CASES DECIDED

IN THE

WITWATERSRAND LOCAL DIVISION.

S.A. LAW REPORTS (1913).

W.L.D. PART III.

GAUF v. APEX MINES, LTD.

1913. *May* 12, *July* 1. WARD, J.

Contract.—Interpretation.— Gold Law.— "Vergunning."— Law 18 *of* 1892.

By an agreement in writing dated the 28th March, 1893, A company agreed that in consideration of certain services rendered by G, it would "grant to G a first *vergunning* of 60 claims on its farm after its mynpacht and owner's claims had been marked off and on condition of its retaining an undivided half share or interest therein."

Held, that by this contract the company undertook to provide G with sixty claims, and that it was not a grant of a mere permission to peg which G took at his own risk and could only turn to account in the event of the law allowing him to peg after the owner had exercised his rights.

Held also, that there was nothing in Law 18 of 1892 to confine the meaning of the word "*vergunning*" to a mere permission to peg.

In interpreting a contract the Court can look at the wording of the contract, the law existing at the time it was entered into, and the surrounding circumstances, but not to events that happened afterwards. Parties may contract in view of future legislation, but, if so, it must appear from the contract itself or from the actual allegation of facts before the Court.

Argument on exception.

The plaintiff claimed an undivided half interest in sixty claims on the farm Rietfontein to be selected by the defendant company, or thirty claims or £30,000 as a *quantum meruit.*

He based his claim on a contract which was set out in the declaration as follows:—

"By an agreement in writing made between the plaintiff and the defendant company, dated the 28th March, 1893, in consideration of the plaintiff's pointing out to one Boucher, the defendant company's consulting engineer, the outcrop of the 'main reef series' on the farm Rietfontein, the property of the defendant company, and on the condition that the said Boucher should decide that such outcrop or outcrops were sufficiently worth prospecting upon it was agreed that the defendant company should (*a*) grant to the plaintiff a first *vergunning* of twelve claims five deep (sixty claims in all) after the defendant company's mynpacht and owner's claims had been marked off, on condition of the defendant company retaining an undivided half share or interest therein. (*b*) That the defendant company should have the eventual right of floating such sixty claims. (*c*) That the plaintiff should pay one-half of the licences thereon."

It was then alleged that the plaintiff carried out his part of the agreement, and the company located the main reef series, and on the 23rd November, 1909, acquired 87.05 discoverers' claims, and on the 23rd March, 1912, in terms of the Precious and Base Metals Act of 1908 acquired a mynpacht of 686 and 587 square roods on the farm, but no owners' claims were marked off as the same no longer accrue to the owner under the said Act.

It was also alleged in section 7 of the declaration that, since the passing of the said Act the owners' right to grant *vergunning* claims no longer exists.

The defendant excepted to this declaration as showing no cause of action.

E. Esselen, K.C. (with him *S. S. Taylor*), for the excipients, defendant in the action.

In 1893 there were no such things as *vergunning* claims, these only came into existence when the Gold Law of 1894 was passed.

By sec. 10 of Law 14 of 1894 (*Locale Wetten*, 1894, p. 118) the owner could grant 60 claims as *vergunning* claims before the proclamation of a farm.

The essence of this contract was that certain information in the possession of the plaintiff should be handed to Boucher, and that the company should pay him a definite price or *corpus*.

The only right which an owner could give before this law was a right to prospect the farm.

Before the proclamation of a farm the owner was entitled to peg out a mynpacht, a werf, and then certain owners' claims, and he then had this right to give 60 *vergunning* claims.

If the law made it possible for us to give this remuneration to Gauf then the way in which it was given was illegal.

The contract is indivisible. If *Gauf* v. *The Modderfontein G.M. Co. and Others* (2 O.R. 11) is to be followed, then this contract is illegal, see at p. 14.

That case was tried under sec. 8 of Law 18 of 1892, the Act which governs the present case. The "*vergunning*" in the contract is not the same as the *vergunning* in sec. 8.

Sec. 54 means that where an owner has given written licences to prospect his farm, and such persons have pegged off claims they are entitled to retain their claims without further payment. The plaintiff can only claim a *quantum meruit* if the amount or means of remuneration has not been specified in the contract, but he cannot claim a definite *corpus*.

There is nothing in the later laws providing for the form in which *vergunning* claims should be granted. There is no allegation that we have given the first *vergunning* to others and so broken our contract, and that, therefore, the plaintiff is entitled to damages. There was no obligation on us to peg off claims, we have given the plaintiff the right.

The allegation in the declaration that we acquired discoverers' claims is irrelevant. Act 35 of 1908 has made it impossible for us to carry out our specific obligation, and therefore we are absolved; see *Landmark* v. *Van der Walt* (3 S.C. 300). The loss falls on a person from whom the law takes away a right.

J. Stratford, K.C. (with him *F. B. Adler*), for the respondents, plaintiff in the action.

As to the construction of the contract, it is to remunerate work by giving claims of a certain type. The granting of *vergunning* claims was merely to give claims in a certain position.

[WARD, J.: Is it not a covenant to give permission to peg, not to give claims?]

No! the reason for the use of the word "*vergunning*" is to define the locality.

The defendant could have remunerated the plaintiff in three ways: 1st, he could have issued the plaintiff a *vergunning*; 2nd, he might have pegged them and handed them over to the plaintiff; 3rd, he might have bought the claims. All of these are legal courses. The

only illegality would have been to grant Gauf a right to peg these claims, and then get Gauf to hand them back to defendant.

The word *vergunning* was used to designate preference claims. It was used in many different ways. In the Gold Law of 1892, see Articles 6 (*d*), 6 (*k*), 8, 10 and 13, 18, 43, 48 (*e*), 63 and 84, it was repeatedly used as "*grant.*"

The Court should adopt as an alternative to declaring the contract illegal or void that interpretation which makes its performance possible. The contract is not a permit to a prospector.

How can it be said that there ever was impossibility of performance? The claims are there, only the name has been changed. If a £5 note is called 50 dollars it is still there.

As to *Gauf* v. *The Modderfontein Co.* (*supra*) Dettelbach was a nominee of the company.

The contract is clearly severable. *Bal* v. *Van Staden* (1903, T.S. 70); Pollock's *Principles of Contract* (7th ed., at pp. 367, 399, and 422); *The Teutonia* (1872, L.R.; 4 P.C. 171; 41 L.J. Adm., p. 57).

As to *quantum meruit* see Hudson on *Building Contracts* (vol. 1, p. 495; *Keys* v. *Harwood* (1846, 2 C.B. 905; 15 L.J.C.P. 207).

This is a sort of *Cy-pres* doctrine of performance.

The owner is not restricted under the Gold Law to his mynpacht, but may peg as an ordinary digger. *Frische* v. *Modderfontein G.M. Co. and Another* (2 O.R. 223).

E. Esselen, K.C., in reply: The action is for part performanace of a joint contract.

Frische's case (*supra*) only lays down that when a farm has been proclaimed everybody may compete, even the owner. Before proclamation, however, the owner may not adopt means to get a greater share than he already possesses and so defraud the public. See also Pollock on *Principles of Contract* (p. 442) and see *Andreka* v. *Barclay and Another* (Barber's 1898 Gold Law, p. 106).

Cur. adv. vult.

Postea (July 1).

WARD, J. [His lordship, after referring to the material portions of the declaration (as set out above) and the exception, proceeded as follows]:

The defendant's contentions are:—

(1) Though the agreement was made while the Gold Law of 1892 was in force, the *vergunning* claims contemplated were under

the Gold Law of 1894, sec. 10. That it was illegal to give them in the way provided for in the agreement, and consequently he is not bound.

(2) The promise was to give a *certum corpus* of 60 *vergunning* claims, and that these have been done away with by law—that is the law has destroyed the *corpus*, and the defendant is no longer liable.

(3) That the contract itself was a permission to the plaintiff to peg off his *vergunning* claims and that there is no further obligation on the defendant to do anything, and if the law has intervened to prevent his pegging the loss is his and no concern of the defendant. In other words he had acquired his right, and the law took away his right without any fault of the defendant.

(4) That the law has made it impossible to fulfil this obligation, and the defendant is therefore excused.

The first point to determine in deciding this case is as to what is the meaning of the contract. What is meant by a grant of a first *vergunning* of twelve claims five deep after the defendant's mynpacht and owners' claims had been marked off?

Mr. *Esselen* says that to determine the meaning of *vergunning* we must go to sec. 10 of Law 14 of 1894, because he says that prior to this there were no *vergunning* claims and sec. 10 provided for 60 *vergunning* claims being given by the owner. He says the parties must have had the new law in contemplation at the time. This is a very bold contention. I have no facts before me except the actual wording of the contract, and the law. And although I am entitled to look to the surrounding circumstances in order to construe a contract, I do not see how I can say the contract must not be construed by the light of the facts existing at the time it was entered into but by events that happened afterwards. Parties may contract in view of future legislation, but if that it so it must appear from the contract itself or from the actual allegation of facts before me.

It is said that the word *vergunning*, being a Dutch word, used in a contract in English with regard to claims, must be taken to have been used in reference to the Gold Law. This seems to be sound provided we can find from the Gold Law a meaning to be attached to the word which will give the contract a meaning. In the Law of 1892, sec. 18, the word is used in different senses.

In sec. 6d provision is made for survey so as to show every water right, mynpacht . . . . or any other right or *vergunning*.

Sec. 6 (*k*) says "een bezitrecht sluit in alle rechten onder de *vergunning*, kontrakten of licenties verkregen."

Sec. 8 provides for written permission from the owner to prospect.

Secs. 10 and 13 refer also to a permission from the owner to prospect.

In sec. 18 it is used in the sense of permission by the Government.

Sec. 43 also uses it in the same sense—and provides that holders of concessions and mynpachts may grant permission to others to dig.

Sec. 48 makes provision for "*vergunning* van waterrechten"—or grants of water-rights.

In sec. 63 it is used as equivalent to "toestemming" or permission.

Sec. 84 refers back to art. 8. So that we see it is used in the sense of a grant, a privilege, or permission.

Under sec. 8 a person who has a written vergunning from the owner may prospect on taking out a licence.

Sec. 10 gives the discoverer the right to six claims—he may also peg as an ordinary digger (sec. 13).

Sec. 14 gives the owner the right to "owner's claims" not exceeding 10 after the discoverer has beaconed off his prospector's and digger's claims.

It seems to have been held that under sub-secs. 8 and 9 the owner could give as many *vergunningen* as he pleased to persons to prospect, and each of these would be entitled to peg off six claims on the proclamation of the farm.

Under Law 14 of 1894 *vergunning* claims properly so called came into force, and sec. 10 of that Law, which corresponds to sec. 10 of the Law of 1892, and which provided for the proclamation of ground over which the owner had given permission to prospect or had prospected himself provided that the owner could allow or give to another a number of *vergunning* claims not exceeding sixty in number.

Under sec. 8 and sec. 54 of the Law of 1892 it was considered that an owner could grant what were then called *vergunning* claims to any person he liked.

Under sec. 8 a person with a written *vergunning* from the owner to prospect had to take out a licence for six claims. Under sec. 54 when a portion of land was proclaimed a public digging persons who had beaconed prospector's claims were entitled to retain such claims. So that he could give as many vergunning claims as he liked.

Gauf v. *The Modderfontein Gold Mining Company* (*supra*) laid down that he could not give them to himself.

Under sec. 10 of Law 14 of 1894 he was entitled to give out 60 *vergunning* claims—but these it was held in *Andreka* v. *Barclay* (*supra*) were not the same as the vergunning in art. 8 of the same law, which article is the same as art. 8 of Law 18 of 1893. If this is so it is difficult to see how Law 14 of 1894 limited the right of the owner under Law 18 of 1892.

It is contended that the agreement was that the defendant should exercise in favour of the plaintiff a right the owner had to give permission to third persons to peg claims. But so far as I have been able to discover the only *vergunning* was under sec. 8, and that was a *vergunning* to prospect which carried with it a right eventually to peg claims.

In my opinion the company under this contract undertook to provide the plaintiff with the sixty claims. I do not think it was to be a grant of a mere permission to peg, which the plaintiff took at his own risk, and could only turn to account in the event of the Law or the Government allowing him to peg after the owner had exercised his rights. The point is one of considerable difficulty, and as it is concerned with the construction of a contract my view is expressed with some hesitation.

The agreement is to grant a first *vergunning* of twelve claims, and not a *vergunning* to peg twelve claims; and it is quite consistent with the meaning of the word *vergunning* to hold that it means the owner is to supply the sixty claims upon the proclaimed area, the owner retaining the privilege of marking his mynpacht and owner's claims first.

If the Gold Law of 1894 had not been passed the word *vergunning* would have been construed without reference to that Law, and there is nothing in the Law of 1892 which can confine its meaning in the sense contended for by Mr. *Esselen*.

If this meaning be attached to the contract I think the defendant's contention must fail.

The question as to the legality of the contract does not then arise, and it is clear that though the owner's rights under the Gold Law have been altered, it is not impossible for him to fulfil his contract. Neither is it possible under this reading of the contract to hold that it amounted to an actual permission to peg which the plaintiff could have exercised under the Gold Law of 1892 without further grant from the defendant, and the risk of which lay with him.

It was further contended that the contract does not warrant a suit for thirty claims, or in the alternative for £30,000 but as there is a claim for a declaration that the plaintiff is entitled to an undivided interest with the defendant company in sixty claims on the farm, the fact that he has put in an alternative claim for less cannot, in my opinion, vitiate his declaration.

The exception must be overruled with costs.

Plaintiff's Attorneys: *Steytler, Grimmer & Murray*; Defendant's Attorneys: *Webber & Wentzel.*

[Reported by *F. B. Adler*, Esq., Advocate.]

WOLPERT v. ABOLSKY.

1913. *June* 26; *July* 1. WARD, J.

Insolvency.—Act of.—Nulla Bona Return.—Subsequent Agreement to Pay.—Not a Ground for Sequestration.

Respondent made a return of *nulla bona* to a writ upon a judgment, and then with the knowledge of applicant arranged with the judgment creditor to pay off the debt in instalments. Thereafter respondent became indebted to applicant who, relying solely upon the above return of *nulla bona* now applied to sequestrate respondent's estate, *Held*, dismissing the application, that in the circumstances the return was not one of which the applicant could take advantage.

Hornabrook v. *Bright* (17 C.T.R. 805) discussed.

Application for the sequestration of respondent's estate. The facts appear from the judgment.

L. Greenberg, for the applicant: The denial of the debt is not *bona fide*; see *Kleinenberg* v. *Dupreez* (1910, T.S.559). As there is a *nulla bona* return, the *onus* is on respondent to prove his solvency.

L. Blackwell, for the respondent: There has been no act of insolvency, the debt on which the return was made has been satisfied by the arrangement for liquidation by instalments; see *Hornabrook* v. *Bright* (17 C.T.R. 805) *per* HOPLEY, J.; *in re Harpur* (2 E.D.C. 103) *per* SHIPPARD, J., at p. 106.

But assuming an act of insolvency, this is not a case in which the Court will sequestrate, *Bloxam* v. *Green* (1905, T.S. 333).