

Vol. 1

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"CAPE TIMES" LAW REPORTS

OF ALL CASES DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1905

(WITH INDEX OF CASES AND DIGEST).

REPORTED BY

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ADVOCATE OF THE SUPREME COURT.

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CAPE TOWN :

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1906.

JUDGES OF THE SUPREME COURT DURING THE
YEAR 1905.

DE VILLIERS, RIGHT HON. SIR J. H., P.C., K.C.M.G., LL.D. (Chief Justice).

Absent from May 5th to December 1st.

BUCHANAN, HON. SIR E. J., Knt. (Senior Puisne Judge).

MAASDORP, HON. C. J. (Junior Puisne Judge).

HOPLEY, HON. W. M. (Puisne Judge of the High Court).

ATTORNEY-GENERAL:

SAMPSON, THE HON. VICTOR, K.C.

Rec. July 18, 1906

decide whether her evidence was quite reliable in the matter. The first defence raised in the case was that her alleged signature was a forgery. That had been withdrawn with an explanation, that even now she was not satisfied that it was hers. He would go no further. He was satisfied that it was hers, and that the signature was made in such a way that she could not have forgotten it. The signature was supposed to have been made in August, 1903.. It was quite possible that if that was all, it might have escaped her memory, because it was a signature in blank, but they found that in August, 1904, the matter was conspicuously brought to her mind, because she was called upon to cancel stamps on a document containing a full cession of the bond as security. That was a circumstance that could not have escaped her memory. Then there was another point. It was undoubtedly a fact that this document was handed to her to submit to her husband to obtain his signature for a full cession. She got the document out of Mr. Gray's hands and took it away, and she now said that she thought she had a perfect right to do as she liked with it, and she cancelled the cession and struck out her own signature and that of her husband. That was most improper conduct. That being so, the question was whether Mr. Gray had not given his evidence in such a manner now as to raise a likelihood or an absolute conviction that it was correct. He found that although the bond was placed in favour of Mrs. Den Dauw's name, it was simply for the purpose of securing both her and her husband, and it was really her husband's property that was given at that time as security for debt due by the husband to Mr. Gray. Up to this point it appears that a contract was entered into between the parties for giving the bond as security. The plaintiff alleged that the position was subsequently altered, and that a further contract was made to the effect that an absolute cession should be passed. The plaintiff stated that this occurred in March. Now, he (his lordship) was rather doubtful at one time whether the question of absolute cession had been raised, until the bank appeared on the scene, but Mrs. Den Dauw admitted that the question was raised, and that she would not consent to it. He was satisfied that if it was raised it was consented to, because the defendant was in some difficulty and required subsequent assistance in financial matters, after her husband left for Europe in a business in which she and her husband were interested. Therefore the Court had to accept Mr. Gray's statement that it was agreed in September to pass an absolute cession. The question was raised as to whether there was power under the English law in the

wife to bind herself, but counsel had admitted that under the circumstances during the absence of her husband she had a perfect right to enter into such a contract. The contract was a *bona fide* one, and it amounted to this. She agreed, instead of giving this bond simply as security for the payment of £200, to give absolute cession of it as payment for £210 due on the promissory note, and further payment of moneys advanced amounting to nearly £300. It had been said that at the time the agreement took place the liability did not amount to £300, and that consequently it was unlikely that a cession would be agreed upon for the payment of a debt of that amount, when it did not exist, but from the accounts he was satisfied that the debt was very nearly £300. There was no doubt that it was agreed that the cession should be out and out. It seemed that in September, 1904, this bond was handed to Mrs. Den Dauw for the purpose of carrying out the subsequent agreement. She received possession of this document, and kept it. She struck out the cession as security. The document was therefore in such a condition that in order to restore the rights to the plaintiffs it would be necessary to have a proper cession executed, and the plaintiffs were entitled to specific performance of their agreement by full cession of the bond. An order would therefore be given in terms of prayers (a) and (b) of the declaration. It appeared that the full debt now due to the plaintiffs amounted to 321 19s. 3d. The Court would therefore give judgment in favour of the plaintiffs for that amount.

Mr. Gardiner said he understood the plaintiff only claimed the £300.

Mr. Close: That is so.

Maasdorp, J.: Then judgment on those terms will be given. The bond will now be handed to the Registrar, and from him to the plaintiff, and defendant is to give full cession of the bond to the plaintiff by noon to-morrow. The defendant is to pay all costs.

[Plaintiff's Attorneys: Fairbridge, Arderne and Lawton. Defendant's Attorney: J. O'Reilly.]

SECOND DIVISION.

[Before the Hon. Mr. Justice HOPLEY.]

STERN AND CO. V. HARRIS. { 1905.
Aug. 4th.

This was an action brought by Stern and Co., of Upington, against Harry Harris, of Cape Town, to recover damages in the sum of £2,000 for an alleged breach of agreement arising out of the purchase by the plaintiff firm of the

business formerly carried on by defendant at Upington under the style of Harris Bros.

Plaintiffs' declaration was as follows:

1. The plaintiffs are William Stern and Leopold Nussbaum, trading together in partnership at Upington under the style of W. Stern and Co.

2. The defendant Harry Harris now resides in Cape Town, but heretofore, before the 16th day of July, 1900, he carried on business at Upington, under the style of Harris Brothers.

3. On the 16th day of July, 1900, the parties entered into the agreement in writing, whereof a correct copy is hereto annexed, to which the plaintiffs crave leave to refer as though the same were here set forth in full.

4. By the said agreement the plaintiffs purchased, *inter alia*, for £1,500, the different forms of business, with the goodwill thereof, carried on by the defendant, and the defendant, by clause 5, specially undertook not to start, open, or support any business such as store, shop, bar, liquor, produce, etc., within fifty miles of Upington, in opposition to the plaintiffs.

5. In connection with and as part of the business heretofore carried on by the defendant and purchased by the plaintiffs, he was accustomed to contract for the supply to the Colonial Government of such produce, mealies, oats, oathay, and the like, as was required from time to time and year to year, for the public service in connection with the gaol and in connection with the police engaged in the town of Upington, the district of Gordonia and neighbouring localities, and it was the duty of defendant, in conformity with his said agreement, neither personally nor as a member or partner of any firm to tender or offer to contract for the supply of such produce at or from the town of Upington, or within the radius of fifty miles from the said town.

6. In breach of his duty and acting in concert or partnership with another or others, and using the style of Harris Brothers, the defendant wrongfully and unlawfully in 1903 tendered for and obtained the contract with the Colonial Government for the supply of such produce to the police throughout the district of Gordonia for the year 1903 to 1904, and thereafter in 1904, in like manner, acting with another or others, and again using as aforesaid the style of Harris Brothers, the defendant in breach of his duty wrongfully and unlawfully tendered for and obtained the contract for the like supplies for the town of Upington, the plaintiffs on this occasion being also tenderers, and being successful in obtaining the contract for such supplies for the neighbouring field-cornetries, but not for the town of Upington.

7. During the year of the contract for police supplies for 1903 to 1904, the defendant by his agents used the town of

Upington as a base or central place of business for the distribution of the required produce, and both during that year and since that contract expired he has wrongfully and unlawfully started, opened, and supported a business as a merchant or purveyor of produce within the town and within the radius of fifty miles from the town of Upington.

8. The plaintiffs have sustained serious injury in their business and the goodwill thereof by reason of the wrongful and unlawful acts of the defendant committed as hereinbefore set forth in opposition to them, and the defendant to the detriment of the plaintiffs has made great profits in business out of the contracts aforesaid, which he has wrongfully and unlawfully obtained in violation of his agreement with the plaintiffs, and the plaintiffs estimate their damage in the sum of £2,000, and claim accordingly.

Wherefore the plaintiffs pray for judgment for the sum of £2,000 sterling, or for other relief and costs of suit.

Clause 5 of the agreement was in the following terms: The said Harris Bros. and the said Harris undertake not to start, open, or support any business such as store, shop, bar, liquor, produce, etc., within 50 (fifty) miles of Upington, in opposition to the said Wm. Stern and Co.

Defendant, in his plea, said that plaintiffs did not now and had not for some considerable time traded at Upington, or within fifty miles thereof. In January, 1900, his (defendants') business premises were burnt down, and he carried on no business thereafter at Upington, and in July he entered into the said agreement. He had theretofore tendered for the supply to Government of produce, etc., as might be required for the public service in connection with the gaol and police engaged at Upington, and the neighbourhood and such tenders were sometimes accepted, but the defendant said that when the said agreement was entered into he had no contract with the Government. He admitted that in 1903 the firm of Harris Bros., of which he was a member, and which carried on business in Cape Town, sent in a tender to the Colonial Government for the supply of produce to the police throughout the district of Gordonia for the year 1903 to 1904, which tender was accepted by the said Government, and thereafter the said firm, as aforesaid, trading in Cape Town, sent in a tender for the like supplies for the town of Upington, which tender was accepted by the Colonial Government. He denied that that was a breach of the agreement that he entered into with the plaintiffs, or that it was wrongful or unlawful. He said that plaintiffs did not tender for the said supply to the said police in 1903 for the year 1903-4. During the said contract for police supplies the aforesaid firm of Harris Bros. sent

the said required and ordered supplies under the said contract with the Government, by rail and otherwise, to Upington, from whence their agent, for that purpose only, sent the various supplies, which arrived at Upington to the outlying stations. Defendant said that neither of the contracts for the supplies for the police in Gordonia and the town of Upington was a breach of the agreement with the plaintiffs. He, therefore, prayed that the claim may be dismissed, with costs.

Plaintiffs, in their replication, admitted that on the 1st September, 1904, they sold their business, but said they continued to carry on business at Upington, especially in the way of purchasing produce and other requisites, to be supplied under contract with the Colonial Government, and the Government of German South-west Africa. They said that the tendering and contracting to supply produce was part of the defendant's business, which they purchased. They admitted that they did not tender for the supplies for 1903-4, but said that they did not see any notices calling for tenders for such contracts. They admitted that defendant carried on business at Cape Town, but said specially that he had carried on business at Upington in respect of the matters complained of in this suit, both personally and by agents, and had not only distributed produce, but had purchased supplies in the neighbourhood of Upington.

Upon this issue was joined.

Mr. Searle, K.C. (with him Mr. Russell) for plaintiffs. Sir H. Juta, K.C. (with him Mr. Burton) for defendant.

Mr. Searle said that since the pleadings were filed, the plaintiffs had discovered, he believed only yesterday (Thursday), that not only did the defendants tender for the 1903-4 contract, but also for the 1902-3 contract, and he applied for an amendment of the declaration accordingly.

Sir H. Juta objected to the amendment asked for, and said that it would raise a point that he had no evidence at present to meet. He added that if it were merely a question of whether the contract with the Government was a breach of the agreement, then that could be discussed without any evidence. That point would decide contracts for 1902-3-4, or any other years.

[Hopley, J.: It almost seems to me that, unless there be a considerable dispute on the facts, the matter might have been settled by a special case.]

Sir H. Juta said that he did not know why an exception was not taken to the plea.

Mr. Searle urged that the amendment to the declaration should be allowed.

Hopley, J., said that the amendment would not be allowed at present, but it would be open to him to allow the amendment at a later stage if he

thought no prejudice would accrue to the defendant.

William Stern (one of the plaintiffs) was called, and gave evidence in support of the case set out in the declaration. He spoke of the way in which the prices of produce were forced up in 1903 by reason of the way in which Jacobson bought up the local produce. Witness had as a consequence to send to Port Elizabeth for mealies and bedding. In 1904-5 goods came in direct to the police camp. Witness sold his business in September, 1904, to take effect from November. Robinson and Hugo came into possession in November, 1904. Witness had prepared a schedule showing how his damages were made up. On the 1903 contract he estimated he lost in his trading about £1,000, on account of farmers whom they would have bought mealies from not having traded at his stores.

[Hopley, J.: Why didn't you throw a sprat to catch a herring, and bid higher than Jacobson?]

It would have been too big a loss on the other side. He tendered for forage in 1903 at 45s. per 100 lb. The cost would have been 30s., so that if he had got the contract he would have made 15s. a bag. The profit on 1,000 bags would have been £793 15s. The bags were reckoned at 150 lb. each.

By the Court: He could not say that if Harris had not got the contract he (witness) would have got it. Nobody else seemed to know about it. The contract was let at 60s.

[Hopley, J.: Do you suggest a police scandal commission?]-If there were no notices and no other tenders were called, the Government should certainly inquire.

Sir H. Juta said that, on behalf of the Government, he might say that the contract was advertised.

Mr. Searle said that the contract was not advertised in the "Victoria West Messenger," which was the recognised organ for Government notices in the district of Gordonia.

Witness, replying to the Court, said that he could not have tendered for the contracts in 1903. He tendered to the Kimberley police district later on. As regarded the contract for 1904-5, he obtained the contract for the out-stations, but Harris obtained the contract for Upington. Witness tendered for both Upington and the out-stations at the same figures, viz., 24s. 6d. for oats, 24s. for oathay, 21s. for mealies, 5s. for bedding, 24s. for bran, per 100 lb. in each case. The margin of profit was very much smaller on the out-station contracts than on the Upington contract in consequence of the cost of transport riding. Witness estimated his damages on the Upington contract at £759 15s., being the difference between the tender prices that he sent in and the cost of the produce landed in Upington. In addition, he claimed dam-

ages because he could have bought the mealies and oathay required in Upington, and would have done trade with the farmers which he estimated at £450, yielding a profit of £150. The profit on the out-station contracts would have been very small. He also claimed that he had lost in Upington on the first contract £1,000 worth of trade, on which he estimated the profit at £333.

Cross-examined: He had sold the goodwill for the contracting, general stores, and bottle stores for £250. He denied that he assumed that Government contracting was not included in his contract with Harris. He did not look at the "Government Gazette" at the time of the 1904 contract, and he did not ask the Magistrate or the Quartermaster. That was not because he knew that contracting was not included in the contract between himself and Harris. Henry Harris was not several times at witness's store trying to buy chaff for this very contract.

Re-examined: Harry Harris and Henry Harris were different persons. Henry Harris was brother of Wolf Harris. Henry Harris never told witness that Harry Harris was in the contract.

Thomas Jacobson said he had carried on business at Upington for five years as a general dealer. He knew Harris Bros. He entered into a sub-contract with them in March, 1903, to supply produce to the police.

Hopley, J., said that he proposed to allow the amendment in the declaration asked for by Mr. Searle, and at the conclusion of that day's hearing adjourn the case till Tuesday, thus enabling defendant to prepare to meet any new points.

Sir H. Juta protested, and said that, as he had already pointed out, if the tendering and contracting in 1903-4 were a breach of the agreement, then it would make no difference to the main issue whether there had been this contract in 1902-3.

Hopley, J., said that he would not allow the amendment at present, under the circumstances.

The witness Jacobson said his first agreement with Harris Bros., was that he should supply at 45s. per 100, Harris Bros., to take the difference between that figure and the contract price. Witness afterwards had an agreement with Harris to supply at 40s. per 100. These agreements lasted six months, at the end of which time he became an agent of Harris Bros. at 8s. 6d. per 100 for transport for the first three months, rising to 9s. in the following three months. In March, 1904, Henry Harris came to Upington, and hired witness's store at £10 a month. Witness had then ceased to be agent of Harris Bros. Witness had sold bedding for the police contract to both Harry and Henry Harris. Witness did not

tender for the contract in 1903, because he did not see any notices. He had tendered for the contract in 1904, and also in 1905, but had not got the contracts.

Cross-examined: He discussed this police contract with Stern in 1903, when the goods were arriving at his store. Witness and Stern had shops opposite each other. He was certain that Stern knew in 1903 that Harris Bros. had got the contract, and that Harry Harris was Harris Bros.

Hendrik Pieter Steyn, farmer, Upington, said that in the winter of 1903 Jacobson came and told him that he would give 2s. a bag more than any other shopkeeper for mealies that he wanted for Mr. Harris, who had to supply the police at Kenhardt and Upington. Jacobson said that he could tell the other farmers of this offer. Jacobson purchased nearly all the mealies grown that season. It was usual for the farmer to deal with the shopkeeper who bought his produce.

Cross-examined: In the year 1903 he did not sell his mealies to Jacobson, but to his own children. He charged his children £2 a bag.

Jacob Jacobus Hugo, of the firm of Robinson and Hugo, general dealers, Upington, said that he entered into an agreement with Stern that they should join equally in the proceeds of any contract they entered into.

Cross-examined: This arrangement did not refer to the police contract that his firm had taken over from Stern.

Certain Cape Town witnesses remained to be called for the plaintiffs.

Major F. A. Elliott, C.M.P., called for the defendant, said that in 1902 he was Acting Commissioner for Cape Police, District No. 2, at Kimberley. He also occupied that position in 1903. It was customary to send notices to the various districts for supplies. In 1903 a tender by Harris Bros. for supplies to Gordonia was accepted. He did not remember a tender having been sent in by Stern. The notice was inserted in the "Government Gazette." He thought the notice might not have been inserted in the local paper owing to an oversight. When the tender of Harris Bros. was accepted, he did not know anything of Harry Harris; he simply looked to Harris Bros. He remembered having seen Wolf Harris.

Cross-examined: All the tenders in 1902 were rejected, because they were too high. He did not know how many tenders were received. Harris Bros. afterwards sent in a tender for £902 3s. He thought that tender was lower than those that had been received. They looked to the surety attached to the tender. He thought the rejected tenders of 1902 would be obtainable from the office of the Quartermaster of the C.M.P.

Re-examined: After the contracts had been let, the police at Uppington were advised who the tenderers were.

Hopley, J., on Mr. Searle's application, allowed the amendment of the declaration already mentioned.

[The case was settled out of Court.]

SUPREME COURT

FIRST DIVISION.

[Before the Acting Chief Justice (the Hon. Sir JOHN BUCHANAN) and the Hon. Mr. Justice HOPLEY.]

COMMISSIONER OF TAXES V. { 1905.
DE BEERS CONSOLIDATED { Aug. 7th.
MINES. " 21st.

Income tax—Share of profits made by a foreign syndicate on diamonds found in this Colony—Sec. 42 of Act 36 of 1904.

The D.B. Diamond Mining Company, carrying on business in this Colony, had arranged to sell their diamonds to a London syndicate, on condition, inter alia, that they should receive a certain percentage of the profits made by the syndicate. Upon this percentage the Colonial Commissioner of Taxes now claimed income tax under Act 36 of 1904.

Held on appeal from the Court of Review, that as the company's share of the profits made by the syndicate was derived from diamonds found in this Colony, Sec. 42 of Act 36 of 1904 was wide enough to cover this, and that it was, therefore, subject to income tax.

This was virtually an appeal (in the form of a special case stated) from a decision of the Court of Review on questions of Income-tax as to the liability of the De Beer's Consolidated Mines to pay Income-tax on a certain

share of profits derived by them from the operations of a certain London Syndicate.

The case was stated in the following terms:

1. The De Beers Consolidated Mines, hereinafter called the company, carries on, *inter alia*, the business of mining in this colony.

2. The company was assessed by the Commissioner of Taxes (hereinafter called the Commissioner) under Act 36 of 1904 for income tax purposes on its general sources of income for the year ending 30th June, 1904.

3. The company objected under section 72 of the said Act to the Commissioner's assessment of £8,135 9s. as income tax in respect of a certain sum of £162,709, this latter sum being an amount received by the company as its share of profits on certain dealings in diamonds hereinafter referred to. The objection was made on the ground that these profits were made in London, and not in this colony. The company did not object to the remainder of the assessment by the Commissioner in respect of the rest of its income, and has paid income tax thereon.

4. The company appealed against the assessment, and on the 6th and 7th March, 1905, the appeal was heard at Kimberley by the Court of Review, constituted under Act 34 of 1904. The appeal was allowed.

5. The Commissioner, being dissatisfied with the decision of the Court of Review, has, under section 74 of Act 36 of 1904, requested that a case be stated for the decision of the Hon. the Supreme Court on the question of law involved in the decision given by the Court of Review.

6. On the 2nd December, 1901, certain persons (hereinafter called the syndicate) entered into an agreement with the company relative to the disposal of the company's diamond output.

7. Clause 1 of the agreement provides as to the purchase of the output for a period ending February, 1902. Clause 12 gives an option to continue the agreement as to the output for the period ending June, 1902; while clauses 15 and 16 give further options for periods extending finally to 30th June, 1906.

8. The agreement was during the year ending 30th June, 1904, of full legal force and effect between the company and the syndicate, in terms of, and to the extent covered by clause 20 thereof, the right of election and option under clause 16 aforesaid having been regularly and duly exercised.

9. Some of the members of the syndicate, with large interests therein, also hold a large number of shares in the company. Some are directors in the company. Mr. Hirschhorn, who is an alternate director of the company with Mr. Beit (who is largely interested in the syndicate), is the valuator, who, act-