1897

SCHOLTZ v. LICENSING BOARD OF KRUGERSDORP.

Postea. 20th July.

The Court was of opinion that it was the duty of the Licensing Board to hear the evidence tendered by the objector, and referred the consideration of the licences back to the Board, which consideration was to take place within fourteen days, the objections already made to stand.

The respondent was ordered to pay the costs.

Attorneys for applicant: *Tancred* and *Lunnon.*

Attorney for respondent: *Carl Ueckermann, sen.*

L. LISSACK & CO.

v.

THE SIGMA BUILDING COMPANY.

Coram:
KOTZÉ, C.J.
MORICE, J.
ESSER, J.

1897

26 *July.*

PUBLIC SQUARE—GENERAL PLAN AT SALE—REPRESENTATION—NOTICE—*DEDICATIO AD POPULUM.*

B., in 1887, *caused the portion of the farm Turffontein belonging to him, to be surveyed into stands. The predecessor in title of the plaintiff bought two of these stands. At the time of the sale a plan was shown to the public, on which two open squares, besides the stands and streets, were marked down. According to this plan, the stands of plaintiffs adjoined one of these squares. In* 1889, *B. sold his portion of the farm to D., and D. in turn sold part thereof, including one of the two squares above mentioned, to the defendant company. The title deeds of D. and the defendant company were free and unburdened by any servitude. The defendant company now notified its intention of having the portion of ground known as a square, surveyed into and sold as stands. The plaintiffs alleged that by exhibiting the plan, and also by verbal representations on behalf of B., it had been represented to their predecessor in title that the ground in question would remain an open square, as long as the lease of the stands for* 99 *years continued, and they prayed for a declaration of rights accordingly. It appeared that the lease of plaintiffs contained no reference to this square, and that the defendant company was a* bonâ fide *purchaser for value.*

Held, *that under the circumstances the onus lay on the plaintiff to prove that the defendant company had knowledge of the alleged representation by its predecessors in title, or that a* dedicatio ad populum *of the square had been made. In the absence of such proof absolution from the instance was granted.*

THIS was an action for a declaration of rights. The facts as set forth in the summons were as follows:—On 16th February, 1887,

1897

LISSACK v. SIGMA BUILDING CO.

one Henry Brown Marshall became the registered owner of a certain portion of the farm Turffontein, situate on the Witwatersrand goldfields, which was sold by him on 31st July, 1889, to the Marshall Township, Limited, while this syndicate in turn, on the 2nd January, 1897, sold a part of this portion to the defendant company. In the year 1887, the said H. B. Marshall laid out the portion of Turffontein belonging to him in a stands-township, and subdivided it into stands, streets and public squares. He thereupon put up to public auction the lease, for 99 years, of these stands, and also held them out for private sale, by means of advertisements, and through his agents, Fraser and Becker, at Johannesburg, at whose office he had a plan open to the inspection of the public, and also of all persons who intended to purchase stands in this stands-township, and he also handed in a similar plan at the Mining Commissioner's office in Johannesburg. A copy of this plan was annexed to the summons, and showed, besides the stands and streets, two public squares in the township, one of which, the piece of ground at present in dispute, was named "Market Square." On 13th October, 1887, a certain Edward Hancock purchased from the agents of Marshall the lease of two stands, Nos. 42 and 44, on the general conditions on which stands in the said township were sold, viz., that the lessee and his successors would have free possession from 1st January, 1887. According to the plan these two stands immediately adjoined the Market Square, and the plaintiffs alleged that W. P. Fraser, member of the firm of Fraser and Becker, acting as the agent for H. B. Marshall, at the time of the sale to Hancock, showed him the plan of the stands-township, and verbally represented to him that the square, marked Market Square, would, for the period of his lease of 99 years, be and remain a public square for the use of the stand holders, and for the usual purposes for which public squares and streets in villages and towns were laid out, and that the said square would never be enclosed or built upon.

In August, 1888, the said W. P. Fraser caused a portion of the said Market Square to be enclosed with wire, but upon a protest by Hancock and others the wire fence was removed, and the plaintiffs alleged that W. P. Fraser then again, on behalf of H. B. Marshall, had given Hancock the assurance that Market Square would remain a public square. In 1889 the Marshall Township Syndicate, to whom the portion of Turffontein then

belonged, publicly placed a plan of the stands-township in their office. This plan also showed Market Square, but the name of the square had been altered into Marshall Square. The plaintiffs alleged that they frequently saw and inspected this plan, and noticed that the stands-township contained a square, along which stands Nos. 42 and 44 were situated. On 12th September, 1888, Hancock sold the two stands to the firm D. and D. H. Fraser, Limited. This firm obtained, on the 12th February, 1895, from the Marshall Township Syndicate, two written leases in which the rights of the firm, as holder of the stands Nos. 42 and 44, were described. The firm in turn, on 9th October, 1895, sold all its right, title and claim to the two stands to the present plaintiffs, and the cession to the plaintiffs was endorsed upon the written leases. The property transferred by the Marshall Township Syndicate to the defendant company comprised the greater part of the square called "Marshall Square," and the defendant company had been formed for the purpose of having the square cut up into stands and sold as such.

The plaintiffs alleged that the facts set forth above, of which the defendant company was aware on or about the 2nd January, 1897, amounted to a representation by the predecessors in title of the defendant company to the predecessors in title of the plaintiffs and also to the plaintiffs themselves, that the square would remain a public square: that the defendant company claimed the right to enclose the said square and to build upon it in infringement of the rights of the plaintiffs, and that the company had already commenced to exercise the rights claimed by it, when the plaintiffs, on 6th February, 1897, obtained a provisional interdict, pending action, to restrain it from so doing. The plaintiffs, therefore, prayed for an order from the Court declaring that the defendant company was not entitled to build upon the said property, to sell it for building purposes, or to enclose it, nor of committing upon it any infringement of the rights of the plaintiffs.

The defendant company in its plea denied the allegations contained in the summons. It admitted the existence of a diagram or plan in the office of the Marshall Township Syndicate, Limited, but denied the further allegations in respect thereto. The company also pleaded specially that it had bought the piece of land in question with unencumbered transfer and title, without any servitude or encumbrance, after the diagram thereof had been

1897

LISSACK v. SIGMA BUILDING CO.

approved by the proper authorities. As a second special plea the defendant company pleaded further, that on the 24th December, 1886, the Government had granted the right to lay out the said portion of Turffontein as a stands-township on the same conditions and with the same rights as if the Government itself had done so: that by reason hereof the land in question was divided into stands, with a reservation of certain pieces of land, including the so-called Market Square, for the erection of church and market buildings, and for such other purposes as the owner of the land may from time to time deem advisable; and that the stands of the plaintiffs had been leased by the Marshall Township Syndicate to the predecessors in title of the defendant company on certain conditions and terms more fully described in the contract of lease.

This contract of lease, of which the plaintiffs' predecessor in title had, on 12th February, 1895, obtained a copy from the Marshall Township Syndicate, contained, *inter alia*, the following clauses:—

"Clause 2. The period of the lease hereby agreed upon shall be for a term of 99 years reckoned from the first day of the month of January of the year 1897, and ending on the 31st December, 1995. But the lessee shall enter upon the rights granted by this lease from the date of the execution thereof, and the lessors shall not be liable to him for anything prior thereto."

"Clause 6. All pieces of land not built upon, squares, streets and passages shall remain in the exclusive possession and control of the lessors, and the lessees shall not obstruct footpaths, nor erect balconies or other buildings without the written permission of the lessors."

In their replication the plaintiffs admitted that transfer had been given to the defendant company without any servitude being mentioned therein, but alleged that the non-insertion of the servitude in the deed of transfer of the defendant company did not deprive the plaintiffs of their rights. For the rest the replication was general.

At the conclusion of the hearing of the evidence for the plaintiffs, absolution from the instance was asked on behalf of the defendants.

Wessels (with *Curlewis*), for the defendant company: The plaintiffs found their claim on two points. First, that our predecessors in title represented to the plaintiffs' predecessors in title that Marshall Square would always be regarded as a public square.

That has not been proved. The Marshall Township Syndicate never made any such representation to Hancock. There is no allegation nor proof that the plaintiffs ever heard of such a representation, and they themselves never had any transactions with Hancock or Marshall. Second'y, the plaintiffs allege that, through the placing of the diagram in the office of the Marshall Township Syndicate, the predecessors in title of the defendant company represented to the plaintiffs that the piece of land known as Marshall Square was a public square. There is no allegation nor proof that the plaintiffs were referred by the syndicate to this plan. There is also no such allegation in the plaintiffs' title. A representation by the predecessors of the defendant company to the plaintiffs' predecessors in title can neither be alleged nor proved. The reasoning of the Judges on the facts in the case of *Peek* v. *Gurney* (L. R. 6 H. L. 377; 43 L. J. Ch. 19) is more than convincing—it disposes of this case. The case of *Hanau* v. *The State* (1 Off. Rep. 87) differs from the present, for there the sale took place publicly, according to a plan of the Government, and Hanau was the original purchaser from the Government. The fact that an open space appears on a plan only means that a purchaser must ascertain whether the square had been dedicated or registered, or appeared on a plan approved by the Government or signed by the State President.

We are *bonâ fide* purchasers from the M. T. Syndicate, and clause 2 of the plaintiffs' contract of lease says expressly, "The lessors" (*i.e.*, the M. T. Syndicate) "shall not be responsible for anything previous thereto." But, moreover, where is there any proof that W. P. Fraser had authority from the M. T. Syndicate to bind it by his alleged representation? The case of *Executors of Hofmeyer* v. *De Waal* (1 Juta, 424) shows that we cannot now go outside of the plaintiffs' written contract of lease. A general plan can never constitute a servitude. (*Parkin* v. *Titterton*, 2 Menz. 296: *cf. Hiddingh* v. *Topps*, 4 Searle, 107; *Ohlsson's Cape Breweries, Ltd.* v. *Whitehead*, 9 Juta, 84.) There is not the slightest proof that the defendant company knew of the alleged representation by its predecessors. This also appears from clause 2 of the contract of lease.

Auret (with him *Sauer*), for the plaintiffs: We allege in the summons, and according to the facts set out therein, that the

1897

LISSACK v. SIGMA BUILDING CO.

Kotzé, C.J.

defendants' predecessors in title have made to the plaintiffs' predecessors in title a direct false representation. *Peek* v. *Gurney* is therefore not applicable. The Cape cases merely lay down that one can only rely on the streets adjoining which one has property. There can be no doubt that the M. T. Syndicate has represented that Marshall Square would always remain an open square. It is not a question of servitude. We have a certain right under our contract of lease, and the defendant company bought subject to that contract of lease. The stands are for ninety-nine years, adjoining or on Marshall Square.

Wessels, in reply.

KOTZÉ, C. J.: We think that there is no proof that the defendant company ever was aware or had knowledge that Marshall Square should always remain a public square. The company is a *bonâ fide* purchaser for value, and the *onus* lies on the plaintiffs to prove this knowledge. Moreover, there is nothing in the contract of lease of the plaintiffs to show that Marshall Square is a public square and has been guaranteed as such to the owners of stands. (See clauses 2 and 6 of the lease.) Nor has any dedication to the public been proved, and Marshall Square is not registered as such in the office of the Registrar of Deeds or of the Surveyor-General. There will, therefore, be judgment for the defendant company in the form of absolution from the instance, with costs.

Attorney for the plaintiffs: *J. H. L. Findlay.*

Attorneys for the defendants: *Rooth* and *Wessels.*