

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

EDWIN WISEMAN appellant

and

MICHAEL DE PINNA 1st respondent

WILLIAM DOUGLAS PORTEOUS 2nd respondent

ELDORADO GOLD MINES (PTY) LIMITED 3rd respondent.

Coram: Corbett, Joubert, Hefer et Grosskopf, JJA, et
 Nicholas, AJA.

Date of hearing: 12 September 1985

Date of judgment: 25 September 1985

J U D G M E N T

CORBETT JA:

At the time of his death on 10 February 1978 the
 late Mr A W Carlin ("the deceased") was the holder of
 certain claim licences in respect of some 200 base mineral

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claims on the farm Louieville, situated in the mining district of Barberton, Transvaal. The licences had been issued in terms of the Mining Rights Act 20 of 1967 ("the Mining Rights Act"). In his will the deceased appointed his surviving spouse, Mrs Doreen Carlin, his sole heiress and executrix in his estate. As sole heiress Mrs Carlin became entitled to the aforementioned base mineral claims and when the estate was wound up she was awarded these claim licences in the distribution account. During his lifetime the deceased had entered into an agreement with Edwin Wiseman (the appellant) in terms whereof appellant became entitled to a half share in the claim licences..

On 3 November 1960 Mrs Carlin and appellant entered into a written agreement with Michael de Pinna (first respondent) and William D Porteus (second respondent). The preamble to the agreement describes Mrs Carlin and appellant as the beneficial owners/holders of the aforesaid mineral

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claims and indicates that first and second respondents contract in their own capacities or as "nominees for a company". The agreement records that in return for certain periodic payments (called in the agreement "option monies") Mrs. Carlin and appellant (called "the GRANTOR") grant certain rights to the other contracting parties (called "the COMPANY"), which rights are to commence on 10 November 1980 and terminate on 10 December 1985 (this being termed "the OPTION PERIOD"). The principal rights so granted are contained in clauses 4 and 5 of the agreement, which read as follows:

"4. The GRANTOR hereby grants to the COMPANY which hereby accepts the sole and exclusive rights to carry out prospecting and mining either by itself or through its authorised representatives and/or nominees at its absolute discretion upon the aforesaid CLAIMS during the OPTION PERIOD and shall in the performance of such prospecting and mining comply with all laws and regulations governing prospecting and mining.

5. The GRANTOR grants to the COMPANY which hereby accepts, the sole and exclusive option
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exercisable during the OPTION PERIOD to take transfer of the LICENCES in its own name or that of its nominee and the GRANTOR undertakes to sign all documents necessary to give effect thereto."

This agreement was not notarially executed.

On 24 November 1980 appellant and first and second respondents entered into a further agreement, referred to in the papers as "the Shareholders Agreement", in terms whereof it was agreed to set up a company in which the parties would subscribe for shares, with the object of exploiting the claims. This was done. A company named Eldorado Gold Mines (Pty) Ltd (third respondent) was incorporated and appellant and first and second respondents subscribed for shares in the company. The company ratified and adopted the agreement of 3 November 1980. Appellant was appointed manager of the company and was put in charge of its mining operations on the claims.

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It appears that at some stage a block of 50 of the base mineral claims had been converted to precious metal claims; and that the object of first and second respondents in acquiring rights to the claims was to search for and mine gold, using third respondent as their instrument. In due course the third respondent took possession of the claims and commenced operations. Not long thereafter appellant left the employ of the company and in July 1982 his shares were taken over by first and second respondents.

In August 1982 Mrs Carlin (as first applicant) and appellant (as second applicant) made application on notice of motion, citing the respondents and claiming an order declaring the agreement entered into between them and first and second respondents on 3 November 1980 to be invalid, an order that the respondents vacate the claims in question, and certain ancillary relief.

The application was based upon the contention that

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the agreement of 3 November 1980 fell within the compass of sec. 3(1) of the General Law Amendment Act 50 of 1956 and was invalid for want of notarial attestation. Sec. 3 of Act 50 of 1956, as amended by sec. 33(1) of Act 80 of 1964, reads as follows:

"3. (1) No lease of any rights to minerals in land and no cession of such a lease shall be valid if executed after the commencement of this Act, unless attested by a notary public, nor shall such a lease or cession thereof be valid as against third parties unless registered against the title deeds of the land concerned or the certificate of rights to minerals concerned, as the case may be.

(2) The provisions of sub-section (1) shall not apply to a lease of any rights to minerals granted or acquired under any law relating to prospecting or mining or to any cession of any such lease."

The matter came before VAN REENEN J in the Transvaal Provincial Division. He held that the agreement in question fell within the terms of sec. 3(1) and was not exempted by the terms of sec. 3(2). There having been

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no notarial attestation, he declared the agreement to be invalid and awarded the costs of the application to Mrs Carlin and appellant. In regard to the claim for vacation of the claims, the learned Judge issued a rule nisi, the terms of which need not be detailed. Respondents appealed to the Full Bench of the Transvaal Provincial Division, which allowed the appeal and substituted an order dismissing the application with costs. The judgment of the Full Bench has been reported (see De Pinna and Others v Carlin and Another 1984 (2) SA 710 (T)). The Full Bench agreed with VAN REENEN J that the agreement fell under sec. 3(1), but held, contrary to the view of VAN REENEN J, that it was covered by the exemption conferred by sec. 3(2) and was, therefore, valid. Leave to appeal to this Court was granted by the Full Bench.

The respondents have acquired the share of the claim licences to which Mrs Carlin was entitled. She accordingly has fallen out of the picture and the appeal to us is prosecuted by appellant alone.

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The question was raised with the appellant as to whether the leave of this Court was not required in terms of sec. 20(4)(a) of the Supreme Court Act 59 of 1959, as substituted by sec. 7 of Act 105 of 1982. Counsel for appellant submitted that, since the judgment of VAN REENEN J was delivered and the appeal to the Full Bench noted prior to the coming into operation of sec. 7 of Act 105 of 1982, sec. 20(4)(b), and not sec. 20(4)(a), applied, with the result that the Full Bench was the proper court to grant leave.

In this connection counsel referred to the decision of the Full Bench of the Transvaal Provincial Division in the case of Video Parktown North (Pty) Ltd v Paramount Pictures Corporation 1984 (2) SA 736 (T), which supports his submission.

It seems to me that appellant's counsel is correct and that the appeal is properly before this Court. No order need, therefore, be made on the formal application for leave to appeal and for condonation, advanced in the event of the appellant's submission proving incorrect.

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I come now to the merits of the appeal. It seems to me that the first question to be considered is whether the agreement of 3 November 1980 falls within the ambit of sec. 3(1) of Act 50 of 1956, as amended. This depends on whether the agreement constitutes a "lease of rights to minerals in land", within the meaning of those words in sec. 3(1).

To anyone conversant with the mineral law of this country and its historical development it is obvious that the words "lease of rights to minerals", as used in sec. 3(1), have a technical legal connotation. When the mining of minerals started in the early days in the Transvaal and elsewhere there evolved a type of contract in terms whereof the owner of land in whom the rights to minerals on the land were vested, granted to another for a certain period the right to enter upon the land for the purpose of prospecting and mining and removing the mined minerals from the land for his own benefit. Often there was added an option to purchase.

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In return for these rights the grantee paid to the owner a financial remuneration, which could take various forms, eg. periodical payments similar to rental, a lump sum, a commission based on output, and so on. These contracts came to be called "mineral leases" or "leases of mineral rights" or "leases of rights to minerals". As was pointed out in various early cases, the use of the term "lease" to describe this type of contract was inappropriate in that it could not properly be classified as a lease at common law (see eg. Lazarus and Jackson v Wessels and Others 1903 TS 499, at p 506; Neethling v Vesta Gold Mining Co 1903 TH 404; Ex parte Lanham's Executors 1908 TS 330; Buy's v South Rand Exploration Co. Ltd 1910 TPD 1058, at p 1062; and see also the later cases of Edwards (Waaikraal) G.M. Co. Ltd v Mamogale NO and Bakwena Mines Ltd 1927 TPD 288; Drymiotis v Du Toit 1969 (1) SA 631 (T); cf. Bozzone and Others v Secretary for Inland Revenue 1975 (4) SA 579 (A)). In fact, the courts

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experienced some difficulty in assigning such a contract to its proper juristic niche. The position was summed up by MARAIS J in Drymiotēs v Du Toit, supra, at pp 632 H to 633 B as follows:

"The 'mineral lessee' has the right to occupy the land for the duration of the 'lease' and for the purpose of mining and removing the mineral deposits the subject-matter of the contract. In that limited respect the contract has something of a lease of land. As soon, however, as he has taken possession of the portions he intends to remove from the land in terms of his contract, the land-owner cannot but lose his ownership in those portions. Ownership in the minerals passes as soon as the 'lessee' takes possession of them. That seems to be an essential feature of the performance of a mineral lease.

The other elements in a mineral lease are the right to occupy the mineral-bearing land for the purpose of extracting the minerals and the payment by the 'lessee' to the owner of the agreed remuneration. The latter may take any commercial form, such as periodic^a payments similar to a rental, a fixed or sliding scale commission on the output of the mining operations, a lump sum, and the like. It matters little what the parties call the quid pro quo; the statutory title of 'lease' itself is inappropriate."

(For convenience I shall henceforth refer to this type of contract as "a mineral lease".)

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From early times legislators prescribed the formalities whereby, inter alia, mineral leases could validly be concluded. There was, for example, a Besluit of the Volksraad of the South African Republic, dated 12 August 1886, requiring contracts concerning a cession of rights to minerals or concerning rights to mine to be notarially executed and registered at the office of the Registrar of Deeds; and decreeing that any such contract which did not comply with these formalities would be void ab initio. (See Whitford's Executors v Solomon 1904 TS 773, where this Besluit is considered.) In 1902 a Proclamation was issued (No. 8 of 1902, regulating the payment of transfer duty), sec. 29(1) of which prescribed formalities for certain types of contract. This sub-section read:

"No lease of any mynpacht, claim or right to minerals, and no lease of any land or any stand for a period not less than ten years or for the natural life of any person mentioned therein, or which is renewable from time to time at the will of the lessee indefinitely, or for periods which together
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with the first period thereof amount in all to not less than ten years, shall be of any force or effect if executed after the taking effect of this Proclamation unless executed before a Notary Public, nor shall it be of any force or effect against creditors or any subsequent bouâ-fide purchaser or lessee of the property leased or any portion thereof unless it be registered against the title deeds of such property."

In Lazarus and Jackson v Wessels and Others, supra, the Court (consisting of INNES CJ and SOLOMON and WESSELS JJ) had to consider whether a contract whereby the owner of a farm gave to two individuals, in return for the payment of an annual rental, the right to prospect on his farm for four years, the right to appropriate all minerals found during the course of their operations and the option to purchase the farm, constituted a "lease of a right to minerals" within the terms of sec. 29(1) of the Proclamation. The Court held that it did. INNES CJ said (at p 506) -

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"Now, in my opinion this contract is a lease of a right to minerals within the terms of the section I have read.

Juristically speaking, it may perhaps be straining language to call such an agreement an ordinary lease; but I am satisfied that the legislature meant to include in the term 'lease of a right to minerals' those mineral prospecting contracts in return for the payment of a yearly rent, and with or without option rights which are so common in this country."

(See also Munnik Myburgh Asbestos (Kaapsche Hoop) Ltd v

The Receiver of Revenue 1927 WLD 98; Estate Du Toit

v Coronation Syndicate Ltd and Others 1929 AD 219.)

Act 50 of 1956 repealed sec. 29 of Proclamation 8 of 1902 (TVL), as also sec. 51 of Ordinance 12 of 1906 (OFS), which contained a provision similar to sec. 29(1), save that it related only to leases of rights to minerals or precious stones. It is clear that sec. 29(1) of the Transvaal Proclamation and sec. 51 of the Orange Free State / Ordinance.....

Ordinance were replaced by sec. 3 of Act 50 of 1956, which in its pristine form consisted only of what is now sec. 3(1), the amendment in 1964 adding what is contained in sec. 3(2).

As in the case of sec. 29(1), the words "lease of rights to minerals" in sec. 3(1) have been held to relate to mineral leases (see Fuls v Leslie Chrome (Pty) Ltd and Another 1962 (4) SA 784 (W); Nortje en 'n Ander v Pool, NO 1966 (3) SA 96 (A), at p 126 H; Drymiotis v Du Toit, supra; Van Coller en Andere v Ocean Bentonite Co (Edms) Bpk 1979 (1) SA 1071 (1) en 1981 (3) SA 1167 (A)).

It is not disputed by appellant that the term "lease of ... rights to minerals" contained in sec. 3(1) relates to what I have called mineral leases. He contends, however, that the term is not confined in its application to such contracts, but that it also covers "leases" of claim rights by the holder of the claim license. ELOFF J, delivering the judgment of the Court a quo stated (see judgment at p 718 G) -

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"In the light of all these considerations I conclude that the phrase 'lease of any rights to minerals in land' includes not only common law mineral leases, but also grants by claim licensees which include all the components of mineral leases."

Appellant's counsel support this conclusion.

The claims which form the subject-matter of the agreement of 3 November 1980 were evidently pegged under the authority of claim licences issued in terms of sec. 48 of the Mining Rights Act. It is to be inferred (though this is not expressly stated in the papers) that the portion of the farm Louieville where the claims are located has been proclaimed to be a public digging and to be open to the pegging of claims (see sec. 39). Now, the claims and claim licences specifically provided for in 1967 by the Mining Rights Act are legal entities which manifestly did not exist in 1956 when Act 50 of 1956 was passed or indeed when the amending Act 80 of 1964 was enacted. The Mining Rights Act, however, repealed and replaced the considerable body of mining legislation, much of it pre-Union statutes of the various provinces, which had

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developed by ~~accretion over the years~~. In the main the policy and principles of the mining laws in force in the Transvaal and the Orange Free State were retained and perpetuated in the Mining Rights Act. (See generally Franklin and Kaplan, The Mining and Mineral Laws of South Africa, pp. 333-5.)

Prior to 1967 and at the time when Acts 50 of 1956 and 80 of 1964 were passed the mining of base minerals and precious metals was regulated in the Transvaal by the Precious and Base Metals Act 35 of 1908 (Tvl), as amended from time to time, usually called "the Gold Law". The Gold Law similarly made provision for the proclamation of land as a public digging, for a declaration that the whole or any portion of a public digging was open for the pegging of claims and for the issue of "licenses" (called "prospecting licenses") entitling the holders to peg claims and to prospect and mine thereon. The Gold Law provided for claims in respect of both precious metals and base metals. The Gold Law, in / its.....

its turn; replaced statutes, mainly of the South African Republic, including the Base Metals Law 14 of 1897 and the Gold Law 15 of 1898, which made similar provisions for the proclamation of public diggings, claims and prospecting licences. The respective legal positions of the owner of the land, the State and the holder of a claims licence under the Gold Law of 1898 were considered by the Transvaal Supreme Court in the case of Neebe v Registrar of Deeds, 1902 TS 65.

WESSELS J stated the position thus (at pp 85-6):

"By the Roman-Dutch law the ownership in the minerals lies in the dominus of the soil. The Gold Law has not entirely abrogated the common law, but it has modified it to the extent of giving to the State the right of disposing of the precious metals. The Gold Law provides the machinery by which the State disposes of these metals. The farm is proclaimed and the owner's full rights of ownership are, during the proclamation, suspended. The State allows a person who takes out a licence to go upon a certain area and take out minerals within that area, so long as he pays his licence-moneys. The usual licence is a monthly one, and if the licence is not renewed when the period has expired the claim lapses
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to the Government. The State therefore confers the privilegium of extracting minerals from a certain area upon the person who takes out a licence. The amount he pays for the licence varies though it never exceeds 20s. per month, and is therefore in no way proportionate to the value of the claim.

The privilegium extends only to the extraction of minerals, for by art. 90 the disposal of the surface of a claim belongs to the Government, and the claim-owner can only use the surface for the purpose of working his claim."

In a separate judgment INNES CJ emphasized that there was no contractual consensus between the State and the claimholder and that the latter's tenure was "one sui generis specially created by statute" (see pp 81 and 83; and see also Whitford's Executors v Solomon 1904 TS 773, at p 776). These analyses applied with equal validity to the Gold Law of 1908 (see Princess Estate and Gold Mining Co Ltd v The Registrar of Mining Titles 1911 TPD 1066; West Driefontein Gold Mining Co Ltd v Brink and Others 1963 (1) SA 304 (W)). The last-mentioned case dealt especially

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with the limited rights and benefits retained by the owner of the proclaimed land, including the right to receive portion of the licence moneys accruing to the State from the licence-holders (see also Johannesburg City Council v Crown Mines Ltd 1971 (1) SA 709 (A), at p 721); but, as was pointed out in Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd 1905 TS 717, at p 726, this right did not establish any vinculum juris between the owner of the land and the licence-holder. (See also judgment of SMITH J in Neebe's case, supra, at pp 90-1.)

Under the Gold Law a claim or the licence relating thereto could be transferred: see secs. 35(2) and 43; and the same position obtains under the Mining Rights Act: see sec. 61(1). (See also Neebe v Registrar of Mining Rights, supra.) It appears, too, that the holders of claims under the Gold Law often granted "leases" of their claims for specified periods, the "lessee" acquiring the

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right to exercise for the period of the "lease" the claimholder's rights, or some of them, in regard to the claim

(see eg. Cassell and Theron v Bedford 1923 WLD 27; cf.

Graham v Local and Overseas Investments (Pty) Ltd 1942 AD

95, at pp 107-8, dealing with the so-called "tribute

agreement"). The provisions of sec. 29(1) of Proclamation

8 of 1902 (Tvl), which are quoted above and deal, inter alia,

with leases of claims, indicate that by then this must have

become a common practice. And, of course, in terms of sec.

29(1) such leases of claims were subject to the same formal

requirements as leases of rights to minerals.

Sec. 29(1) provided that for the contracts therein referred to, which included a lease of a claim and a lease of a right to minerals, to be of any force or effect against "creditors or any subsequent bonâ-fide purchaser or lessee of the property leased or any portion thereof" it had to be registered against the title deeds of "such property".

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The general system of deeds registry, recording the ownership and transfer of land and the creation of servitudes and other burdens on land, in vogue in the Cape Colony was imported into the South African Republic (Houtpoort Mining and Estate Syndicate Ltd v. Jacobs 1904 TS 105, at p 109) and in 1866 a deeds registry under a Registrar of Deeds was established (see Ordonnantie 3 of 1866). In terms of the early Gold Law, however, title to mining claims was registered by Gold Commissioners and later by the Mining Commissioner or the Magistrate. In 1902 there was established for the Transvaal a Mining Rights Office, which was to be located in Johannesburg and was to be supervised by an official styled the Registrar of Mining Rights, for the registration of titles to mining rights and leases thereof (see Proclamation 35 of 1902 (Tvl)). The law regulating the Deeds Office and the Mining Titles Registration Office was consolidated by Act 25 of 1909 (Tvl); the former being designated as the office for the registration of all deeds, such as deeds of

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title to immovable property, deeds of transfer, mortgage and other bonds, antenuptial contracts, etc, and the latter as the office for the registration of all mining titles and titles to stands on mining property and transfers and cessations thereof. The Deeds Registries Act 13 of 1918 consolidated the law in force in the Union for the registration of deeds. It repealed Act 25 of 1909 (Tvl), save in so far as that Act related to mining titles and the Mining Titles Office. Act 13 of 1918 was in turn repealed and replaced in 1937 by the Deeds Registries Act 47 of 1937. This Act followed the general scheme of Act 13 of 1918 and it did not affect the work of the Registrar of Mining Titles in terms of Act 25 of 1909 (Tvl). Thus at the time when Act 50 of 1956 was passed there was, as regards the Transvaal, a clear general distinction to be drawn between the various Deeds Registries in the country in which broadly speaking title to land and to real rights over land were recorded in terms of Act 47 of 1937 and the Mining Titles Registration Office in which title to mining

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rights was registered under the provisions of Act 25 of 1909 (Tvl).

In sec. 70, read with secs. 71, 72 and 73, of the Deeds Registries Act of 1937, as it was in 1956, it was provided that rights to minerals may be separated from the ownership of land in four ways: (1) by an owner transferring land subject to a reservation in his favour of rights to minerals thereon or by an owner establishing a township on his land subject to such a reservation; (2) by a reservation of rights to minerals in favour of the State (then termed "the Crown") included in grants of land by the State; (3) by the exclusion of the rights to minerals in the land in any partition agreement relating to land held in joint ownership; and (4) by the cession of the rights to minerals by the owner of the land to another person. Such separation may take place in respect

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of a portion of the land or a share of the land and may be in respect of all the minerals or of a particular mineral or minerals (sec. 70(2)). Where there is such a separation of the rights to minerals, the party in whose favour the reservation has been made is required to take out a certificate of rights to minerals, which is signed by the Registrar and registered against the title deeds of the property concerned and which, when so signed and registered, constitutes the title to the rights to minerals (sec. 71). The general legal effect of these provisions was considered in Webb v Beaver Investments (Pty) Ltd and Another 1954 (1) SA 13 (T), at pp 30-1. The severance of the rights to minerals in respect of land from the title to the land is a procedure which had long been recognized in the law of the Transvaal and in earlier legislation (see Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295, at p 315).

/ I revert.....

I revert to the meaning of the words "lease of any rights to minerals in land" appearing in sec. 3(1) of Act 50 of 1956. In my opinion, there is no reason to believe that the Legislature intended these words to bear anything other than the technical legal meaning which they had acquired over the years (~~cf.~~ Uitenhage Divisional Council v Port Elizabeth Municipality 1944 EDL 1, at pp. 6, 10; Chequers Outfitters (Bloemfontein) (Pty) Ltd v Sussman 1959 (3) SA 55 (O) at p 57 A-B; Willis, NO v Registrateur van Aktes, Bloemfontein 1979 (1) SA 718 (O), at p 725 H). As I have indicated, it is not disputed that they refer to what I have termed a mineral lease. The essential question is whether or not the Legislature intended them also to cover a "lease" of his rights by the holder of a claim licence. In my opinion, for the reasons which follow, this question must be answered negatively.

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In the first place, there are, in my opinion, fundamental differences between a lease of mineral rights held at common law by the owner of the land or, where the rights have been separated from the ownership of the land, by the holder of such rights, on the one hand, and a lease of his rights by the holder of claim licences, which are held as a privilegium under the statutory laws relating to the mining of minerals. The rights in respect of which the lease is granted in each case are different and they are separately recorded and registered. This basic distinction was drawn in two early Transvaal cases: Louw v Joffe 1903 TH 44, and Whitford's Executors v Solomon 1904 TS 773. In Louw's case, supra, a donation of a certain mining claim was held not to fall within the ambit of the Volksraad's Besluit of 12 August 1886, referred to above. MASON J stated (at p 45):-

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"Claims are dealt with by special laws, and in my opinion the provisions of the Resolution were not intended to refer to the claims of a gold field, which are called into existence by special legislation, but to rights over property granted otherwise than by the issue of licences."

In the case of Whitford's Executors, supra, the Supreme Court of the Transvaal (consisting of INNES CJ and WESSELS and BRISTOWE JJ) came to a similar conclusion with regard to an agreement whereby the holder of certain claims gave an interest in these claims to another. INNES CJ held that a cession of claim rights could not be construed as a cession of "rechten op mineralen" within the meaning of the Besluit. He said that this was rendered clear by the provisions of the Gold Law. He said (at p 776):

"From the time of the first Gold Law in this country every succeeding statute has made provision for the registration of claim licences, and transfer of the rights to those licences, by entry in the books of the mining commissioner. And as the Volksraad always made special provision in
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that way for the transfer and cession of claims, I think they could not have intended the words of the Besluit to cover contracts with regard to cession of claims. In my opinion, therefore, this agreement is not covered by the terms of the Volksraadsbesluit."

Of course, sec. 29 (1) of the Proclamation grouped together leases of claims and leases of rights to minerals when enacting the requirements for formal validity and effectiveness against third parties, but what is significant is the fact that these two types of lease were separately named in the sub-section. In other words, in conformity with the above-mentioned decisions, a lease of a claim was regarded by the law-giver as being something different from a lease of a right to minerals. As regards the requirement of registration, the section speaks of the lease being registered against the title deeds "of such property". This is a reference back to the words "property leased". In the case of the lease of a claim,

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the property leased is the claim and so it would seem that the registration contemplated by the sub-section is against the claim title as registered in the office of the Registrar of Mining Rights - or his predecessor or successor in terms of earlier and later legislation. And this is in fact what was decided and ordered in Cassell and Theron v Bedford, supra.

Although more tersely worded than sec. 29(1), sec. 3(1) of Act 50 of 1956 also provides for notarial attestation as a basic requisite for validity and for registration for validity against third parties. Sec. 3(1) also uses the same term "lease of any right to minerals" to denote its subject-matter, but significantly the sub-section omits all reference to a lease of "any claim". This omission leads to the inference that, in enacting sec. 3(1), the Legislature intended to deal only with what I have termed

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mineral leases and not with leases of claims. This inference is greatly strengthened by the registration provisions in sec. 3(1). In contrast to sec. 29(1) which provided for registration against the title deeds of "such property", ie the property leased, and which would cover both registration in the Deeds Office against the title deeds of the land concerned in the case of a right to minerals or a long lease, and registration against the title deeds of the claims in the office of the Registrar of Mining Rights (or his successor under later legislation), sec. 3(1) provides for registration against the title deeds of the land concerned or the certificate of rights to minerals concerned, such registration clearly to be effected in the Deeds Office. This fits in with the notion that sec. 3(1) was concerned only with mineral leases and catered for (a) the case where the lease was granted by the owner of the land, and (b) the case where the rights to minerals had been separated from

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the ownership of the land and someone other than the owner, holding a certificate of rights to minerals, (in terms of secs. 70-73 of the Deeds Registries Act 47 of 1937, referred to above) granted the lease.

In this connection it is important to note that Act 47 of 1937 contains (in sec. 3(m)) a specific provision charging the Registrar of Deeds with the duty of registering, inter alia, leases or sub-leases of rights to minerals (see also sec. 77). Having regard to the provisions of secs. 70-73, a lease of rights to minerals would seem to mean a mineral lease. Since sec. 3(1) contemplates registration by the Registrar of Deeds, there is a close connection between sec. 3(1) and the provisions in Act 47 of 1937 to which I have alluded. This is further support for the view that sec. 3(1) has reference only to mineral leases.

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Obviously the provisions in sec. 3(1) regarding registration in the Deeds Office are a significant pointer to what was intended to be included in the term "lease of any rights to minerals". It was submitted by appellant's counsel that registration in the Deeds Office of a lease of claim licences issued under the Mining Rights Act, or previously under the Gold Law, is (or was) "notionally possible" and in this regard relied on the reasoning of the Court a quo at pp 715 A to 717 H of the reported judgment. Appellant has, of course, placed no evidence before the Court as to what the general practice in these matters is or has been in the past, but, knowing the legal background of case-law and legislation, I would be surprised to learn that the Registrar of Deeds would accept, or could be obliged to accept, for registration against the title deeds of the land concerned or the certificate of rights to minerals a lease of claim licences. However, I do not think it is

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necessary to decide whether such registration is notionally possible. What seems to me to be more relevant as a pointer to what the Legislature meant by the words "lease of any rights to minerals" are the kinds of leases relating to mineral rights which were ordinarily and in accordance with accepted practice regarded as being registrable in the Deeds Office. In my view, that would not include leases of claim licences.

This view seems also to accord with practical common sense. The contrary view, in my opinion, would not. In the first place, the registration of a lease of claim licences against the relevant title deeds or certificate of rights to minerals would presumably require the consent of the owner of the land or the holder of the certificate, as the case may be. In all but the most exceptional type of case, the owner/holder would not be party to the lease.

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Moreover, by reason of the proclamation of a public digging the owner would have been deprived of his beneficial ownership of the land: while the land remains proclaimed his ordinary proprietary rights are suspended. Why in the circumstances should the owner, or holder, give his consent to the lease of claim licences? And if he did not, on what basis, if any, could he be compelled to do so?

Another practical consideration is: what would be achieved by registration against the title deeds or certificate, bearing in mind that the title to the claims themselves would be registered in the Mining Titles Office and, as appellant's counsel conceded, could not be registered in the Deeds Office? Would such a registration in practical terms constitute effective notice of the lease to creditors of the claim licence holder and other interested third parties? Furthermore, would not such registration merely duplicate a registration of the lease in the Mining Titles Office?

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It is not necessary to answer these questions. Most of them are, in any event, rhetorical. They demonstrate, in my view, the impracticality of the interpretation of sec. 3(1) advanced by the appellant.

Appellant's counsel argued that sec. 3(2) which excludes from the provisions of sec. 3(1) -

"a lease of any rights to minerals granted or acquired under any law relating to prospecting or mining or to any cession of any such lease"

supported his interpretation of sec. 3(1): see also the judgment a quo at p 716 A-C, where the argument is set forth.

Sec. 3(2) attracts its own problems of interpretation: witness the difference of opinion as to its meaning between the Court of first instance and the Court a quo, as also the opposing arguments in this regard presented to this Court. In the circumstances and since I regard the

/ meaning.....

meaning of sec. 3(1) as being reasonably clear, I would not be inclined to place much reliance on sec. 3(2) as an aid to the interpretation of sec. 3(1). Accepting, however, that sec. 3(2), as a subsequent amendment, can in law be used to throw light on the meaning of sec. 3(1) (see in this regard New Mines Limited v Commissioner for Inland Revenue 1938 AD 455, at p 463; R v Correia 1958 (1) SA 533 (A), at p 540; Davies v Gordonia Liquor Licensing Board and Others 1958 (3) SA 449 (A), at p 453 H - 454 A) and assuming that the amendment was not inserted ex abundante cautela simply in order to allay a fear that the language of sec. 3(1) might be misconstrued (as to which see Rex v Abel 1948 (1) SA 654 (A), at p 662), I am nevertheless of the view that sec. 3(2), properly construed, has a field of operation which would not detract from the meaning that has been assigned to the words "lease of any rights to minerals in land" in sec. 3(1); and in this connection I would refer to what is stated by Franklin and Kaplan (op. cit., at pp

295-6):

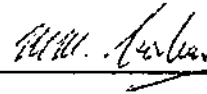
"The plain grammatical meaning of the words 'granted or acquired under any law relating to prospecting or mining' in subsection (2) indicates clearly that what the legislature had in mind were prospecting and mining leases granted by or acquired from the State under the statutory provisions of the laws relating to prospecting and mining, such as the Transvaal Gold Law then in force, the Precious Stones Act 1927, the Reserved Minerals Development Act 1926, the Base Minerals Amendment Act 1942 or similar legislation."

For these reasons I conclude that the agreement of 3 November 1980 was not a "lease of... rights to minerals in land" within the ambit of sec. 3(1) of Act 50 of 1956 and was consequently not invalidated by reason of the fact that it had not been notarially attested. I might add that in coming to this conclusion I have not found it necessary or appropriate to refer to certain provisions of the Mining Rights Act or the Mining Titles Registration Act 16 of 1967, which were relied upon in argument by counsel.

/ The.....

In view of this conclusion the question of the applicability of the exemption provided for by sec. 3(2) does not arise.

The appeal is dismissed with costs, including the costs of two counsel.



M M CORBETT

JOUBERT, JA)
HEFER, JA) CONCUR.
GROSSKOPF, JA)
NICHOLAS, AJA)