TSEWU v. REGISTRAR OF DEEDS.

1905. *April* 4. INNES, C.J., and SOLOMON and WESSELS, J.J.

Land.—Transfer of land to natives.—Laws of the late South African Republic.—Conventions of London and Pretoria.—Promulgation by reference.

An aboriginal native of South Africa is entitled to claim transfer in the Deeds Office of any land of which he is the owner; and the Registrar of Deeds is not justified in refusing to pass transfer of such land to him.

The applicant, an aboriginal native of South Africa, had purchased a piece of land in the Krugersdorp district, and applied to the Registrar of Deeds to pass transfer of the property to him. The Registrar refused on the ground that the applicant was a native. The Court was thereupon asked for an order to compel the Registrar of Deeds to pass transfer.

Williamson, for the applicant: The onus is upon the respondent to prove that any particular individual is legally incapacitated from obtaining transfer of land in this country into his own name.

The Court held that the onus was on the respondent.

Burns-Begg (with him *Matthews*), for the Registrar of Deeds: I rely upon Volksraad Resolution 106, dated the 14th August, 1884, which laid down that no native could hold land transferred into his own name. As to the validity of this Law, see *Blake* v. *Goldman* ([1903] T.S. 764); *Crow* v. *Aronson* ([1902] T.S. 247, at p. 273). I also base my contention on art. 13 of the Pretoria Convention, which convention is of full force and effect in so far as it has not been specially repealed. In terms of that Convention the Commissioner of Natives can hold land in trust for them, but no native can take transfer in his own name. These Conventions (of London and Pretoria) were always regarded as the law of the land, prior at any rate to annexation: see *Ginsberg* v. *Jooste* ([1903] T.S. 861).

INNES, C.J.: It is unnecessary to hear Mr. *Williamson*. The case for the respondent has been very fully and fairly argued by Mr. *Burns-Begg*, who has referred to all the Volksraadbesluits and laws which bear on the question, and I think after hearing his argument that the Court is in a position to give judgment at once.

The applicant is an aboriginal native of Africa. He purchased land in the township of Klipriversoog, near Johannesburg, and he applied to the Registrar of Deeds to pass transfer into his name of the land so purchased. The Registrar refused on the ground that he was a native. Now the Deeds Office is open for the transfer of all land in this country; and it lies upon the Registrar, when he refuses to pass transfer to any particular individual, to show by some law that the individual is disentitled to the ordinary right of a citizen in that respect. Reliance is placed upon a Volksraad Resolution of the 14th August, 1884. The circumstances under which that Resolution came to be passed were the following: In March, 1882, a petition was sent by one du Plessis and others to the Raad requesting that no ground should be sold to natives or directly or indirectly transferred to them. That petition was not dealt with directly by the Raad, but was disposed of by the Government, during the recess, under general powers granted to it by the Raad. At its next sitting the matter was reported to the Raad, and this Resolution was adopted: "In connection with a remark made by Mr. Burger, his Honour the State President further explained the reply sent. Mr. Stoop proposed and Mr. Rabie seconded that the reply of the Government be approved, and the Raad resolved accordingly." The reply of the Government was as follows: "By art. 816 of the Volksraad Resolutions, dated 12th July last, the Government has been instructed wherever practicable to finally deal with all petitions which have been addressed to the Volksraad and which on account of the breaking up of the session could not be dealt with by that body. Amongst those is yours of March, 1882, the second part of which appears not to have been dealt with by the Volksraad. With reference to that portion wherein you request that no ground may be sold to natives (*naturellen*) or be either directly or indirectly trans-

ferred into their names, I have to refer you to art. 13 of the Convention, whereby provision is made for the holding of ground for natives (*naturellen*) in the name of the Commission for the Kafir Locations, so that the aboriginals (*inboorlingen*) do not hold ground in their own names. The Government cannot possibly comply with your request to prohibit the sale of ground to natives (*naturellen*), seeing that there are no laws, neither have any ever existed, which prohibit this."

It is contended that the adoption by the Raad of this reply was equivalent to a law; and the point was argued by Mr. *Burns-Begg* whether this law had been duly promulgated. The minutes of the Raad embodying the Resolution were promulgated, and I assume for the purposes of this judgment that such promulgation was a sufficient promulgation of that Resolution to give it, if otherwise in order, the force of law. I assume that, though the point is not quite clear, in view of the terms of the Rules of Order 82. But though the minutes containing the Resolution approving of the Government reply were promulgated, the reply itself was never promulgated. It was not printed in the *Gazette*, and, as my brother WESSELS reminds me, was not incorporated in the minutes which were published. Clearly, therefore, there was no promulgation of the letter which contained the pith of the whole matter. Now we decided, in the case of *Ismail Amod* v. *Pietersburg Municipality*, that there can be no such thing under our law as promulgation by reference; and following that decision, I should be bound to hold that the letter had never been promulgated, and could therefore under no circumstances have the force of law. But I go further, and say that even if it had been promulgated, it would not have amounted to a law. It was merely an expression of opinion by the Government—and, when adopted by the Raad, became an expression of the opinion of the Raad—that art. 13 of the Convention sufficiently dealt with the case which the petitioners, Mr. du Plessis and others, had brought to their notice. That being so, I think we may dismiss from further consideration this Volksraadbesluit.

We turn now to art. 13 of the Convention itself. It reads as follows: "Leave shall be given to natives to obtain ground, but

the passing of transfer of such ground shall in every case be made to and registered in the name of the Commission for Kafir Locations hereinafter provided for, for the benefit of such natives." Provision is afterwards made for the appointment of this Commission. It is said that this Convention having been adopted by the Raad—for we are to assume that it was adopted by the Raad and promulgated—has the force of a municipal statute. I do not see my way to assent to that contention. This was an argument between two communities who had been at war, and who settled by this Convention the regulation of their future rights. True it was ratified by the legislature of the Transvaal and no doubt by the legislature of Great Britain, and was a document of which a court of justice would take judicial cognisance. But it appears to me not to be a statute or to be in the same position as a statute. It was merely a treaty agreement. However, by art. 13 it was never intended to take away from the natives any rights which they enjoyed at that time; rather it was intended to safeguard them. It appears to me to have been a stipulation inserted at the instance of the British Government to endeavour in some way to obtain a minimum of rights in regard to the holding of landed property for the natives.

The same remarks apply to the Convention of London, which was executed some years later. Art. 18 says: "No grant of land which may have been made and no transfer or mortgage which may have been passed between 1877 and 1881 will be invalidated by reason of their having been passed between such dates. All transfers of land held . . . in trust for natives will remain in force, an official of the South African Republic taking the place of the Secretary for Native Affairs."

I have expressed my view as to whether these Conventions ever had the force of municipal statutes; but it really was not necessary to do so, because since the annexation of the country they may be disregarded. One of the parties to them has ceased to exist; the other party has absorbed the whole country, and their provisions may so far as this case is concerned be dismissed from consideration. It does not seem to me, therefore, that the stipulations which they contain take the case of the Registrar of

Deeds any further than the Besluit of 1884, to which I have already alluded.

Then we come to inquire whether there is any other law which would justify this Court in saying that because a man is a native he may not receive transfer of land. One Besluit was quoted by Mr. *Burns-Begg* which, if it were still in force, would be very strongly in favour of the contention of the respondent. That is the Besluit 159 of the 18th June, 1855. It enacts that nobody who is not a burgher shall be entitled to hold landed property in the Republic. It then provides that under no circumstances shall any native obtain burgher rights. As it stood, therefore, it distinctly prohibited any natives from holding landed property in the Transvaal. Whether that Besluit was acted upon or whether it was subsequently altered it is difficult to say. On the face of it no alien could have owned any land in the Transvaal. And yet we know that thousands of aliens did own such land. Whether the Besluit fell into disuse, or whether because it was passed before the Grondwet it did not possess the same authority as if passed after that date, I am not able to say, nor is it necessary to determine; because, strong though its words are, the fact remains that the Besluit has been repealed by Proclamation 34 of 1901. There is no doubt that it has been removed from the statute book, so that we must consider the case apart from its provisions.

I am not aware that there is any other law bearing upon the matter. None has been quoted to us, though diligent search seems to have been made on behalf of the Registrar of Deeds. The first Grondwet said there should be no equality between black and white with regard to the matters of State and Church. The Grondwet of 1896 omitted the words "State and Church"; but those Grondwets have been repealed. If they had not been, it would be difficult to define the exact meaning of those expressions. It is not contended that a native may not buy land; and I do not understand Mr. *Burns-Begg* to say he could not part with land which had been registered in trust for him in the name of the Commission for Native Affairs. So that it is hard to say what those general words in the Grondwets would mean when applied to a case of this nature. But the Grondwets have

disappeared from the statute book, and we need consider them no further.

The position then is this—that there is no law which justifies the position taken up by the Registrar. No doubt the practice has prevailed for years in this country of not allowing transfer of land to be made direct to any native, but insisting upon transfer being taken in trust for him by an official appointed by the State. But the existence of that custom cannot in my judgment justify the attitude of the respondent. It is for the legislature to deal with the matter if it is thought right to make special provision in regard to natives. When we find nothing in the statute book which would warrant us in drawing any distinction we are bound to draw none. Moreover, I would point out that if the contention on the part of the Registrar of Deeds were the correct one, it would lead to very great difficulty in the future, for it only goes part of the way towards prohibition. If a native buys land, and it is registered in the name of the Commission for Native Affairs, can he compel the Commission to transfer it, in the event of a resale, to the man who purchases it from him. If so, then registration in the name of the Commission is a mere form. If, on the other hand, the Commission has a right of veto, under what law does it get that right; what law prescribes the terms of the trust in which it holds land for the native? The law would be exceedingly difficult to work even if it existed. In my opinion it does not exist; the position taken up by the Registrar of Deeds cannot be supported, and the application must be granted.

SOLOMON, J.: I entirely concur in the judgment which has been delivered, but as the case is one of considerable importance, I desire to make a few observations upon it. The Registrar of Deeds refuses to pass transfer in this case to a native who has purchased land, and he does so on the ground that by the Transvaal law a native is debarred from holding land in his own name. Now as the Registrar of Deeds takes up this position, it is quite clear that the onus is upon him to satisfy us that there is some law of the Transvaal prohibiting a native from being registered as the owner of land. We must of course presume that all the

inhabitants of this country enjoy equal civil rights under the law: and if the position is taken up that any one section of the community is debarred from rights enjoyed by other sections, the onus lies upon the person who makes the case to satisfy us that there is some law which justifies him in his contention. Now the Registrar bases his report upon the provisions of a Volksraad Resolution which is embodied in art. 106 of the Volksraad minutes of the 14th August, 1884, and in his argument Mr. *Burns-Begg* has relied mainly on that Resolution in support of the case made by the Registrar of Deeds. His argument practically is to the effect that this Resolution is a statute declaring that it was a provision of the Transvaal law that no native should be allowed to hold land Now, it appears to me that there are at least two conclusive answers to that argument. The first is that there is no evidence that this law has ever been duly promulgated. The Resolution passed by the Raad arises out of a reply which had been sent by the Government in answer to a certain petition which had been presented to the Government; but that Resolution, standing by itself, is meaningless, and it can only have a meaning by reference to the reply which was sent to the petitioners. The argument is that that letter must be taken to be incorporated in the Resolution, and that the Resolution must be read by the light of that letter. But we have already laid down in a previous case that there can be no promulgation of a law by reference to some other publication; and the case with which we have now to deal is a much stronger one than the one which has been referred to, because in that case what was proposed to be incorporated had already been published —it had been promulgated in the *Gazette*. But in this case there has been no publication at any time of this letter in the *Gazette*, and it is quite clear that the Resolution cannot be taken to incorporate this letter. There being then this decision in the previous case, we are bound to hold, unless we go back from our previous decision, that there has been no proper promulgation of this Resolution.

But even if there had been, it appears to me that the Resolution was never intended to make law. The answer of the Government to the petitioners is merely to refer them to the pro-

visions of art. 13 of the Pretoria Convention, which in the opinion of the Government provided that no native should be allowed to take transfer of land in his own name. Therefore, even if the letter were incorporated in the Resolution, we should simply have to fall back upon the Convention, and judge for ourselves whether art. 13 of the Convention does prohibit natives from holding land in their own names. Now it seems to me that there would be a great many difficulties in the way of coming to that conclusion. Even if we assume that this Convention was different from ordinary conventions between States: if we assume that this Convention was intended not only to regulate the relations of the two States by whom the Convention was made, but was also intended to lay down municipal law within the Transvaal—assuming all that, I should be unable to come to the conclusion that this art. 13 did prohibit natives from holding land in their own names. For what is the municipal law which it is said is embodied in this article? It is said that it is a provision depriving the natives of a certain right, of a right which other inhabitants of the Republic held, viz., the right to have land registered in their own names. How that conclusion can be drawn from this article of the Convention I must say I find it very difficult to understand. The object of the article was to protect the natives: the object was to put him in a better position than he had been in before—to improve his status, not to reduce his status. Consequently, unless Mr. *Burns-Begg* can satisfy us that previous to the date of this Convention there was some law prohibiting natives from holding land, I am unable to see how a provision in a Convention which was intended to protect the natives, which was intended to confer on natives greater rights than they had previously enjoyed, can be now twisted into a provision taking away rights from those natives.

I need not refer to the other difficulties there are in the way of basing our decision upon this art. 13 of the Convention. I quite agree with what the CHIEF JUSTICE has said on this subject. In my opinion this Convention was not legislation: it was intended to regulate the rights of the two parties to the Convention, and was not intended to make law within the Transvaal. And there is the further difficulty that the Convention has now

come to an end, and that since the annexation of the Transvaal the Convention is no longer in force.

Then Mr. *Burns-Begg* falls back upon the provisions of the Grondwet, which provides that there should be no equality between white and black. What the effect of that may be I do not think it is necessary to consider in this case, because the conclusive and simple answer to this argument is that the Grondwet has been repealed, and that that no longer is the law of the land. Therefore I do not see that any argument can be based upon the Grondwet. No other law has been referred to from which we can possibly draw the conclusion that natives are or were prohibited by law from holding land or from being registered as the holders of land. If the Besluit of 1855 had still been in force, then of course there would be great force in the contention: but as that has been repealed there is nothing left for the Registrar of Deeds to fall back upon, and in my opinion the application must be granted.

WESSELS, J.: I concur.

INNES, C.J.: The application will be granted as prayed; no order as to costs.

Applicant's Attorneys: *Stegmann, Esselen & Roos*; Respondent's Attorneys: *Findlay, MacRobert & Niemeyer.*