

BOYNE AND NIGHTINGALE *vs.* SPITZKOP GOLD MINING  
COMPANY.

*Concession—Diggers—Compensation for Direct Damage.*

*The Government granted a concession to dig for gold, etc., on the farm Spitzkop to the predecessors in title of the defendants. One of the conditions of the concession was that the concessionaires should compensate all diggers then working on the farm for any direct damage which they might sustain through the granting of the concession, and in the event of the concessionaires not being able to come to an amicable agreement with such diggers as to the amount of such compensation, the Government was to fix the amount upon a fair and just principle of arbitration. The Government awarded £2649 to the plaintiffs, who were diggers on the farm. The plaintiffs sued for payment of the above-mentioned sum. Held, that the defendants could not then plead that the plaintiffs were not diggers, but ought to have taken this objection in the first instance, when the Government Commissioner was sitting as arbitrator. Held, further, that the plaintiffs were entitled to compensation only for direct damage caused by the granting of the concession, and not for indirect damage caused by the withdrawal of the proclamation of the farm. The Court therefore reduced the amount awarded by the Government, and gave judgment in favour of the plaintiffs for £900 and costs.*

By proclamation of the State President, dated the 14th May, 1873, the ward Ohrighstadtsrivier, in which the farm Spitzkop was situated, was proclaimed a public gold digging. On the 11th November, 1881, this proclamation was withdrawn. On the 3rd July, 1882, the Government granted a concession to Gilbaud & Co. to dig for gold, etc., on the farm Spitzkop. On the 8th April, 1884, the Spitzkop Gold Mining Company bought the said farm, and on the 9th May, 1884, obtained cession from Gilbaud & Co. of the above-mentioned concession. Clause 8 of the concession was as follows: "That the said Desire Gilbaud, Otto Rothschild, Henri Franck, and Solomon Franck, their

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successors or assigns, shall compensate and pay out to all diggers at present being, and working, on the said farm, compensation for the direct damage which they may sustain through the granting of this concession; and if no mutual settlement can be effected by them, or their successors or assigns, with the diggers at present being and working on the said farm, the Government shall be entitled to fix such compensation upon a fair and reasonable principle of arbitration." The Government sent a commission to investigate and report upon the claim of the plaintiffs, who asked for compensation for loss of water rights bought from third parties, loss of extended claims, and labour and money expended in cutting a certain furrow leading to the claims. The defendant Company lodged an objection against this claim upon the ground that what was asked for was not compensation for a direct loss occasioned by the granting of the concession. The plaintiffs held diggers' licences in November, 1881, when the proclamation was withdrawn and the issue of further licences to diggers stopped. The Government, after considering the report of the commission, fixed the amount of compensation to which the plaintiffs were entitled at £2649. The defendants objected to this, and declined to pay the amount so fixed. The plaintiffs instituted action to enforce payment. The defendants pleaded that, as the plaintiffs had no licences to dig at the time of the granting of the concession, they were not diggers, but trespassers; and, further, that they had suffered no direct damage, and that the compensation awarded was not assessed upon a fair and just principle of arbitration. They further claimed in reconviction £1000 damages for trespass. The plaintiffs excepted to the plea on the ground that it was inconsistent with itself.

*Ford*, with him *Cooper*, for the plaintiffs:—

The defendants wish the Court to go into the merits of the case again after the matter has been settled by the arbitrator. If they had any objections to the plaintiffs' claim they ought to have put such objections before the arbitrator. (*Vide Russell on Awards*, 4 ed. pp. 646–649. In the case of *The Waterfall Gold Mining Coy. vs. Owen and the Lisbon Berlin G. M. Coy.* (Kotzé's Rep. 1881–1884, p. 197)

it was decided that the Government was entitled not only to fix the amount of compensation, but to decide who was entitled to it. The defendants ought to have lodged the objection that the plaintiffs were not such persons as were entitled to compensation when the case was heard by the Government Commissioner. The defendants have not pleaded that they lodged any objection with the Commissioner, nor have they pleaded that the amount of compensation awarded is excessive, nor that any irregularities were committed by the Commissioner. (*Groenewald vs. Smith*, 3 Menzies, p. 158; *Wood vs. Gilmour*, 3 Menzies, p. 159; *Fryer and others vs. King*; *Wells vs. Mackenzie*, qq. *Campbell*, 1 Menzies, p. 379; *Macdonald & Co. vs. Gordon & Co.* 1 R. p. 251; *Chabaud & Son vs. Mackie, Dunn & Co.*, Buch. 1876, p. 190; *Russell on Awards*, pp. 499, 543.)

The defendants do not give any particulars of their counter-claim for £1000.

*Cooper* followed on the same side.

*Hollard*, with him *Keet*, for the defendants:—

This is not an arbitration case. There was no deed of submission. The defendants can re-open the whole case before the Court. The claim in reconvention is sufficiently clear.

*Ford*, in reply.

KOTZÉ, C.J. I am of opinion that the exception that the defendants cannot now allege that the plaintiffs are not diggers within the meaning of Art. 8 of the concession and therefore not entitled to compensation, but that this objection ought to have been taken in the first instance before the Government Commissioner, is well founded. As to the claim in reconvention, I think it sufficiently clear.

The exception to the plea is therefore good, and the plaintiffs are entitled to the costs. Leave is granted to the defendants, if so advised, to amend their plea by alleging that they did lodge objections with the Government Commissioner to the effect that the plaintiffs were not entitled to compensation, and that these objections were disallowed.

The defendants then amended their plea by alleging that at the sitting of the Special Commissioner on August 14th,

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1884, they objected to the claim of the plaintiffs on the ground that they had suffered no direct loss, and that they again protested after the award was made known. The case was again heard on August 26th and 27th.

*Ford*, with him *Cooper*, for the plaintiffs:—

The defendants submitted to the hearing of the dispute by the Government Commissioner, and if they were dissatisfied with the amount assessed, they ought to have claimed a reduction. (*Russell on Awards*, pp. 646, 656; *Papegay*, vol. i., pp. 228-234; *Van Leeuwen, Roman-Dutch Law*, 5, 24, 11.)

*Hollard*, with him *Keet*, for the defendants:—

The concession is a contract between the Government and the company. How can the Government act as arbitrator in a case in which it is concerned? The defendants ask that the whole claim be set aside. The damage suffered by the plaintiffs was not due to the granting of the concession, but to the withdrawal of the proclamation. (*Spitzkop Gold M. Coy. vs. Stanley and Tate*, August, 1885.)

*Ford*, in reply:—

The proclamation was withdrawn in order to enable the Government to grant the concession, and therefore the concessionaires must pay compensation for any damage suffered in consequence of the withdrawal of the proclamation and the granting of the concession. (*Vide Law 6 of 1875, Art. 18; Gilbaud & Co. vs. Walker and others*, Kotzé's Rep., 1881-1884, p. 82.)

*Cur. adv. vult.*

*Postea* (December 4th, 1886).

KOTZÉ, C.J. The defendants maintained that they were answerable only for direct damage caused by the granting of the concession, and that the Government had admitted claims for damage not directly resulting from the granting of the concession, but from the withdrawal of the proclamation and the refusal to issue licences. This contention is a sound one. Several of the losses for which compensation was awarded, such as loss of water-rights bought by the

plaintiffs in 1881 from other persons, and loss of extended claims, were the result of the closing of the gold fields, and the refusal to issue further licences. Such losses therefore cannot be included in determining the amount of compensation for damage *directly* caused by the concession. There is, however, an item of £900, being amount of labour at £3 per day, expended in the making of a furrow, which may be fairly considered a loss occasioned by the granting of the concession. In the case of the *Spitzkop Gold Mining Coy. vs. Stanley & Tate* (August, 1885, *ante*, p. 38), the Court decided that the diggers were, by the terms of the concession (similar to the provisions of the concession in the present instance) obliged to quit the farm, and could not, by way of defence to an action for ejectment, set up a right of retention for labour, etc., expended on the ground. This right of retention is a common-law right, afforded to persons who have expended labour and materials on, or otherwise improved, the land or property of another. The Legislature, by confirming the concession, intended that all diggers on the farm should quit the ground, and leave the concessionaires free to enjoy the sole benefit of the concession in digging for gold, etc. By the concession, therefore, the right of claiming for improvements done to the land, and setting this up as an answer to an action for ejectment, is taken away. The item mentioned is one of the things for which compensation may be claimed under the concession, and the plaintiffs are therefore entitled to their £900. It was argued that the Court could not go behind the decision of the Government, which had acted as arbitrator in terms of the concession. To this it was replied that the Government had not acted as arbitrator, but was only obliged to fix the compensation upon a fair and reasonable principle, usually followed in matters of arbitration. It is not necessary to decide that point. It is clearly within the province of the Court to review the proceedings and disallow so much of the amount awarded as is not compensation for damage, the direct result of the granting of the concession. There must therefore be judgment in favour of the plaintiffs for £900 and costs.

ESSELEN, J., concurred.

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