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

ELIAS SYNDICATE

v.

LEYDS N. O. AND THE RESPONSIBLE CLERK OF DOORNKOP.

1897
12 *June.*
14 ,,
15 ,,
23 *August.*

DAMAGES—MEASURE OF.

Where, by reason of the inability of the Government to give him possession of 350 *claims on the farm Witfontein, the plaintiff sued for damages:* Held, *by a majority of the Court (Jorissen, J.,* diss.), *that with regard to eighty-seven of these claims, the price, which in* 1895 *had been offered for certain adjoining claims, should be taken as the measure of damages; and with regard to the remaining* 263 *claims, the average price paid at public auction for all lapsed claims on the same farm should be taken as the measure of damages.*

THIS was an action for damages. The Elias Syndicate had failed to obtain possession from the Government of certain claims, for which the Supreme Court had ordered licences to be issued, as the Government had given out these claims in a lottery. The plaintiff claimed 125,000*l.* as compensation. At the trial there was a conflict of evidence as to whether the main reef ran through these claims or not. The Court was asked to fix the compensation to which the plaintiff was entitled. Two experts, Hamilton and Simpson, stated that the main reef ran through the claims; while one Kubali, also an expert, gave it as his opinion that the main reef was some three or four miles away from these claims. It was proved that in October, 1895, one Steyn, the owner of 74 claims adjoining 87 of the 350 claims in dispute, had refused an offer of 5,000*l.* for the same. It was also proved that from September, 1895, until June, 1897, 952 lapsed claims on the farm Witfontein had been sold on behalf of the Government for 2,110*l.* 19*s.* 6*d.*, that is to say, at the rate of 2*l.* 4*s.* 6*d.* per claim.

Wessels (with him *De Wet*), for the plaintiff: The only question is, to what amount of compensation is the plaintiff entitled? The Court should take into consideration the offer refused by Steyn, and the different sales of claims on the farm. The plaintiff has to

be compensated, and the fact that it is difficult to assess the amount is no reason why it shall not be awarded. The evidence of the experts in regard to the position of the main reef is very strong, and the claims are beyond doubt of great value. On the question of damages, see *The Risoluto*, L. R. 8 Prob. Div. 48 L. T. 909; *Smith on Damages*, p. 389; *Sedgwick on Damages*, § 171.

Esselen (with him *Coster* and *Hummel*), for the defendants: The Court cannot possibly take the offer made to Steyn as a guide. There may have been special circumstances connected with the claims of Steyn. No market value has been proved. The most reasonable guide would be the prices realised by lapsed claims. (See *Stow* v. *Chester and Gibb*, Barber's Gold Law, p. 10; *S. C.*, Transv. Rep. (1890), p. 127.) It has not been proved that the main reef runs through the claims.

Cur. ad. vult.

Postea. 23rd August, 1897.

KOTZÉ, C. J.: The only point we have at present to decide is to what amount of compensation is the plaintiff entitled? He has not succeeded in obtaining possession of the 400 claims for which the Court ordered prospecting licences to be issued to him, owing to the closing of the proclaimed farm Witfontein, on which the claims to which the plaintiff lays claim are situated. According to the demand in the summons the considerable sum of 125,000*l.* is claimed by way of compensation, and the witnesses, Hamilton, Simpson, and McCullum, have been called to state that the well-known main reef runs through a portion of the 400 claims. The main reef has, however, not been exposed on these claims; and the witness Kubali, who was called on behalf of the defendants, states that in his opinion the main reef will be discovered some three or four miles to the south of the claims in question. The witnesses for the plaintiff, however, agree that 87 of the 400 claims are of far greater value than the rest. They value the 87 claims, which presumably lie on or adjoin the main reef, at 300*l.* each, and the other 313 claims at 15*l.* each. This is their personal opinion, and, owing to the uncertainty of the title to the ground pegged off, the plaintiff has not been able to prove any instances in which claims, such as the said 87 claims, have actually been disposed of at these prices. In a case like the present, it would not be fair to demand

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of the plaintiff that he shall prove the precise value of each individual claim. All that we can expect him to do, is that he shall as nearly as may be satisfy us as to the market value of the claims. Now it has been proved by Mr. Steyn, who possesses 74 claims adjoining the 87 claims in question, that he was offered 5,000*l.* for the 74 claims in October, 1895. This offer he did not accept. Nevertheless, it seems to me that we will not be acting unfairly if we place the same value on these 87 claims, which will give a sum of 5,878*l.* So far as concerns the remainder of 313 claims, the evidence of the responsible clerk, Wolmerans, is of importance. This official has stated that all the sales of claims on Witfontein, from September, 1895, to June, 1897, yield the following result, viz.: 952 claims realised 2,110*l.* 19*s.* 6*d.* This actually represents the sale of claims scattered over the farm Witfontein, and affords a safe and satisfactory measure according to which the Court can calculate the value of the 313 claims. Thus considered, these claims would be worth about 694*l.* The account of 921*l.* 5*s.*, showing a list of expenditure by the plaintiff, cannot be taken into consideration, seeing that this expenditure represents outlays incurred in order to obtain possession of the claims, and are therefore included in the value placed upon the claims. There must therefore be judgment in favour of the plaintiff for the sum of 6,572*l.*, with costs.

It is admitted by the plaintiff that there are certain vergunning-claims among the claims in question which will have to be deducted. There is no definite evidence before the Court in regard thereto, and I understand that the plaintiff is willing to deduct these vergunning-claims from those to which he claims to be entitled. The parties can therefore mutually settle that. If not, they can again approach the Court in respect thereof, as the Court has not sufficient evidence at present before it on the point.

MORICE, J., concurred.

JORISSEN, J.: On the 22nd February, 1897, J. Rothkugel, *alias* the Elias Syndicate, obtained a judgment, whereby the defendant in his official capacity was ordered to issue to him 400 licences for as many claims on Witfontein. The Government being unable to carry out this judgment, the plaintiff company now comes and asks

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compensation, assessed by it at plus minus 300*l.* per claim, that is, 120,000*l.* more or less.

At the hearing of the case the claim was amended by Mr. Wessels as follows. First of all he confined himself to 350 claims, abandoning 50 claims as infringing upon water rights and vergunning-claims. He further draws a distinction in the value of the claims. With regard to 87 claims he fixes the value at about 300*l.* each, and for the balance of 263 he asks 15*l.* per claim. It is not easy to arrive at an exact and fair valuation, nor to find a true basis or measure for the purpose. The plaintiff company would certainly have advanced a good length on the way adopted by it, if it had proved to my satisfaction that the claims pegged by it in 1893 were gold-bearing. This is not the case. No work whatever has been done on these claims for two years, and not a grain of gold found. Two witnesses indeed, the one a professional expert, the other a practical man (viz., Messrs. Hamilton and Simpson), declare on probable grounds, derived from their knowledge of the geological formation, that the great main reef runs through the 400 claims; but they have nowhere traced the reef, and their theory, for it is nothing more, is contradicted in the most positive manner and for very able reasons by the geologist, G. Kubali, who states: "My scientific opinion is that the main reef does not run through these 400 claims, but three or four miles more to the southward." Both of them, carried away by their theory in regard to the main reef, place a high value on the claims; but although they both are consulting engineers to gold-mining companies which buy up valuable claims, their enthusiasm has been confined to words, for they have not at any time made any offer.

We must look for another measure. It is now two years ago since Witfontein was set open as a goldfield. What is the present value of the claims, and what was it two years ago? About 952 claims were abandoned and sold on behalf of the Government for 2,110*l.* 19*s.*; each claim, therefore, realised at an average 2*l.* 4*s.* 6*d.* A few claims out of this very block of 400 realised from 1*d.* to 1*l.* The highest price which these claims fetched is 20*l.* per claim, as is shown by the claim inspector Kock. Not a single circumstance was brought forward to prove an actual market value. An attempt has been made to fix the value approximately. One Steyn had, and still has, 74 vergunning-claims adjoining the 400 claims. He was offered 5,000*l.* in October, 1895, which he declined to

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accept. This offer was made to him by his partner, Mr. J. D. Celliers, and has not since been repeated. I quite agree with counsel for the defendant that such an exceptional instance cannot be taken as the market value of these claims on Witfontein. There may have existed very special reasons at the time, and who knows what prospects may have been in contemplation of amalgamating these claims with others, to have induced a purchaser to make an offer of 5,000*l.*? When this was not accepted the matter was allowed to drop, and the offer has never been repeated. The request of the plaintiff company to adopt this offer to Steyn as an indication of the market value of the claims cannot be entertained, and for yet another reason, viz., 80 vergunning-claims belonging to Morgan were sold in 1896 for 600*l.*, and according to the evidence of Mr. Wolmerans, the situation of these claims was more favourable than that of those of Steyn—"they are in the immediate vicinity of our claims."

I therefore arrive at the conclusion that there can be no question of a market value of the claims in 1895. Nor has any the least evidence been likewise tendered of a so-called speculative value, even were I disposed to found any right thereon. I have nothing before me but the purchase price paid at public auction for the claims on Witfontein. Here I must find my basis. One point, however, still remains to be considered. Must the 350 claims (the plaintiff having abandoned 50) be all assessed on the same footing? The respected counsel for the plaintiff has sought to draw a distinction between 87, for which he claims at least 300*l.* apiece, and 263, which he submits should be valued at 15*l.* per claim. This reduces the claim in the summons from 120,000*l.* to 30,000*l.* I cannot agree with him. The only ground for a distinction among the 350 claims rests on an unproved assumption (that is, on the theory) that the main reef runs through the claims in question, and consequently that those of the claims which are situated close to or on this main reef are of greater value than those lying further to the northward. Very excellent; provided the presence of the main reef on this piece of ground had, I will not say been proved, but been even rendered more probable. Neither the one nor the other is the case, and it is therefore quite impossible for me to admit any distinction between the claims, and I must place upon all these 350 claims one and the same value.

Considering (1) that the plaintiff company originally complained of a wrong done to it; (2) that the defendant has failed to comply with the order of the Court to issue 400 or 350 licences to the plaintiff for as many claims; (3) that the defendant has made no tender of any compensation, but has wrongfully denied that the plaintiff has sustained any loss: I determine that the compensation to be paid to the plaintiff must be according to the average amount paid for similar claims to those of the plaintiff, viz., 2*l.* 4*s.* 6*d.*, but doubled and fixed at a round sum of 5*l.* This, of course, includes the account put in by the plaintiff of the expenses incurred at the original pegging off in 1895. There should, therefore, be judgment for the plaintiff for five times 350; that is to say, for 1,750*l.*, with costs.

Plaintiff's attorney: *H. L. Scholtz.*

AFRICAN BANKING CORPORATION *v.* OWEN.

DEBT CONTRACTED BEYOND THE JURISDICTION—PRESCRIPTION OF—SECT. 149, NATAL INSOLVENCY LAW.

Where a provision in the insolvency law of a foreign country merely bars the remedy for recovery of a debt, but does not extinguish such debt, an action is maintainable in this country against the debtor for recovery of the debt contracted in such foreign country. (Cf. *Dyer* v. *Carlis*, ante, *p.* 67.)

THIS was an appeal from the decision of Jorissen, J., pronounced in the Circuit Court at Johannesburg, in a case wherein payment of certain moneys was claimed on an overdrawn bank account, against which claim an exception of prescription was pleaded on the strength of sect. 149 of the Natal Insolvency Law, which provides that no action or execution can be brought or issue against an insolvent after four years from the date of sequestration. At the trial in the Circuit Court the debt was admitted, and counsel merely argued as to the meaning of sect. 149.

Jorissen, J., gave the following judgment on 14th April, 1897: "In this action, heard at Johannesburg in December, 1896, for the