Regspraak

CAN PERSONAL SERVITUDES BE WORDED IN SUCH A WAY THAT THEY ARE PERPETUAL IN NATURE AND THUS FREELY TRANSFERABLE AND TRANSMISSIBLE?

Resnekov v Cohen 2012 1 SA 314 (WCC)

1 *Introduction*

The issues in *Resnekov v Cohen* (2012 1 SA 314 (WCC)) were whether a restrictive condition inserted into the title deeds of the servient property constituted a praedial or personal servitude, and if found to be personal, whether it could be made transferable to successors in title by the correct wording of the restrictive condition in title deeds of the servient property.

2 *Facts of the case*

The applicant and the respondent owned neighbouring properties in Duncan Road, Sea Point. The applicant applied for an urgent interdict aimed at preventing the respondent from erecting a further storey above the level of the existing ceiling of his residence on the basis that doing so would be in conflict with a title deed restriction applicable to his property. The two properties originally formed part of a parcel of land which was purchased by Kantorowitch in July 1923. Kantorowitch sold much of this parcel to two different purchasers in August 1923 and in July 1924, while retaining only a small part of the original property, which at present belongs to the respondent. In 1926 Kantorowitch sold off this last piece of land to the respondent's predecessor in title. The deed of transfer, executed on 10 April 1926, contained the following restrictive condition: "No building other than single storied buildings shall be allowed to be erected on the property hereby transferred." This restriction was duly inserted into the title deeds of the respondent's property in favour of "Kantorowitch and his successors in title". On transfer of the property in 1926, Kantorowitch no longer owned any property surrounding or adjoining the property sold to the respondent's predecessor. However, in March 1928, Kantorowitch bought back a piece of the property he had earlier sold off and which had in the meantime been subdivided. Part of this piece of land became the property of the applicant in 2010. The respondent had submitted plans to the local authority, manifesting an intention of effecting certain alterations to his property, which would have the effect of adding a further storey to his existing residence. The present application was aimed at preventing this result, relying exclusively on the wording of the restrictive condition referred to above (par 1 to 5).

3 *Decision of the court*

On the enquiry whether the restrictive condition against the respondent's title deed constituted a praedial or a personal servitude, Griesel J accepted as 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; by

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contrast, a personal servitude is constituted over a servient tenement in favour of a particular person and is ordinarily extinguished by the death of the holder (par 6).

Griesel J agreed with counsel for the applicant that whether a praedial or personal servitude was created depended on the intention of the parties. However, he pointed out that the contract between the parties was not before the court and that the court had to rely on the original deed of transfer, executed on 10 April 1926. He mentioned that on its original wording the restrictive condition was apparently intended to benefit "the owner or owners of the adjoining property", which on being considered too vague by the registrar, was supplemented with the words "being the remainder of the land known as Lots 11, 12 and 13". Griesel J conceded that on this wording the restrictive condition would have constituted a praedial servitude in favour of an adjoining dominant landowner. However, this wording was later deleted and replaced by the wording "in favour of Kantorowitch and his successors in title". Griesel J did not agree with the submission of counsel for the applicant that this wording likewise demonstrated that a praedial servitude was intended and that the reference to "Kantorowitch and his successors in title", rather than to "the owners of the adjoining property", does not suggest that a personal servitude was intended (par 7).

Griesel J pointed out that for a praedial servitude to exist there had to be a dominant and a servient property. It was therefore fatal to the applicant's contention that the condition concerned did not purport to be registered in favour of any particular property, since on the authority of *Malan v Ardconnel Investments (Pty) Ltd* (1988 2 SA 12 (A) 37D) the existence or non-existence of a dominant tenement is the decisive factor in differentiating between personal and praedial servitudes. He further regarded it as significant that the servitude was not registered against the title deeds of the dominant property, which is usual with praedial servitudes. In this regard it should be noted, however, that despite conveyancing practice of endorsing the title deeds of the dominant property, registration against the title deeds of the servient property is the only requirement for the valid establishment of both praedial and personal servitudes. This is made clear in the following statement of Joubert JA in the *Malan* case:

> "The normal procedure for the registration of servitudes in a transfer of land in the Deeds Office is to embody the terms of the servitude with a description of the servitude holder (personal servitude) or the dominant tenement (praedial servitude) in the title deed of the servient tenement. As a matter of conveyancing and for convenience the existence of the registered praedial servitude is endorsed upon the title deed of the dominant tenement …. It is the registration of the servitude in the title deed of the servient tenement that constitutes the servitude in law" (37E-G).

It is only in the case where restrictive conditions in townships are construed as praedial urban servitudes that they are registered against the title deeds of both the servient and dominant land due to the fact that each erf in the township became simultaneously a dominant and a servient tenement.

Griesel J finally pointed out that the fact that the provisions made specific mention of a particular person – instead of mentioning a dominant property – was a powerful indication that a personal servitude was being created. In concluding that the condition in question constituted a personal servitude and not a praedial servitude, Griesel J found further support in 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. He cited "Servitudes" 24 *LAWSA* (2 ed) paragraph 543 in support of this presumption (par 8-9).

Griesel J then considered the alternative argument on behalf of the applicant, namely that even if the restriction is regarded as personal, the wording "and his successors in title" rendered it perpetual and that although ordinarily personal servitudes terminate upon the death of the beneficiary, this legal rule applied only in the absence of an agreement to the contrary. Counsel for the applicant cited the following passage in Hall and Kellaway *Servitudes* (3 ed) 163-164 in support:

> "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."

These passages were quoted in *Bhamjee v Mergold Beleggings (Edms) Bpk* (1983 4 SA 555 (T) 562A-C) where, for the purposes of argument it was accepted 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. However, on the wording of the particular servitude at issue in that case, it was held that no such intention could be found. The applicant also relied on *Meintjes v Oberholzer and Graafreinet Municipality* ((1859) 3 Searle 265), 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 construed this as recognition by the court of the existence of perpetual personal servitudes. However, Griesel J accepted the explanation on behalf of the respondent that the court merely gave a decision as to the meaning of the words "het brand-hout op dit land tot algemeen gebruik" in the original crown grant of a farm to the first owner. He reasoned that although the public's right in terms of the grant is described as a servitude by Van der Merwe *Sakereg* (2 ed) 496 and 545, there was no mention that a perpetual personal servitude could be created by agreement (par 10-13).

The applicant then relied on the proviso contained in section 65(1) of the Deeds Registries Act 47 of 1937, which states that:

> "in the case of a servitude in favour of the public or of all or some of the owners or occupiers of erven or lots in a township or settlement, the registrar may, if in his opinion it is impracticable to require such deed to be executed by the persons in whose favour the servitude is created, register such deed notwithstanding the fact that it has not been executed by such persons."

In view of its strict wording, the inference drawn from the proviso, namely that perpetual personal servitudes are permissible, is misplaced. All that the proviso provides is that two kinds of servitudes, namely servitudes in favour of the public and servitudes in favour of all or some of the owners or occupiers of erven in a township, may if impracticable be executed without the co-operation of all the beneficiaries. Griesel J added that the applicant's reliance on section 65(1) could be countered by the provisions of section 66 of the act, which gives full effect to our common law by providing that "no personal servitude of usufruct, *usus* or *habitatio*, purporting to extend beyond the lifetime of the person in whose favour it is created, shall be registered". This is fortified by the second part of section 66, which reads "nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered". Note, however, that section 66 refers only to the personal servitudes of usufruct, *usus* and *habitatio* and does not cover

the so-called irregular personal servitudes which might be the servitudes we are dealing with here (par 13).

The final arrow in the applicant's quiver was based on the passage in the decision of the appellate division in *Durban City Council v Woodhaven Ltd* (1987 3 SA 555 (A) 562D-E), where the court declined to decide "whether a personal servitude could be rendered alienable by agreement between the parties". Accordingly, applicant's counsel invited the court to "fill the gap" and to find that a personal servitude can indeed be rendered alienable by agreement between the parties (par 14).

In summing up, Griesel J pointed out that the counsel for applicant frankly conceded that there was no direct authority in our law for his proposition, 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. The opinion of Hall and Kellaway had not been followed by the courts and their reliance on the analogy of mineral rights was unsustainable due to the fact that mineral rights are both transferable and inheritable. Furthermore, there is ample authority in our case law and jurisprudence for the general principle in broad, unqualified terms that the right by virtue of a personal servitude cleaves inseparably to the beneficiary, that it is not transferable or transmissible by will and that it perishes with the death of the beneficiary. Case law and jurisprudence quoted in support of this view include *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* (1913 AD 267 282), *Erlax Properties (Pty) Ltd v Registrar of Deeds* (1992 1 SA 879 (A) 886G-I) and "Servitudes" 24 *LAWSA* (2 ed) par 541 and 579. Finally, Griesel J pointed out that the applicant's contention was also in conflict with the well-established rule of construction enunciated *inter alia* in *Kruger v Joles Eiendomme (Pty) Ltd* (2009 3 SA 5 (SCA) par 8) and "Servitudes" 24 *LAWSA* (2 ed) paragraph 543 that, because a servitude is a limitation on ownership, it must be accorded an interpretation which least encumbers the servient tenement (par 15-17).

In view of the above considerations and sitting as a judge of first instance, Griesel J declined the applicant's invitation to make new law. Consequently he held that the application was dismissed due to the fact that the applicant did not have the necessary *locus standi* to enforce the restrictive condition in question (par 18).

4 *Discussion*

There is ample authority that the question whether parties intended to constitute a praedial or personal servitude depends on the agreement of servitude and the surrounding circumstances (par 7). The difficulty in this case was that the court was presented only with the notarial deed of transfer of the servient land which reserved a negative servitude of not raising any buildings on the servient land in favour of "Kantorowitch and his successors in title". On close inspection, the restrictive condition that we are dealing with here, namely a prohibition on the owner of a servient tenement to raise any buildings on the land higher than a single storey, is a typical example of a negative urban servitude in favour of an adjoining landowner. Although there was evidence that the registrar suggested that the wording in the notarial deed should be changed to make the servitude "in favour of the owners of the remainder of the land known as Lots 11, 12 and 13", which would have resulted in the constitution of a valid negative urban servitude in favour of the plots of land mentioned, this phrase was replaced in the registered notarial deed by the words "Kantorowitch and his successors in title". This made it virtually impossible for Griesel J to decide that the servitude was praedial in nature and enduring in favour of the lots mentioned, which presumably included the lot of the respondent.

The servitude concerned was in the nature of a personal servitude for lack of a specifically mentioned dominant tenement.

Thus counsel for the applicant was forced to try to fit the servitude concerned into another category of servitudes in order to make it perpetual in nature. His efforts to bring the servitude into the mould of a so-called public servitude in favour of the general public was not successful, for the wording of the particular servitude did not fit this particular mould. A servitude which intends to benefit "Kantorowitch and his successors in title", although intended to be a servitude in favour of more than one person, is not a servitude established for the public in general or even a specific sector of the general public. Furthermore, a restrictive condition prohibiting the owner of a particular erf to raise the buildings on his land to more than one storey does not fit into the normal content of so-called public servitudes. It differs from the usual examples of public servitudes constituted in favour of the public in general such as a right of outspan, the right to gather wood (see the *Meintjes* case referred to by Griesel J at par 12), the right to cross land to reach the beach or across a particular landed tenement in favour of the public in general. This type of servitude may by agreement between the parties be registered against the title deeds of private land as acknowledged by Griesel J and permitted in terms of section 65(1) of the Deeds Registries Act 47 of 1937. *Bamford v Minister of Community Development and State Auxiliary Services* (1981 3 SA 1054 (C)) is authority that such servitudes may be created in a will and *Forellendam Bpk v Jacobsbaai Coastal Farms (Pty) Ltd* (1993 4 SA 138 (C)) supports that view that public servitudes can be established on proof that the public has used a certain route over a particular landed property from time immemorial. However, the most important mode of establishment of so-called public servitudes is when land is granted by the state to a private person subject to the reservation of, for example, a right of way in favour of the public in general. For this reason such rights should not be classified as private real rights, but rather as entitlements granted by a public authority and registered on the title deeds of the servient land in favour of the public in general. For these reasons this particular servitude contained in the deed of transfer cannot gain perpetual effect by being classified as a so-called public servitude.

Due to the fact that modern South African law does not limit the kind of personal servitudes to the traditional servitudes of usufruct, the right of use and the right of habitation, the restrictive condition concerned could possibly have been construed as a so-called irregular servitude (*servitus irregulare*). These servitudes are usually praedial in nature but become personal servitudes when constituted in favour of a particular person in his/her personal capacity and not in his/her capacity as the owner of land. An example is where a right of way over a farm is granted to a person in his personal capacity, for example, to facilitate access to a beach cottage during holiday seasons. Further examples are the granting of trading rights over a farm to a particular person and the granting of a right to lay a railway line, underground cables or underground sewerage pipes on or under a particular landed property in favour of a particular local authority (see "Servitudes" 24 *LAWSA* (2 ed) par 580 and authorities quoted there). The lack of benefit to a person who has been granted a negative servitude preventing the owner of the servient land to raise buildings on his land, militates against the construction of this particular servitude as an irregular personal servitude. Moreover, although the granting of some of these servitudes in favour of municipalities may render such servitudes virtually perpetual, due to the fact that the "life-time" of a personal servitude is limited to 100 years (see "Servitudes" 24 *LAWSA* (2 ed) par 599 and authorities quoted there), this would not

apply to the servitude concerned, which is granted in favour of "Kantorowitch and his successors in title".

Closely related to the so-called irregular servitudes are the restrictive conditions in favour of certain lot-holders of a township or the developer of the township. If constituted in favour of and against all the lots in the township, they are construed as reciprocal urban praedial servitudes in favour of and against all the plots of land in the township. In the event, on the other hand, that they are constituted in favour of the owner or developer of the township they become personal servitudes constituted in favour of a particular person in his capacity as owner of the township. If construed as personal servitudes they bind only the person against whom and benefit only the person in whose favour they are registered. Presently, the construction of restrictive conditions in the title deeds of lot-holders in townships as personal servitudes seems to have been only a step in forcing the foreign English concept of "an equitable interest in land" into the truly South African mould of urban praedial servitudes to make these conditions enforceable. The present case is not concerned with restrictive conditions registered against all landowners in a township, and even if it could be construed as a personal servitude, it would not be perpetual in nature.

With regard to Hall and Kellaway's reliance on mineral rights as a species of personal servitudes which are perpetual in the sense of being transferable and transmissible, it must be pointed out that the recognition of mineral rights as a separate real right in land alongside ownership in violation of the *cuius est solum* rule was spearheaded by the following circumstances: there was, first, the Cape practice (following the British practice) of granting state land with the reservation of mineral rights in favour of the state; secondly, the overriding importance of mining to the South African economy after the discovery of diamonds and gold in South Africa in the second half of the nineteenth century; and, finally, the fact that large mining companies needed security of title before investing in the expensive activities of prospecting for minerals and then mining them. (See Van der Merwe *Sakereg* (1989) 553; Milton "Ownership" in Zimmermann and Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 681.) Forced by economic realities, independent mineral rights have since 1881 been recognised in the Zuid-Afrikaanse Republiek of the Transvaal and later in the precursors of and the present Deeds Registries Act. (See Resolution of the Volksraad of the Zuid-Afrikaanse Republiek of 8 Nov 1881 a 3 of Act 7 of 1883; s 30-32 of the Registration of Deeds and Titles Act 25 of 1909 (Transvaal); s 3(j), 13 and 41 of the Deeds Registries Act 13 of 1918 and s 70 and 71 of the Deeds Registries Act 47 of 1937.) Reluctant to accept the English principle that land can be divided into horizontal layers, our courts first classified mineral rights as quasi-servitudes (*Coronation Collieries v Malan* 1911 TPD 577 591; *Rocher v Registrar of Deeds* 1911 TPD 311 316) and more particularly as quasi-personal servitudes (*Lazarus and Jackson v Wessels* 1903 TS 499 510; *Van Vuren v Registrar of Deeds* 1907 TS 289 294-295; *Ex parte Marchini* 1964 1 SA 147 (T) 150; *Aussenkjer Diamante (Pty) Ltd v Namex (Pty) Ltd* 1980 3 SA 896 (SWA) 902-903). Only three South African cases up to now had the courage to take mineral rights out of the mould of servitudes and classify them as real rights *sui generis* (*Ex parte Pierce* 1950 3 SA 628 (O) 634; *Erasmus v Afrikander Proprietary Mines Ltd* 1976 1 SA 950 (W) 956E; *Apex Mines Ltd v Administrator, Transvaal* 1986 4 SA 581 (T) 590I-591C). This classification allows mineral rights to have a *sui generis* content, namely to be freely assignable and transmissible, not to be subject to the constraint of being exercised *salva rei substantia*, nor terminated when the owner

regains ownership of the land subject to mineral rights and creating the possibility of mortgaging a mineral right and of constituting a usufruct over mineral rights. (See Van der Merwe *Sakereg* 560-562.) It was therefore unacceptable for Hall and Kellaway to rely on the classification of mineral rights to prove that the alienability of personal servitudes had become entirely a matter of the intention of the contracting parties.

The best line that could perhaps have been taken by the applicant was to develop an argument around the *Bhamjee* case. In that case a certain N, the registered owner of a farm, had sold the property to the Coronation Collieries Ltd with the reservation of trading rights over the property for himself subject to a certain notarial lease. In the appeal to the full bench of the Transvaal provincial division, the sole issue was whether the rights created by the reservation in the title deeds of the servient land were indeed rights that were perpetual and that could thus devolve upon the heirs and successors in title of N, the holder of the servitude. The appellants contended that a personal servitude had been established in favour of N and that such servitude had not been destined to endure beyond the life of N but had terminated on his death. In reply it was argued that a perpetual servitude could be created in perpetuity or for an indefinite period and the court was asked to have regard to the circumstances of the case. The following surrounding circumstances were relied upon to indicate that it was not the intention of the parties that the servitude was destined to last only until the death of the holder of the servitude: at the time that the servitude was established, the holder of the servitude was already 70 years old; the notarial lease mentioned in the reservation was not intended to endure only until the death of the servitude holder and the servitude was registered against the title deeds of the servient tenement. The court decided that even if it could be accepted for argument's sake that a personal servitude could extend in favour of successors in title (a point not decided by the court), there was nothing in the clause referring to the servitude which indicated such an intention: the reservation of the trading rights had been only in favour of N and not also, for example, in favour of his successors in title (562D); the reference to the notarial lease had merely served as notice to the purchaser and any successors in title of the existence of the lease and, far from rendering the entitlements in terms of a personal servitude freely assignable and destined to endure indefinitely, it instead indicated an intention of the parties to restrict the powers of the servitude holder. In the event that the holder of the servitude was granted the power to transfer his right freely, the reference to the existing notarial lease was superfluous (562E-F). Divesting a personal servitude of its traditional characteristic of inalienability and its restriction to, at most, the life of the holder would require clear wording to that effect. Such an extraordinary consequence for a personal servitude which would burden the entitlements of the owner of the servient land significantly cannot be presumed easily and must appear clearly from the words used in the clause reserving the servitude (562G-H).

Although the court found that in view of the clear wording in the reservation of the trading rights referring solely to the holder of the servitude it was impermissible to consider the surrounding circumstances, the court nevertheless pointed out that these did not necessarily support an intention to establish a freely transferable perpetual right on the part of the holder of the servitude. The fact that the holder was already 70 years old could, instead of endowing the holder with a perpetual right, have persuaded Coronation Collieries to grant the servitude in view of its expected shorter endurance (563A); the notarial lease mentioned in the reservation terminated at least with the death of the last lessee and the reference to such lease

was insufficient to support an intention that the lease would survive the death of the servitude holder (563C-D); and the registration of the reservation indicated an intention that the right should become real and had no bearing on an intention to specify the duration thereof (563E).

In my view this judgment has, as submitted by counsel for the applicant, at least opened the door for certain kinds of personal servitudes attaining a more perpetual character if specifically described as such in the notarial deed reserving such servitude. Thus, for instance, with the correct description, the reservation of trading rights as in the *Bhamjee* case could possibly in future be endowed with perpetuity by the correct designation in the constituting documents. An argument in favour of such a construction would be that our courts, except for Vivier JA in the *Durban City Council* case (561E-F), have up to now never authoritatively stated that the characteristic of inalienability and intransmissibility of personal servitudes also apply to so-called irregular personal servitudes. Some of these personal servitudes (like a right of way in favour of a person over a servient plot of land) are not granted for the sustenance of the beneficiary as in the case of the traditional servitudes of usufruct, right of use and right of habitation. This could then be an area where our courts could be encouraged to develop the law, as should have happened by founding a perpetual right of passage to a burial ground in favour of family members on religious and cultural beliefs that deceased members of their family must be buried close to their homestead and thus easily accessible to fortify their links with the spirits of their ancestors – as presumably insinuated by Cachalia AJA in *Dlamini v Joosten* (2006 3 SA 342 (SCA) par 21). Instead, the court linked the burial right and the burial ground not to particular families but to people residing on the land. The court accordingly found that the burial right was in the nature of a personal servitude which the occupier had over the property on which he possessed a real right of residence at the death of the family member who at the time of death was residing on the land, based on the Extension of Security of Tenure Act 62 of 1997 ((par 16); see 2006 *Annual Survey* 395-396). A similar issue had to be resolved in the case of development rights reserved in favour of sectional title developers. An amendment of section 25(4) of the Sectional Titles Act was ultimately needed to make such a development right transferable and mortgageable after it had been classified as a personal servitude in the *Erlax* case.

5 *Conclusion*

The restrictive condition concerned restricting buildings on the servient land being raised to more than one storey. This was in the nature of an urban praedial servitude or even a restrictive condition applying to a number of subdivided erven in a certain part of a township. However, the fact that it was constituted in favour of a particular person and his successors in title, and not in favour of a dominant tenement, precluded it from being classified as a praedial servitude perpetual in nature. The condition was correctly classified by Griesel J as a personal servitude. There may be instances in which our courts could be persuaded to create new law to endow certain personal servitudes with transferability and transmissibility. However, only certain personal servitudes should be earmarked for such treatment, and this should happen only where, as in the case of mineral rights, there is a clear commercial or other need for such recognition. All in all, it should be kept in mind that the recognition of personal servitudes of a perpetual nature would burden landed properties to such an extent that commerce in such properties would be stilted. In the event that, as in the case

of mineral rights, the need for recognising new perpetual rights becomes patent, the courts should consider whether it would not be a better option to recognise new limited real rights, if necessary, as being of a *sui generis* character instead of forcing them into the mould of personal servitudes.

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