Coram:
KOTZÉ, C.J.
AMES-HOFF, J.
GREGO-ROWSKI, J.

1896
16 *November.*
1897
22 *February.*

CURLEWIS *v.* CARLIS.

PROSPECTING CONTRACT—CESSION OF—DISPOSAL OF CLAIMS.

The plaintiff entered into a notarial contract with the defendant, whereby he ceded to the defendant for an indefinite period the exclusive right of prospecting for gold, &c. on certain 79 claims belonging to him. By clause 4 of the said contract the defendant had the exclusive right of purchasing, selling, floating into a company with limited liability, or otherwise disposing of the said claims, provided that on such purchase, sale, flotation or otherwise, he would be obliged to pay to the plaintiff 100*l. per claim, or* 100 *shares in the company floated on these claims. On 26th October,* 1895, *the defendant ceded, for value received, all his right, title, and interest in the said contract, together with all his obligations thereunder to J. Crewel, Taylor, and Neumann & Co. On 29th October,* 1895, *J. Crewel ceded his undivided one-third share therein to the Klerksdorp Proprietary Mines, Limited. It was also agreed that Taylor and Neumann & Co. should likewise cede their rights to the same company. The plaintiff sued for* 7,900*l. or* 7,900 *shares in the said company.*

Held (*Gregorowski, J.,* diss.), *that it was not shown that there had been a disposing of the claims, as contemplated by clause* 4 *of the contract, and that accordingly absolution from the instance with costs should be granted. Jooste* v. *Carlis* (3 Off. Rep., p. 120) *not followed.*

On 16th February, 1895, Curlewis, the owner of certain 79 claims on the farm Elandsheuvel, in the district of Potchefstroom, entered into an agreement with one Carlis, by which the latter obtained the exclusive right of prospecting for gold on the said claims. It was further agreed in clause 4 that Carlis should have the exclusive right of purchasing and selling the said claims, or of floating them into a company with limited liability, or otherwise disposing of them, provided that in the event of such sale, purchase, flotation or otherwise, he should pay to Curlewis 100*l.* per claim, or 100 fully paid-up shares of 1*l.* each in a company formed on these claims. On 26th October, 1895, Carlis ceded his rights under an agreement to Jacob Crewel, William Peter Taylor and S. Neumann & Co. On 29th October, 1895, Crewel ceded his one-third share under the contract to the Klerksdorp Proprietary Mines, Limited. Thereupon Curlewis instituted an action against Carlis for 7,900*l.* or 7,900 shares in the said company, maintaining that there had been a disposing of the claims within the meaning of clause 4 of the agree-

ment. Clause 6 provided, that a syndicate that may be formed for the simple purpose of testing and exploiting the said claims should not be considered to be a company within the meaning of clause 4.

Wessels (with him *Esselen*), for the plaintiff: This case is exactly on all fours with *Jooste* v. *Carlis* (3 Off. Rep., p. 120), and the arguments advanced there are also applicable here. There was a disposal of the claims, and therefore the plaintiff must succeed.

Dickson (with him *Laurel*), for the plaintiff: The decision in *Jooste* v. *Carlis*, it is submitted, is untenable. The defendant has not disposed of the claims within the meaning of clause 4. He has simply ceded his contract, so that the cessionaries now stand in his place. A cession of the contract cannot be regarded as a disposal of the claims.

Cur. ad. vult.

Postea. 22nd February, 1897.

KOTZÉ, C. J.: In this case, in which the principal facts are similar to those in the case of *Jooste* v. *Carlis*, decided in this Court in August, 1896, I have come to the conclusion that absolution from the instance with costs should be granted. The difficulty which occurred to me at the trial was not so much what the judgment of the Court should be on the merits, but whether we are bound by two previous decisions of this Court pronounced in two other cases. At the conclusion of the argument I had formed the opinion that the plaintiff could not succeed, and now, after having had the opportunity of considering the two previous decisions of this Court, I see no reason to alter my view. In the case of *Schuler* v. *Sacke and Saenger*, which was decided on 4th August, 1896 (*a*), on appeal from the judgment of Jorissen, J., by Ameshoff, Morice and Gregorowski, JJ., the facts were somewhat different from those in *Jooste* v. *Carlis* and in the present case. Schuler based his action on a verbal agreement, subsequently confirmed by a letter addressed to him by Saenger. At the end of the contract entered into afterwards in London by Sacke, on behalf of himself and Saenger, with the Sacke Estates Mining Company, the following clause occurs:—"The company must take over the rights of the vendors in the three last-mentioned farms, subject

(*a*) 3 Off. Rep. (1896), p. 92.

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to the provisions of and compliance with a letter of agreement, addressed by the said Heyman Saenger to one Schuler, dated 27th February, 1895, which states that the said Schuler shall receive on flotation, sale or otherwise, 500*l.* in cash on each portion and 500 shares of 1*l.* each," &c. Now, there the condition in the letter and in the notarial contract was observed. The company, as stipulated and agreed upon, was floated, and I see no reason to question the decision of the Court in that case. But, as pointed out by my brother Morice in the subsequent case of *Jooste* v. *Carlis* (decided on 23rd August, 1896), that case differs from the earlier one of *Schuler* v. *Sacke and Saenger*. The later case, so far as the material facts are concerned, is similar to the present one, and upon the facts and documents put in I agree with the dissenting view of Morice, J. My brother Gregorowski, who, in *Jooste* v. *Carlis*, delivered the judgment of the majority of the Court (*viz.*, the late Kleyn, J., and himself), held that there exists no distinction between *Schuler* v. *Sacke and Saenger* and *Jooste* v. *Carlis*, and that consequently the Court was bound by the earlier decision, which was a unanimous one. With all deference, it appears to me that Gregorowski, J., has erred in this view. The disposal mentioned in clause 4 of the contract in the case of *Jooste* v. *Carlis*, which is the same as the fourth clause in the present instance, denotes something quite distinct from a bare cession of the rights stipulated in and under the contract. This is apparent not merely from the wording of clause 4 of the contract, but clause 6 also confirms this; and a comparison of the letter and the contract in the case of *Schuler* v. *Sacke and Saenger* not only shows the distinction between that case and the two subsequent ones, but also supports the argument of Mr. Dickson that the defendant has simply, for a consideration, ceded to third parties his rights under the contract with Curlewis, which he was fully entitled to do. As no sale, flotation or disposal, as contemplated by clause 4, has been established, I am of opinion that absolution should be granted. Seeing that *Schuler's* case differs from the present one, and as only two out of the three Judges, in the case of *Jooste*, delivered the judgment of the Court in that case, apparently under the impression that they were bound by *Schuler's* case, I consider that, as the question has again arisen, I am at liberty to examine the earlier decisions; and when I find that one of these decisions is not in conflict with my view, and that in the other instance the Court was not unanimous and

based its judgment upon an erroneous conception of *Schuler's* case, I ought to decide the present case upon its own merits.

AMESHOFF, J., concurred.

GREGOROWSKI, J.: The summons sets forth that on 16th February, 1895, the plaintiff ceded to the defendant, under the provisions of a certain written contract, his rights to certain 79 claims on the farm Elandsheuvel, in the Schoonspruit Goldfields, and that the defendant in turn had, as contemplated by sect. 4 of the contract, disposed of the claims to Crewel, Taylor, and the firm of Neumann & Co., as appears from a cession of the contract dated 25th October, 1895. The summons further states that the said Crewel did, on 25th October, 1895, cede to the Klerksdorp Proprietary Mines, Limited, a third share in the said claims in consideration of certain shares in this company, and that by reason thereof the plaintiff is entitled to claim from the defendant the sum of 7,900*l.* or the delivery of 7,900 shares in the Klerksdorp Proprietary Mines, Limited, which at the time of the trial had a value of 2*l.* to 2*l.* 5*s.* each.

The defence to the action is that the defendant on 31st August, 1896, gave written notice to the plaintiff that he had terminated and cancelled the contract of 16th February, 1895, and that he was prepared to return the claims to the plaintiff, and that consequently by clause 3 of the said contract the contract is no longer of force. Secondly, that on the 26th October, 1895, the defendant merely ceded and transferred his option in the contract of 16th February, 1895, to Crewel, Taylor, and the firm of Neumann & Co., and that Crewel had, on the 29th October, 1895, ceded his third share to the Klerksdorp Proprietary Mines, Limited, and that neither the defendant, nor Crewel, Taylor, Neumann & Co., nor the Klerksdorp Proprietary Mines, Limited, had floated the claims into a company with limited liability or otherwise disposed of them as contemplated by clause 4 of the aforesaid contract.

The question which this Court has to decide is whether there has been a disposal of the claims by the defendant in accordance with clause 4 of the contract of 16th February, 1895.

According to this contract the plaintiff grants to the defendant the exclusive right of seeking and prospecting for gold and precious stones, and of exploiting the claims at his own cost for

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an indefinite period. The defendant agrees to pay the licence from time to time and to defray all the expenses incurred, he having the right to cancel the contract by giving fourteen days' previous notice. Then we have clause 4, tha the defendant (*b*) shall have the right "of purchasing, selling, floating into a limited liability company, or otherwise disposing of said claims—provided that upon such purchase, sale, flotation or disposal," the defendant shall pay to the plaintiff 100*l.* or 100 shares (paid up) for each claim at the option of the purchaser. Clause 6 provides that a syndicate which may be floated "for merely testing and developing the said claims" shall not be deemed to be a company within the meaning of clause 4.

According to the cession of 26th October, 1895, the defendant ceded to Crewel, Taylor, and the firm of Neumann & Co., all his rights, title and interest, together with all his obligations under the contract of 16th February, 1895, as well as under other contracts. In the cession the consideration paid to the defendant is not stated.

On 29th October, 1895, Crewel ceded his third share under the cession of 26th October, 1895, to the Klerksdorp Proprietary Mines, Limited, together with all his obligations. In this cession likewise no consideration is mentioned. From the schedule attached to the Memorandum of Agreement of the Klerksdorp Proprietary Mines, Limited, we see that on 29th October, 1895, Jacob Crewel and Wolf Carlis ceded to the company a number of claims and a third interest in the claims in question. Why Carlis, in October, 1895, when he was on the point of floating the Klerksdorp Proprietary Mines, Limited, called in the assistance of Crewel, Taylor, and Neumann & Co., in respect to his contract with Curlewis, has not appeared. He who floats a company has many characteristics in common with the "Heathen Chinee" of Bret Harte, and it is difficult to probe his motives. It has been maliciously suggested by the plaintiff that Carlis has first of all floated a third undivided share in the claims in the Klerksdorp Proprietary Mines, Limited, in order, subsequently, with the remaining two-third undivided share, to make a still greater profit out of the shareholders; but the good man has naturally repudiated this insinuation with indignation. The fact, however, that these two cessions leave the circumstances so obscure is something well worth considering.

(*b*) The original has plaintiff (*curlewis*), which is obviously a misprint.—TR.

It appears from the evidence that Carlis obtained 400,000 shares in the Klerksdorp Proprietary Mines, Limited, and that these shares have (according to him) a value of 2*l.* to 2*l.* 5*s.* each. There is also evidence that Crewel admitted to Curlewis that he (Curlewis) would get shares in the Klerksdorp Proprietary Mines, Limited, and Crewel asked him to pool these shares. Curlewis states that he was not satisfied with this. Against this evidence objection was taken on the ground that Crewel is not a party to the action, and the circumstance is not of importance, for it can easily be explained.

In the case of *Jooste* v. *Carlis* (13 C. L. J., p. 296) the contract between the parties was similar to the contract now before the Court, and all the parties concerned in this contract were also affected by the contract in the case of *Jooste* v. *Carlis*. It is admitted that there is no distinction between the two cases, but it is contended that the case of *Jooste* v. *Carlis* was wrongly decided. I trust I am open to conviction, but the consideration of the present case has simply confirmed me in the view to which I gave expression in the former case. It is plain that a right may be ceded. No one need remind me of this elementary principle, but it is also equally plain that an obligation cannot be ceded, and where a contract consists of obligations and rights a party can cede his rights but he cannot thereby free himself from his obligations. In the present case we have not to decide whether Carlis has ceded his rights to the different persons; but the question is, What are his obligations under the circumstances towards Curlewis? In arguing this case there has been hopeless confusion, and counsel for the defendant appeared to think that it was a difficult task to convince the Court that a right could be ceded, whereas he ought rather to have busied himself with an interpretation of the contract.

Now the principle laid down in *Schuler* v. *Sacke and Saenger*, and in *Jooste* v. *Carlis*, is this: that where two parties, by a written agreement, enter upon a joint undertaking, and have a common interest, the Court will, if the contract be capable of such a construction, give a fair and reasonable interpretation to the words of the contract, in order that effect may be given to the intention of the parties. The Court will not adopt a construction which frustrates the object of the parties in entering into the contract, and which places it in the power of one of the parties to derive all the benefit, and leaves his co-contractor out in the cold, exposed to wind and weather. Now the intention of the parties under the

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contract is plain to me. Carlis had to deal with the claims; he had to float them himself, or sell them to one of the numerous companies already floated at the time, and if any preliminary operations were necessary, such as opening up the reef, before any company would deal with the claims, Carlis had to defray the cost of these operations himself, or otherwise, under clause 6, at the cost of a syndicate created for that purpose.

The Klerksdorp Proprietary Mines, Limited, was a company floated by Carlis himself, and to such a company he would, in the ordinary course of things, have made over the claims. But he appears to have entertained other thoughts on this point. Claims which belonged to him he sold out-and-out to the company, and received the purchase price; but claims entrusted to him for flotation had first to be tested, and although he received the consideration for his rights from the company, the owners of the claims had to wait for an indefinite time before they received anything. Years might elapse before the company might deem it necessary to take transfer, and pay the purchase price. By this mode of dealing on the part of the defendant, the payment for the claims of the plaintiff was indefinitely postponed. Booms might come and go, the market for claims might rise and fall, the claims of the plaintiff would be effectually excluded. It is not denied that the plaintiff has been placed in this difficult position, but the defendant appeals to the contract.

It is admitted by the defendant that the Klerksdorp Proprietary Mines, Limited, is not a syndicate falling within clause 6 of the contract, but he alleges that he has not disposed of the claims, but only of his option to take over the claims. Now, this would be a sufficient answer if the defendant had by the contract obtained an option to purchase the claims, and had in turn given an option to the company to take over the claims at a fixed price. But the contract under which the defendant acted was not merely an option to him to purchase. He had for an indefinite time the right to purchase the property, to sell it, to float it, or otherwise to dispose of it, with the obligation of meanwhile keeping it up, and, as soon as he bought, sold or floated, he had to pay the purchase price. The defendant has irrevocably ceded the contract, obligations and all. He has been paid, and what has remained unpaid is alone the purchase price which belongs to the plaintiff, and the cessionary had to perform that whenever it suited him.

The question is, is this in accordance with the contract? It has been contended that the plaintiff is entitled to payment only when he is asked for transfer. If we consult the contract, we find that the defendant by this contention places the cart before the horse. The contract does not say that the defendant shall only be obliged to make payment whenever he desires transfer, but on the contrary, the defendant has to pay as soon as he has disposed of the claims. Now, if the contract has the simple meaning which the defendant ascribes to it, this meaning could have been expressed in a few sentences, instead of employing the long and cumbersome clauses which are actually found in the contract, and then clause 6 would have no meaning or sense. In England it was the practice years ago to pay the draftsmen and conveyancers of contracts and deeds according to the length of the documents, and then it was comprehensible to find long meaningless sentences and clauses, by way of bringing water on to the millrace of the conveyancer. I do not think that the notary has in the present instance been paid in this manner. If the intention was that the defendant took an option to purchase the claims if they suited him, the notary would have used short and pertinent words. He would never have thought of inserting clause 6, and he would have mentioned that the purchase price was to be paid on transfer. We have to give a meaning to the words of clause 4 of the contract, "purchasing, selling, floating into a limited liability company, or otherwise disposing of said claims," and to the words that, in case of purchasing, selling, floating or disposing, the purchase price has to be paid. The defendant cannot be allowed to do indirectly what he is not at liberty to do directly. He cannot take all his share of the profit and leave the purchase price in the hands of the cessionary. He cannot dispose of the claims and say, "I have merely disposed over a piece of paper."

Moreover, we must give a meaning to clause 6. This clause would be meaningless if the plaintiff has to wait for his money until transfer is demanded of him, and if the defendant can cede the whole contract in the way he has done, why was this clause inserted in the contract? Just by reason of this clause it is plain what passed in the minds of the parties. The parties thought, and the defendant was under the impression, that if he formed a syndicate to test the ground the plaintiff would be entitled to claim payment, and in order to prevent that the clause was inserted.

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We must interpret the contract in such a manner that every part of it has a meaning and effect.

Again, the plaintiff placed himself in the hands of the defendant for an indefinite time. Is it probable that he would have done so if he had not confidence in the person of the defendant? Would he have left it to the defendant to float the claims and accept payment in shares if he had not the same confidence? It could not be a matter of indifference to him who obtained the flotation of the claims. In order briefly to recapitulate, the question is whether the defendant has disposed of the claims in accordance with clause 4 of the contract, and whether the plaintiff is entitled to payment on the ground that a purchase, sale, flotation or disposing has taken place? The only reasonable explanation which can be given to the conduct of the defendant (*c*) is that a disposing (of the claims) has occurred; and that the term must be taken in a very general sense appears from the necessity, which the parties themselves have felt, of safeguarding the defendant in a particular instance by inserting clause 6 in the contract. Moreover, we must not so much regard the precise wording of the cession as the actual tendency and effect. We must attach importance to the clear intention of the parties. Bearing this and the circumstances of the case in mind, I consider that the plaintiff is entitled to judgment so far as concerns the one-third share floated by Crewel and Carlis in the Klerksdorp Proprietary Mines, Limited. The defendant has further disposed of the other two third shares to Taylor and Neumann & Co., and the onus lies on him clearly to show that there has been no alienation of the claims. The contract between Carlis, Crewel, Taylor and Neumann & Co., has not been put in. Under these circumstances I have no difficulty in giving judgment for the full sum claimed.

Attorney for the plaintiff: *Paul Nel.*

Attorneys for the defendant: *Booth* and *Wessels.*

(*c*) The text has plaintiff (*eischer*), which is a misprint.—TR.