

## HOMBERGER

v.

## THE MINING COMMISSIONER OF JOHANNESBURG.

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

1897

6 June.  
5 July.

GOLD LAW No. 19, 1895, SECTS. 15, 96 AND 97—STAND  
LICENCES—DISCRETION OF MINING COMMISSIONER.

*Homberger applied to the Mining Commissioner of Johannesburg for two licences, under sect. 97 of Law 19, 1895, for stands on an unoccupied portion of the proclaimed stands-township Johannesburg, on the proclaimed farm Randjeslaagte. The Mining Commissioner refused to issue the licences, as the ground in question was in the middle of one of the best parts of Johannesburg. Held, on appeal from the decision of Ameshoff, J. (Morice, J., diss.), that as the Mining Commissioner had failed to show that the ground applied for was not suitable for stands, as being an obstruction to the diggings, or as being on a known gold-bearing or precious stones area, he was obliged to issue the licences applied for. Held, further, that the discretion allowed the Mining Commissioner under the Gold Law must be exercised in the interests of the public on the goldfields, and not arbitrarily.*

THIS was an appeal from the judgment of Ameshoff, J., pronounced in chambers on 4th March, 1897. Homberger applied for an order directing the Mining Commissioner to issue to him licences for the stands on unoccupied ground on the proclaimed farm Randjeslaagte. The Mining Commissioner had refused to issue these licences because the farm had already been surveyed into stands, and the diagram thereof had been approved, and further, because sect. 97 of the Gold Law No. 19 of 1895, under which the application was made, referred to ground in the vicinity of the mines, and not in the midst of a town, while the ground in question was situate in one of the best parts of Johannesburg. Ameshoff, J., ruled that the Mining Commissioner was not obliged to issue the licences applied for, and dismissed the application. Homberger appealed against this ruling. Sect. 97 of Law 19 of 1895 reads as follows: "Every white person who wishes to erect a shop or shops or dwelling on a proclaimed or a prospecting field shall apply to the Mining Commissioner for one or more stand licences for the same. Each licence shall give him the right to a

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piece of ground in extent fifty feet by fifty, on a spot approved by the Mining Commissioner, but not to be a hindrance to the diggings on a known gold or precious stones bearing area."

*Curlewis*, for the appellant: The Mining Commissioner was not justified in refusing the licences applied for. The ground in question is not an area bearing gold or precious stones. The Mining Commissioner does not possess an arbitrary power. He must act in the interests of the public on the diggings. The ground is unoccupied, and the fact that it is situate in the middle of Johannesburg is all the more reason why the stands licences should be issued. Sect. 97 of Law 19 of 1895 can not be said to refer solely to ground in the vicinity of the mines.

*Coster*, for the respondent: The Mining Commissioner has exercised his discretion, and the Court can not interfere with it. The ground is in the middle of Johannesburg, and has been surveyed years ago as stands, and the diagram thereof has been duly approved. Homberger can not now come and apply for stand licences thereon. Sect. 97 only applies to ground in the vicinity of the mines. Ameshoff, J., rightly refused the application.

*Cur. ad. vult.*

*Postea.* 5th July, 1897.

KOTZÉ, C. J.: This is an appeal from the judgment of Ameshoff, J., who, on an application made to him by Homberger, refused to order the Mining Commissioner of Johannesburg to issue two stand licences to Homberger under the Gold Law. Morice and Esser, JJ., have each prepared a written judgment, and unfortunately they do not agree. Having read the facts set out in the petition, and the answering affidavit of the Mining Commissioner, I agree with the reasoning of my brother Esser, and with the conclusion at which he has arrived.

The facts are very simple, and the case presents no difficulty. Homberger applied to the Mining Commissioner for certain two stand licences for a small piece of unoccupied ground situate in the town of Johannesburg, between Hancock Street and the ground belonging to the railway company. This was refused by the Mining Commissioner, for the reason that by the Gold Law (No. 19, 1895), sect. 15, clause 2, he possesses the power to

regulate, at discretion, the issue of stand licences, and the determining of places where one may or may not build. The Mining Commissioner also relies on sect. 97 of the Gold Law, which, according to his view, leaves it quite optional with the Mining Commissioner whether he shall grant or refuse the issue of a stand licence. The Mining Commissioner further supports his action by the fact that "the ground applied for is situate in the middle of one of the best parts of an approved stands-township or inhabited locality." Ameshoff, J., has apparently considered that sect. 15 of the Gold Law is not applicable in the present instance. He gives as the reason for his decision that sect. 97 does indeed give a right to apply for a stand licence, but does not say that the Mining Commissioner is bound to comply with such application. But that is just the question which has to be decided, and the answer to it entirely depends upon the wording of sects. 15 and 97, which must be read together. According to sect. 15 the Mining Commissioner is *inter alia* given and entrusted with "the entire regulation of the issue, if necessary, of stand licences, and the determining of places where one may or may not build." It goes without saying that this power must be exercised by the Mining Commissioner not arbitrarily but with discretion, and under and in accordance with the provisions and the spirit of the Gold Law. Now it has been argued, on behalf of the respondents, that if we compare sect. 96 with sect. 97 of the Gold Law, we find that according to sect. 96 every licensed digger is *entitled* to a stand for his habitation in the vicinity of his claims, while sect. 97 provides that every white person, who wishes to erect a shop or dwelling, *shall apply* to the Mining Commissioner for one or more stand licences for the purpose. From this it is attempted to draw the conclusion that according to sect. 96 the Mining Commissioner is bound to issue a stand licence, but according to sect. 97 he is at liberty to issue or refuse the licence. I cannot agree with this view. We must read sect. 97 in its entirety: "Every white person, who wishes to erect a shop or shops or dwelling on a proclaimed or prospecting field, shall apply to the Mining Commissioner for one or more stand licences for the purpose. Each licence shall give him the right to a piece of ground 50 ft. by 50 ft. in extent in a locality approved by the Mining Commissioner, but not to be a hindrance to the diggings on a known gold or precious stones bearing area. The Govern-

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ment shall, however, have the right to give out stands of larger dimensions, where it deems such necessary, under one licence." Seeing now that the Mining Commissioner cannot act arbitrarily, the meaning of this section is plain. A white person who wishes to erect a shop or a dwelling-house on a proclaimed goldfield, is obliged first to apply to the Mining Commissioner for a stand licence for the purpose, which licence will then entitle him to a small piece of ground, 50 ft. by 50 ft. in extent, in a locality approved by the Mining Commissioner. Every white person has, therefore, a right given to him, which the Mining Commissioner, unless he be allowed to frustrate the object of the Gold Law, is bound to acknowledge and to give effect to, except only where in special instances good reasons exist for refusing the application for a stand licence; *e.g.*, that a digging would be hampered thereby, or that the ground has been reserved and destined for some purpose recognised by the Gold Law. The only reason given by the Mining Commissioner for his action is that the piece of ground in question is in the middle of one of the best portions of an approved stands-township or built-upon spot. I would have thought that this most aptly demonstrates the suitability of the locality for the erection of a shop or dwelling-house, and that it accordingly afforded the best reason for granting the application. The discretion entrusted to the Mining Commissioner by sects. 15 and 97 has been given him for the public benefit, and denotes something quite different from a *sic volo sic jubeo*. The appeal must, therefore, be allowed with costs, and the Mining Commissioner ordered duly to issue the stand licences applied for, according to law, to the applicant.

MORICE, J. : This is an appeal from the decision of Ameshoff, J., given in Chambers on 4th March, 1897. The applicant, the present appellant, applied for an order to compel the Mining Commissioner to issue two stand licences to him for unoccupied ground in the town of Johannesburg on the proclaimed farm Randjeslaagte. The Mining Commissioner refused, on the ground that the issue of stands was left to his discretion by the Gold Law; that Randjeslaagte had already been surveyed into stands and the diagram thereof approved, and that sect. 97 of the Gold Law (No. 19, 1895), upon which the applicant based his request, referred to ground near the mines and not to ground in the middle of a town, of

which preferent rights had been sold by the Government; and that the ground applied for was situate in one of the best portions of Johannesburg, and the applicant had no title or right whatever to the ground. The ground in question lies between Hancock Street and the railway line, and forms part of a triangular piece of land where the railway line makes a bend. Ameshoff, J., decided that the Mining Commissioner was not bound to grant the ground as stands, and from this an appeal has been brought.

Section 97 of the Gold Law (No. 19, 1895), on which the applicant bases his request, reads as follows: "Every white person, who wishes to erect a shop or shops or dwelling on a proclaimed or prospecting field, shall apply to the Mining Commissioner for one or more stand licences for the purpose. Each licence shall give him the right to a piece of ground 50 feet by 50 feet in extent, in a locality approved by the Mining Commissioner, but not to be a hindrance to the diggings on a known gold or precious stones bearing area." In connection with this we must bear in mind sect. 15 of the same law, in which under the powers of the Mining Commissioner are included "the entire regulation of the issue, if necessary, of stand licences and the determining of places where one may or may not build." It appears that, beyond and besides the stands referred to in sect. 97, another kind of stands is dealt with by the Gold Law. According to sect. 96, every digger or prospector is "*entitled*" to a stand for his habitation in the immediate vicinity of his claims, but not, however, on a known gold or precious stones bearing area. These stands are, however, held by a precarious title, as the holders have to give them up on an order from the Mining Commissioner whenever the public interests so require. In order to obtain the stands referred to in sect. 97, it is not necessary to be a digger or prospector. Every white person can apply for them, but it is not stated, as in sect. 96, that every white person is entitled thereto. The meaning of the section seems to be that every white person has a right to a stand licence, provided an approved locality exists where he can get a stand. The approval of the locality is left to the discretion of the Mining Commissioner, subject only to the provision that he shall not give out any ground as stands "so as to hamper the diggings on a known gold or precious stones bearing area." It therefore requires a strong case for the Court to interfere with what falls within the administrative capacity of the Mining Commissioner in

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regard to the fixing of places, which shall be granted as stands for dwelling-houses or shops. It is not enough merely to show that he has exercised a foolish discretion. A discretionary power of the Mining Commissioner in regard to claims stands upon a different footing from his discretion in respect of stands. A farm is proclaimed with the view that diggers' operations may proceed thereon, and not for the purpose of providing the public with places for dwelling-houses or shops. The Mining Commissioner is competent to prescribe limits to the places where stands may be obtained. He can, so far as concerns ground for dwelling-houses and shops, limit the public to ground surveyed for a stands-township. That is what the Mining Commissioner has done in the present instance. Randjeslaagte, upon which the applicant desires to have stands, has been surveyed as stands and the diagram approved. There is, therefore, a locality set apart for stands, and there is no reason why the piece of ground in question outside the locality should be given to the applicant. It appears to me that, regard being had to the position of the piece of ground, it would be more equitable to use it for the benefit of the inhabitants of the town. In any case there is nothing to show that the Mining Commissioner has not exercised a reasonable discretion. I may point out that he seems to have refused to do what he is prohibited from doing by the later Gold Law (No. 21 of 1896, § 93), viz., to give out stands in the immediate vicinity of a group of stands already given out. If now there was a good reason for this later provision, the Mining Commissioner must certainly have had a reason for his action. I therefore arrive at the conclusion that the judgment of Ameshoff, J., was right, and that the appeal must be dismissed with costs.

ESSER, J. : This is an appeal from an application in which judgment was given by Ameshoff, J., on 4th March, 1897. The appellant (then applicant) applied for licences for two stands situate on disposable open ground at Johannesburg, and indicated on the diagram annexed. The application was made under sect. 97 of the Gold Law of 1895. The Mining Commissioner refused the application, and in an affidavit, which has been put in, he relies on sect. 15 of the Gold Law, maintaining that this leaves the regulation of the issue of stands to him entirely according to his best judgment and approval. He further relies on sect. 97, which

according to him does not refer to ground in approved stands-townships, townlands, and generally to pieces of ground the rights over which the Government has sold. To this the applicant replies that in similar instances at Barberton stands have been given out by the Mining Commissioner in this way, and in support thereof he has annexed certain correspondence.

First of all I observe that the piece of ground applied for, in area about the size of two stands, has not yet been surveyed as stands, and therefore, although situate within the radius of the surface of Johannesburg, it need not necessarily be considered as forming portion of the proclaimed stands-township of Johannesburg. But, apart from this circumstance, the interpretation put upon sect. 97 by the Mining Commissioner appears to me, although perhaps such may have been the intention of the Legislature, to be in conflict with the wording of the section. I merely find mention made therein of "a proclaimed or prospecting field," and it moreover appears from the documents that the same Mining Commissioner was formerly, when stationed at the proclaimed stands-township Barberton, of a different opinion.

The learned counsel for the Government drew attention to the wording of sect. 96, which declares the licensed digger or prospector to be *entitled* to a stand for his habitation; while sect. 97 directs the white person, who wishes to erect a dwelling-house or shop, to *apply* to the Mining Commissioner for a stand licence; and he concludes from that, that in the latter instance the request or application can be met by a refusal. I cannot share this view. Section 96 says that the digger is entitled to a stand *without payment*, but that he will have to give it up on an order issued by the Mining Commissioner in the public interests. Section 97 provides that *application* must be made, and further that a *licence* must be taken out, and also how the right thus acquired can be maintained. The same section also mentions what the Mining Commissioner must observe on the issue of such licences. They may not be issued "so as to hamper the diggings" or "on a known gold or precious stones bearing area." And in connection with this we must also refer to sect. 15, where the Mining Commissioner is entrusted with "the entire regulation of the issue, if necessary, of stand licences, and the determining of places where one may or may not build."

It therefore seems to me that through the power given to the

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Mining Commissioner, the issue (of licences) is entirely left to his discretion, but that he has at the same time to proceed in the interests of the diggings, and, on refusing to issue a stand licence he is bound to show that the application for the same would be "to hamper the digging on a known precious metal or stones bearing area." In the case before me the Mining Commissioner has entirely failed to show the existence of any such reason for his refusal. On the contrary, the applicant has succeeded in his contention that the ground applied for is open and suitable for stands without hampering the digging, which is not anywhere contradicted by the Mining Commissioner. For these reasons I think the appeal should be allowed with costs, and the Mining Commissioner must be ordered to issue to the applicant two stand licences for the unoccupied ground applied for in the proclaimed township of Johannesburg situate on the proclaimed farm Randjeslaagte.

Attorney for the appellant: *Jas. Berrangé.*

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N. E. SMUTS & Co. v. R. H. BOLMAN.

FOREIGN JUDGMENT—ARREST *AD FUNDANDAM JURISDICTIONEM*—DOMICIL—JUDGMENT BY DEFAULT.

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 5 July.

*Where in an action on a judgment by default granted by a foreign tribunal it appeared that the defendant at the time of the judgment was not domiciled within the jurisdiction of such tribunal, and that jurisdiction had merely been founded by arresting certain immovable property of the defendant, the Court granted absolution from the instance.*

THIS was an action for the payment of 148*l.* 3*s.* 8*d.* with interest, being the amount of a judgment granted by default in favour of the plaintiff against the defendant, by the Court of the Eastern Districts of the Cape Colony, together with the taxed costs of the action. The facts were as follow: The plaintiff practised as an attorney at Aliwal North in the Cape Colony, under the style or firm of N. E. Smuts & Co. The defendant formerly resided in the Cape Colony, but was now living at Krugersdorp, in the South