

55/56

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

Appellate (Provincial Division).
(Provinsiale Afdeling).

Appeal in Civil Case.
Appel in Siviele Saak.

PETRIUS NKWANA Appellant,

versus

REBECCA S. HIRSCH Respondent.

Appellant's Attorney A. Horowitz Respondent's Attorney W. J. D. ...
Prokureur vir Appellant Prokureur vir Respondent

Appellant's Advocate J. ... Respondent's Advocate J. ...
Advokaat vir Appellant Advokaat vir Respondent

Set down for hearing on Wednesday, 5th Sept., 1956
Op die rol geplaas vir verhoor op

(TFD) 2, 4, 9, 10, 11

(Schreiner, Jagan, de Beer, Beyers J.A. Hall as a)

S. Kentridge for appellant.

D. Gould (with him N. Lochoff) for respondent.

- 9.50 am: ...
- 11. ...
- 12.35 pm: ...
- 1.55: ...
- 2.17: ...
- 3.40: Kentridge in reply.
- 4. ...

Appeal dismissed with costs.

W. J. D. ...
17/9/56.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

PETRUS NIWANA

Appellant

and

REBECCA SONIA HIRSCH

Respondent

Coram:Schreiner,Pagan,de Beer,Beyers,JJA.et Hall A.J.A.

Heard: 5th. September, 1956.

Delivered: 17-9-1956

J U D G M E N T

SCHREINER J.A. :- The respondent sued the appellant in the Witwatersrand Local Division for £87. 0. 1., being the balance payable in terms of a magistrate's court judgment, and for £5. 9. 1., being the costs and Messenger's charges in respect of that judgment. I shall retain the expressions plaintiff and defendant. So far as the costs of the action in the Witwatersrand Local Division were concerned the plaintiff only claimed her disbursements, including counsel's fees. The declaration alleged that the amount for which judgment was taken in the magistrate's court was owing by the defendant under a general notarial bond. Included in the property

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covered by the bond were the defendant's rights in "the
"movable buildings and other erections" on Stand 959
Benoni Municipal Location and also all his rights "in
"and to the Site Permit relating to the said Stand."
The declaration further alleged that the defendant's
interest in the site permit was not an attachable asset
"in terms of Rules of the Magistrate's Court" and that
the plaintiff was therefore obliged to obtain judgment
in the Supreme Court in order to enable her to attach
the defendant's interest therein in execution. The
plea admitted the magistrate's court judgment and that
the defendant's interest in the site permit was not at-
tachable by the messenger. Liability for the amounts of
£87. 0. 1. and £5. 9. 1. was not disputed but the plea
set up the legal contention that the defendant's interest
in the site permit did not constitute property capable of
being attached or sold in execution of a judgment even of
the Supreme Court, so that the action in the Witwatersrand
Local Division was of no value to the plaintiff. The
defendant accordingly resisted only the plaintiff's
limited claim for costs, relying on Jcosab v. Tayob (1910
T.S. 486 at page 489). The facts not being in dispute,

the/.....

the hearing took place under Rule 44 of the Transvaal Rules of Court. LUDCROFT J. gave judgment in favour of the plaintiff for the amounts claimed and costs, limited to disbursements, but granted the defendant leave to appeal against the order as to costs. The defendant appealed to the Transvaal Provincial Division which dismissed his appeal but granted him leave to appeal to this Court.

It will be seen from the above that, while the parties were in disagreement as to whether the defendant's site permit could be attached and sold in execution of a judgment of the supreme court, they were in agreement that it could not be subjected to execution of a judgment in a magistrate's court. In Kruger v. Monala (1953(3) S.A. 266) the Transvaal Provincial Division held that the debtor's interest in a site permit in respect of a site in Pimville Location, Johannesburg, was not liable to be attached in execution of a magistrate's court judgment. An appeal to this Court was dismissed (1953(4)S.A.529) but on other grounds, the correctness of the basis of the Transvaal Provincial Division's decision being left open. According to certain decisions/.....

decisions quoted in the Provincial Division judgment in that case the Messenger of the Magistrate's Court can only attach the debtor's interest in a site permit if it falls within the language of section 68(3) of the Magistrate(s Court Act (No. 32 of 1944), the only relevant portion of the sub-section being that which authorises the messenger to attach and sell "the interest of the "execution debtor in property movable or immovable leased "to the execution debtor." It was decided by the Transvaal Provincial Division that, although the interest in property held under a site permit resembles the interest of a lessee under a lease, there are differences that take it out of the operation of section 68(3). As in 1953 it is unnecessary for this Court to decide whether the view taken by the Transvaal Provincial Division is correct or not. Since neither party attacked that view we cannot be satisfied that all arguments that might be advanced on the problem have been put before us. The plea specifically admits that the defendant's interest in the site permit was not attachable by the messenger, and no attempt has been made at any stage to withdraw that admission. The question whether the defendant should have to pay the plaintiff's costs in the Witwatersrand Local Division was contested only on the issue of the



general liability of an interest in a site permit to execution, the correctness of the reasoning of the Transvaal Provincial Division in Kruger v. Monala being raised for the first time by this Court in the course of the argument. In the circumstances even if this Court were to hold that a debtor's interest in a site permit is subject to execution not only on a supreme court judgment but also on a judgment of the magistrate's court, this conclusion would not affect the order to be made on appeal. Consequently the preferable ~~order~~ course is to decide this appeal upon the one issue raised by the parties and dealt with in the Transvaal courts.

I turn accordingly to the consideration of whether a debtor's interest in a site permit in the Benoni Location is liable to be attached and sold in execution of a supreme court judgment against him. We were referred to certain cases in which the nature of site permits in other urban locations was touched upon. None of these cases provides authority which is decisive of the present appeal, and, inasmuch as the nature of a site permit must ultimately depend upon the particular statutory provisions which govern it, it is necessary to

examine/.....

examine the material parts of the Benoni regulations published under Administrator's Notice No. 542, appearing in the Transvaal Provincial Gazette of the 1st. November 1933.

Under Regulation 21 a native may acquire a "building site permit" and when he is armed also with a "building permit" he may erect a dwelling on the site allotted to him. When the dwelling is completed the superintendent of the location is obliged to issue to him a site permit. Regulation 22, so far as relevant, then proceeds :-

"22(a) Every person desiring to occupy or to continue
"the occupation of any site in the location upon which
"are erected buildings belonging to him shall apply to
"the superintendent for a permit in terms of these
"regulations, and the superintendent, if he is satisfied
"that the applicant is a fit and proper person to reside
"in the location and is resident or employed within the
"area of jurisdiction of the Council, shall issue to him
"such permit. Such permit is herein referred to as a
" 'Site Permit'.

"(b) Every site permit.....shall expire on the 30th
"day of June in each and every year, and the holder
"thereof/.....

1. The first part of the report is a general introduction.

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"thereof shall, on or before that date in each year
"make application to the superintendent for the renewal
"thereof for the next ensuing year and the superintendent
"shall renew such site permit provided

"(1) he is satisfied that the applicant is a fit and
"proper person to reside in the location and is
"resident or employed or carrying on a lawful occupation
"within the area of jurisdiction of the Council;

"(2) the applicant has paid all amounts due by him to
"the Council up to the preceding 31st May.....

"(c) No holder of a site permit shall sub-let his site
"and/or dwelling or other buildings thereon except upon
"a written permit (hereinafter referred to as a 'tenant
"permit') to be issued to the sub-lessee by the superin-
"tendent who shall grant such permission provided.....

"(e) Any site permit may be terminated by the holder
"giving the Council one month's notice, in writing, of his
"intention so to do provided that where such site has been
"sublet in terms of sub-section (c) hereof the holder of
"the tenant permit in respect of such site shall have the
"first option to acquire such site, provided he complies
"with the provisions of these regulations applicable to
"the holder of a site permit.

"(g)/.....

"(g) Every site permit issued or renewed as aforesaid
"shall (subject to the provisions of these regulations)
"convey the right of occupation of the site named therein
"only for the period of currency of such permit or renew-
"al thereof.....

"(k) The holder of any site permit shall be entitled,
"subject to the provisions of these regulations, to sell
"or otherwise dispose of his buildings, erections and
"improvements on any site and to apply for transfer of
"the site permit to the purchaser and the superintendent
"shall grant such transfer provided -

"(i) he is satisfied that the purchaser is a fit and
"proper person to reside in the location and is
"resident or employed or carrying on any lawful
"occupation within the area of jurisdiction of the
"Council;

"(ii) the seller has paid all rents, fees or other
"charges due by him to the Council under these
"regulations;

"(iii) the proposed purchaser is not already the holder
"of a tenant, residential or site permit in the
"location.

"(o) The holder of a site permit issued in terms of

"sub-section/.....

"sub-section (a) hereof shall during the currency thereof permanently reside on the site or ~~shall~~ should he be the holder of more than one site, on one of such sites and should he absent himself therefrom for a period of two consecutive months without the written permission of the superintendent, such site permit may be cancelled by the superintendent....."

The most important of these provisions for present purposes is Regulation 22(k). If the site permit holder produces to the superintendent a person who complies with sub-paragraphs (i) and (iii) of that paragraph, and if he has himself complied with sub-paragraph (ii), the superintendent is obliged to accede to his request that the site permit be transferred to his nominee. From the viewpoint of the holder of the site permit this provision has the great importance that he is able to dispose of his buildings as a dwelling appurtenant to the site. A buyer who can acquire the buildings as a dwelling which he can occupy will naturally pay much more for them, than if they must be regarded merely as so much building material which may have to be removed. The right given to the site permit holder by

Regulation/.....

Regulation 22 (k) is thus one of great value.

It was suggested on behalf of the defendant that the course of the present proceedings left it in doubt whether there were in fact any buildings on the site. The suggestion is without foundation. The scheme of the regulations requires that there shall be buildings if there is to be a site permit. If the buildings are removed someone must begin de novo and obtain a "building site permit" and, after he has erected buildings, a fresh site permit.

It was argued on behalf of the defendant that, because, apart from certain exceptions, natives in urban areas have to live in locations, they have a right to live there and that to allow a man's site permit to be sold in execution would be to compel him to leave the location and, consequently, the urban area. In any particular case this might, indeed, be the result, though there would be various lawful alternatives which in theory at least would be open to him. It is, no doubt, a grievous misfortune when a man's home is sold to pay his debts, and in the case of a dwell^{er} in an urban location the result may be particularly disastrous, but
the/.....

the defendant has not been able to point to any provision of the Act or the Regulations which shows that the interest in a site permit was intended to be protected against the holder's creditors. Counsel was constrained to argue on general lines that the ^hscheme of the Act and the Regulations was such as to make a site permit a personal right, intended to secure a home for the individual native and his family and not a commercially disposable asset. No doubt, as was said in Molife v. Superintendent of Locations (1931 A.D. 19, at page 26), the interest in a site permit is personal, but that does not mean, in the present context, that it cannot be dealt with by the holder and that it cannot be made available to pay his debts. There certainly exist restrictions and controls designed, it may be assumed, to secure that only persons found to be fit and proper shall hold permits. But the holder is certainly not without rights which have a realisable value not only in the buildings but, in association with the buildings, in the site permit itself.

A liquor licence may be described as a purely personal privilege (see Fick v. Woolcott and Ohlsson's Cape Breweries, 1911 A.D. 214 at

page 230), but it seems to me that it was rightly decided in Solomon v. Registrar of Deeds (1944 C.P.D.319) that it can be bonded and, accordingly, sold in execution of a judgment on the bond. In Makue v. Makue's Trustee (1923 T.P.D. 163) STRATFORD and TINDALL J.J. held that the trustee of the holder of a "stand permit" in a native location in Pretoria could obtain an order of ejectment against the holder, in order to obtain possession for a purchaser from the trustee. At page 166 STRATFORD J., giving the court's judgment, said, "Then it is said "this is a mere personal right and not transmissible. "The right to occupy is certainly personal, but it is "also certainly transmissible (see Regulation 27)." Regulation 27 corresponded to Regulation 22 (k) but did not, in terms at least, require the superintendent to transfer to a suitable nominee presented by the holder of the permit; the difference, if any, favours the present plaintiff. That case was in my view rightly decided. The further contention advanced on behalf of the defendant that the right to obtain transfer to a nominee under Regulation 22 (k) must be personally exercised by the holder of the permit himself and cannot be exercised against his will by an officer executing a court's judgment seems to me to be wholly

wholly without foundation.

Counsel for the Defendant also referred us to the English case of Sutton v. Dorf (1932, 2 K.B. 304), where it was held that a so-called "statutory tenancy" under the Rent Restriction Acts did not pass to the tenant's trustee in bankruptcy. Though the situations have some superficial similarity, it is clear from the report that the right of the statutory tenant under the English Acts is personal in quite a different sense from the sense in which it may be properly used in relation to a site permit under regulations of the present kind.

For these reasons the plaintiff was entitled to execute upon her Witwatersrand Local Division judgment against the defendant's interest in his site permit and the award of costs properly followed the decision of that issue in her favour.

The appeal is dismissed with costs.

Fagan, J.A.

de Boer, J.A.

Beyers, J.A.

Hall, A.J.A.

Concur

P.W. Schreiner
14/9/56