MAGNUS DIAMOND MINING CO., LTD., v. WELGEGUND DIAMOND MINING CO. LTD.

1910. *March* 9, 10 and 14. MAASDORP, C.J., and WARD, J.

Cancellation of lease.—Non-notarial prospecting contract.—Res litigiosa. —Company.—Pre-incorporation contract.—Adoption and ratification.—Knowledge of pending action.

In an action previously instituted by M Co. against H and D, H and D had been ordered *inter alia* to pass transfer of the diamondiferous farm W to the M Co. on the ground that H and D had acquired it as trustees for the M Co. W Co. was formed after pleadings had been closed in that action, H and D and the firm of attorneys acting for them in the action signing the memorandum of association and one member of the firm becoming chairman of the local board of the company. W Co. on flotation purported to take over from a syndicate and to adopt a prospecting contract as regards the farm W, and entered into a notarial lease of the property two days later. *Held*, that W Co.'s acquisition of prospecting rights over the farm W could not be taken as dating before the notarial lease, which was a new contract; that W Co. must be taken to have been aware of the pending action between M Co. and H and D; that W Co. could acquire no greater rights under the lease than H and D were previously entitled to and that the lease must be cancelled.

The facts sufficiently appear from the headnote and the judgment.

Blaine, K.C. (with him *P. U. Fischer*), for the plaintiffs: The lease of the farm was not ceded by the S. A. Prospecting and Concessions Syndicate to the defendants. A company cannot make or ratify an agreement purporting to have been entered into for its benefit prior to its coming into existence. See *Lecomte* v. *W. and B. Syndicate of Madagascar* ([1905] T.S. 696). Even if the company did acquire the rights of the syndicate by cession, they could not have acquired them prior to the 26th July, the date of the formation of the company. The agreement contained in the notarial lease of the 28th July was an entirely new one. A lease of mining rights must be notarial.

See sec. 51 of Ordinance 12 of 1906. Sec. 49 provides that a contract of sale of immovable property must be in writing. An option to sell immovable property must be in writing; see *Sturt* v. *Roos* ([1907] O.R.C. 4). An agreement to give a lease of mining rights by analogy requires to be in writing. The defendants had full knowledge of the action against Hawthorne and Macdonald, and that the pleadings had been closed. Even if they had no such knowledge the farm was *res litigiosa*. See Bell's *Commentaries* (7th ed.), vol. 2, p. 144; Voet, *De litigiosis*, 44, 6, 1, and 3; Gaill's *Observations*, bk. 1, 118; Grotius, 3, 14, 21; Groenewegen on the *Code*, *De litigiosis;* Voet, 20, 3, 2; Van der Keessel, *Thes.* 630; Burge's *Colonial and Foreign Law*, vol. 2, p. 446. The close of the pleadings is now generally accepted to correspond to the *litis contestatio*. See *Coronel* v. *Gordon Estate and Gold Mining Co.* ([1902] T.S. at p. 101).

Williamson, for the defendants: The doctrine of litigiosity only applies in real actions. The action in question was a personal action against Hawthorne and Macdonald as defaulting directors. See Sande's *Restraints on Alienation* (Webber's trans.) ch. 9, par. 5, pp. 130 and 132.

[MAASDORP, C.J.: How can a real action be instituted if an action for the transfer of property is not such an action?]

By an action for a declaration of rights. The judgment in the case in question was only given against Hawthorne and Macdonald personally, and not as against the whole world. The case of *Coronel* v. *Gordon Estate and Gold Mining Co.* (*vide supra*, at p. 99) was on all fours with the present case, and that is the only case in which the doctrine of litigiosity has been discussed. Bell and Voet (*loc. cit.*) only refer to real actions. See Brunnemann on the *Pandects*, 44, 6. Van der Keessel and Grotius must be referring to real actions, for summary execution could only be granted in actions for a declaration of rights. The decision of the court did not affect rights *in rem*, and therefore the action cannot have been a real action. See Gaill's *Observations*, bk. 1, 117. The doctrine of *res litigiosa* is obsolete. The system of interdicts has taken its place. The doctrine that an old law has become obsolete

was adopted in the case of *Blower* v. *Van Noorden* ([1909] Leader Law Reports, 181). The Magnus Syndicate had no vested rights. See *Cape of Good Hope Bank Liquidators* v. *De Beers* (11 S.C. 441). The plaintiff company has not taken transfer and is not *dominus* of the property, and is therefore premature in applying for cancellation of the lease. As to the prejudice to defendants, see Voet, 44, 6, 3. See also Sande, par. 23, p. 140. Sec. 51 of Ordinance 12 of 1906 prohibits leases of mining rights from being of force unless notarial or registered. That does not apply to an option, because the option cannot be registered. An agreement to sell is the sale. The sections of the Transvaal and Orange River Colony laws in regard to the necessity for written contracts in the case of sales of immovable property and of notarial contracts in the case of mining leases are the same. See *Taylor and Claridge* v. *Van Jaarsveld and Nellmapius* (2 S.A.R. 137); *Kriegler and Others* v. *Du Preez and Others* (2 S.A.R. 216); *Pearce* v. *Olivier and Others and Noyce* (3 S.A.R. 79); *Van der Hoven* v. *Cutting* ([1903] T.S. 299). The contract of the 24th July simply carries out the contract of the 26th January. See *Herzfelder* v. *McArthur, Atkins & Co., Ltd.* ([1908] T.S. 332). The plaintiffs have adopted the lease by acquiescence, and they have waived their right to object. As to knowledge, the knowledge of a solicitor is not necessarily knowledge of a shareholder. See Lindley on *Companies* (6th ed.), vol. 1, p. 251.

Blaine, K.C., in reply: As to acquiescence, the question of the lease was clearly mentioned, and it was understood that the judgment by consent in the action against Hawthorne and Macdonald was subject to any action that might be instituted in regard to the lease. I rely upon want of cession. See *Wolfowitz* v. *Fresh Meat Supply Co.* ([1908] T.S. at p. 514). Litigiosity is not confined to real actions. See Voet, 6, 1, 20; *Digest*, 44, 6; Gaill's *Observations*, 55, 11.

[MAASDORP, C.J.: See *Coaton* v. *Alexander* (Buch, 1879, at p. 20) as to knowledge in the case of the sale of a movable.]

See Maasdorp's *Institutes of Cape Law*, vol. 3, p. 145.

Cur. adv. vult.

Postea (March 14):—

MAASDORP, C.J.: This is an action brought by the plaintiff syndicate against the defendant company for an order cancelling a notarial lease of the farm Welgegund, in the district of Winburg, entered into on the 28th July, 1909, between the defendant company as lessees and Macdonald and Hawthorne as lessors. The grounds of this action are alleged to be based upon the fact that this lease was entered into after the close of the pleadings in the action brought by the plaintiffs against the said Macdonald and Hawthorne, in which, amongst other things, the ownership and transfer of the said farm Welgegund, which then stood registered in the names of Macdonald and Hawthorne, were claimed. The claim is based on two alternative grounds, namely, (1) that at the time of the execution of the lease the defendants had full knowledge of the action instituted by plaintiffs against Macdonald and Hawthorne and of the fact that the pleadings in the same had been closed, and (2) that, even if they had no such knowledge, the farm Welgegund was, by virtue of such closure of pleadings, *res litigiosa*, and could therefore not be validily leased by Hawthorne and Macdonald to defendants.

It will be as well to deal with the second claim, which is based on the principle of *res litigiosa*, first. In answer to this it has been maintained, in the first place, that the doctrine of *res litigiosa* has become obsolete in South Africa, because there have been no decided cases bearing on the subject, and because of the prevalence of the practice of applying for interdicts for the protection of rights which are prejudicially interfered with by others. On this point it must be sufficient to say that the Court is not prepared to lay down that the doctrine of *res litigiosa* has become obsolete, because as a general rule a more expeditious remedy is resorted to, or to say that, because prevention is better than cure, there shall be no cure whenever there has been no prevention.

The defendants further maintain that the principle of *res litigiosa* only applies to real actions, and that the action of the plaintiffs against Macdonald and Hawthorne was not a real, but a personal action, and that the principle did not

therefore apply to it. In the view which the Court has taken of the present case it will be unnecessary to decide this point, and we therefore proceed to the consideration of the first count of the declaration, which is based upon express knowledge of the action on the part of the defendants. Before doing so, however, it will be as well to dispose of one of the defences set up, namely, that the plaintiffs have waived any right that they may have had to the cancellation of the lease, and have acquiesced in and adopted the same, and are estopped from questioning the validity of the lease by reason of the form of the action brought by them against Macdonald and Hawthorne and of the judgment obtained by them and of the form of the order granted by consent on 1st September, 1909. The Court is of opinion that there is no ground whatsoever for this defence.

Proceeding now to the consideration of the main question at issue between the parties, the admitted facts are that the action of the plaintiffs against Macdonald and Hawthorne was begun in March, 1909, that the pleadings in that case were closed on the 2nd July, 1909, and judgment in favour of the plaintiffs delivered on the 16th August following. It is further admitted that the defendant company only came into existence on the 26th July, 1909, and that the notarial lease which is the subject of this present action was only executed on the 28th of the same month. On the other hand, the defendants allege that the said agreement was not a new agreement, but that the said lease was granted on the 28th July under and by virtue of an agreement entered into on the 26th January, 1909, between the said Macdonald and Hawthorne on the one hand and the S. A. Prospecting and Concessions Syndicate on the other, and as a matter of fact it was proved that such an agreement was entered into upon the 26th January, 1909, which was afterwards nullified by agreement on the 15th April, 1909, and again on the 24th July, 1909. In reply to this contention counsel for the plaintiffs insisted that the agreement of the 28th July was an entirely new agreement, and further contended that the agreement of the 26th January and the subsequent agreement of the 15th April and the 24th July were null and void, inasmuch as they were

not notarially executed, as required by sec. 51 of Ordinance 12 of 1906. For the defendants, on the other hand, it was contended, and this view was adopted by the Court, that these agreements did not fall under sec. 51, inasmuch as they did not constitute a lease of any right to minerals or precious stones or of land, but merely a prospecting contract (*Taylor and Claridge* v. *Van Jaarsveld and Nellmapius*, 2 S.A.R. 137; *Kriegler and Others* v. *Du Preez and Others, ibid.* 216; *Pearce* v. *Olivier and Others and Noyce*, 3 S.A.R. 79). The Court is therefore of opinion that as between Macdonald and Hawthorne and the S. A. Prospecting and Concessions Syndicate the agreement of the 26th January, 1909, and two subsequent agreements were perfectly valid, though not notarially executed or registered.

This does not, however, conclude the case as between the plaintiffs and defendants, and it was contended for the plaintiffs that the defendant company, not having come into existence before the 26th July, 1909, could acquire and did acquire no rights to the farm Welgegund under the agreements previously made by the S. A. Prospecting and Concessions Syndicate, even though made in contemplation of the defendant company being subsequently formed. In support of this contention the Court was referred to the case of *Lecomte* v. *W. and B. Syndicate of Madagascar* ([1905] T.S. 696), in which it was decided that a company cannot sue or be sued upon a contract made on its behalf before its incorporation, nor can it after incorporation ratify or adopt such a contract. This principle had been previously laid down in *Kelner* v. *Baxter and Others* (L.R. 2 C.P. 174), and had been adopted by our South African courts (*O'Leary and Another* v. *Harbord*, 5 H.C.G. at p. 18), and applied by the Privy Council in a Natal case (*Natal Land and Colonisation Co.* v. *Pauline Colliery and Developing Syndicate* (25 N.L.R. N.S. 1), in which it was laid down that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence; but that in order to do so a new contract must be made with it after its incorporation on the terms of the old. These views are quite consistent with the decision in the case of *Tradesmen's Benefit Society* v. *Du Preez* (5 S.C. 269), in which

it was laid down that a contract may validly be entered into for the benefit of a third party, provided it is subsequently ratified and adopted by the latter; but it is an essential to the validity of a contract, both according to our law and according to the law of England, that the parties to the contract shall be actually in existence at the time of its execution. In accordance with the views laid down in these decisions the Court feels bound to hold that before the 28th July, 1909, the defendants held no rights as regards the farm Welgegund, and that any rights they subsequently acquired were due entirely to the notarial lease of that date, which was a new agreement, and not merely a confirmation of the agreements previously entered into by the S. A. Prospecting and Concessions Syndicate. Whether they could have acquired the rights of that syndicate under those agreements, if these had been formally ceded to them by the syndicate, it is unnecessary to inquire, as it has not been alleged, nor has it been proved, that there was ever such a cession.

It follows, from what has been said thus far, that the notarial lease of the 28th July, 1909, must be regarded as a new agreement concluded on that day between the defendants and Macdonald and Hawthorne, and must be judged of in connection with the circumstances as they existed upon that day. Now it is alleged by the plaintiffs that on that day the defendants had full knowledge of the action which had been instituted by the plaintiffs against Macdonald and Hawthorne, and that the pleadings had been already closed, and that any rights acquired by them under the notarial agreements must be subject to any rights the plaintiffs were contending for in that action. Upon the evidence it is quite clear that the defendants at that time either actually had or ought to have had such full knowledge, seeing that Messrs. Adam and B. Alexander of Johannesburg were the Johannesburg attorneys for Macdonald and Hawthorne in the action brought against them by the plaintiffs, and also in the previous application for an interdict; that these gentlemen on the 26th July signed the memorandum of association of the defendant company on behalf of the South African Prospecting and Concessions Syndicate, and one of them, B. Alexander, on his own behalf, the other signatories being the local attorneys, Marais

& De Villiers, of Macdonald and Hawthorne and their clerks; and that B. Alexander was the chairman of the local board of the defendant company, as appears from the minutes of the meeting of the said board held on the 29th July, 1909 (that is, the day after the signing of the notarial agreement of lease), the other members present being Macdonald and Hawthorne. It follows that in accordance with the rules laid down in *Coaton* v. *Alexander* (Buch. 1879, at p. 20), *Thompson* v. *Malgas* (6 S.C. 281), *Van Zyl* v. *Engelbrecht* (16 S.C 209), *Cohen* v. *Shires, McHattie and King* (1 S.A.R. 41) and *Blumberg* v. *Buys and Malkin & Margolis* ([1908] T.S. at p. 1181), the defendants could acquire no greater rights under their agreement of the 28th July than Macdonald and Hawthorne were previously entitled to, and that, as Macdonald and Hawthorne had no rights to the farm Welgegund as opposed to plaintiffs, no more can the defendants have such rights.

Judgment must therefore be for the plaintiffs in terms of their prayer upon the first count of the declaration, with costs.

WARD, J., concurred.

Plaintiffs' Attorneys: *McIntyre & Watkeys;* Defendants' Attorney: *A. Harris.*