89/89

Case No 597/87
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

KLOOVAL INVESTMENTS (PTY) LIMITED	First Appellant
RIETWINKELS (PTY) LIMITED	Second Appellant
KLOOFHANDELSREGTE (PTY) LIMITED	Third Appellant

and

THE MINISTER OF ECONOMIC AFFAIRS AND TECHNOLOGY	First Respondent
KLOOF GOLD MINING COMPANY LIMITED	Second Respondent
MANUEL PEREIRA DA SILVA	Third Respondent

Coram: JOUBERT, BOTHA, VIVIER, KUMLEBEN JJA et F H GROSSKOPF JA.

Heard: 2nd MAY 1989.

Delivered: 24 AUGUST 1989.

J U D G M E N T

VIVIER JA.

VIVIER JA:

The second respondent is the registered holder of a mining lease granted over a joint area under sec 20 bis (3) of the Precious and Base Metals Act 35 of 1908 ("the Gold Law") on the farms Elandsfontein No 346, Libanon No 283, Doornkloof No 348, Doornkloof No 350, Leeudoorn No 351 and Rietfontein No 349 on the Far West Rand. The mining lease was originally granted on 23 August 1967 by the Government to West Witwatersrand Areas Ltd, the owner of the mineral rights of the area in question, who subsequently ceded the lease to the second respondent. Both the lease and the cession were duly registered. West Witwatersrand Areas Ltd thereafter changed its name to Gold Fields of South Africa Ltd. The second respondent carries on gold mining on the area in question, to which I shall refer as the mining ground. The first appellant is the registered freehold owner of a portion of the mining ground viz portion 25 of the farm Rietfontein No 349, to which portion I shall refer as the Klooval property.

During the early part of 1967 and in consequence of an application by first appellant, trading site No 42 on the Klooval property was set apart in first appellant's favour under sec 5(5) ter of the Trading on Mining Ground Regulation Act 13 of 1910 (T) ("the 1910 Act"). Sub-sec 5(5) was amended at various times, by sec 1 of Act 10 of 1924, by sec 49 of Act 36 of 1934, by sec 6(2) of Act 20 of 1941 and by sec 4 of Act 18 of 1955. I will deal with the effect of these amendments more fully later. First appellant was thereby authorised to carry on the business of "a general dealer, butcher and keeper of an eating-house for Bantu" on the said trading site.

I shall refer to these three businesses as the triad. Between them the three appellants are the vested holders of the aforesaid trading rights which they have exercised for more than twenty years. The third respondent is the registered owner of another portion of the mining ground viz portions of the farms Doornkloof No 350 and Rietfontein No 349. Third respondent's property is in close proximity to the Klooval property.

Both the Gold Law and the 1910 Act were repealed by the Mining Rights Act 20 of 1967 ("the 1967 Act") which came into operation on 1 October 1967. Like its precursors the 1967 Act contained elaborate provisions (in chapters X to XV, sections 90 to 142) for the control of trading or the carrying on of business on proclaimed land or land held under mining title. Sec 139(1) of the 1967 Act generally prohibited any trade or business on proclaimed land or land held under mining title except upon a recognised stand, trading stand or trading site.

On 12 August 1985 the third respondent applied to the Minister of Economic Affairs and Technology ("the first respondent") to be exempted, in terms of sec 158 of the 1967 Act, from the provisions of chapters X to XIV and sec 139(1) of that Act in respect of a certain area of his land situated on the farm Doornkloof No 350. The purpose of the application was to enable the third respondent to commence trading on his land. The application for exemption was amplified and widened in a letter dated 30 June 1986 addressed to first respondent. The first respondent granted the application and a notice appeared in the Government Gazette of 19 September 1986 which exempted the third respondent from the provisions of chapter X and sec 139(1) of the 1967 Act in respect of the land mentioned in the application.

The appellants thereupon applied on notice of motion to the Transvaal Provincial Division for an order declaring invalid the first respondent's grant of the exemption on a number of grounds. The application was supported by Doornkloof Winkels (Edms) Bpk and Webco Winkels (Edms) Bpk, both of which carry on the triad businesses on the mining ground. Neither the first respondent nor the second respondent opposed the application, although an affidavit deposed to by the first respondent was filed by the third respondent in support of his opposition to the application. The matter came before GOLDSTONE J who dismissed the application with costs but granted leave to the appellants to appeal to this Court.

Before considering the provisions of the 1967 Act and those of its precursors relating to the control of trading and the carrying on of business on proclaimed land and land held under mining title, it is necessary to deal briefly with the legal position governing the use of the surface of such land with particular reference to the respective rights of the holder of the mining title and the owners of the surface. In terms of sec 20 bis (5) read with sec 19(11) of the Gold Law, the second respondent's mining lease was a mining title for all purposes of the Gold Law or "any other law" and was registrable as such in the office of the Registrar of Mining Titles. Upon registration the mining ground became deemed to be "proclaimed land" in terms of sec 26 bis of the Gold Law. The mining ground was thus both land held under mining title and proclaimed land under the Gold Law (cf West Driefontein Gold Mining Company Ltd v Brink and Others 1963(1)

SA 304 (W) at 307 D-E). It retained its character as such for the purposes of the 1967 Act, which provides in sec 188 that everything done and all rights acquired or conferred under the repealed legislation are, save as otherwise provided in the 1967 Act, deemed to have been done, acquired or conferred under the corresponding provisions of the 1967 Act. Sec 1 of the 1967 Act defines "proclaimed land" as land which has been proclaimed as a public digging in terms of sec 39 or which is proclaimed land by virtue of the provisions of sec 40. I shall return to sec 40 later. The expression "mining title" was first used in the Gold Law which specified the different rights constituting mining title. The 1967 Act defines mining title in general terms to mean "any right to mine granted or acquired under this Act, and any other right to mine granted or acquired under any prior law

and existing at the commencement of this Act, but does not include a right to mine for precious stones".
The provisions of the 1967 Act relating to the use and disposal of the surface of mining land apply equally to both proclaimed land and land held under mining title.

The basic policy of the Legislature relating to the use and disposal of proclaimed land and land held under mining title is expressed in sec 90(1) of the 1967 Act which is substantially similar to sec 68(1) of the Gold Law. Sec 90(1) provides in clear terms that the right of disposal over the surface of proclaimed land and land held under mining title is reserved to the State for the purposes of the Act or any other law, and that, save as is specially otherwise provided in the Act, the surface of proclaimed land

and land held under mining title shall not, without the written permission of the Mining Commissioner, be used otherwise than for mining.

This policy has remained consistent since the earliest statutes dealing with mining for precious metals in this country. So, for example, sec 15 of Act 7 of 1874 provided that in respect of privately owned land "het geheele bestuur, beide van handel en delvings belangen" rested with the Government. And in Greathead v Transvaal Government and Randfontein Estate and Gold Mining Co Ltd 1910 TPD 276 INNES CJ, dealing with the policy and scope of the Gold Law of 1889 and its successors, said at p 288 :

> "So far as the surface was concerned, the exclusive rights of the owner were recognised to portions of it, such as his werf, his

> garden, his cultivated lands and so on; but, subject to those reservations, the Government had in effect the control of the surface for purposes connected with the industry, and the welfare of the population which it attracted."

In West Driefontein Gold Mining Company Ltd v Brink and Others, supra, TROLLIP J dealt with the legal metamorphosis in the ordinary proprietary rights of a surface owner of land resulting from proclamation as follows (at pp 307 in fine - 308 C).

> "In the Transvaal, on and during such proclamation, the ordinary proprietary rights of the freehold owner are suspended, and the only rights and benefits that he is entitled to are those conferred by the Gold Law or any other special law. In so far as the surface of the land is concerned, those rights under the Gold Law are limited to the use of his homestead,

buildings, cemeteries, kraals, certain cultivated lands and water, reserved to him on proclamation of the land (secs 23 and 24 bis); and under the Mine Trading Act, 13 of 1910, as amended by Act 18 of 1955, to the use of a trading site which was being used when the mining title was acquired (sec 5(5) ter thereof). The rights in the remainder of the surface vest in and are at the disposal of the State, to be allocated by it or its officials to the freehold owner, the holder of the mining title or lease, or other persons by means of permits, licences or certificates for such purposes of mining or other purposes as the Gold Law or any other law allows (see Chaps IX and X of the Gold Law and the Trading on Mining Ground Regulation Act, 13 of 1910). That applies, of course, too, to trading rights on the surface (see Chap X of the Gold Law and Act 13 of 1910)."

See also Johannesburg City Council v Crown Mines Ltd 1971(1) SA 709 (A) at 721 C-G.

As regards trading rights on the surface, sec 82 of the Gold Law contained a general prohibition against trading upon ground held under mining title except upon a stand mentioned in sec 77 or a stand for which a certificate was granted under the Gold Law. Sec 77 dealt with stands granted under Law 15 of 1898 or prior laws. Sections 83 to 96 of the Gold Law provided for the grant of trading stands on which the only business permitted was that of "a general dealer or keeper of a kaffir eating-house". Sec 96 made it a criminal offence to carry on any trade or business on proclaimed land without the statutory permission, licence or certificate. Sec 97 prohibited the person or company mining the proclaimed land or land held under mining title from being directly or indirectly interested in the carrying on of any trade or business thereon.

Section 2 of the 1910 Act prohibited the carrying on of any trade or business upon ground held under mining title except (a) upon a stand mentioned in sections 77 or 79 of the Gold Law (i e stands under prior laws or industrial stands); (b) trading stands (i e those granted under the Gold Law), and (c) trading sites (i e those granted under the 1910 Act). Like the Gold Law, the 1910 Act confined the type of business allowed on such stands or sites to the original two of the triad. Act 18 of 1955 completed the triad by adding a butchery business. Sec 5(1) of the 1910 Act introduced provisions for the selection of sites for trading on mining ground whenever the Minister was of the opinion that additional trading facilities were required. Sub-sec 5(5) provided for the sale by the Mining Commissioner by public auction of the right to trade upon a site so selected. Sec 6(2) of Act 20 of 1941 added subsec 5(5) _ter_ which granted the owner of land held under mining title certain rights to obtain a trading site. A new sub-sec 5(5) _ter_ was substituted by sec 4(c) of Act 18 of 1955. It provided that, if requested thereto by the owner of any mining ground to which the mining title was acquired after the date of commencement of the new subsection, the Mining Commissioner was obliged to set apart in his favour a trading site on the ground, provided, _inter alia_, that the request was made within 3 months from the date on which the mining title was acquired and that the trading site was being so used when the mining title was acquired. This was the form of sec 5(5) _ter_ of the 1910 Act when the first appellant obtained his rights. In the West Driefontein Gold Mining Company Limited case, supra, TROLLIP J described the effect of the provisions of the Gold Law on the freehold owner's ordinary trading rights thus (at p 308 E-H):

> "It follows that during proclamation (except for the special dispensation in regard to a trading site reserved to the freehold owner under sec 5(5) ter of Act 13 of 1910) his ordinary trading rights whether flowing from his dominium or any special grant or reservation in his favour in his documents of title, are suspended; and any grant by the State or its proper officials of trading rights on the land according to law to any other person would not ordinarily require his consent, because such a grant and the user of the land in consequence thereof would not be adverse to him or infringe his rights (Swanepoel v Crown Mines Ltd, 1954(4) SA 596 (AD) at p 605 H to p 606 C)."

I turn to the provisions of the 1967 Act relating to the carrying on of trade or business on proclaimed land or land held under mining title. As has been mentioned, sec 139(1) prohibits any person from carrying on any trade or business on such land unless he holds any of the rights set out in subparagraphs 1(a), (b) or (c) thereof. The relevant portion of sec 139(1) provides :

> "139(1) Save as is otherwise provided in this Act, no person shall on proclaimed land or land held under mining title (whether or not that land has been reserved to him or his predecessor in title in terms of section 47(1) of this Act or a corresponding provision

of a prior law) carry on any trade or business elsewhere than -

(a) on a stand granted under section 102 or 103 of this Act or corresponding provisions of a prior law; or

(b) on a trading stand referred to in section 113; or

(c) on a trading site reserved or set apart under Chapter XIV of this Act or corresponding provisions of a prior law,

and in conformity with the provisions of the stand licence, stand grant, certificate for a trading stand, certificate of reservation, lease or surface right permit whereby the right to carry on business on such stand, trading stand or trading site was acquired under this Act or a prior law......"

The term "stand" in subparagraph 1(a) of sec 139 is defined in sec 1 to mean "a stand granted under chapter XII of this Act" and includes certain stands existing at the commencement of the Act which had been granted under prior laws. Sections 102 and 103 in chapter XII provide only for the grant of stands for business or industrial purposes and sec 102(1)(b) provides that only businesses other than the triad may be carried on upon a stand granted in terms of that subsection. Sec 113 of chapter XIII, referred to in sec 139 (1)(b), provides for the continued existence of the old trading stands which had been granted under the Gold Law.

In order to trade in the triad businesses the third respondent could, however, have applied for the right referred to in sec 139 (1)(c) i e for a trading site to be reserved or set apart under chapter XIV. This brings me to sec 126, the first section in that chapter, which reads in part :

> "126(1) The right to carry on the business of a general dealer, butcher or keeper of an eating house for coloured persons or Blacks on -
>
> (a) proclaimed land in the province of the Orange Free State which is not owned by the State or (if so owned) is held by a lessee;
>
> (b) any such land in any other province which has been proclaimed under section 39 or is proclaimed land by virtue of any provision of section 40(2), (3) or (4),
>
> shall, subject to the provisions of this Chapter, vest in the owner or lessee concerned."

Section 126 reflects a new policy on the part of the Legislature i e to vest the right to carry on the triad businesses on future proclaimed land in the owner or lessee of the land. Previously, under the Transvaal Gold Law, trading rights on proclaimed land were vested in the State, which leased or sold those rights. Under the 1910 Act the trading sites were registered in the name of the Mining Commissioner by whom they were leased to traders. See Franklin and Kaplan, Mining and Mineral Laws of South Africa, p 436. The amendments introduced to sec 5(5) *ter* of the 1910 Act in 1955 did, however, facilitate the granting of trading sites to the owners of proclaimed land.

In terms of sec 126 (1)(b) the land in respect of which the trading rights are vested in the owner or lessee (apart from land proclaimed under sec 39 which is not applicable) is land which is proclaimed land by virtue of sec 40 (2), (3) or (4). Sec 40 (1), which is not mentioned, provides that any land which immediately prior to the commencement of the 1967 Act was proclaimed land or land deemed to have been proclaimed land under the Gold Law shall be proclaimed land for purposes of the 1967 Act. As has been shown the land owned by the third respondent was deemed to be proclaimed land under the Gold Law. The land is accordingly governed by sec 40(1) of the 1967 Act and is thus excluded from the provisions of sec 126 of this Act. In this way existing rights in the Transvaal in respect of trading on proclaimed land or land held under mining title have been preserved. As no trading site had been granted before 1 October 1967 in respect of the land now owned by the third respondent, he is accordingly in no different position to any other member of the public. Once sec 126 does not apply to the third respondent, it follows that the provisions of sections 127, 128 and 129 (1)(a) of the Act also have no application to him. The third respondent could, however, have obtained the necessary authority to carry on the triad businesses in terms of sec 129 (1)(b) and under sec 102 (1)(b) he could have applied for authority to carry on businesses other than the triad.

His application for exemption originally stated that he intended using the site as a "trading site for general business" and that he intended establishing a general dealer's store on it. It is clear, I think, that the third respondent originally intended to confine himself to the triad businesses, and it appears from the first internal memorandum prepared by officials in the department of the first respondent in response to the application, that they saw it as such. In the memorandum it is pointed out that trading rights on mining ground have always been regarded as extremely valuable and that enormous sums of money have in the past been paid at sales by public auction held in terms of the 1910 Act for the right to carry on the triad businesses on mining ground. It is further pointed out that in respect of land proclaimed under the 1967 Act the right to carry on the triad businesses now vests in the owner of the land in terms of sec 126. However, because it was regarded by the Legislature as unfair to create competition in this way for people who under the previous statutes had to pay the State for these rights, the trading rights under sec 126 were not vested in the owners of land proclaimed or deemed to have been proclaimed prior to the coming into operation of the 1967 Act. It is further stated that for the same reason -

"die departement nie maklik verdere handelsregte op sulke grond sal toelaat nie tensy die skepping van sulke handelsregte op die grond noodsaaklik word."

The memorandum goes on to point out that as the third respondent's land was proclaimed prior to 1 October 1967, the only way in which he could obtain the right to trade in the triad businesses without having first to call for tenders, and running the risk that someone else might tender successfully, was to apply for an exemption in terms of sec 158. The memorandum points out that there are seven similar businesses in the area which are conducted by owners of land under sec 5(5) ter of the 1910 Act and that it can hardly be said that any need exists for the third respondent's proposed business.

The application for exemption was amplified and widened in the aforesaid letter of 30 June 1986. In the letter it was stated that the third respondent, in addition to the triad businesses, now also intended to carry on a number of other businesses as well as to provide recreational facilities in a modern shopping centre which he intended erecting on his land. In a second internal memorandum to the first respondent it was stated that Gold Fields of South Africa Ltd (second respondent's holding company) had, in the meantime, indicated that it was desirable to create more elaborate trading and recreational facilities for its Black mine workers but that its policy was not to be involved in the provision of these facilities. In this memorandum, it was recommended that the exemption be granted for the reason, inter *alia*, that it would serve no purpose to call for tenders in terms of sec 129 of the 1967 Act, and that it was not anticipated that the interests of the holders of trading rights on the mining ground would be seriously prejudiced by granting the exemption. The first respondent accepted the recommendation and granted the exemption after fully considering, he states, the objections raised by the appellants. He decided that it would be in the public interest and in particular in the interests of the mine workers to grant the exemption.

The reason why the third respondent resorted to an *ex parte* application for exemption instead of obtaining the business and trading rights he was seeking in the normal way in terms of secs 102 (1)(b) and 129 (1)(b), becomes apparent when the provisions of these subsections are analysed.

In terms of sec 102 (1)(b)

any person who desires to erect any place of business, except that of the triad, on land which is held under mining title, may apply to the Mining Commissioner for a stand on the land. A copy of the application has to be posted up by the Mining Commissioner in a conspicuous place in his office and by the applicant on the land to which the application relates (sub-sec (2)(a)). Written notice of any objection to the granting of such application and the grounds of the objection must be served on the Mining Commissioner in terms of sub-sec (4). The latter is not required to hold any hearing, but he must notify in writing the applicant and any objector of his decision (sub-sec (5)). The applicant or any person who is dissatisfied with the Mining Commissioner's decision may in terms of sub-sec (6) appeal to the Minister.

Sec 129 (1)(b) provides, in so far as is relevant to this case, that whenever the Minister is of the opinion that additional trading facilities are necessary on any land held under mining title he may instruct the Mining Commissioner to select and to reserve one or more trading sites on such land. A notice is then published in the Gazette and in one or more newspapers circulating in the mining district inviting tenders for the lease of the site or sites so reserved for the purpose of carrying on the triad businesses. After the period stated in the notice for the submission of tenders has elapsed, the Minister may let any site so reserved for such period and upon such conditions as he may determine to any person who has tendered for the purpose mentioned in the notice.

It is apparent that the main reason why the third respondent applied for an exemption under sec 158 instead of obtaining the right to carry on his proposed business or trade under sec 102 (1)(b) and 129 (1)(b) was to avoid opposition from other interested parties and to secure an advantage over business rivals. Had he applied under sec 102 (1)(b) he faced possible objections to his application by interested parties and under sec 129 (1)(b) he would have had to tender in competition with others. In fact, in the first memorandum submitted to the first respondent to which I have referred above, it was expressly stated that the whole purpose of the application for exemption was to avoid having to tender for the trading rights in competition with others whose tenders might be successful.

It now becomes necessary to examine the provisions of sec 158. That section reads as follows:

"158(1) The Minister may after one month's written notice served upon the holder of any mining title on the land in question by notice in the *Gazette* exempt any proclaimed land or land held under mining title or any portion of such land from any of the provisions of Chapters X to XV, inclusive, of this Act for such period as he may deem fit, provided such exemption is not in the opinion of the Government Mining Engineer likely to interfere with mining.

(2) Any such notice shall specify the date from which such exemption shall take effect and the provisions from which the land shall be exempt.

(3) (a) The Minister may by notice in the *Gazette* withdraw any exemption under subsection (1).

(b) Any such withdrawal may be in

respect of the whole or of a portion of the land exempted or in respect of any or all of the provisions from which such land has been exempted.

(4) The powers conferred by subsection (3) shall be exercised only upon application made to the Minister by a person who requires the land in question for mining purposes or purposes incidental to mining and has furnished security to the satisfaction of the Minister for the payment of compensation as provided in subsection (5).

(5) Any person who has suffered any loss as a direct result of the exercise of the powers conferred by subsection (3) shall be entitled to be paid such compensation for that loss by the person at whose instance those powers were exercised as may in the absence of agreement be determined by arbitration.

(6) The provisions of section 44(4) relating to land deproclaimed under section

44 shall mutatis mutandis apply in respect of land exempted in terms of this section."

The provisions of chapters X to XV in respect of which the first respondent may grant an exemption all relate to the use of the surface of proclaimed land or land held under mining title. Under the corresponding sec 30 bis of the Gold Law it was only possible to grant an exemption from the provisions of chapter IX of that Act, which corresponds to chapter X of the 1967 Act. Apart from the fact that the procedure has now been simplified the provisions of sec 158 are substantially similar to, though more extensive than, those of sec 30 bis of the Gold Law.

There is no provision in sec 158 for any application for an exemption. It is left entirely to the first respondent to act on his own initiative.

He need give notice to no one of his intention to grant an exemption except to the holder of the mining title on the land. There is no provision in sec 158 requiring notice to the holders of trading or business rights or to the owner or lessee of the land or neighbouring land who have vested trading rights under sec 126.

It seems that sec 158 is mainly concerned with the interests of the holder of the mining rights on the land and the use of the land for mining purposes. That is why the only notice required is that to the holder of the mining title. Furthermore, in terms of the proviso to sub-sec (1), the first respondent may only grant an exemption if the Government Mining Engineer is of the opinion that the exemption is not likely to interfere with mining. So also, in terms of sub-sec (4), the power to withdraw any exemption conferred by sub-sec (3) will only be exercised upon application made to the first respondent by a person who requires the land for mining purposes or purposes incidental to mining. The only person entitled to apply for the withdrawal of an exemption would seem to be the holder of the mining title.

The omission from sec 158 of any provision requiring notice to interested parties other than the holder of the mining title on the land is, in my view, a clear indication of what the main authorised purpose is for which the administrative power conferred in sec 158 may be used, particularly if regard is had to the other provisions of the 1967 Act. As I have shown above the consistent policy of the successive statutes with which we are concerned has been to recognise and protect trading and business rights granted under previous statutes. In <u>Johannesburg City Council v Crown Mines Ltd, supra</u>, WESSELS JA said at p 721 H that, upon the grant of permission to the freehold owner of proclaimed land held under a mining title to occupy a portion of the surface of that land for non-mining purposes, such permission

> "becomes a right in the ordinary sense of that term, adding value to the dominium of the owner".

Such rights conferred under previous statutes are protected generally under sec 188 of the 1967 Act, as we have seen. In particular, sec 126 (1)(b), read with sec 40(1), protects the rights of owners of land proclaimed or deemed to have been proclaimed prior to the commencement of the 1967 Act who had obtained trading rights under sec 5(5) ter of the Gold Law prior to 1 October 1967. Those provisions, as well as the provisions of sec 126(1)(b) conferring vested trading rights on owners of certain land, would be rendered nugatory by an exemption granted without prior notice to the holders of those rights, and such grant would be in clear conflict with the policy of recognising and protecting rights previously granted.

It seems to me, therefore, that the intention of the Legislature in enacting sec 158 was primarily to empower the first respondent to grant exemptions relating to the interests of the holder of the mining title and the use of the land for mining. It would also seem that sec 158 was intended to empower the first respondent to grant exemptions where the only rights affected would be those of the person in whose favour the exemption was granted, although it is not necessary, for present purposes, to define the exact ambit of the authorised purpose in this regard. What is clear, though, is that it was never the intention of the Legislature that sec 158 could be used in a situation where there may be business and trading competition, for the purpose of creating business and trading rights for one party to the exclusion or detriment of his rivals or other interested parties. Franklin and Kaplan, op cit p 447, support this interpretation in the following words :

> "Exemption from the restrictive provisions on the use of the surface will be considered if it is clear that the relevant provisions applicable to the control of the use of the surface are unnecessary, as, for example, where the holder of the mining title is also the owner of the land; or where the owner of the land has agreed to provide trading facilities on his land and it is clear that other people trading on mining ground will not be adversely affected, the restriction against trading on mining ground may be removed."

The first respondent, accordingly, did not have the power which he purported to exercise, and in doing so he acted <u>ultra vires</u> sec 158. In <u>Broadway Mansions Ltd v Pretoria City Council</u> 1955(1) SA 517 (A) VAN DEN HEEVER JA said at p 522 B :-

> "The question is simply, did the respondent have the power purported to be exercised? Where a power is granted for a specific purpose it canot be used for a purpose other than that for which it was intended .... In relation to such other purpose the power does not exist."

This disposes of the appeal, but for certain new submissions made by counsel for the third respondent in additional heads of argument, which he was granted leave at the hearing of the appeal to file later. It was contended, for the first time in this case, that the mining ground, including the third respondent's land with which this appeal is concerned, had previously been proclaimed a public digging in terms of sec 26 of the Gold Law. The submission was that the third respondent's land was therefore deemed to have been proclaimed under sec 39 of the Act by virtue of sec 188(2) of the Act, and was thus proclaimed under sec 39 within the meaning of sec 126(1)(b). It followed, so the argument proceeded, that the right to trade in the triad businesses vested in the third respondent in terms of sec 126(1)(b) even before he applied to the Minister for an exemption under sec 158 of the Act. There is no direct evidence to show that the third respondent's land with which this appeal is concerned, was ever proclaimed a public digging in terms of sec 26 of the Gold Law. It was, however, contended on behalf of the third respondent, that the terms of the mining lease justify the inference that the mining ground had previously been proclaimed under sec 26 of the Gold

Law. It appears from the provisions of the mining lease that West Witwatersrand Areas Ltd had applied not only for a mining lease over a joint area under sec 20 bis (3) of the Gold Law on the said farms, but also "for a lease of the exclusive right to mine precious metals underneath a certain area, in extent 1,9879 morgen equal to 2,8625 claims and situate on the aforementioned farm Rietfontein No 349". The reference to "claims" would seem to indicate that this portion of the farm Rietfontein No 349 must already have been declared a public digging. A composite lease was in the event granted over both ~~the~~ joint area and the 1,9879 morgen on Rietfontein No 349. The grantor is stated to be "the Government" which, according to clause 1 of the lease, means both the Acting State President and the Minister. The reason for this is that the joint area lease under sec 20 bis (3) of the Gold Law was required by that sub-section to be granted by the Minister, whereas the lease over the 1,9879 morgen on Rietfontein No 349 had to be granted by the Acting State President since that area had already been proclaimed a public digging. According to paragraph V of the preamble to the mining lease, it was in respect of the 1,9879 morgen on the farm Rietfontein No 349 only that the Acting State President had determined, in terms of sections 30 and 52 of the Gold Law and sec 3 of the Transvaal Mining Leases and Mineral Law Amendment Act 30 of 1918, to lease the 1,9879 morgen to West Witwatersrand Areas Ltd. These sections do not appear to be relevant to the grant of a joint area lease.

As I have pointed out earlier in this judgment, the third respondent's land with which this appeal is concerned, is situated on the farm Doornkloof No 350, which forms part of the joint area. In my view the terms of the mining lease provide no basis for inferring that the joint area or any part thereof was proclaimed in terms of sec 26 of the Gold Law before 1 October 1967. As I have said, the joint area was merely deemed to be proclaimed land in terms of sec 26 <u>bis</u> of the Gold Law when the mining lease was registered. Sections 188(2) and 39 of the Act cannot therefore assist the third respondent to bring his land within the ambit of sec 126 (1)(b) of the Act, quite apart from the fact that, as I have said, that sub-section was intended to apply only to land which may be proclaimed land on or after 1 October 1967.

With regard to costs there remain to be decided the costs of an application <u>in limine</u>, brought on notice of motion by the third respondent at the commencement of the hearing of the appeal. The application <u>in limine</u> was brought in response to a notice, received a few days before, of two new points which Mr Welsh, for the appellants, intended arguing on appeal. These were that the exemption was invalid because the first respondent had added a condition that it could be withdrawn after 5 years, and secondly because of non-compliance with the proviso to sec 158(1), in that it had not been shown on the papers before the Court that the Government Mining Engineer had formed the requisite opinion that the exemption was not likely to interfere with mining. In the application the Court was asked not to allow the appellants to raise the new points on appeal, alternatively that the hearing of the appeal be postponed in order to allow the third respondent an opportunity of preparing further affidavits dealing with the factual aspects raised by the new points. After hearing argument on the application the Court disallowed the new points to be raised and intimated that its reasons would be furnished later. The hearing of the appeal then continued and concluded the same day. In view of the conclusion to which I have come that the purported exemption was ultra vires sec 158, it is not necessary to set out the reasons for not allowing the new points to be raised on appeal. Although the main relief sought in the application in limine was granted, it is only the costs of preparing the notice of motion in respect of which the need for a special order for costs arises, as the hearing of the application in limine formed part of the hearing of the appeal and no extra costs were occassioned thereby.

In the circumstances of this case I am not satisfied that a special order for the costs of preparing the notice of motion is justified as the objection to the new points being argued on appeal could have been raised by counsel for the third respondent during the course of argument.

In the result the appeal succeeds with costs, including the costs of two counsel. The order of the Court a quo is altered to read: An order is granted in terms of prayer 1.1 declaring the exemption granted by the first respondent to be of no force and effect. The third respondent is ordered to pay the costs of the application, including the costs of two counsel.

W. VIVIER JA.

JOUBERT JA)
BOTHA JA) Concur.
KUMLEBEN JA)
F H GROSSKOPF JA)