G.P.-S.918—1950-1—2,000.

182/54

U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case. 11/52
Appèl in Siviele Saak.

NATAL NAVIGATION COLLIERIES AND ESTATE Co LTD — Appellant,

versus

MINISTER OF MINES & DEPUTY COMMISSIONER FOR MINES NATAL — Respondent.

Appellant's Attorney / Prokureur vir Appellant: Webber

Respondent's Attorney / Prokureur vir Respondent: Naude & [illegible]

Appellant's Advocate / Advokaat vir Appellant: D.G. Fannin Q.C. with D. Shaw.

Respondent's Advocate / Advokaat vir Respondent: [illegible] Q.C. with him J.S. [illegible]

Set down for hearing on / Op die rol geplaas vir verhoor op: TUESDAY 1st MARCH 1955

1 2 3 4 5 6 Before Centlivres CJ, Greenberg JA, Hoexter, Hoexter et Fagan, JJA

9.45 am — 12.45 & 2.15 — 3.45 } — C.A.V.

Judgment: 2/4/55:

(Appeal allowed, with costs, see written judgment handed in.)

[signature]
Registrar
2/4/55.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:-

The Natal Navigation Collieries and Estate Company Ltd.
Appellant

and

The Minister of Mines

and

The Deputy Commissioner for Mines, Natal.
Respondents

Coram:- Centlivres, C.J., Greenberg, van den Heever, Hoexter et Fagan, JJ.A.

Heard:- 1st March, 1955. Delivered:- 2/4/1955

VAN DEN HEEVER, J.A. JUDGMENT

The facts are stated in the judgment of my brother Hoexter. I have come to the same conclusion for the following reasons.

The legislative policy of Natal prior to Union was to vest dominium in minerals in the Crown but, in the public interest, to encourage prospecting by granting facilities to prospectors and by rewarding

2/ discoverers .....

discoverers either by granting them preferent claims or rewards in money.

The prerogative rights of the Crown in England in regard to mines of gold and silver (Hailsham's Halsbury, Vol. 22 S 1170 p. 534) were declared by statute to extend to Natal (Section 25 of Law No. 34 of 1888) and several measures were enacted expressly

> "To encourage the search for minerals and precious stones within the Colony of Natal" (Section 2(a) of Law 34 of 1888).

By Section 4 of the lastmentioned Law it was enacted that:

> "The right of mining for and disposing of all gold, precious stones and precious metals and all other minerals in the Colony of Natal, is vested in the Crown for the purposes and subject to the provisions of this law."

Another feature of legislative policy was that in the earlier measures there was little or no interference with private rights (cf. Law 23 of 1883). According to later measures the private owner had merely preferent rights to prospect and, if he failed to exercise them at all or adequately, the State could step in and cause adequate steps to be taken for the discovery and exploitation of the mineral

resources of the Colony. That these policies were continued in the later consolidating and amending laws relating to mining, including Act 43 of 1899, clearly emerges from these measures themselves.

Section 9 of this Act in so far as it is relevant reads:-

> "The right of mining for and disposing of all minerals .... is vested in the Crown, subject to the provisions of this Act and nothing in this Act regarding the prospecting, mining or disposal of minerals shall abridge or control the rights and powers of Her Majesty in respect of such minerals, otherwise than is expressly provided in this Act."

In pursuance of the policy of encouraging and exploiting the mineral resources of the Colony Part III of the Act throws Crown lands open for prospecting and provides for the conversion of prospecting claims into mining claims and the disposal of minerals for profit subject to the payment of royalties (Section 41, now repealed by Act 6 of 1910 (V); a tax is substituted).

Part IV of the Act deals with private lands. Section 42 thereof provides:

"The provisions of this Act, and the Regulations framed thereunder in respect of Crown Lands, shall apply to all private Lands, save as in this Act otherwise provided."

In Part IV the owner is given preferent rights to peg off and register prospecting claims, but there is provision for the issue of licences to and the pegging of such claims by others if he does not exercise or does not effectually exercise his preferent rights. In this part there is no suggestion of a distinction between an owner whose title is unencumbered and an owner whose title deeds contain a reservation of mineral rights in favour of the Crown, unless it be in Section 60, with which I deal later.

Crown lands are owned by the Government by virtue of its dominium eminens. Where the Crown has parted with the surface rights (which is really a misnomer, for apart from mineral rights the owner has rights to the earth's centre) but retained rights to minerals, the nature of its tenure of these rights is not altered. It still holds them as the Crown, not as a subject. I am aware of the fact that it has been held that what really happens is that pari passu with transfer the Crown acquires a servitude from

the transferee. But we are not now concerned with the mechanics of deeds registration. Conceptually and juridically the Crown has disposed of the main portions of that complex of rights which make up the abstract notion of dominium (which after all is only a short term to denote that complex of rights) and retained or reserved some relating to minerals.

Moreover Part IV of the Act recognises that prospecting and mining on private land may cause loss and inconvenience to the owner.

Considering the clear objects of the Act it seems to me inconceivable that the Legislature could have intended to throw ~~open~~ Crown land, in respect of which the Crown hold the whole complex of proprietary rights, and in regard to which it may therefore suffer two kinds of loss, ~~open~~ to prospecting and mining, while jealously precluding from discovery and exploitation mineral occurrences on land which it has alienated retaining only the right to minerals. Unless Section 60 compels me to do so, I cannot accept that the Legislature intended

6/ such .....

such an anomaly.

But there are further anomalies. It seems to me contrary to the spirit of the Act to suppose that the Legislature intended that private land, in respect of which the Crown has reserved mineral rights, should not be prospected at all, or should be prospected by strangers rather than the owners.

It is necessary carefully to consider the terms of the conditions registered against the title of the forms in question. Condition (d) reads:

> "The Government reserves to itself the dominium of all minerals found, or being in, upon or under the said lands."

Obviously the right so reserved is exclusive, but it is as obvious that inroads can be made into it by statute.

Condition (e) reads:

> "The Government reserves to itself the right, by itself or to any person authorised by for such purpose, to enter upon the said lands for the purpose of prospecting for, mining, or removing therefrom any such minerals and for the carrying out thereon or therein of such workings as may be required for the utilization or removal of any such minerals....."

Save as to "mining or removing therefrom any such minerals" and the consequential rights, the powers reserved in this condition are not necessarily exclusive of the owner's rights. The owner of a servient tenement subject to a servitude is not precluded from also doing what the owner of the dominant tenement is authorised to do by virtue of the servitude.

This leads me to a consideration of the decision in Natal Cambrian Collieries v. Durban Navigation Collieries Ltd., and The Minister of Mines, (1925 N.P.D. p. 27) in which conditions exactly similar to those now under investigation were considered. In so far as the majority of the Court decided in that case that as the Government had reserved to itself the dominium of all minerals, such minerals remained Crown land, it is sufficient for me to say that I agree with Broome, J.P. in the present case that that part of the decision was erroneous. The ratio decidendi now relevant was that owners of land

granted subject to these reservations could not prevent other qualified subjects from acquiring prospecting and mining claims under Act 43 of 1899, nor could they cede or let mining rights which they did not have since these had been reserved

8/ to .....

to the Crown. At p. 35 of the report the following observations appear:

> "And (The Government's) right to authorise is reserved without qualification or restriction. It is subject to the consent of nobody; it is left to the Government and the third party to agree what form that authority shall take; the right thus reserved is one which the Act cannot affect or lessen; and the Crown cannot waive or give it away. Collector of Customs v. Cape Central Railways, 6 S.C. 402, 405. The particular way in which the Government has chosen to give its authority is by using the machinery of the Act, by the issue of prospecting claims which can be converted into mining claims. It was open to the Government to select this way, but it was not bound to."

The question whether, if the owner could avail himself of the provisions of the Act to acquire prospecting claims convertible into mining claims, did not arise. With great respect, I doubt the correctness of the dictum - which was obiter in the circumstances - that the Government had a free hand as to the manner in which it gave its authority. But even if that be so, it does not follow that, if Part IV of the Act applies to

private land in respect of which mineral rights were reserved to the Crown, the Government could arbitrarily withhold a prospecting licence from an intending prospector merely because of the reservation. It may be that Section 60 is not capable of being so widely interpreted.

Before I deal with Section 60 it is expedient to consider the definition of "owner" in Act 43 of 1899. It reads: "The registered owner of any lands held under freehold or quitrent tenure ....."

Judging by the number of Natal statutes relating to quitrent tenure enacted at ~~xxxx~~ intervals between 1865 and 1887 it seems reasonable to infer that quitrent tenure was well known in that Colony.

In quitrent farms the owners had according to the Common law no mineral rights; over and above that, perhaps ex majore cautela, mineral rights were frequently reserved to the Crown in the deeds of grant. (Union Government v. Dundee Coal Co., 1911 A.D. 473; De Villiers v. Cape Divisional Council, 1875 Buch. p. 50; 1876 Buch. p. 105; Vos v. Colonial Government, 14 N.L.R. p. 201; Maasdorp, Instit. Vol. 2 5th Edition p. 165). Moreover, it is to be presumed that when Act 43 of 1899

10/ was .....

was passed the Legislature must have been aware of the fact that numbers of farms had been granted in freehold but with reservation of mineral rights to the Crown.

Section 60 of that Act reads:

> "Nothing in the preceding section or in this Act contained relating to private lands shall in anyway affect or lessen the rights of the Crown, whether declared in this Act or in any document of title or otherwise."

Appellant is the "owner" in terms of the definition, and its land is private land. If Section 60 were to be interpreted literally it would be in direct conflict with Section 42, which provides that "the provisions of this Act, and the Regulations framed thereunder in respect of Crown Lands, shall apply to all Private Lands, save as in this Act otherwise provided". The draftsman of the Act was over-cautious, a tendency which leads to confusion. If it was the intention that Part IV of the Act should not apply to land held under quitrent and land in respect of which the Government had reserved mineral rights, it is remarkable that no clear mention of the fact is made anywhere.

To my mind Section 60 was inserted in that spirit of caution and has ample scope for operation if reconciled with other provisions in the Act with which at first blush it is inconsistent. Crown rights are not saved in general; it is only safeguarded against inferences to be drawn from anything "in the preceding Section or in this Act contained relating to private lands". The preceding Section gives the clue. It provides that, despite the provisions of the Act, no person other than the owner shall, without the owner's written consent, be allowed on such owner's property to prospect for or mine non-precious minerals. That provision applies only to lands alienated by the Crown before, or in the process of alienation on the 14th November, 1900, and to properties alienated thereafter with express provision in the title that the provision shall apply. Several rights are therefore to be protected against the inference of waiver by implication: the right of third parties to prospect for precious minerals and the Crown's rights through its agents.

Where, therefore, mineral rights have been reserved, the Crown could still issue prospecting licences against the wishes of the owner. But that does not mean that the Crown can simply disregard the owner's prospecting or mining rights acquired under the Act. It has concurrent rights subject to priority. The provisions of Sections 44 and 45 will not preclude Government agents from prospecting. Section 46 would temporarily exclude third parties but not the Government. The owner of such land would not be able to object to the issue of prospecting licences or to the registration of prospecting claims. But all these limitations of the owner's dominium are consistent with his acquiring prospecting claims, with all it entails, on his own land.

In the Dundee Coal Co. case (supra) Innes, J.A. crisply stated the policy of the Act of 1899 as follows:

"The Legislature was establishing an entirely new code intended to secure among other things more

12(a)/ effective .....

effective supervision of all mining operations and increased revenue from them." (p. 488).

Referring to the Law of 1899 he said:

"The question before us relates to rights which a quitrent owner never possessed, and of which a freehold owner had been deprived, but for the acquisition or re-acquisition of which (as the case might be) provision was specially made by a clause in the repealed law."

That policy was maintained in the ~~xxxx~~ Act of 1899. Under Section 9 the right of mining for and disposing of minerals continued to be vested in the Crown. Crown land was thrown open to prospecting and mining in Part III of the Act. Private land was thrown open, subject to certain rights of priority in favour of the owner, by the provisions of Part IV, irrespective of the fact that mineral rights had been reserved to the Crown by virtue of the prerogative, by virtue of conditions imposed on freehold grants, by virtue of the land being held under quitrent or by virtue of the provisions of the Act or prior statutes. In other words Part IV of the Act provides

for the acquisition or re-acquisition (as the case might be) of mineral rights by the owner and acquisition of such rights by others "for the more effective supervision of all mining operations and increased revenue from them". All mineral rights were pooled, as it were, and the public - including the owners - were invited to exploit them in the interests of the Colony.

I have come to the conclusion that there is nothing to prevent an owner of land with mineral rights reserved to the Crown from acquiring mining rights on his land. The question then arises whether the provisions of Act 43 of 1899, upon which

13/ appellant .....

appellant relies, have been repealed by Act No. 55 of 1926 (as amended) by necessary intendment.

This latter measure (henceforth called " the Act ") does not expressly repeal the former. Its object as expressed in the long title is "to make further provision for the working of minerals on land alienated by the Government, subject to reservation of minerals to the Crown." It was intended, therefore, to be complementary to prior statutes. In a sense it can be said to be a special Act in that it specially deals with reservations to the Crown of mineral rights. In a sense, however, it is general in that it applies to the whole Union. Where the Act intends to exclude the operation of prior provincial laws, it expressly states that intention. In Section 1 (3) for example, it is provided that "any lessee or licensee of Crown land in the Province of the Cape of Good Hope shall be entitled to the rights granted to lessees and licensees under this Act and to no other, notwithstanding anything in any other law contained."

As Dr. Lushington remarked in The India

((1864), 33 L.J. Adm. 193)

> "What words will establish a repeal by implication it is impossible to say from authority or decided cases. If, on the one hand, the general presumption must be against such a repeal on the ground that the intention to repeal, if any had existed, would have been declared in express terms, so, on the other, it is not necessary that any express reference be made to the statute which is to be repealed. The prior statute would, I conceive, be repealed by implication, if its provisions were wholly incompatible with a subsequent one; or, if the two statutes together would lead to wholly absurd consequences; or if the entire subject-matter were taken away by the subsequent statute."

The same principles must apply to the separate provisions of a prior statute.

There is nothing in the Act which is inconsistent with appellant acquiring prospecting and mining claims on its land under a prior (provincial) law, unless it be the provisions of Section 4. That Section obliges the owner to waive his claims to compensation against the Government. As Craies on Statute Law remarks (3rd Ed. p. 314) :

"If a subsequent statute merely creates an exemption or exception from the operation of a previous statute, or 'modifies its operation by the annexation of a condition,' the previous statute is not necessarily held to be repealed."

But the provisions of Act 55 of 1926 and Act 43 of 1899 in regard to the acquisition of mineral rights by owners are not inconsistent. Under the earlier Act the owner has a precarious right of prospecting, which gives him no protection. In order to get protection he must obtain a prospecting licence and peg off claims. Under the 1926 Act he need not peg off claims at all. If he chooses to exercise the right conferred on him by section ? he has the exclusive right to prospect for reserved minerals on his land. But in consideration of this concession he must waive his right to claim compensation from the Government for damage to his surface rights. The damage contemplated is of course damage caused by others after the land has been proclaimed a public digging; after the owner has failed to exercise his rights; or after a mineral lease has come to an end as contemplated in Section 8.

16/ The .....

The exclusive right to prospect was conceived in favour of the owner. Not only can a person generally waive a right so conceived; the Act contemplates that the owner or his nominees and assignees may fail to exercise, abandon or forfeit such rights.

If an owner does not wish to exercise his rights under Section 2 of the Act, I fail to see on what ground he can be prevented from exercising rights conferred by the unrepealed provisions of Act 43 of 1899 and peg prospecting claims, provided he does not do so on ground to which other persons have acquired rights under either Act.

The provisions of Section 15 (1) of the Act of 1926 only confirm my view as to the proper construction to be placed upon Section 60 of the Act of 1899. If interpreted literally the scheme of the Act would be a farce. Rights acquired under the Act would be so illusory as not to be worth having and no one in his sober senses would spend money and toil in developing the mineral resources so entrenched. What

17/ was .....

was intended seems to me plain. The provisions of the Act are extremely generous to owners. Section 15 (1) was therefore inserted to forestall the contention that the Crown, by consenting to the Bill, had waived its rights to take gravel from quitrent land or to resume mineral rights under the Acts where mineral occurrences are not effectually prospected or exploited by owners or their assignees or to allow farms to be prospected concurrently with the owner by other prospectors where the owner pegs claims under the 1899 Act.

I cannot see how the fact, that there is endorsed against the ~~title~~ title of the Farm Greenwich a waiver under Section 4 (2) of Act 55 of 1926, can affect the issue. Appellant is not claiming a right to retract that waiver. On the other hand he is not bound to accept a favour held out to him by statute.

In my opinion the basic fallacy in the contention of the respondents is contained in paragraph 8 ~~and 9~~ of the replying affidavit where the Secretary for Mines states:

"In view of the provisions of Section 60 of the Natal Mines Act No. 43 of 1899, more particularly as interpreted unanimously by the full Bench of this Honourable Court in the case of Natal Cambrian Collieries v. Durban Navigation Collieries, Ltd., and The Minister of Mines, (1925 N.P.D. p. 27) coupled with the fact that the minerals in the farms Knockbrex and Greenwich are and were at all relevant times reserved to the Crown in terms of the title deeds thereof, I contend that neither the applicant nor its predecessors in title enjoy or enjoyed through any statutory provision or otherwise any legal right to have prospecting or mining claim licences issued to it or them under the provisions of the said Act in respect of such farms.....

It has at all material times been the view of my Department that no persons were entitled, as of right, to take out prospecting or mining claim licences under the provisions of the 1899 Act in any case of land held in Natal with a reservation of minerals to the Crown."

As I have pointed out, the dictum relied upon in the above excerpt was an obiter dictum and quite unnecessary for the decision of that case. The crisp points xxxx which - with respect - were correctly decided in that case were that the owners of such land could not at a price consent, or withhold their consent, to third

parties acquiring claims on such land under the 1899 Act. In the obiter dictum an incorrect interpretation was placed on Section 60.

Two principles of construction are stated by Maxwell (Interpretation of Statutes, 8th Edition pp. 120 and 123) which are pertinent to this case:

> "It is presumed that the Legislature does not intend to deprive the Crown of any prerogative, right or property, unless it expresses its intention to do so in explicit terms, or makes the inference irresistible."

> "The Crown, however, is sufficiently named in a statute, within the meaning of the maxim, when an intention to include it is manifest."

To my mind it is manifest from the provisions of Sections 9, 42 (incorporating the provisions of Part 111 save as otherwise provided) and the provisions of Part 1V of Act 43 of 1899, that it was intended to hold out a promise of rights interfering with those of the Crown, notwithstanding the provisions of Section 60. Where the subject desires to accept such a promise and exercise a right I know of no principle which entitles

the officers of the Crown arbitrarily to withhold such rights.

D.V.H. eeu b.

Centlivres, C.J.
Greenberg, J.A.
Fagan, J.A. } - Concur.