set it aside but eventually the application for default judgment was postponed *sine die* the plaintiff being granted costs of the day's appearance. In the present case Mr. *Bliss* has asked for judgment by default urging that defendant should receive no consideration inasmuch as he could also have applied for a condonation, but he was not able to cite any cases in which in the present circumstances default judgment has been granted.

The need to plead over was enforced in *Steenkamp* v. *du Toit*, 1909 T.S. 1093. In this case the defendant excepted to a declaration without pleading over but the Court refused to hear argument on the exception until a plea had been filed, and ordered the excipient to file a plea forthwith and pay the costs necessitated by the postponement. The Court pointed out that the object of the rule is to avoid the expense of separate instructions to counsel and of separate sets of stamps. This case does not appear to have been dissented from at any time and must be followed. It has however been held that Rule 37 gives the Court a general discretion in connection with matters of procedure and that the Court is entitled to overlook in proper cases any irregularity in procedure which does not work any substantial prejudice to the other party (*Foster* v. *Carlis and Houthakker*, 1924 T.P.D. 247; *Goosen* v. *van Dijk*, 1939 W.L.D. 32).

It seems to me that in the present case the respondent should be ordered to file his plea within fourteen days of the date of the delivery of this judgment and he is ordered to pay the costs.

Applicant's Attorneys: *Friedland, Hart & Cooper.* Respondent's Attorneys: *Slade & Viljoen.*

MESDLW-G

S.A. PULP AND PAPER INDUSTRIES LTD. v. COMMISSIONER FOR INLAND REVENUE.

(TRANSVAAL PROVINCIAL DIVISION.)

1954. *June* 3, *October* 19. BRESLER, J.

Landlord and tenant.—Lease.—What amounts to.—Plantation of Saligna trees.—"Lessee" given sole right to cut down trees and regrowths for a defined period.—Property to be returned intact at end of "lease".—Contract a "lease of property" within meaning of sec. 1 (vi) (*a*) *of Act* 40 *of* 1949.

A notarial deed of "lease" of certain plantations of Saligna trees provided that the "lease" should be for 30 years; that the plantations, i.e. "the land on which the Saligna trees were growing", were to be used solely for the purpose of growing and cutting of Saligna timber; that the lessee had the right to fell and remove all trees including regrowths but no regrowths were to be felled after 1978; that the lessee accepted and assumed all risks in respect of the plantation; that the lessee would maintain the plantation in proper condition according to approved practice; that the lessee was invested with a number of rights and facilities in order to exercise its rights under the lease and that the rental was calculated at per acre of

the plantation. In an application for an order declaring that such deed was a "lease of property" within the meaning of section 1 (vi) (*a*) of the Transfer Duty Act, 40 of 1949, and therefore not subject to transfer duty, the respondent contended that the deed constituted a "real right" in land and was not a lease.

Held, having regard to the intention expressed in the deed as well as the fact that the property would be returned intact at the expiration of the lease, that the contract did not contain anything inconsistent with the requisites of a lease.

Held, accordingly, that the order should be granted as prayed.

Application for an order declaring a certain notarial deed to be a lease. The facts appear from the reasons for judgment.

A. Fischer, Q.C. (with him *W. H. R. Schreiner*), for the applicant: Whether duty is payable or not depends upon whether the contract constitutes "property" in terms of sec. 1 of Act 40 of 1949. The contract is a lease. As to what is a lease, see Wille *Landlord and Tenant*, 4th ed., p. 1; *Graham* v. *Local and Overseas Investments Ltd.*, 1942 A.D. 95; *Kessler* v. *Krogmann*, 1908 T.S. 290. *Prima facie* parties to an agreement are entitled to decide what legal relationship they wish to create between themselves and their intention must prevail unless the agreement is inconsistent with such relationship, *Zandberg* v. *van Zyl*, 1910 A.D. 302. There is nothing inconsistent with the contract in question being a lease. The subsidiary rights granted are not inconsistent with a lease. *Cherry and Amm* v. *Leask and Potgieter*, 1907 T.S. 702; *Olivier* v. *S.A. Townships*, 1927 W.L.D. 113. *Botha* v. *Soocher*, 1941 T.P.D. 245, is distinguishable, and so is *Federal Timber Co.* v. *Celliers*, 1909 T.S. 909. See further *Neethling* v. *Vesta Gold Mining Co.*, 1903 T.H. 404. As to costs, see *C.I.R.* v. *Ropes and Mattings Ltd.*, 1945 A.D. 724; *Malherbe* v. *Civil Commissioner, Pretoria*, 1903 T.S. 611; *du Toit* v. *Registrar of Deeds*, 1912 T.P.D. 297; *Kleinenberg* v. *Clerk of the Court, Pietersburg*, 1904 T.S. 90.

M. Murray, Q.C. (with him *L. L. Esselen*), for the respondent: The agreement is not a lease but gives the so-called lessee real rights in the land. The test laid down in *Botha* v. *Soocher, supra*, does not go so far as to decide that where there is no *jus abutendi* there is a lease. The true test is to consider for what the consideration was paid. If for the right to cut trees and occupation is merely incidental, then there is no lease. Agreements to cut *sylva caedua* are similar to agreements to work saltpans. In both cases though part of the reality is removed, renewal takes place. As to minerals which are *renascentia*, see *Master* v. *African Mines Corporation Ltd.*, 1907 T.S. 925 at pp. 930-931. Salt is such a mineral, *Maasdorp*, 7th ed., vol. II, p. 218. The test suggested was laid down and applied in *Royal Salt Pans* v. *Laubscher*, 1953 (4) S.A. 398. In the Court below evidence was led to the effect that at the end of the contract the property would be restored to the same condition, and it was assumed that there was a lease, *Levy and Another* v. *Laubscher and Another*, 1953 (2) S.A. 403. Applying such test to the agreement under discussion, since what is really being granted is the right to cut trees and occupation is merely incidental, this is not a lease. Being the grant of a right to exercise some of the rights of an owner, and to remove portion of the realty it is a real right in land, *Federal Timber Co.* v. *Celliers, supra*. As such

it is liable to transfer duty as falling within the definition of property in sec. 1 (vi) of Act 40 of 1949.

Fischer, Q.C., in reply.

Cur. adv. vult.

Postea (October 19th).

BRESLER, J.: The petitioner asks for an order declaring that the notarial deed entered into between it and one Irene Emmett Catherine Chalkley is "a lease of property" within the meaning of that term in sec. 1 (vi) (*a*) of the Transfer Duty Act, 40 of 1949 and therefore not subject to tranfer duty. The respondent's answer is that the deed in question constitutes a "real right" in land and he is prepared to concede that the eucalyptus trees in question fall within the category of *sylva cædua*. According to the petition the "saligna trees" referred to in the deed grow again from the stumps remaining after the trees have been felled and within a period of between six to ten years, depending on the locality, a new growth, similar in quality to the first, is developed. Three or four growths of timber may be obtained from the same root before it becomes necessary, from the commercial point of view to remove it and replant. At the date when the deed was entered into some of the trees had already been cut once and others had not been cut owing to the variation in ages. The preamble reads as follows:

"And whereas plantations of Saligna trees have been established upon the said farms;

And whereas the lessors have agreed to lease to the lessee the said plantations to enable the lessee to cut and remove the timber therein."

'Plantations' are then described as "the land on which the Saligna trees are growing" and the duration of the lease is to be 30 years. The plantations are to be used solely for the purpose of the growing and cutting of Saligna timber and for no other purpose whatsoever. The lessee is to have the right to fell and remove all trees including regrowths in the plantations but no regrowths from trees which have been felled after the 31st December, 1977, may be felled. The lessee accepts and assumes all risk of whatsoever nature in respect of the plantations and undertakes to maintain the plantations in addition to being required to carry out a number of things; further the lessee is invested with a number of rights and facilities in order to exercise its rights under the lease which is for a period of 30 (thirty) years namely from the 1st January, 1952, to the 31st December, 1981. The rental is calculated at per acre of the plantation and the lessee is required to maintain the plantations in proper condition according to approved practice and his responsibilities are set out in a number of respects.

The respondent's attitude was indicated in a letter dated the 20th October, 1953, in which it is indicated that the contract in question is not in fact a lease. It was not enough, the letter said, merely to designate the contract a lease—*plus valet quod agitur quam quod simulate concipitur.*

Sec. 1 (vi) (*a*) of the Transfer Duty Act, 40 of 1949 reads as follows:

"(vi) 'property' means land and any fixtures thereon, and includes—

(*a*) any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in para. (*b*) or (*c*)."

These two latter paragraphs do not concern us.

The nature and essentials of a lease were not disputed (*Kessler* v. *Krogman*, 1908 T.S. 290 at p. 297; *Neebe* v. *Registrar of Mining Rights*, 1902 T.S. 65 at p. 81; *Graham* v. *Local and Overseas Investments (Pty.) Ltd.*, 1942 A.D. 95 at p. 108) and the argument in one of its forms was that under the contract in question, providing as it did for a *ius abutendi*, a tenant could have no right to appropriate or destroy the substance of the leased property and the fact that a "mining lease" is not regarded as a true lease was utilised in argument on behalf of the respondent. It was further contended that the intention appearing more particularly from the preamble was to cut timber as the main objective of the agreement. The right it was said savoured somewhat of a servitude and constituted a real right in land and in conclusion reliance was placed upon *Royal Salt Pans* v. *Laubscher and Another*, 1953 (4) S.A. 398 (A.D.), which it was said furnished an apposite analogy.

For the applicant it was contended that there was nothing inconsistent with the requisites of a lease in the deed in question. The subject matter it was said were the plantations on which the trees were growing and the subsidiary rights could not affect the contract. (*Cherry and Amm* v. *Leask & Potgieter*, 1907 T.S. 702; *Oliver* v. *S.A. Townships Mining and Finance Corporation Ltd.*, 1927 W.L.D. 113). There was no destruction of the substance of the leased property, it was maintained, and in any event there was a replenishment of the timber by a natural process. In this connection reference might well be made to *Ex parte Lanham's Executors*, 1908 T.S. 330. The intention was to lease the land on which the timber was and it was argued that the case of *Royal Salt Pans* v. *Laubscher and Another*, 1953 (4) S.A. 398 (A.D.), was not applicable.

These sufficiently constitute the main points raised in argument and I must refer to a number of cases which were cited. The first I wish to refer to is *Zandberg* v. *van Zyl*, 1910 A.D. 302 at p. 309, which laid down that a Court must be satisfied that there was a real intention, definitely ascertainable, which differed from the simulated one but in the present case hardly any one of the tests there suggested seems to be applicable. There are no facts leading up to the contract that can be said to throw any light upon the intention nor does the position of the parties clarify the matter and there seem to be no unusual provisions from which definite conclusions can be drawn. The question of the *onus* was dealt with by the Court which said that the burden of proof was upon the person asserting that the nature of the transaction was something different from what it appeared to be to establish that assertion. In the present case of course the issue appears solely from the papers.

There seems to be no direct authority in point in the matter and the only case cited in connection with the existence of a servitude was *Neethling* v. *Vesta Gold Mining Co.*, 1903 T.H. 404, but the learned

Judge there refused to be "enticed" into considering this possibility. Two points are of some assistance. The so-called "rent" used in connection with a mineral lease is said to be a deposit or retaining fee in connection with a speculative venture. The characteristics of an agricultural lease again were said to be the periodical harvests emanating from a process of sowing and reaping.

The present case seems analogous to the letting and hiring of land on which existing vegetables are permitted to be consumed and on which fresh ones are permitted to be cultivated for sale on the vegetable market; an agreement which could not be said not to be a lease. If the right to consume is expressly provided for in the agreement and there is a process of natural renewal then it seems to me that such an agreement could be called a lease. (*In re Estate Lanham's Executors*, 1908 T.S. 330).

A case which indicates that the present may well not be inconsistent with the requisites of a lease is *Botha and Another* v. *Soocher*, 1941 T.P.D. 245, the facts of which require full recapitulation.

The agreement provided that the respondent be granted the sole and exclusive right to cut such indigenous trees as according to his opinion could be used to make fruit and tomato boxes. The further purpose was to produce woodwork and shavings from the trees. The respondent was to be the sole judge of which trees were to be used and was granted the right to select a lot or lots on the farm large enough for the accommodation of a saw-mill machinery and offices—all of which respondent was at liberty to remove to other portions of the farm if necessary. The agreement was to continue as long as respondent was of the opinion that there was enough indigenous timber on the farm for his activities. The agreement contained no provision for the replanting of the timber and on p. 247 the learned Judge GREENBERG, J.P., as he then was, said this:

"It may be of course that a person who is a lessee is also given the right to consume a certain portion of what is leased, but I think that the contention has this amount of force in it that if it is not clear whether the agreement is a lease or not then the fact that the so-called lessee is given the right to consume portion of the matter leased is an indication that the contract is not a lease, and that it is a contract of some other kind."

After referring to the fact that the object was the disposal of the indigenous timber on the farm the learned Judge proceeded to say this:

"In the present case I think it is clear that the object of the contracting parties was the disposal of the indigenous timber on the farm, and the other terms which gave the respondent the right to occupy certain portions of the farm were conceived, in my opinion, with the object of enabling the purpose that I have mentioned to be carried out. What the position would have been had its sites, which respondent was given the right to use, been definitely allocated in the first instance or definitely described and had they not been changeable I find it unnecessary to consider. But I have come to the conclusion that the terms of the agreement in the document before us are such that it cannot be said that this is a lease; I have already referred to its objects and the mere fact that the respondent is given the right, in the terms to which I have mentioned, to occupy from time to time pieces of ground for incidental purposes is sufficient to convert the agreement either wholly or partially into a lease. It may well be that an agreement may be a lease and may also be an agreement to sell timber or minerals on the farm. It is not necessary that an agreement must fall under one heading—it may partake of the nature of both. But in the present case it is clear, in my opinion, that the parties did not intend to lease the ground. They intended to dispose of the timber and gave the right of occupation in

order to enable respondent to carry his part of the contract economically and conveniently."

This case then in my view cannot be employed as destructive of applicant's contention, and I will now refer to another case which I think is applicable.

In *Estate Thomas* v. *Kerr and Another*, 20 S.C. 354 at p. 370, KOTZE, J., said this with regard to a lease of "certain mining rights";—

"It has been said on behalf of the defendant that in this case we have not in strictness to do with a contract of lease, inasmuch as the *ius abutendi* as well as the *ius utendi*, is granted to Kerr, who is given the right to mine and remove the coal from the farm. But the insertion of conditions of this kind, like the right given to a lessee to cut and remove wood, or use up the soil in the making of bricks does not, as it were create a separate class of contract. The contract in the present case, which occurs daily in practice, remains in its essential features one of lease, and must be so regarded by the Court."

This brings me to a very recent decision, namely *Royal Salt Pans* v. *Laubscher and Another*, 1953 (4) S.A. 398 (A.D.). Much reliance was placed on this case and it becomes necessary to deal with it somewhat fully. The contract between the parties was in respect of a certain salt pan and one of the conditions read as follows:—

"(c) Die huurders het die reg om die soutpan vir hul doeleindes te bewerk, die sout uit te haal en te vervoer vir hul eie rekening en daar word aan hul en hul bediendes en werkslui ingang en uitgang na die soutpan ten alle tye toegestaan, en hul het die reg om een honderd jaart breedte en vier honderd lengte van die grond links van die pad na die see te gebruik en die sout uit te ry en te pak."

This contract was assumed by the Court *a quo* to be a lease within the meaning of Act 43 of 1950 but in his judgment HOEXTER, J.A., said that it could only be such within the meaning of the Act if the payment therein is "rent" as defined in sec. 1 (x) thereof and the learned Judge pointed out that "rent" as defined in this Act is a payment made primarily for the use and occupation of premises whereas in the contract the alleged rent is primarily a payment for the right to take salt from the pan. Accordingly the learned Judge found that the appellants were not entitled to the protection accorded to a lessee by the Act. This conclusion made it unnecessary to decide whether the salt pan could be regarded as "business premises" as defined by the Act. It was argued that there was an analogy between this case and the present one but the applicability has not been proved.

There is no direct authority in point in the present case but in view of the intention as well as the fact that the property will be returned intact on the expiration of the contract it does not appear to me that the contract can be said to contain anything inconsistent with the requisites of a lease.

Accordingly an order is granted declaring that the notarial deed in question is "a lease of property" within the meaning of that term in sec. I (vi) (*a*) of the Transfer Duty Act, 40 of 1949.

Respondent is ordered to pay the costs of the application.

Applicant's Attorneys: *McIntosh, Cross & Farquharson.* Respondent's Attorney: *Government Attorney.*