impossible to say that the Council approved of the lease within the meaning of section 3 of the Law, for the approval contemplated in the section is an approval made with a full knowledge of the facts. The result is unfortunate for the plaintiff, who, without any blame on his part, finds himself remediless, but the Court has only one function to perform and that is to apply the law as it is. There must be judgment for the defendant.

CURLEWIS, J.: I agree that there must be judgment for the defendant on the defence raised in the amended plea, and in the view

I take of that defence it will not be necessary to go into the details of the case. On the first day of the hearing of this case the defendant obtained leave to file an amendment to the plea. The first paragraph of this amendment is as follows: "2 (*a*) Alternatively if the Court should hold that there was a lease of the said site by the defendant to plaintiff the same is void by reason of the provisions of sec. 3 of Law 3 of 1898, the Executive Council never having approved of the defendant's binding the said tribe by a lease of ground on a portion of the said farm not belonging to the said tribe." After the evidence and argument had been concluded on the 10th August, Mr. *Tindall*, on behalf of defendant, obtained leave to file a further amendment by adding to par. 2 (*a*) the following: "The Executive Council having approved of the lease attached to the declaration under the misapprehension that the said site was in the portion belonging to the Bapo tribe, but for which error the said Council would not have approved of the said lease."

A postponement was granted to enable defendant to lead evidence in support of this amended plea, and from that evidence it is clear that the Executive Council would not have approved of the lease had they been aware that the site of the proposed lease was on ground belonging to the Bakwena tribe and not to the Bapo tribe.

In the case of *Davis* v. *Corporation of Leicester* (1894, 2 Ch. 208), which was quoted by Mr. *Tindall*, in support of his contention that there was no proper approval of the lease of the site in question by the Executive Council, the Court of Appeal upholding a decision of NORTH, J., decided that a Municipal Corporation which had sold and conveyed certain land to the plaintiff was not bound by certain restrictive conditions limiting its rights to disposal of certain other land, inasmuch as though the consent of the Treasury, which is required under the English Municipal Corporation Act, 1882, for the alienation of municipal land, had been given to the sale and conveyance to plaintiff, the Treasury had no knowledge of the restrictive conditions to which the Corporation would be liable.

That case does not appear to me wholly conclusive and may to a certain extent be differentiated, and I have felt some hesitation in extending the principle there laid down to the length required to cover the present case. In the case referred to the approval of the Treasury was given by two Lords of the Treasury joining in the conveyance, which though referring to a certain contract with

the purchaser made no direct reference to any restrictive conditions binding the Corporation.

The position was put by NORTH, J., thus: "The Treasury when asked to sanction a sale of Corporation land is not in a position to express approval if it is kept in ignorance of the fact that the conveyance not only disposes of the land sold but also disposes of and confers rights over other lands of the Corporation. The plaintiff is in this dilemma. The Treasury have given their approval to all that can be found within the four corners of the deed of conveyance to him, but nothing to be found in those conveyances gives him any right of action against the defendants. He claims larger rights outside the conveyances, but these rights depend upon a disposition of corporate property which has not been approved by the Treasury, and the absence of that approval is a fatal defect." (p. 224.)

And LINDLEY, L.J., puts it in this way: "Now what have the Corporation done here? They have obtained the consent of the Treasury to the conveyance of the various lots purchased by the plaintiff in this case. But what they have not done, whether by oversight or otherwise, I do not know, is this: they have not obtained the consent of the Treasury to the disposition of any lot upon the terms that the owner of that lot shall have rights negative or affirmative over any other land of the Corporation."

Those expressions indicate clearly how that case differs from the present, where the whole contract was laid before and approved by the Executive Council and all the conditions which are sought to be imposed on the defendant are contained in the contract; the only though crucial fact not known to the Executive Council was that the site described in par. 1 of the lease and subsequently indicated by or on behalf of defendant to plaintiff or his representative fell within the portion of the farm belonging to the Bakwena and not to the Bapo tribe.

Does the ignorance of this fact invalidate the approval of the Executive Council having regard to the description of the site in par. 1 of the lease?

I was at first disposed to the view that it did not; on further reflection, however, it appears to me that we must regard the approval of the contract as based only on the assumption that the site leased belonged to the Bapo tribe.

The contract describes the lessor as "Chief Fillius Mogale, acting herein for and on behalf of the Bapo tribe as the registered

owners of the portion of the farm Kareepoort 623, Rustenburg district," and clause I of the lease provides " the lessor in his capacity aforesaid and with the consent of his Principals, hereby lets to the lessee a portion of the aforesaid farm Kareepoort in extent 100 feet adjoining the Railway Siding on the main road to be used for trading purposes."

On the evidence I am satisfied that the Chief and some of his Council were at that time under the impression that the ground " adjoining the Railway Siding on the main road " fell within the portion of the farm belonging to the Bapos.

One of the objects of Law 3 of 1898 was to protect the tribe as against the Chief, and the consent of the Executive Council is required to any contract or obligation entered into by the tribe or chief before the same can be of any force or effect.

The Chief and tribe were as from that date placed as it were under the tutelage of the Executive Council in regard to contracts and obligations.

The approval of a contract by the Executive Council would imply a knowledge of all facts necessary to arrive at a decision on the subject matter of the contract, and if we consider the terms of the contract in question it cannot be doubted that it was intended thereby to lease only what was considered as belonging to the Bapo tribe.

There was nothing in the contract which could indicate that any ground other than ground belonging to the Bapo tribe was the subject matter of the lease.

Nor do I think that the description of the site as in par. 1 of the lease is sufficient to affect the Executive Council with notice and to make its approval effective when it is clearly shown that the Executive Council was ignorant of the fact that the site in question did not belong to the Bapo tribe.

The position seems to me to be somewhat analogous with that of property being sold with the sanction of the Court as property of a minor in ignorance of the fact that the property belonged to a third party.

Such a sanction or approval based on a misapprehension is not binding.

I have therefore come to the conclusion that the contract of lease between plaintiff and defendant having been approved of by the Executive Council under the misapprehension that the subject matter of the lease was ground belonging to the Bapo tribe is not effectual or binding on that tribe.

As regards the costs, we have come to the conclusion that the defendant should bear the costs connected with the first issue raised in the plea and on which so much evidence was heard, the issue, namely, that the site on which plaintiff erected his buildings was occupied by him without reference to defendant and was not leased or purported to be leased or indicated to plaintiff by the defendant.

On this issue I agree with the JUDGE-PRESIDENT in rejecting the evidence of the defendant and his witnesses.

We think that the defendant should also bear the costs of the last amendment, and of the postponement on the 10th August to take evidence of Messrs. Manning and Dower, as also the costs of the postponement to take the evidence of Mr. Burton.

As regards the rest of the costs we think there should be no order. Personally I feel that the costs are primarily due to the defendant's conduct.

The order will therefore be judgment for the defendant; defendant to pay such costs as relate to the first issue—*i.e.*, the question whether the site was indicated to plaintiff by defendant—as also the costs of the last amendment to the plea and costs of the two postponements on the 10th August and the subsequent postponement. No order as to the rest of the costs.

Attorneys for plaintiff: *Roux & Jacobsz*; Attorneys for defendant: *Rooth & Wessels.*

[A. D.]

REX v. PITSANI.

1915. *September* 13. MASON, BRISTOWE and CURLEWIS, JJ.

*Criminal law.—Stock theft.—Possession of carcase.—What constitutes.—*Ord. 6 of 1904, sec. 2.*

Where a sheep had been stolen and thereafter a portion of its carcase was found under a tub on the verandah of a native's hut, *Held*, that there was *prima facie* evidence of possession by the native as required by sec. 2 of the Stock Theft Ordinance (No. 6 of 1904).

* Sec. 2 of Ord. 6 of 1904, reads: "'Theft' shall embrace besides actual stealing, (3) being or having been in unlawful possession of stock and not being able to give a satisfactory account of such possession. 'Stock' means . . , . sheep and carcase or portion of the carcase of any slaughtered stock."