J. P. CREGOE

v.

F. J. BEZUIDENHOUT, JUNR., AND THE LARK SYNDICATE.

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

1896
1 *December.*
2 ,,
3 ,,
4 ,,
5 ,,
1897
22 *February.*

EXPIRATION OF CONTRACT—COMPUTATION OF TIME—*NATURALITER ET CIVILITER.*

A contract was entered into on the 24th July, 1893, *whereby B. sold to C. the mineral rights in a certain piece of ground laid out as a stands-township. B. undertook to deliver to C. the licences for claims or* vergunningen *on the ground within a certain time, but the contract provided further that if B., through circumstances beyond his control, was unable to obtain the licences from Government within ten days and deliver them to C., then the contract shall be wholly void and determined. The stipulated period of ten days was by mutual consent extended for two months from the expiration of the ten days. On the 3rd October*, 1893, *the approval of the Government was obtained, and on 4th October*, 1893, *B. obtained the licences. It was held by the Court that, taking the most favourable computation for C.* (de momento in momentum), *in the absence of any allegation of delay on the part of B., the contract had already expired when B. obtained the licences on the morning of 4th October*, 1893.

In this case the plaintiff sued the second defendant for a declaration of rights in regard to certain 235 claims situate on the farm Doornfontein, district of Heidelberg, and the first defendant for delivery of transfer of the said 235 claims, and on failure of delivery of transfer he sued the defendants jointly and severally for a sum of three million pounds sterling (3,000,000*l.*) as and for damages.

The plaintiff alleged in his summons that on 24th July, 1893, a contract was entered into between the plaintiff, the second defendant, and a certain W. B. Schurmer, whereby the first defendant sold to the plaintiff for the sum of 45,000*l.* all his right, title, interest and claim in and to certain contracts, to wit:

(a) A contract dated 28th August, 1889, entered into between the first defendant and F. J. Bezuidenhout, *senior*, whereby certain rights were given to the first defendant to survey stands on certain open ground, being a portion of the farm Doornfontein, district Heidelberg.

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(b) A contract dated 29th October, 1889, entered into and executed between the Government and the first defendant with regard to the creation of a stands-township.

Further, that the first defendant undertook to do his utmost to obtain from the Government within *ten* days the mineral rights in the ground mentioned in the two aforesaid contracts, and also within the ten days to obtain from the Government licences, and after having obtained them to cede these licences to the plaintiff; that the said term of ten days was, on 2nd August, 1893, by verbal agreement between the parties, extended for a further period of two months, reckoned from the expiration of the said ten days, thus until and inclusive of the 3rd day of October, 1893; that the contract of 29th October, 1889, was on 3rd October, 1893, cancelled by the Executive Council, and the Mining Commissioner was authorised to issue licences to the first defendant on the said ground; that the first defendant thereupon pegged off 235 claims on the said ground on the 4th October, 1893; that the plaintiff, during the months of September and October of 1893, was ill in bed and was unaware that the first defendant had obtained the said permission from the Government; that on 21st October, 1893, a certain Max Langerman, acting on behalf of the defendants, came to the plaintiff and informed him that such permission had not been obtained by the first defendant within the stipulated time; that the plaintiff thereupon, at the request of the said Langerman, wrote a letter to the first-named defendant requesting him to enter into a new contract; that the plaintiff subsequently discovered that Langerman had deceived him, and that the first defendant had indeed succeeded in obtaining the said permission of the Government within the time fixed, and in any case in terms of the provisions and in accordance with the condition and the spirit and meaning of the contract of 24th July, 1893, whereupon the plaintiff withdrew the said letter; that the first defendant on the 9th April, 1894, sold and transferred the said 235 claims to the second defendant, wrongfully and with the intent of defrauding the plaintiff, and contrary to the contract of 24th July, 1893, and without giving the plaintiff notice thereof; that the second defendant received transfer of the said claims *malâ fide*, well knowing that the plaintiff was entitled to these claims, and acted in collusion with the first defendant with the view of defrauding

and injuring the plaintiff and depriving him of his said rights, and that the value of the said claims amounted to the sum of 3,000,000*l.*

The second defendant denied any *mala fides*, or any knowledge of the rights alleged by the plaintiff.

The first defendant denied the verbal extension of the contract, and denied further that the granting of the licences took place within the ten days and two months, as stated in the contract of 24th June, 1893, mentioned in the summons and in the verbal extension thereof.

Clause 4 of the contract read as follows: "If the said F. J. Bezuidenhout, jun., shall be unable, owing to circumstances beyond his control, to obtain within the ten days afore-mentioned the said licences, or *vergunningen*, from the Government and deliver them, and likewise proper title as aforesaid, then this contract, notwithstanding anything contained to the contrary in any other part or parts of this contract, shall wholly cease and become null and void, and the parties shall revert to exactly the same position which they occupied before this contract was entered into, and this contract shall be deemed never to have been entered into, &c."

A great deal of evidence was submitted to the Court, but the facts will sufficiently appear from the judgment of the Court pronounced by Gregorowski, J. The arguments are merely given in so far as they relate to the question when the contract, upon which the action was brought, terminated.

Carlenis (with him *Cloete* and *Sauer*), for the plaintiff: The contract of 24th July, 1893, was extended for two months. This was in the interests of Bezuidenhout. Time was not of the essence of the contract. The object of the extension was to enable the contract to have effect, and the contract created *uberrima fides* between the parties. It was the duty of Bezuidenhout to do all in his power to secure the mineral rights for Cregoe. The ten days expired first on the evening of the 3rd August, and the two months run from 4th August to the 4th October inclusive. The day on which the contract was entered into is not reckoned in the computation. (*Bishop on Contracts*, § 1341; *Parsons on Contracts*, *vol.* 2, § 661.)

Whatever Bezuidenhout obtained from the Government he obtained as trustee for Cregoe, and this even although it was

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obtained a few days after the two months had elapsed, for the rights were obtained from the Government upon a request founded on the contract between Bezuidenhout and Cregoe. Meyer, the agent of Bezuidenhout, acted both in the interests of Cregoe and Bezuidenhout. The licences must be regarded as having been obtained on 4th October by Meyer, *pro* Cregoe.

Dickson (with him *Barber* and *Hummel*), for the first defendant: The two months expired on the 3rd October, and on 4th October the licences were first granted. The contract expressly stipulates that it shall cease and expire if the licences are not obtained within the time fixed.

Auret (with him *De Korte*), for the second defendant.

Curlewis, in reply: The clause in the contract, that unless it be done within a fixed time the contract shall be null and void, is a stipulation in favour of Cregoe, and cannot be interpreted against him. If Cregoe chooses to waive it, that is his business, but the vendor (Bezuidenhout) cannot take advantage of it.

Cur. ad. vult.

Postea. 22nd February, 1897.

GREGOROWSKI, J.: In this case the two defendants are summoned by the plaintiff for transfer and delivery of 235 claims situate on the farm Doornfontein, in the district of Heidelberg, or in the alternative for 5,000,000*l.* by way of damages, under circumstances which I will proceed to state.

On the 28th August, 1889, a contract was entered into between Bezuidenhout, sen., and his son the defendant, Bezuidenhout, jun., by which the former, as owner of the farm Doornfontein, granted a certain piece of open ground situate on the proclaimed portion of the said farm to Bezuidenhout, jun., under certain conditions to lay it out in stands. As the ground in question had already been set open for gold digging, Bezuidenhout, jun., on 29th October, 1889, entered into an agreement with the Government whereby it permitted and authorised him to lay out a stands-township, as contemplated in the contract between him and his father, under the name of Bezuidenville. Through this contract it was considered that this ground was no longer disposable for pegging as a gold digging.

Bezuidenhout, jun., was, however, not left in peaceable possession of Bezuidenville, for a certain Schurmer alleged that, on 24th April, 1888, already, he had entered into a contract with Bezuidenhout, sen., in regard to the same piece of ground, or a considerable portion of it. Schurmer likewise contemplated the laying out of a township, under the name of Prospect Township. Disputes arose between Bezuidenhout, jun., and Schurmer, and in 1893 Schurmer was sued in ejectment, but the case resulted in absolution from the instance. While Schurmer and Bezuidenhout, jun., were preparing for again attacking each other in law, Cregoe, the plaintiff, appeared on the scene, and succeeded in bringing about a contract to which Cregoe, Schurmer and Bezuidenhout, jun., were parties. This contract was entered into on 24th July, 1893.

If this contract went through, the dispute between Schurmer and Bezuidenhout would cease to exist, but unfortunately the contract was subject to a resolutory condition. Cregoe was not minded to lay out a township; what he wanted was the mineral rights, and consequently, according to the contract, the defendant had to take the necessary steps to cancel the creation of Bezuidenville as a stands-township, and he had to deliver to Cregoe the licences for claims, or *vergunningen*, of mineral rights. The contract of 29th Oct. 1889, with the Government, whereby Bezuidenville was created a township, had, as a preliminary condition, to be cancelled, and Bezuidenhout had to take out the licences for pegging off the ground and deliver them to the plaintiff before the contract could come into operation. In order that this might be done, a time limit of ten days was fixed in the original contract between the three parties. Upon receipt of the licences Cregoe had to make the first payment of 4,500*l.* in cash, and further discharge the purchase price by means of two instalments of 13,000*l.* and 27,000*l.*, payable at the expiration of six and fifteen months respectively. He had further, within five weeks after receipt of the licences, to give security for the second instalment of 13,000*l.*, and on failure of his so doing he would forfeit the ground and the first instalment of 4,500*l.* already paid by him. The contract further provided that Schurmer ceded his rights to Cregoe under the conditions and stipulations contained in a separate contract, and that this separate contract was likewise dependent upon the resolutory condition contained in clause 4 of the contract between Cregoe, Bezuidenhout, jun., and Schurmer. The resolutory con-

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dition (clause 4) upon which everything therefore depended reads as follows: "If the said F. J. Bezuidenhout, jun., shall be unable, owing to circumstances beyond his control, to obtain within the ten days afore-mentioned in paragraph 1, the said licences or *vergunningen* from the Government and deliver them and likewise proper title as aforesaid, then this contract, notwithstanding anything contained to the contrary in any other part or parts of this contract, shall wholly cease and become null and void, and the parties shall revert to exactly the same position which they occupied before this contract was entered into, and this contract shall be deemed never to have been entered into."

Clause 3 provides for the case where Cregoe pays the first instalment but fails to offer the necessary security for the second instalment, for then Bezuidenhout was to divide the ground in the proportion of three to one. Bezuidenhout would get three-fourths and Schurmer one-fourth. But the contract provides in the clearest terms that if Bezuidenhout was not able to deliver the licences within the ten days, then everything reverted to the former position as if the contract had never been made, and Schurmer, Bezuidenhout and Cregoe, would be entirely released from any of the obligations arising from the contract.

J. G. Meyer, who represented Bezuidenhout, jun., in the making of the contract of 24th July, 1893, anticipated no difficulty in his negotiation with the Government for the cancellation of the contract of 29th October, 1889; but things did not proceed so smoothly as he had supposed. The Government would only cancel the contract after due notice in the *Gazette*, and this notice could not appear before 1st August. The fixed period of ten days was therefore too short, and on 2nd August the parties met and the time for the delivery of the licences was by mutual consent extended for two months after the expiration of the ten days. The extension was not reduced to writing, and the evidence was conflicting on the point whether there had been an extension or not; but the testimony of the plaintiff was in all respects supported by letters from Schurmer that an extension was approved by all the parties interested.

On the 3rd October, 1893, the contract of 29th October, 1889, was cancelled by a resolution of the Executive Council, and on 4th October, 1893, Bezuidenhout, jun., took out 235 licences and pegged off the former township of Bezuidenville into 235 claims.

It is certainly a remarkable concurrence of circumstances that the resolution of the Executive Council was exactly taken on the 3rd October, 1893, but we do not know what was the cause of this. The summons does not allege that a delay was caused by the defendant, and if the defendant desired the contract to lapse and it was in his power to cause the resolution to be postponed, then he would clearly have let the resolution stand over to a date entirely beyond the period fixed in the contract. Nor is it alleged that the defendant by exercising diligence could have taken out the licences on the same day on which the resolution was passed.

The question therefore remains simply this: whether Bezuidenhout, jun., was still obliged, on 4th October, to tender the licences to the plaintiff, and so perform what he had by the contract undertaken to do? In other words, was the contract of 4th October still in force? Were Cregoe, Schurmer and Bezuidenhout still on that day bound by the contract? If the contract had already on that day determined, there would be no obligation on Bezuidenhout to tender the licences. There were three parties to the contract, and whatever may have transpired between Cregoe and Bezuidenhout on 4th October, Schurmer was perfectly entitled to consider himself released if the period fixed had already expired, and the contract could not be carried out without him. There is no allegation nor proof that Schurmer, after 4th October, was prepared to uphold the contract. The contrary has been shown. It appears to me that if the time had not expired, Bezuidenhout, jun., was bound to tender the licences on 4th October in order to enable the plaintiff to retain his rights against Schurmer, and if Bezuidenhout, jun., did not do so, Cregoe would have a ground of action for damages against him. An offer after the period fixed could not be made except with the approval of Schurmer, for he was restored to his former rights the moment the period fixed had expired.

The summons, however, enters into the history of what subsequently took place, and alleges that Cregoe was ill and was unaware of what occurred, and that on 21st or 22nd October Max Langerman, who had a common interest with Bezuidenhout, paid him a visit and falsely represented that the licences had not been obtained within that time. If there was a breach of contract, then it consisted in the failure of Bezuidenhout, jun., to tender the licences on 4th October.

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What occurred subsequently may serve as evidence that the plaintiff had renounced the rights which a breach of contract gave him, but nothing more. Upon the advice of Langerman, Cregoe, on 25th October, 1893, wrote a letter to Bezuidenhout, jun., admitting that the old contract had terminated and suggesting the making of a new contract. After that, in November, 1893, the plaintiff discovered that Langerman had deceived him, as he says, and he withdrew the letter of 25th October, 1893. The summons further sets forth that the defendant, on 9th April, 1894, sold the 235 claims to the Ecksteins as constituting the Lark Syndicate, and gave the Lark Syndicate transfer, and that the Ecksteins acted *malâ fide*, and in collusion with the defendant in the acceptance of such transfer, being well aware of the rights of Cregoe to transfer. Upon these grounds the plaintiff prayed that the transfer of the claims to the Lark Syndicate shall be set aside and the plaintiff declared to be entitled to the claims.

It is plain from the facts already mentioned that the preliminary question in the case is, Whether on 4th October, 1893, the defendant Bezuidenhout was still under an obligation to tender the licences to the plaintiff? This is a question of computation. Had the ten days and two months already expired? There were three parties to the contract, and if all three of these parties were not of one mind, then what the contract contemplated could not be carried out. And just for this reason time must be considered as of the essence of the contract. Schurmer would not have been bound if, for instance, Bezuidenhout, jun., after the time had expired, had tendered the licences to Cregoe and he had accepted them. Schurmer could have relied on the clear wording of the contract. He could have said "no, from the hour when the contract ceased I have made other arrangements with regard to my interests."

The question of computation of time in our law in regard to contracts was very fully considered by Watermeyer, J., in the case of *Cock* v. *The Cape of Good Hope Marine Insurance Co.* (3 Searle, 114). He observes: "The Roman-Dutch law recognizes two kinds of computation, the natural and the civil. In the natural computation, *de momento in momentum computatur*, we count from moment to moment, and here portions of a day are reckoned. In the civil, the rule is *ultimus dies inceptus pro completo habetur*, and portions of a day are not reckoned, and the period expires with the first moment of the beginning of the last day." Thus

a policy of insurance on a ship was issued on 14th January, 1857, to run for a period of twelve months, till 14th January, 1858. The ship was lost at 6 P.M. of 14th January, 1858, and the learned Judge held that the policy had already expired at 12 o'clock at night on 13th January, or at the utmost, counting from 12 o'clock noon of 14th January, 1857, *naturaliter de momento in momentum*, it might possibly be contended that the policy lapsed at 12 o'clock noon of 14th January, 1858. Therefore, when the ship was lost at 6 P.M. the policy had already expired.

It was admitted that the contract was signed on the evening of 24th July, 1893. Now, reckoning *de momento in momentum* as being most favourable to the plaintiff, and taking 12 o'clock midnight of 24th July as the first moment, then the ten days expired at midnight on the 3rd August, and the two months likewise expired at midnight on 3rd October. In the computation *civiliter* the first day is also reckoned, and the last day is considered as completed at the first moment of it. This method of computation is evidently unfavourable to the plaintiff. (See Voet, 44, 3. 1; Mackeldey, § 195.) Savigny, in his treatise on Modern Roman Law, fully discusses the matter in Book 4, §§ 177 *et seq.*, and advances an entirely new theory (see § 182); but we are obliged to make our computation according to Roman-Dutch law, and according to this mode of reckoning the contract in the present case was no longer of force on the morning of 4th October, 1893, and there must be judgment for the defendants with costs.

KOTZÉ, C. J., and AMESHOFF, J., were of the same opinion.

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Attorneys for the first defendant: *Roux* and *Ballot*.

Attorneys for the second defendant: *Tancred* and *Lunnen*.