THE REGISTRAR OF DEEDS *v.* A. A. DE KOCK N.O.

Coram: KOTZÉ, C.J. JORISSEN, J. GREGOROWSKI, J.

1897
8 *February.*
15 "

JOINT PROPERTY — PARTITION OF — GOVERNMENT DUES — REGISTRATION.

Three co-owners of two farms can, among themselves, divide these farms in equal shares as they please, without payment of transfer dues.

THIS was an appeal from the ruling of Morice, J., in chambers, on 23rd January, 1896. The petition of A. A. De Kock N.O. set forth that he was the duly authorized agent of the three owners of the farms Honesty, No. 40, and Catharina, No. 20, in the District of Bloemhof, for the purpose of framing and passing partition deeds of these farms; that no consideration passed between the said three co-owners for the partition of the farms among themselves, and that the Registrar of Deeds refused to register the said deeds of partition. The applicant accordingly prayed for an order compelling the Registrar to do so.

The two farms adjoined each other. They were sub-divided as follows:—J. P. S. Lubbe obtained 2,528 morgen 512 square roods of the farm Catharina; C. J. Lubbe obtained a portion of Catharina and a portion of Honesty, together 2,528 morgen 512 square roods in extent; and J. G. Wessels obtained 2,528 morgen 512 square roods of the farm Honesty.

MORICE, J., ordered the Registrar of Deeds to register the deeds of partition without payment of transfer dues. His written judgment was as follows: "This is an application for an order directing the Registrar of Deeds to register certain deeds of partition of certain two farms in the district of Bloemhof. It appears that the three principals of the applicant were the co-owners of the two farms. These three owners agreed to divide the two farms in three equal portions, in such a way that one of them should get a portion of the two farms, and the other two a portion each in one of the two farms. A partition deed was drawn up and also transfers of the three portions in the names of the three parties. The Registrar of Deeds refused to register these documents, on the ground, firstly, that there was an actual exchange and consequently transfer duty had to be paid; and secondly, that there

1897

REGISTRAR OF DEEDS v. A. A. DE KOCK N.O.

Morice, J.

ought first to be a division and transfer of each farm separately and then an exchange of the portions of these two farms.

"The contention of the Registrar of Deeds is that first of all each party was the owner of a third undivided share in each of the two farms, and that the division makes each of two of the parties owner of two-thirds of a farm. Consequently, these two parties have respectively given up their share in one farm for a share in the other farm, and accordingly there is an exchange. Now, this may well be a logical argument, but it seems to me that the wording of Law No. 7 of 1883 (the law on transfer duty) is against it. This law does not speak of payment of transfer duty on the transfer of *a farm*, but of *immovable property*. Section 4 (d) provides that, in case of a dissolution of partnership, the transfer of the *immovable* property of the partnership from the name of the joint owners to the separate owners shall take place without payment of transfer duty. The learned Attorney-General admits that when a farm held by co-owners is divided in severalty no transfer duty is payable. And why should a distinction be drawn in the case of two farms, seeing that the law only refers to immovable property? In other words, the law does not seem to regard the farm as a unit for the purpose of the payment of transfer duty. I am therefore of opinion that, as the law at present stands, the registrar cannot insist that the two farms must first be separately divided, and that after that an exchange shall be registered on payment of transfer duty. The application will accordingly be granted. The Registrar of Deeds is ordered to register the deeds of partition mentioned in the petition, and the Registrar of Deeds N.O. is ordered to pay the costs."

The Registrar of Deeds appealed from this decision.

Dickson, for the appellant: An exchange has actually taken place, and therefore transfer duty is payable. It is precisely as if each farm was first divided and then the portions were exchanged by the owners *inter sese*.

Esselen (with him *Cloete*), for the respondent: When co-owners divide their joint property among themselves they may do so as they please, provided each one does not get more than his share. It can make no difference that there are two farms instead of one.

1897

REGISTRAR OF DEEDS v. A. A. DE KOCK N.O.

The Registrar of Deeds can claim no transfer duty. (*See Law No. 7, 1883, sect. 4 (d).*)

KOTZÉ, C. J.: We think the Registrar of Deeds must register the deeds of partition without payment of transfer duty. The appeal is therefore dismissed. There will be no order with respect to the costs.

JORISSEN and GREGOROWSKI, JJ., concurred.

Attorneys for respondent: *De Villiers* and *De Kock*.

WILSON

v.

THE CONSOLIDATED GOLDFIELDS OF SOUTH AFRICA, LIMITED, VAN DER MERWE N.O. AND LEYDS N.O.

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

1897

18 *February.*
19 ,,

LAPSED CLAIMS—PEGGING OFF OF—BEZITRECHT.

Section 87, clause 3, of Law No. 18 of 1892 gives the Mining Commissioner the right of granting licences for the pegging off of lapsed claims which it was not possible to sell.

Per *Kotzé, C. J., and Jorissen, J.: Where a certificate of* bezitrecht *has been obtained, the Court will not interfere with it, unless very strong grounds exist for so doing.*

Per *Morice, J.: A certificate of* bezitrecht *is irrefutable, unless fraud can be proved.*

THIS was an action for a declaration of rights. A certain portion of the farm Elandsfontein, district Heidelberg, was on 25th June, 1888, proclaimed as a public digging. In November, 1893, certain 112 claims, belonging to one Namacher on the said portion, lapsed to the Government by reason of non-payment of the licence-moneys. In December, 1893, these claims were advertised in the *Gazette* for public sale in January, 1894. They were put up to auction, but not sold. In April, 1894, they were pegged off by a certain Ben Dell, and his licences were regularly renewed by the Mining Commissioner. They were subsequently transferred to