

SOUTH AFRICA / JUDGMENT

**Resnekov v Cohen (1787/11) [2011]
ZAWCHC 317; 2012 (1) SA 314 (WCC);
[2012] 1 All SA 680 (WCC) (24 August 2011)
[2011] ZAWCHC 317**

COURT

Western Cape High Court, Cape Town

BEFORE

Griesel

CASE / FILE NUMBER

1787/11

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE
TOWN)

Case No 1787/11

In the matter between:

ANTON MICHAEL
RESNEKOV

.....Applicant

and

GORDON COHEN

.....Respondent

Court:

GRIESEL J

Heard:

23 August
2011

Delivered: 24 August
2011
ADV. FOR
APPLICANT: Adv
D Bagulcy
INSTRUCTED
BY: Dimitri
Kakiades Attorneys (D Kakiades)
ADV.
RESPONDENT: Adv
T Potgieler, SC
INSTRUCTED
BY: Harmse
Kriel (J W Harmse)
Reportable
IN THE HIGH COURT OF SOUTH
AFRICA
ANTON MICHAEL
RESNEKOV Applicant
GORDON COHEN
Respondent

JUDGMENT

GRIESEL J:

11] The applicant and the respondent own neighbouring properties in Duncan Road, Sea Point, described as Remainder Erf 1017 and Remainder Erf 1020 Sea Point East respectively. The applicant applies for an urgent interdict aimed at preventing the respondent from erecting a habitable level above the level of the existing ceiling of his dwelling on the basis that doing so would be in conflict with a title deed restriction applicable to his property.

Factual background

- [2] The two properties originally formed part of a parcel of land known as Lots 11, 12 and 13 at Sea Point, which was purchased by a Mr Alfred Kantorowitch in July 1923. Kantorowitch sold much of this parcel of land to one Coeizee in August 1923 while keeping a portion for himself. In July 1924 Kantorowitch sold off some of the land he had retained to one Titteiton leaving in his possession only a small part of the original property. It is common cause that the portion retained by Kantorowitch now constitutes the respondent's property.
- [3] In 1926 Kantorowitch sold off this last piece of land to a certain Miss Courtenay, the respondent's predecessor in title. It was during this transfer that certain title deed restrictions were inserted into the title deeds of the respondent's property including the one which forms the subject of this case. That restriction as registered against the respondent's title deed reads as follows:

SUBJECT

A.

B.

C. To the following special conditions contained in the said Deed of Transfer No 3312 dated 10 April. 1926, imposed for the benefit of A. Kantorowitch and his Successors in Title'.

"No building other than single storied buildings shall be allowed to be erected on the properly hercbv transferred ..." (Emphasis added)

- [4] When transferring the last piece of land to Courtenay in April 1st 1926, Kantorowitch no longer owned any property surrounding or adjoining the property he sold to Courtenay. However, approximately two years later, in March 1928, Kantorowitch bought back a piece of the property he had earlier sold to Coetzee and which the latter had in the meantime subdivided. This piece of land is referred to in the papers as 'Lot DA', part of which later became the applicant's property, Remainder Erf 1020. which he acquired in 2010.
- [5] The applicant has submitted plans to the local authority, evincing an intention of effecting certain alterations to his property, which will have the effect of adding a further level to his existing dwelling. The present application is aimed at preventing this result, relying exclusively on the wording of the restrictive condition quoted above.

Is the restriction a praedial or personal servitude?

- [6] The dispute between the parties revolves, in the first instance, around the question whether the restriction against the respondent's title deed constitutes a praedial or a personal servitude. It is trite that a praedial servitude is established over a servient tenement for the benefit of a dominant tenement in perpetuity, irrespective of the identity of the owner.¹ A personal servitude, on the other hand, is constituted over a servient tenement in favour of a particular person and is ordinarily

extinguished by the death of the holder.²

- [7] In an interesting and wellpresented argument, Mr Baguley, who appeared for the applicant, submitted that the question whether Courtenay and Kantorowitch agreed to a praedial or personal servitude depends on their intention to be gathered from the terms of the contract construed in light of the relevant circumstances.³ The practical difficulty with this approach, however, is that the contract between Courtenay and Kantorowitch is not before the court. All that the court has, is the original deed of transfer, executed on 10 April 1926. Be that as it may, from that document it appears that the restrictive condition, on its original wording, provided that the restriction was intended for the benefit of "the owner or owners of the adjoining property". This provision was apparently regarded by the registrar as too vague, with the result that the description 'the adjoining property' was supplemented with the words "being the remainder of the land known as Lots 11, 12 and 13 situate as above".¹ I agree with counsel that this wording tends to indicate that a praedial servitude was

intended. However, these words were also deleted and replaced with the words 'the transferor [ie Kantorowitch] and his successors in title'. Mr Baguley submitted that these words, likewise, tend to demonstrate that a praedial servitude was intended and that the reference to Kantorowitch 'and his successors in title', rather than the owners of the adjoining property, does not suggest that a personal servitude was intended.

- [8] I am unable to agree. It is trite that for a praedial servitude to exist there has to be at least two properties, a dominant and a servient tenement.⁴ The condition in question does not purport to be registered in favour of any particular property. This is fatal to the applicant's

contention, as '[i]t is the existence or nonexistence of a dominant tenement which is the decisive factor in differentiating between

personal and praedial servitudes'.⁵ In casu, there is no dominant tenement. In this context, it is also significant although not decisive that the servitude is not registered in the title deed to the applicant's property.⁶ Instead of mentioning a dominant property, the provision makes specific mention of a particular person, namely Mr Kantorowitch. He is cited simply as 'transferor' and not in his capacity as owner of any property. This is a powerful indication that a personal servitude was being created.

- [9] In the light of these various considerations. I am of the view that the condition in question constitutes a personal servitude, and not a praedial servitude. I am fortified in this view by the presumption in law that in cases where it is uncertain whether a particular servitude is praedial or personal, the servitude is presumed to be personal.⁷ Can a personal servitude be made transferable by agreement? [10] The applicant's alternative argument was that even if the restriction is considered to be personal, on its own terms the restriction is perpetual by reason of the words 'and his successors in title'. In this regard, counsel were in agreement that ordinarily personal servitudes terminate upon the death of the beneficiary of the servitude. Mr Baguley submitted, however, that this is a legal rule which applies in the absence of an agreement to the contrary. He argued that it cannot be legally impossible by agreement to create a perpetual personal servitude. He relied in this context on I Lall & Kellaway,⁸ who state: 'Despite the dictum of Innes. J [in Willoughby's case] it is submitted that in constituting a personal servitude the parties to it are at liberty to make it assignable at the option of the grantee, and even to make the right a perpetual one provided it is of such a nature that it can exist in perpetuity or at least for an indeterminable period. The idea that personal servitudes are inalienable and that they die with the holder appears to be an inheritance from Roman law — but the development of mining and mineral rights during modern times has made this doctrine untenable, and the alienability of personal servitudes has become entirely a matter of the intention of the contracting parties/

[11] The above passages were quoted in *Bhamjee v Mergold Beleggings*,⁹ by Spoelstra J (writing for the full court), who accepted for the purposes of the argument that a personal servitude could be worded so as to endure for an indeterminate period in favour of the first beneficiary and his or her successors.¹⁰ On the wording of the particular servitude in question, however, it was held that no such intention could be found.

[12] The applicant also placed reliance on the decision in *Meintjes v Oherholzer and the Graaf Reinets Municipality*,¹¹ where a full court upheld a servitude imposed by the Crown over the defendant's farm allowing members of the public to use fuel or firewood growing on the farm. The applicant construes this as recognition by the court of the notion of perpetual personal

servitudes. However, as pointed out by Mr Potgieter on behalf of the respondent, the court merely gave a decision as to the meaning of the words 'het brandhout op dit land tot algemeen gebruik' in the original grant by the Crown of a farm to the first owner. Although the public's right in terms of the grant is described as a servitude,¹² there is no mention of the creation of a perpetual personal servitude by agreement.

[13] The applicant also placed reliance on the proviso contained in s 65(1) of the Deeds Registries Act 47 of 1937 which, according to the applicant, recognises that perpetual personal servitudes are permissible and that it is possible to register personal servitudes in favour of more than one person. This appears to be countered, however, by the provisions of s 66 of the Act, which 'gives full effect to our common law by providing that no personal servitude of usufruct, itsus or habitation purporting to extend beyond the lifetime of the person in whose favour it is created, shall be registered'.¹³ [14] Finally. Mr Bagidey referred to the *Durban City Council* case, *supra*, where the court found it "not necessary" to decide whether a personal servitude could be rendered alienable by agreement between the parties'.¹⁴ Counsel accordingly invited this court to 'fill the gap' that had been left open by the Appellate Division in that case and to find that a personal servitude can indeed be rendered alienable by agreement between the parties.

[9] In the light of these various considerations. I am of the view that the condition in question constitutes a personal servitude, and not a praedial servitude. I am fortified in this view by the presumption in law that in cases where it is uncertain whether a particular servitude is praedial or personal, the servitude is presumed to be personal.⁷

Can a personal servitude be made transferable by agreement?

[10] The applicant's alternative argument was that even if the restriction is considered to be personal, on its own terms the restriction is perpetual by reason of the words 'and his successors in title'. In this regard, counsel were in agreement that ordinarily personal servitudes terminate upon the death of the beneficiary of the servitude. Mr Baguley submitted, however, that this is a legal rule which applies in the absence of an agreement to the contrary. He argued that it cannot be legally impossible by agreement to create a perpetual personal servitude. He relied in this context on *I lall & Kellaway*,⁸ who state:

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[15] In my view, the applicant's arguments ingenious and creative as they may be amount to clutching at straws. Counsel frankly conceded that there is no direct authority in our law for the proposition that he was advancing, namely that the parties may by agreement convert a

personal servitude, which is ordinarily limited to the lifetime of the beneficiary, into a perpetual right. As pointed out by Mr Potgieter, the opinion by the learned authors of Hall & Kellaway has not been followed by our courts. Their reliance on the analogy of mineral rights is dismissed in one sentence by Van der Merwe:¹⁵ "Minerale regie word gewoonlik nie as 'n persoonlike scrwiiuut geklassifiseer nic. Omdal sodanige regie wcl vcrrccmbaar en oorerllik is." [16] Moreover, there is ample authority including in the Appellate Division stating the general principle in broad unqualified terms, viz that the right conferred by a personal servitude is inseparably attached to the beneficiary and that it cannot be transmitted to his or her heirs, nor can it be alienated: 'when he dies it perishes with him'.¹⁶

- [17] Apart from these powerful considerations, the applicant's argument also falls foul of the well established rule of construction that because a servitude is a limitation on ownership, it must be accorded an interpretation which least encumbers the servient tenement.¹⁷
- [18] In the light of these considerations, and sitting as a judge of first instance, I must accordingly decline the applicant's invitation to make new law. It follows that the application cannot succeed, as the applicant lacks the necessary focus standi to enforce the restrictive condition in question.

Conclusion

[19] For the reasons set out above, the application is DISMISSED with costs. B M GRIESEL Judge of the High Court

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Conclusion

[19] For the reasons set out above, the application is DISMISSED with costs.

B M GRIESEL

Judge of the High Court

1 *Servitudes*, 24 *Lawsa* (2 ed) para 545

2 *Id* paras 541.579.

3 He relied in this context on *Wittoughby's Consolidated Co., Ltd. v Copthail Stores Ltd* AD 1 ai 16: *Hotel De Aarr Jonordan Investment (Edms.) Upk 1972 (2)SA 400 (A)* at 406D.

4 *Lawsa*, *op cit*, para 546 and the long line of authorities cited in n 5,

5 *Malan v Ardconnel Investments* 1988

(2) SA 12 (A) ai 37D.

6 *Newall. The Law and Practice of Deeds Registration* p 103; *Malan v Ardconnel Investments*, *supra*, at 37EG

7 *Lawsa*, *op cit*, para 543

8 *Servitudes* 3ed at pp 163 164

9 1983 (4)SA 555 (T) at 562A C.

10 At 561H562A.

11 L859 Scarle 265. See also *Van Niekerk v Wimble* (1878) *Buchanan* 190.

12 *Van der Merwe, Sokereg*, 2 ed. describes it at 496 and 545 as a public servitude 'ten gunste van die algemene publiek

13 *Durban City Council v Woodhaven Ltd* 1987

(3) SA 555 (A) at 562CD.

14 At 562DE.

15 *Op cit*, p506

16 *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267 al 282. followed *inter alia* in *Hotel De Aar v Jonordon Investments* 1972

(2) SA 400 (A) at 405DF; Durban City Council v Woodhaven Ltd, supra, at 561FH; Erlax Properties v Registrar of Deeds 1992 (I) SA 879 (A) at 886GI. See also n 2 above.

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(3) SA 5 (SCA) para 8: Lawsa, op cit, para 543..

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