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

GEORGE

v.

LEYDS N.O. AND THE MINING COMMISSIONER OF JOHANNESBURG.

1897
10 *June.*
2 *July.*

GOLD LAW NO. 14 OF 1894, SECT. 28—INSTRUCTIONS FROM THE GOVERNMENT.

Where the Government had given instructions to the Mining Commissioner of Johannesburg not to issue any further licences on the Government's portion of the farm Braamfontein, and the Mining Commissioner had published a notice to that effect in the "Mining Argus" of 1st February, 1890: Held, *that under these circumstances the Mining Commissioner was justified in refusing to issue licences to one George, who, on 15th August,* 1895, *applied for eight hundred licences to peg off claims on the said portion of ground.*

THIS was an appeal from the judgment of Ameshoff, J., pronounced in Chambers on 5th December, 1896. George applied for an order directing the Mining Commissioner to issue to him 800 prospecting licences on a portion of the farm Braamfontein. It appeared that by a proclamation in the *Gazette* of 5th June, 1888, the Government ground in the districts of Heidelberg and Potchefstroom was made available for prospectors. By a subsequent proclamation of 22nd July, 1895, the farms mentioned in the proclamation of 5th June, 1888, were closed to prospectors from the 24th August, 1895. On the 15th August, 1895, George applied to the Mining Commissioner for 800 licences on the said portion of Braamfontein, but these were refused him. The application in Chambers was refused by Ameshoff, J., and against this the applicant appealed.

Wessels (with him *Curlewis*), for the appellant: This case is similar to that of *Eloff* v. *The Mining Commissioner of Johannesburg* (2 Off. Rep. 287), and the decision must be the same. George never abandoned his rights, and hence the case of *Louw* v. *The Mining Commissioner of Johannesburg* (3 Off. Rep., p. 190) is not applicable.

Lohman, for respondent: The ground in dispute was never proclaimed as a prospecting field, but was merely made available for

prospectors, and therefore it does not fall under the Gold Law. No claims can be pegged thereon. Moreover, George has abandoned his rights, and cannot possibly succeed.

Cur. ad. vult.

Postea. 2nd July, 1897.

KOTZÉ, C. J.: This case has come before us in appeal from the judgment of my brother Ameshoff. The facts are briefly these: The farm Braamfontein was, by a proclamation of 5th July, 1888, made available for prospectors, and on the 22nd July, 1895, a second proclamation was duly published, whereby *inter alia* Braamfontein was, from the 24th August, 1895, closed to prospectors. On the 15th August, 1895, a certain George applied to the Mining Commissioner for prospecting licences in order to peg off 800 prospecting claims on a portion of Braamfontein. This was, however, refused by the Mining Commissioner, whereupon, on the 16th of August, 1895, the said George proceeded to peg off 800 prospecting claims. On the 18th October, 1895, George signed a power of attorney authorising his attorney to take legal steps, and on the 11th December, 1895, the petition, subsequently heard by my brother Ameshoff, was sworn to by George. The petition was to compel the Mining Commissioner to issue prospecting licences for 800 claims on Braamfontein to George. From the answering affidavit of the Mining Commissioner, Mr. Van der Merwe, it appears that on 1st February, 1890, a notice was published in the *Mining Argus*, a newspaper printed at Johannesburg, by his predecessor, Mr. Jan Eloff, as Mining Commissioner, whereby the public were notified that, as during the past eighteen months no payable gold-bearing reef had been discovered on the Government portion of the farm Braamfontein, the Government had decided not to issue any further prospecting licences on the said portion of Braamfontein. The ground in question was subsequently used for various purposes; for instance, a portion of it was granted to certain wholesale dealers in explosives for storing such explosives thereon; and another portion was given to the Pony and Galloway Club of Johannesburg, which expended about 3,000*l.* in enclosing the place and putting it into order. A further portion was awarded to the Johannesburg Agricultural Society, which has expended about 10,000*l.* on it, and, finally, the still remaining piece of Braamfontein is reserved for the necessary and already proposed extension of the gaol of Johannesburg. All these dispositions of

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the ground in question have taken place upon the instruction of the Government.

My brother Ameshoff dismissed the application with costs, principally upon the ground that the farm Braamfontein had only been made available for prospectors, and had not been proclaimed as a prospecting field, and that consequently the Government could at any time and in any manner withdraw its permission to prospect; in other words, that a person cannot under the Gold Law legally claim prospecting licences on ground, which has merely been rendered available for prospectors. I cannot share this view. It seems to me that the opinion expressed by my brother Gregorowski in the case of *Louw* v. *The Mining Commissioner of Johannesburg* (*a*), on 21st November, 1896, is more in accordance with the provisions of the Gold Law. But be this as it may, I deem it unnecessary to enter into a lengthy discussion on the point, as this appeal can be decided upon other grounds.

The case has much in common with that of *Eloff* v. *The Mining Commissioner of Johannesburg* (*b*), although I must admit that the decision in Eloff's case is not to be extended. There the *ratio decidendi* was that once a proclamation has been duly published by the State President in the *Gazette*, it cannot be superseded by a notice from the Mining Commissioner in the *Mining Argus*, nor by an instruction of the Government to that official. The learned counsel, who appeared for the State in Eloff's case, admitted that if the Court was against him on that point he had no other defence against the request of Eloff, that the Mining Commissioner should be ordered to issue the licences applied for to Eloff. This Court has, however, during the present term (23rd June, 1897), in the case of *Johannesburg Sanitary Board* v. *Hockley* (*ante*, p. 185), decided that according to sect. 28 of the Gold Law the Mining Commissioner can under instruction of the Government give out *bonâ fide* proclaimed ground for public purposes: that is to say, that upon instruction of the Government the Mining Commissioner possesses the power to declare where prospecting for gold shall not take place. Such instructions were given by the Government in the present instance, and as the law does not prescribe any fixed form in which the instruction by the Government must take place,

(*a*) 3 Off. Reports, p. 190.
(*b*) 2 Off. Reports, p. 287.

I fail to see how the Court can deal any further with it. This principle, then, likewise applies to the case now in appeal before us. For this reason I am of opinion that the appeal must be dismissed, with costs.

MORICE, J.: This is an appeal from the judgment of Ameshoff, J., dated 5th December, 1896, in an application heard by him in Chambers on the 17th December, 1895. The application was to compel the Mining Commissioner to issue prospecting licences for 800 claims on a portion of the farm Braamfontein, near Johannesburg, and that the applicant should be declared entitled to peg off 800 claims as indicated on a diagram annexed to the petition. It appears that by a proclamation in the *Gazette* of 5th June, 1888, the Government ground in the districts of Heidelberg and Potchefstroom was made available for prospectors. The portion of the farm Braamfontein mentioned in the petition is included in this proclamation. By a proclamation of 22nd July, 1895, the farms mentioned in the proclamation of 5th June, 1888, were closed to prospectors from the 24th August, 1895, with the exception of ground on which rights had already been secured. On 15th August, 1895, therefore, before the last-named proclamation came into operation, the applicant applied to the Mining Commissioner concerned for 800 licences on the same portion of Braamfontein, but these were refused. Thereupon the applicant on 16th August, 1895, pegged off 800 claims on the farm in order to clearly define the situation of the ground which he desired to possess, and again applied for licences, which were again refused. Two months later he applied to the Judge in Chambers that the Mining Commissioner should be ordered to issue the licences. It appears from the affidavit of the Mining Commissioner that the Government had already disposed of the greater part of the Government portion of Braamfontein, by letting the ground as storage for explosives, by giving it in use to the Johannesburg Agricultural Society, and otherwise, and that only a small piece remained at the back of the gaol, which was already proposed to be used for the extension of the gaol, on which the applicant could exercise his rights. I understand, however, that Mr. Wessels, on behalf of the applicant, admits that the applicant is only entitled to this last piece of ground. But it is not clear what the size of this piece is, or how many licences will be necessary to peg it off. The question is,

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therefore, whether the applicant is entitled to licences in order to peg off this last-named piece of ground?

This application differs from that of *J. A. Louw* v. *The Mining Commissioner of Johannesburg*, decided by the Chief Justice, Gregorowski, J., and myself on the 16th November, 1896. In that case Louw had, in 1893, pegged off on Braamfontein without licences, the licences having been refused him. He did not do anything until 23rd December, 1895, after the ground had been closed by proclamation, when he sent a demand to the Mining Commissioner, and then made an application to the Court. The Court held, that by delaying until the ground had been closed by proclamation, he had abandoned his rights. The applicant in the present instance, on the contrary, has applied to the Court soon after the licences were refused; and although the deproclamation commenced to operate prior to this application, it seems to me, as pointed out by Mr. Wessels, that, if the original refusal to issue licences was illegal, the position cannot be changed by the deproclamation, but that the application must be decided *nunc pro tunc*. Such was likewise the view of the Chief Justice in the application of *Eloff* v. *Leyds N.O. and the Mining Commissioner of Johannesburg*, decided on 29th November, 1895.

In the present case, against which the appeal is brought, Ameshoff, J., has laid down, so far as I understand him, that the rendering of Government ground available for prospectors is equivalent to a permission (*vergunning*) by the owner to prospect on an unproclaimed private farm, and that neither upon Government ground nor upon a private farm a prospecting claim can be pegged unless the ground or farm has been proclaimed as a prospecting field or a public digging. In accordance with this view he was also of opinion that the rendering of the ground so available, even as the granting of a special permission, can take place without a proclamation. In the present instance, the Judge apparently thought that the ground in question had been closed, or rather that the permission to prospect had been withdrawn by the Government notice, published in the *Mining Argus* of 3rd February, 1890, and that the applicant was accordingly not entitled to peg off claims on such ground.

The view of my brother Ameshoff, in respect of the nature of the right given by a licence to prospect on Government ground rendered available for prospecting, appears to me to suppose a

greater consistency between the different Gold Laws and the different sections of the same Gold Law than in reality exists. Since 1885 the Gold Law has been continually altered by Commissions, always composed of different persons, who are not always imbued with the same motive or principle. It does not follow that because the framers of the Gold Law of 1885 had kept a given principle in view, such principle was adhered to in the subsequent amended laws. Hence it may have been the intention of the Gold Law of 1885 that a licence to search, as a prospecting licence was formerly called, should give no right to a claim or definite piece of ground until the area was proclaimed as a digging or prospecting field; but it is plain to me that by the Gold Law of 1894, under which this application must be decided, a prospecting licence is considered as giving a right to a prospecting claim or definite piece of ground. A prospecting claim is regarded as the natural result of a prospecting licence, and, as such licences are under this law granted for ground not forming part of a digging or prospecting field, the reasonable conclusion is that a prospecting claim can be pegged off on such ground. I refer to sects. 53, 61a, 61b, 61c, 65, 70 and 89 of the Gold Law, No. 14, 1894.

On the other hand, regard being had to the danger of searching for principles in the Gold Law, I hesitate to lay down, as my brother Gregorowski has done in the case of *J. A. Louw* v. *The Mining Commissioner of Johannesburg*, that Government ground, rendered available for prospectors according to sect. 61 of the Gold Law of 1894, is equivalent to ground proclaimed as a prospecting field within the meaning of sects. 17, 18, 20 and 67.

In my opinion, this application can be decided upon grounds not referred to in the argument, but which constitute the *ratio decidendi* of the case, *Johannesburg Sanitary Board* v. *Hockley*, decided on 23rd June, 1897 (*ante*, p. 185). Section 28 of the Gold Law, No. 14 of 1894, gives the Mining Commissioner the power to prohibit prospecting and digging in places set apart for roads, &c., and also in such other places with regard to which instructions shall be given by the Government. On 1st February, 1890, the Mining Commissioner caused the following notice to be published:—"Inasmuch as prospecting has been going on for more than eighteen months on the Government portion of the farm Braamfontein, and no payable gold-bearing reef has yet been discovered, the Government has decided not to permit any further

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prospecting on that portion of the farm, in consequence of which no prospecting licences will in future be issued or renewed. Signed—Jan Eloff, Mining Commissioner, Mining Commissioner's Office, Johannesburg." In an affidavit in this case, the Mining Commissioner, Mr. Van der Merwe, declares that this notice is entirely in accordance with the instructions of the Government, and this is not denied. The action of the Government seems to have been altogether *bonâ fide* and reasonable, and the closed ground appears to be used for the public benefit; the piece, for instance, which the applicant now claims is proposed to be utilised for the extension of the gaol. The Government portion of Braamfontein must therefore be considered as having been closed against prospecting since 1890, and the Mining Commissioner was justified in refusing the licences to the applicant.

The application of Eloff, above mentioned, might indeed also have been decided on the same grounds; but it does not appear that this argument was urged on behalf of the Government in that case.

I am therefore of opinion that my brother Ameshoff was right in refusing the application in this matter, and that the appeal must be dismissed with costs.

GREGOROWSKI, J., concurred.

Attorneys for appellants: *Rooth* and *Wessels*.