

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

(APPELLATE ~~Provinciale~~ Division.)
Provinciale Afdeling.)

Appeal in Civil Case.
Appel in Siviele Saak.

COMMERCIAL AND INDUSTRIAL HOLDINGS(PTY) LIMITED Appellant,

versus

BRAAMFONTEIN INDUSTRIAL SITES(PTY) LIMITED Respondent

Appellant's Attorney Lovius, Block, M & C. Respondent's Attorney Israel S. S.
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate S. K. M. Advocate Respondent's Advocate H. K. M. Advocate
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on 25. 5. 70
Op die rol geplaas vir verhoor op

3. 4. 5. 7. 8.

TPD

Kommandant: Van der Merwe, in die Hof van Bloemfontein, 25. 5. 70.
Tyd: 9. 40. - 11. 00.
Uitspraak: C. 11. 1.

By sk. 2-6-70 van Rumpff J.A.: -
appellat afgesnede met kots insluitend
kots op twee kassas

REGISTRAR, APPEAL COURT,
GREGGIE, APPELHOOF,
BLOEMFONTEIN.

2-5-70

Bills Taxed.—Kosterekenings Getakseer.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Date.
Datum.

Amount.
Bedrag.

Initials.
Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

COMMERCIAL AND INDUSTRIAL HOLDINGS

(PROPRIETARY) LIMITED Appellant

and

BRAAMFONTEIN INDUSTRIAL SITES

(PROPRIETARY) LIMITED Respondent

CORAM: RUMPF, BOTHA, HOLMES, TROLLIP, JJ.A. et
DE VILLIERS, A.J.A.

HEARD: 25.5.1970. DELIVERED: 2.6.1970

J U D G M E N T

RUMPF, J.A. :

This is an appeal against an order issued by the Full Court of the Transvaal Provincial Division, dismissing an appeal against an order of a single Judge in Chambers, in the Witwatersrand Local Division, in terms of which an application, which the appellant had brought against the respondent, was dismissed with costs. The appellant, being the registered owner of leases of Leasehold Stands Nos. 972 and 973 in the

township/

township of Fordsburg had claimed in its application that the respondent, being the township owner, was obliged to grant to the appellant freehold of the stands against payment of R260.

In order to appreciate the issues between the parties, it is necessary to investigate certain matters concerning the history of the township ~~concerned~~ and to refer to some statutory provisions and correspondence relevant to the relationship between the parties and their predecessors-in-title.

In 1889, the Ford and Jeppe Estate Company Limited acquired the townships of Jeppestown and Fordsburg, both of which were so-called semi-Government townships. Semi-Government Townships were townships owned by individuals and laid out on land proclaimed under the Gold Law, No. 15 of 1898 (T) or any prior law, and because of the rights given by the Government, the Government received a share or interest in the stand licence ^{moneys} ~~or~~ some fixed payment from the township owner under an agreement with him. Previous to the acquisition of the two townships by the company referred to above, the stand licence monies had been collected by the Government but from 1889 onwards they were collected by the Company. According to the papers before us, the/.....

the Witwatersrand Township Estate and Finance Corporation, Ltd. (hereinafter referred to as "the Corporation") became the owner of the two townships in 1897, although the leases in respect of stands Nos. 972 and 973 were entered into between the Corporation and the leaseholders in 1895. In June 1899, a formal agreement was entered into between the original company and the Government of the South African Republic providing, inter alia, (i) that the collection of stand monies should be continued by the company for its own benefit, (ii) that the company would pay the Government £900 as the share of the Government in the stand licence monies, and (iii) that the arrangements would remain in force for a period of ninety-nine years from May, 1887. This agreement was registered in the Registry of Deeds and published in the Staatscourant of the 21st June, 1899. For purposes of the present case the agreement must be deemed to have been entered into between the Government and the Corporation.

On the 1st of January, 1909, the Townships Amendment Act 1908 (Act No. 34 of 1908, Transvaal) came into operation, which in chapter II, dealt with the conversion of leasehold title in certain township stands, including stands

in semi-Government townships, to freehold title. Section 8 provides that:

"Semi-Government township' shall mean any such township as is defined as a private leasehold township, laid out under the provisions of Law No. 15 of 1898 or of any prior law, but in which the Government receives or has been receiving some share or interest in the stand license moneys or some fixed payment from the township owner under an agreement with him";

and that:

"Registered holder' shall mean any person for the time being registered under the provisions of Law No. 15 of 1898 as the owner of any stand or lot in a township, or registered under a lease granted by a township owner; and shall include any person who has entered into an agreement with the township owner for the purchase of the lease of any stand or lot."

Sections 10 (1), 11, 12 (1), 15, 16 and 17 (1) of the Act read as follows:

"10 (1) Notwithstanding anything in any lease or other contract contained, the registered holder of a stand in a semi-Government township shall be required to pay in respect of the share of stand license moneys on the stand which may become due to the Government after the commencement of this Act, such amount only as is provided by sub-section (2), and the amount payable to the Government by the township owner, or the amount/....

amount which the Government is entitled to retain in cases where stand license moneys are collected by the Government, shall be diminished accordingly."

"11 In semi-Government townships, where the Government receives a fixed annual payment and not a specified portion of the stand license moneys, the Government may remit such payment if the township owner offers to grant freehold on terms approved by the Governor."

"12 (1) The registered holder of any stand in a semi-Government township may agree with the township owner for the purchase of the freehold of such stand in the manner and subject to the conditions provided by section fifteen or section sixteen as if such township owner were the owner of a private leasehold township, and, on payment of the sum agreed upon with the township owner together with the sum fixed in section ten, the registered holder shall receive a freehold title to the land comprised in the said stand in the manner and subject to the conditions hereinafter provided."

"15 (1) Where a registered holder of a lot in any private leasehold township whereof the township owner is the owner of the unencumbered freehold, agrees or has agreed with the township owner for the purchase of the freehold of such lot and makes, or has heretofore made, payment ^{on} account thereof, the township owner shall lodge with the registering officer a duplicate

copy of such agreement signed by the parties, unless the said agreement is embodied in the deed of lease registered in the office of the registering officer.

(2) The township owner shall also furnish the registered holder with a receipt in duplicate in the form set forth in the Third Schedule for all payments heretofore or hereafter made in respect of such agreement."

"17 (1) It shall be lawful at any time after the commencement of this Act for any township owner who has offered freehold to registered holders upon terms approved by the Governor, to make written application to the registering officer requesting him to collect, on behalf of the applicant, all stand license moneys or rent due or to become due in respect of stands or lots in such township and all instalments of purchase price due or to become due in respect of the purchase of the freehold of any such stands or lots, and, upon such application, and upon being furnished with all such leases and registers of leases or other title and all books of account showing the sums payable upon each stand or lot in the township as the registering officer may require, such registering officer shall on behalf of such township owner collect such stand license moneys rents or instalments and shall transmit to him the amounts collected either quarterly or half-yearly at the option of such township owner and without making any charge therefor."

Section 18 deals with cases where a township owner has offered freehold terms but continues himself to collect the stand licences. Section 19 reads:

"Any township owner who desires to avail himself of the provisions of either of the last two sections, shall lodge with the registering officer a statement of the terms upon which registered holders may obtain freehold. If such terms are approved by the Governor, a notice shall be published by the registering officer in the Gazette and in a newspaper circulating in the locality, and thereafter any registered holder in the said township may obtain freehold upon the terms contained in the said statement, without entering into any other or further agreement; provided that...."

In 1909 the Chairman of the Corporation addressed a letter to the Rand Townships Registrar in which he stated that the Corporation was prepared to sell the freehold of the stands in all townships owned by it to the registered holders thereof for fifteen years purchase of annual licence monies to be paid in half-yearly payments extending over a period of ten years. The Government was requested, in consideration thereof, to remit the payment of £900 per year then payable by the original township company. In the offer contained in the letter the

Corporation also undertook to keep the above offer to lease-holders open for a period of five years. In a Minute from the then Colonial Secretary to the Minister of Mines this fact was criticised and the statement was made: "In the special case of Jeppestown and Fordsburg, for which provision was made under section II of the Act, I may state that it was certainly intended that the stand holders and not the township owners should benefit by the remission of the £900."

Nothing came of this request by the Corporation until 1932, when fresh proposals were addressed to the Rand Townships Registrar on behalf of the Corporation which by then had adopted the name: South African Townships and Mining Finance Corporation, Limited. The letter, dated 16th May, 1932, containing the proposals reads as follows:

"In accordance with the provisions of Section 11 of Act No. 34 of 1908, my Corporation requests approval of the offer of the Freehold Conversion of their Stands, to the Leaseholders of the Townships of Jeppestown and Fordsburg, for £75. and £65. cash per Stand, equal to 12½ years and 11 years capitalisation, subject to the remission of the Annual Royalty

hereinafter/.....

hereinafter referred to. My Corporation would be agreeable, however, to accept payment on Terms, such to be a cash payment of £10. on signing of the Deeds, and the balance payable over a period of 5 years (approx: at £1.6.6. per month inclusive of interest at 7% per annum) on the Balance of Capital outstanding from time to time. The Leases in those townships expire in both cases on the 31st December 1967.

In the event of such approval being granted, my Corporation trusts that the Government will thereupon remit the Royalty at present paid to it in respect of these Townships, namely £900. per annum. In this connection, may I call your attention to the following facts. According to the Contract between the Government and the Corporation dated 15/6/1899, this annual payment was partly as a share of stand licence monies, and partly as a monetary consideration for the supplying of Police by the Government. At that time there were in Jeppestown 2,042 Leases, and now there are only 1,204; In Fordsburg there were 987 Leases, and now there are only 438; a decrease of 41% in respect of the former and 55% in respect of the latter. The question of payment for police protection is, I think you will agree, now an anachronism, and any portion of the annual payment which might be regarded as consideration for such service ought to be at once eliminated, and as regards the stand licence portion, it must be remembered that if the consideration had been a share of the licence monies, such

share/.....

share would have been decreasing steadily over the whole period owing to conversions, whereas the lump sum has continued unabated up to the present date.

In view of the foregoing, I trust you will see your way clear provided the Government approves of our terms of conversion, to recommend the remission of the royalty."

An extract from the minutes of the Board of Directors of the Corporation, dated 17th May, 1932, and confirmed on the 21st June, 1932, reads as follows:

"ROYALTY - JEPPESTOWN AND FORDSBURG STANDS:

The Chairman reported that renewed endeavours were being made to obtain either a remission of or reduction in the £900. per annum which was paid to the Government for Police protection, and share of stand licences. In connection with the matter, it was proposed that the Corporation should bind itself permanently (i.e. until the termination of the lease) to the Freehold Conversion terms which had been in vogue for the last two or three years. After a short discussion, this proposal was agreed to."

On the 19th May, 1932, the following letter was sent by the Rand Township Registrar to the Corporation:

"I have the honour to acknowledge the receipt of your letter of the 16th instant and to inform you that/.....

that the question therein mentioned will be placed before the Honourable the Minister of Mines and Industries at the earliest opportunity.

I find, on going into this matter, that the special conditions to be embodied in each certificate of conversion to freehold title were approved by minute of His Excellency the Governor-General-in-Council dated 19th August 1909 (No. 2606) and the conditions for Fordsburg were later amended by Executive Council Minute No. 280 dated the 16th February 1910.

I shall be glad if you will advise me whether or not the present proposals will include those portions of Jeppes known as Belgravia and Jeppestown South.

As regards extended terms of payment, it will be appreciated if you will please submit a draft of the agreement of purchase and sale which you intend entering into with the Standholders in each case. This can then be regarded as the basis for negotiation with the Government.

It is to be observed that for the purposes of the Townships Amendment Act 1908 (Act No. 34 of 1908) the Townships of Fordsburg, Jeppestown (including Belgravia) and Jeppestown South are defined in the First Schedule as 'Stand Townships'. They also come within the definition of 'Semi-Government Townships' in Section eight of the said Act and therefore Section twelve thereof applies to them.

Thus when this Section is read together with Section fifteen/....

fifteen it will be seen that it is the duty of the 'Township Owner' to lodge with me a duplicate copy of each agreement of sale and also a duplicate of every receipt issued in the form prescribed in the Third Schedule to this Act.

Will you also please say whether your Company desires to avail itself of the provisions of Section 17 (1) et seq of the Act aforesaid. I am quite prepared to undertake the collection of the stand licence moneys as therein prescribed, for which service there would be no charge against the township owner or the standholders.

As mentioned to Mr. Barker and yourself on Saturday last the 14th instant, it will have to be a condition precedent to the grant of any remission under Section eleven of moneys payable to the Government that the terms of payment for freeholding the stands as distinguished from the special conditions upon which title is granted shall first be approved by His Excellency the Governor-General-in-Council.

I may say here that I am agreeable to recommend the approval of such terms upon the basis of 12½ years and 11 years capitalization, but suggest for your consideration that it might be advantageous to stipulate for 12 years and 11 years respectively.

I am having the previous papers looked up and the old Contracts to which you refer and I hope to be in a position to proceed with the matter very shortly."

On/.....

On the 23rd May, 1932, the Corporation sent a reply in the following terms:

"I beg to acknowledge receipt of your letter No.M.T.559/32 of 19th instant, and thank you for the trouble you have taken in this matter.

The present proposal will embrace those portions of Jeppes known as Belgravla and Jeppes South. For your information, there are only four Leasehold Stands remaining in the latter portion. I enclose herewith draft Deeds of Agreement of Purchase and Sale in connection with both Fordsburg and Jepestown.

I note that it is our duty to lodge with you a duplicate copy of each agreement of sale, and also a duplicate of every receipt issued, and this will be done. I may mention that my Corporation has been doing this for some considerable time.

My Corporation does not at present wish to avail itself of the provisions of Section 17(1) et seq of the Act.

My Corporation quite understands that it will have to be a condition precedent to the grant of any remission under Section eleven of moneys payable to the Government that the terms of payment for free-holding the stands as distinguished from the special conditions upon which title is granted shall first be approved by His Excellency the Governor-General-in-Council.

My/.....

My Corporation wishes to adhere to the terms of capitalisation mentioned in our letter to you of 16th Instant."

A Minute was addressed by the Rand Townships Registrar to the Secretary of Mines and Industries, Pretoria, and headed: "Memorandum for Council re Stands in Jeppestown (including Belgravia), Jeppestown South and Fordsburg Townships" and it contains, inter alia, the following statement:

"The South African Townships Mining and Finance Corporation, Limited the present freehold owner and also the 'township owner' in respect of all three townships, is prepared to offer terms to the leaseholders to enable them to convert their titles to freehold, the terms being £75. for Jeppestown (including Belgravia) and Jeppestown South stands equal to twelve and one-half years' capitalisation of the licence money, and £65. for Fordsburg stands equal to eleven years' capitalisation of licence money. The Corporation would be agreeable to accept payment on terms, such to be a cash payment of £10. on signing the deeds and the balance payable at the rate of £1.6.6. per month inclusive of interest at the rate of seven per centum per annum on the balance of capital outstanding from time to time.

In submitting these terms for approval, the Corporation has made application that, in the event of the terms/.....

terms of conversion receiving the approval of the Government, the annual payment now made in respect of Jeppestown and Fordsburg Townships should be remitted, supporting the request with the statement, that, whereas since the promulgation of the Townships Amendment Act 1908 (Act No. 34 of 1908 of the Transvaal) 41 per cent. of the leases in Jeppestown and 55 per cent. of the leases in Fordsburg have been converted to freehold, no abatement has been made in the fixed payment of £900, notwithstanding the fact that had the payment taken the form of a share of the licence moneys, such share would have been subject to a steady decrease in amount.

In view of the fact that the policy in general of Act 34 of 1908 of the Transvaal is that standholders should benefit by the remission of the Government's share of licence money and that the Corporation has collected and will continue to collect the full licence money on all stands not converted, it is not recommended that a total abatement of the fixed sum is justified."

On the 19th December, 1932, a letter was sent by the Rand Townships Registrar to the Corporation containing the following:

"With reference to your letter of the 16th May last and subsequent correspondence relative to the above subject, I have the honour to inform you that His

Excellency/.....

Excellency the Governor-General, under date the 12th instant, has been pleased to approve of the following:

- (a) that the terms of payment from the freehold of stands in the Townships of Jeppestown (including Belgravia) and Jeppestown South, situate on the Farm Doornfontein No. 24 in the District of Johannesburg, shall be fixed at the rate of £75 per stand and in the Township of Fordsburg situate on the farm Turffontein No. 21 in the District of Johannesburg, at the rate of £65 per stand;
- (b) that the annual payment of £900 in respect of the Townships of Jeppestown and Fordsburg, due in terms of an Agreement registered in the Deeds Office, Pretoria on the 19th June 1899, under No. 263 of 1899, shall be periodically abated in the following manner:
 - (i) from the date hereof by deduction of an amount which bears to the total sum of £900 the ratio borne by the number of stands converted from leasehold to freehold since the 1st January 1909, to the number of stands held in leasehold on the 31st December 1908;
 - (ii) the adjustments in the amount payable under the Agreement to be made every six months, for which purpose payments under the Agreement to be made and accepted half-yearly instead of yearly;
 - (iii) all payments under the Agreement to cease when no stands in the Township are held under leasehold;

And further, under the powers vested in him by subsection (1) of section sixty-two of the said Townships Amendment Act 1908, to approve that the certificates of Freehold Title to be issued under Section sixty

of/.....

of the said Act in respect of Stands in the said Townships shall be subject to the conditions approved in Executive Council Minute No. 2606, dated the 19th August 1909, and as regards stands in the Township of Fordsburg, amended by Executive Council Minute No. 280 dated 16th February 1910.

I shall be glad, therefore, if you will kindly furnish me with information regarding the number of stands still held in leasehold and the distinctive numbers of those converted to freehold since 1st January 1909, in order that the amount of the abatement may be arrived at."

On the 21st of December receipt of this letter was acknowledged by the Corporation.

The arrangement between the Government and the Corporation was not advertised or proclaimed in any newspaper or official Gazette and no steps were taken, either by the Government or by the Corporation to inform the leaseholders of the terms thereof.

The Corporation adhered to the prices for conversion referred to above until 1936. In 1937, however, the Corporation raised the prices for conversion without the knowledge of the Government and in the meantime it obtained the periodical benefit of the abatement of the £900 annual payment.

In/.....

In 1941 the respondent purchased the township of Fordsburg from the Corporation and the following appears, inter alia, in the Deed of Transfer No. F 2475/41:

"Subject to the following special conditions (i), (ii), (iii), (iv) and (v), which are imposed for the benefit of and shall be enforceable by the said SOUTH AFRICAN TOWNSHIPS, MINING AND FINANCE CORPORATION, LIMITED, its successors or assigns, and in so far as any owner of a Stand or Lot or Erf, or Portion of a Stand or Lot or Erf in the aforementioned Township (of which the property hereby transferred forms a portion) is able to exercise rights such as are described in the following special conditions (i), (ii), (iii) and (iv), such special conditions are also imposed for the benefit of and shall be enforceable by any such Owner:

(i)

(ii)

(iii)

(iv) The Transferee assumes all the rights and obligations of the SOUTH AFRICAN TOWNSHIPS, MINING AND FINANCE CORPORATION, LIMITED, and/or its predecessors in title in respect of all and any agreements whatsoever entered into by the SOUTH AFRICAN TOWNSHIPS, MINING AND FINANCE CORPORATION/....

CORPORATION, LIMITED, and/or predecessors in title with the Union and Provincial Government and with any Local Authority and with any other person or persons, relating to the above described land and/or the Township of which it forms a portion and/or the land on which the Township is situated."

The abatements continued until the end of 1945 when they were stopped as a result of the appointment of the Witwatersrand Land Titles Commission (the Feetham Commission) in January, 1946. The respondent had not been advised of the existence of the 1932-arrangement between the Government and the Corporation, and had continued to receive from the Government the benefits of the abatement until some time in 1950. On the 12th June, 1950, the respondent was advised by the Rand Townships Registrar that as from the 1st September, 1936, when the first breach occurred, the township owner was not entitled to further abatement and the township owner's liability for each subsequent payment was fixed at the amount to which the half-yearly payment had been abated. The respondent was also advised that the Government was entitled to receive from it an amount of £3339.4.6 for the 18 half-yearly periods as from

the 1st January, 1941, to the 31st December, 1949. As the amounts which had already been paid amounted to £1338.5.5. the Government called upon the respondent to pay the balance of £2000.19.1. immediately. The respondent was also advised that, in future, half-yearly payments would have to be made at the rate of £185.10.3. The respondent accepted this position and paid the amount demanded by the Government and continued to make the periodic payments at the stipulated rate until the 30th June, 1952, when payments were progressively reduced in terms of sec. 10 (1) of the Conversion of Leasehold to Freehold Act, 1952 (Act No. 61 of 1952), which came into operation on the 1st July, 1952.

On the 11th August, 1966, leasehold title in stands Nos. 972 and 973 ^{was} ~~were~~ formally transferred to the appellant who thereafter claimed freehold title from the respondent against payment of R130 per stand. The respondent disputed this claim and instituted proceedings in the Court of first instance. Although the leases in question expired on the 31st December, 1967, the proceedings in the Witwatersrand Local Division had been instituted before that date, namely/.....

namely in October, 1967, so that the expiry of the leases did not affect the merits of the application before the Court of the first instance.

The appellant advanced the contention in both Courts below that on a proper construction of sec. 11 of the 1908 Act, it must necessarily be implied that once the Government had undertaken to grant a remission in terms of sec. 11, the leaseholder had a statutory right to enforce the terms of the arrangement arrived at between the Government and the township owner. It was submitted that in terms of sec. 11 the Government was empowered when it received a "fixed annual payment" to "remit such payment if the township owner offers to grant freehold on terms approved by the Governor". A reference to the word "offer" in the Oxford English Dictionary would show that "offer with infinitive" means "to propose, or express one's readiness (to do something) conditionally on the assent of the person addressed." If this meaning is taken, so it was argued, what was contemplated was that the township owner should convey to the Government an expression of its readiness to grant conversion on certain terms, which the Government was

to be invited to approve, and that the Government, if it signified its approval, should remit the annual payment to which it was entitled. On the Government conveying its approval of the proposed terms, and granting remission, there would be an acceptance of the "offer" made by the township owner to the Government, and a contractual bond of a permanent nature would be established against them. It was further submitted that that did not exhaust the full force and effect of the word "offer"; it further connoted that on conclusion of that bond the township owner became obliged to offer to the leaseholders conversion of their titles to freehold on the approved terms, or alternatively, the bond necessarily implied that each leaseholder thereupon became entitled to enforce conversion on those terms. For otherwise the section would be rendered nugatory. Both Courts below rejected the contention that under sec. 11 the appellant had acquired a statutory right, the approach of the Court a quo being as follows:

"The nature and effect of Section 11 is ascertainable not only by an analysis of the Section itself and its terms, but also and more particularly by reference to Section 19 and Sections 17 and 18 of the Act.

Section 19 refers to the situation where a township owner willing to permit conversion desires to avail himself of the provisions of Sections 17 and 18.

The Section enables the Governor to approve of the terms/.....

terms upon which the township owner is willing to allow registered holders to obtain freehold and provides for notice in the Gazette and a local newspaper. It contains an effective means of obtaining freehold on demand by a lessee. After the formalities provided for in the Section have been complied with, any registered leaseholder in the township is entitled to obtain the freehold of his stand upon the terms contained in the statement, "without entering into any further or other agreement".

Section 11, on the other hand, is an enabling section empowering the Governor to remit stand licence moneys on certain conditions and no more. It does not either expressly or by implication confer any rights on leaseholders- it does not give leaseholders the right to make any demand; it merely says 'if the township owner makes the offer'."

On behalf of the appellant it was submitted that sec. 19 referred to different circumstances from those of sec. 11, that sec. 19 did not refer to a case in which the Government itself gave up any rights as a quid pro quo for the carrying out of an agreement for conversion and that sec. 11 was intended to give a real benefit to the leaseholder.

As an alternative argument, the appellant contended that the arrangement, entered into between the Government

and the Corporation in 1932, was an agreement intended to be for the benefit of the leaseholders in the township and that in terms of the agreement any leaseholder could accept the benefit of the agreement and enforce it. Although the Court a quo also rejected this contention, the Court of the first instance came to the conclusion that the arrangement in 1932 was an agreement in favorem tertii, but it also held that, in the circumstances, appellant had failed to show any privity of contract between the respondent, the Government and the appellant in respect of the 1932 agreement. The appellant for purposes of argument adopted the reasoning of the Court of first instance as to the existence of the agreement for the benefit of leaseholders. It reads as follows:

"The 1932 agreement must obviously be construed in the light of the provisions of Section 11, which, as I have already pointed out, apply to such township owners of semi-Government townships as were, by agreement, obliged to pay a fixed annual royalty to the Government in lieu of licence moneys. The purpose of this section was plainly to encourage such township owners to offer their leaseholders freehold title on terms and at prices approved by the Government. The

section/.....

section enabled the Government to ensure that the conversion terms would be binding upon the owners once they have received and accepted the benefit of a remission for abatement of the annual royalty. The provision requiring the Governor's approval of the proposed terms of conversion, clearly indicates that the Legislature wanted to secure and safeguard the interests of the leaseholders. A township owner, seeking a remission under Section 11, is obliged to come to an agreement with the Government as to the terms of conversion to be offered to the leaseholders, and, in such a case, the Government would naturally want to be satisfied that the rights of the leaseholders to acquire ownership of their respective leasehold stands, on reasonable terms, have been adequately safeguarded. Anything less would be quite futile and would defeat the real purpose of Section 11. In terms of the 1932 agreement, the Government undertook to abate the annual payment on a certain basis and, as a quid pro quo, the Corporation agreed to grant its leaseholders freehold title against payment of the prices stipulated in the agreement. I am quite satisfied that the Government agreed to the immediate partial remission of the royalties and the gradual process of future remissions only because it had succeeded in obtaining what it considered to be satisfactory terms of conversion for the leaseholders.

Mr. Rothschild has referred to the absence of any provision in the agreement for the leaseholders to

be/.....

be informed of its terms and he has suggested that it shows that the parties did not intend to contract for the benefit of the leaseholders.

In my view, a more probable explanation for the absence of any such provision, is that the parties simply took it for granted that the Corporation would, in due course, advise its leaseholders of the contents of the agreement. However, I have no doubt that, notwithstanding the absence of any such provision, the agreement was clearly designed to enable the leaseholders, by the adoption of its terms, to acquire freehold title from the Corporation at the specified prices stipulated in the agreement."

In order to arrive at a true construction of sec. 11 of 1908 and of the arrangement between the Corporation and the Government in 1932, it is necessary to consider the legal position of the township owner, the leaseholder and the Government under the Gold Law, No. 15 of 1898 (T), and the 1908 Act. The Gold Law enabled the Government, inter alia, to establish stand townships either on Government or on private land, whether proclaimed or not. The first part of sec. 93 of the Gold Law read as follows:

"De Regeering zal de macht hebben om, wanneer het publiek belang zulks vereischt, private geproclameerde gronden/...

gronden, in overleg met den eigenaar, indien mogelijk, in standplaatsen te doen opmeten en als standsdorpen te doen proclameeren. Het voorkeurrecht op deze standplaatsen zal door de Regeering publiek verkocht worden en de opbrengst van den verkoop, na aftrek der onkosten, zal den geregistreerden eigenaar of eigenaren van den grond uitbetaald worden. Van de op zulke standsdorpen ontvangen standlicentiegelden, zal den Staat de helft en den geregistreerden eigenaar of eigenaren de andere helft toekomen."

The last part of sec. 93 provides:

"Het voorkeurrecht op standplaatsen gelegen op gouvernementsgronden zal bij publieke veiling moeten worden verkocht ten bate van den Staat.

Het voorkeurrecht op standplaatsen in standsdorpen of gouvernementsgronden en op private geproclameerde gronden vermeld in de eerste alinea van dit artikel, wordt toegekend voor 99 jaren van af den dag van toewijzing, en wordt behouden zoolang door den houder geregeld opbetaling geschiedt van de verschuldigde standlicentiegelden.

Dit voorkeurrecht geeft geen recht tot compensatie indien de publieke delverijen, waarop de standplaatsen gelegen zijn, binnen den tijd van 99 jaren gesloten mochten worden.

De wijze van verkoop en van betaling van dit voorkeurrecht zal door de Regeering geregeld worden."

The leasehold agreements did not contain any provisions enabling the leaseholder to claim freehold title or the township owner to foreclose on a non-paying leaseholder. In terms of the 1899 agreement between the Corporation and the Government of the South African Republic, the Corporation undertook to pay to the Government the amount of £900 for a period of ninety-nine years as from 1887, as the Government's share of the stand licence monies. It seems clear that under this agreement the parties did not contemplate any conversion from leasehold to freehold and no provision was made for the reduction of the amount payable in the event of any such conversion. One of the objects of the 1908 Act obviously was to remove the problems that would arise with regard to any future development of townships, if leaseholders were not given the opportunity to claim freehold. The object of the Act is stated to be:

"To amend the Townships Act 1907, to provide for the establishment of New Townships on Proclaimed Land and in Municipalities, and to effect conversion of title in certain township lots to freehold."

In Chapter 11 of the Act three classes of existing leasehold townships were dealt with, namely, Government townships/.....

townships, private leasehold townships and semi-Government townships. A definition of each is given in sec. 8. Section 9 provided by what manner of payment standholders in Government townships would become entitled to obtain freehold titles to their stands. Section 10 provided that in the case of those semi-Government townships in which the Government received a share of the stand licence moneys the standholder was entitled to obtain relief from future payment of the portion of his stand licence money which represented such share in accordance with the provisions applicable under sec. 9 to stand licence moneys in Government townships. Sec. 11 empowered the Government to remit payment of a fixed annual amount if the township owner offered to grant freehold on terms approved by the Governor. Section 12 dealt with an agreement between the township owner and leaseholder in a semi-Government township to convert in the circumstances referred to in secs. 15 or 16. Sections 17 and 18 dealt with the case of a township owner who had offered freehold to registered holders upon terms approved by the Governor and who wanted the licence moneys to be collected by

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the registering officer or who wanted arrear licence money to be dealt with in terms of sub-sections (2) and (3) of sec. 17. Section 19 provided that a township holder who wanted to avail himself of the provisions of secs. 17 and 18 should lodge with the registering officer a statement of the terms upon which registered holders might obtain freehold, and if such terms were approved by the Governor that a notice should be published in the Gazette and a local newspaper and that "thereafter any registered holder in the township may obtain freehold upon the terms contained in the said statement without entering any other or further agreement." There were no provisions in the Act making it compulsory for the township owner to grant freehold, without any previous agreement, save and except the provisions in sec. 9 which dealt with leaseholders in a Government township. Section 9 (1) reads:

"From and after the commencement of this Act the stand license moneys payable on any stand in a Government township before the commencement of the Act shall continue to be payable, but the registered holder shall have the right subject to the provisions of this Act to obtain a freehold title thereto in manner/.....

manner provided by this Act either-

- (a) on payment, of the sum calculated as shown in Table 'A' of the Second Schedule to this Act; or
- (b) after having paid stand license moneys accruing after the commencement of this Act in respect of such stand for the number of months shewn in Table 'B' of the said Schedule."

The position is therefore that as far as leaseholders in a Government township were concerned, a right to obtain freehold was given to them by the Act. In sec. 10 a direct benefit is also given to leaseholders who became freehold owners. Not wishing to compel township owners to convert, the legislature made certain provisions to encourage township owners to agree to conversion. And that inducement is contained in sec. 11 and in sec. 12 read with secs. 15 and 16. It would seem therefore, that the object of the legislature was to induce both leaseholders and township owners to effect conversions and that the legislature sought to achieve that result in the general public interest for "the welfare of a city is best established when its people, in their corporate capacity, control the land upon which each individual lives" (see Report of the Financial Relations Commission (1906) quoted in the Feetham Commission Report, 1947, the relevant part of which was handed in by consent).

In order to ascertain whether there is an implied statutory right given to leaseholders in sec. 11, one has/.....

has to look at the words of the section and at its context in the Act. According to the wording of the section, it merely serves to empower the Government to remit the "fixed annual payment" when the Government approves of the terms on which a township owner is prepared to convert from leasehold to freehold. I do not think that the word "offer" in the section has the connotation suggested by the appellant. If it had, one would have expected the section to provide for publication of the offer and the terms approved of, as was done in sec. 19. I think the word "offer" simply connotes "is prepared to offer to the leaseholders".

The context of the Act shows that the legislature envisaged that contracts would be entered into between the township owner of a private leasehold township or the owner of a semi-Government township and the leaseholder and only when the provisions of sec. 19 apply, was a right given to obtain freehold "without entering into any other or further agreement". I agree, therefore, with both Courts below that the legislature did not intend in sec. 11 to grant a statutory right to leaseholders to claim conversion when the Government approved of

the terms offered by the township owner and granted a remission.

Having regard to the meaning to be given to sec. 11 of the 1908 Act, as decided above, it is necessary to consider whether the Corporation and the Government in 1932 intended to enter into an agreement for the benefit of the leaseholders, in the sense that the parties agreed that on remission being granted by the Government, the leaseholders would be entitled, as of right, to claim conversion on the terms approved of by the Government.

The first paragraph of the letter from the Corporation to the Rand Townships Registrar, dated 16th May, 1932, reads as follows:

"In accordance with the provisions of Section 11 of Act No. 34 of 1908, my Corporation requests approval of the offer of the Freehold Conversion of their Stands, to the Leaseholders of the Townships of Jeppestown and Fordsburg, for £75. and £65. cash per Stand, equal to 12½ years and 11 years capitalisation, subject to the remission of the Annual Royalty hereinafter referred to. My Corporation would be agreeable, however, to accept payment on Terms, such to be a cash payment of £10. on signing of the Deeds, and the balance payable over a period of 5 years (approx: at

£/.....

£1.6.6. per month inclusive of interest at 7% per annum) on the Balance of Capital outstanding from time to time. The Leases in those townships expire in both cases on the 31st December 1967."

The word "offer" in this paragraph cannot refer to an offer made to leaseholders in the letter. It must refer to an offer which the Corporation is prepared to make. Although the prices are referred to as £75 and £65 cash per stand, the Corporation states that it would be agreeable to accept terms, namely a cash payment of £10 on signing of the Deeds and the balance payable over a period of 5 years. This, in my view, is a clear indication that the Corporation contemplated that it would, after getting the remission, conclude the necessary ^{contracts} ~~deeds~~ and allow terms to leaseholders who wanted to pay in instalments.

The letter also draws attention to the fact that the numbers of leases in Jeppestown and Fordsburg had decreased by 41% and 55% respectively and that if the consideration had been a share of the licence monies, such share would have decreased owing to the conversions, whereas the sum of £900 had continued unabated. This fact indicates that a

remission in the present case would constitute a benefit to

the/.....

the Corporation and would serve as an inducement to the Corporation to allow conversion on reasonable terms.

The letter ends with a request to recommend the remission, provided the Government approves of the terms of conversion.

There is nothing in the letter that suggests that the Corporation intended to enter into an agreement with the Government for the benefit of the leaseholders. On the contrary, the reference to payment to be accepted in instalments suggests that the Corporation had in mind terms to be discussed between it and the leaseholders after remission was agreed upon. The fact that on the 17th of May, i.e. after the letter of the 16th May, the Board of Directors of the Corporation decided that the Corporation would bind itself permanently to the "Freehold Conversion terms which had been in vogue for the last two or three years" does not, in my view, affect in any way its intention expressed in the letter of the 17th May.

In the letter from the Rand Townships Registrar dated 19th May, 1932, there is no suggestion that the agreement, if entered into, will be one for the benefit of leaseholders.

The/.....

The Corporation is requested to submit "a draft of the agreement of purchase and sale which you intend entering into with the Standholders in each case". This is an indication that the Registrar realised that the Corporation intended, after remission is agreed upon, to enter into a contract with the leaseholders in each case, and it negatives an inference that the parties intended the arrangement between them to be an agreement containing an actual offer to the leaseholders. In this letter the Corporation is also requested to say whether it desired to avail itself of the provisions of sec. 17 of the Act. If the Rand Townships Registrar had understood the Corporation to have the intent to enter into an agreement for the benefit of the leaseholders he would, I think, at that stage have raised the matter of the publication of the terms of such agreement because sec. 17 envisages publication of the approved terms. The Corporation in its reply of the 23rd May, 1932, stated that it did not "at present" wish to avail itself of the provisions of sec. 17 of the Act and it enclosed draft deeds of agreement of purchase and sale.

At/.....

At this stage the "memorandum for Council", quoted above, must be referred to. It contains the following statement: "The South African Townships, Mining and Finance Corporation, Limited, the present freehold owner and also the "township owner" in respect of all three townships is prepared to offer terms to the leaseholders" Here, again, the suggestion is not that the Corporation is actually offering terms to the leaseholders in the letters which it had sent to the Registrar, but that it was prepared to make offers to the leaseholders. There is also the following statement: "In view of the fact that the policy in general of Act 34 of 1908 of the Transvaal is that standholders should benefit by the remission of the Government's share of licence money and that the Corporation has collected and will continue to collect the full licence money on all stands not converted, it is not recommended that a total abatement of the fixed sum is justified." The benefit to the leaseholders of a partial abatement would consist of the inducement to the Corporation to proceed with its intention to convert on the terms approved by the Government rather than to convert on its own terms, which again indicates that the

Council was informed, in effect, that although the Corporation expressed the intention to convert on the approved terms it might not do so.

The final letter from the Rand Townships Registrar is the one dated 19th December, 1932. It contains the terms approved of for conversion and the particulars of abatement of the annual payment of £900. There is nothing in this letter which suggests that an agreement for the benefit of the leaseholders was concluded. What is of significance, in my view, is the condition that the "terms of payment shall be fixed at the rate of £75 per stand.... and £65 per stand." There is no reference to a cash payment and, having regard to what the Corporation indicated in the letter of the 16th May, 1932, as to its willingness to allow payment to be made in instalments, the Corporation is now left at liberty either to demand cash or to allow instalments. That, again, is quite inconsistent with an intention that leaseholders would immediately be entitled to claim conversion on the receipt by the Corporation of this letter.

It/.....

It must be accepted that the provisions of secs. 9 and 10 of the Act directly benefited leaseholders. As far as leaseholders in semi-Government townships were concerned, however, no direct benefit was intended although in a sense sec. 11 was beneficial to leaseholders because it was thereby intended to encourage township owners to agree to conversion on reasonable terms. The 1932 arrangement was arrived at in pursuance of the provisions of sec. 11. To succeed, the appellant must not only show that the 1932 arrangement was beneficial to the leaseholders but that the parties to the arrangement intended to enter into an agreement which would contain an offer to the leaseholders. For the reasons set out above, I am of opinion that the documents to which I have referred, do not disclose such an intention and it cannot be said, therefore, that the 1932 arrangement was an agreement in favorem tertii.

The respondent in both Courts below, and in this Court, advanced some alternative arguments. It was submitted that even if there had been an agreement for the benefit of the leaseholders, the appellant had no rights

thereunder/.....

thereunder against the respondent who was not a party thereto, alternatively, that the agreement had been terminated by the original parties thereto. In view of the conclusion to which I have come that there was no agreement for the benefit of the leaseholders, it is not necessary to deal with those arguments.

The appeal is dismissed with costs, such costs to include the costs of two counsel.



RUMPF, J.A.

BOTHA, J.A.

HOLMES, J.A.

TROLLIP, J.A.

DE VILLIERS, A.J.A.

} Concurring.