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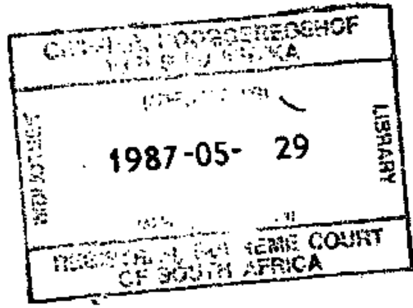
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SUPREME COURT OF SOUTH AFRICA

63/87

Case no 126/86.
MC

THE CITY COUNCIL OF THE CITY OF DURBAN

- and -

WOODHAVEN LIMITED

ELECTRICITY SUPPLY COMMISSION

REGISTRAR OF DEEDS

VIVIER JA.

Case no 126/86
MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE CITY COUNCIL OF THE CITY OF DURBAN — Appellant (Second Respondent in the Court *a quo*)

and

WOODHAVEN LIMITED — First Respondent (Applicant in the Court *a quo*)

ELECTRICITY SUPPLY COMMISSION — Second Respondent (First Respondent in the Court *a quo*)

REGISTRAR OF DEEDS — Third Respondent

Coram : RABIE ACJ *et* JANSEN, JOUBERT, VIVIER JJA *et* BOSHOFF AJA.

Heard: 15 May 1987

Delivered: 27 May 1987.

Judgment / ....

JUDGMENT

VIVIER JA :-

The first respondent, Woodhaven Ltd, which was the applicant in the Court *a quo*, and to which I shall refer as "Woodhaven", is the registered owner of a certain immovable property ("the property") in Durban described as the remainder of lot 2597 and the remainder of lot 2598, both of the farm Mobeni No 13538. On 2 November 1970 Woodhaven purchased the property, together with other land, from the appellant, the Durban City Council, which was the second respondent in the Court *a quo* and to which I shall refer as "the City Council". In terms of a notarial deed of servitude dated 11 April 1957,

which / .....

which was duly registered against the title deeds of the property, the City Council, which then owned the property, granted a servitude, described as an electric power transmission line servitude, over the property in favour of the second respondent, the Electricity Supply Commission (first respondent in the Court _a quo_), to which I shall refer as "Escom". The servitude was granted for the purpose of conferring upon Escom the right to convey electricity across the property along the route of the servitude. Escom was given the right to enter upon the property and erect and maintain the transmission line and ancillary structures, and to exercise the powers necessary for the proper and effec= tive use of the transmission line. The consideration

payable by Escom for the grant of the servitude was the amount of R 7512,00. Amongst the limitations which were placed on the City Council's rights as owner in the deed of servitude were certain building and other restrictions within the servitude area and the grant of certain rights of access to the property in favour of Escom. The transmission line was duly erected. During 1972 the City Council transferred the property to Woodhaven subject to the servitude.

During 1981 Escom started to dismantle certain power lines and removed certain pylons and foundations. In a letter addressed to Escom dated 15 June 1982, Woodhaven requested Escom to confirm that the servitude

was to be cancelled, and Escom duly furnished the required confirmation. Events took a different turn, however, when the City Council expressed a wish to take over itself the power line for the transmission of electric power. When Escom informed Woodhaven that the servitude was about to be ceded to the City Council, Woodhaven launched the present proceedings upon notice of motion in the Durban and Coast Local Division. It sought an order declaring that Escom had abandoned the servitude, alternatively declaring that Escom was not entitled to cede its rights under the servitude to the City Council. The Registrar of Deeds (Natal) was cited as the third respondent but no relief was sought against him. After service of the

application on it, Escom intimated that it was prepared to concede that the servitude had been abandoned and that it would not oppose the application, provided no order for costs was sought against it. The necessary assurance in this regard was given by Woodhaven and Escom has played no further part in these proceedings.

At the hearing of the application before BOOYSEN J, counsel for Woodhaven and the City Council respectively were agreed that it was not possible to decide the issue of abandonment without hearing oral evidence. With regard to the alternative prayer BOOYSEN J held that the servitude was inalienable and he granted an order declaring that Escom was not entitled

to cede its rights under the servitude to the City Council. With regard to the issue whether Escom had abandoned the servitude, the matter was postponed to a date to be arranged. No order was made as to costs. BOOYSEN J subsequently ordered that the issue whether or not Escom's rights under the servitude could be ceded, should be regarded as having been adjudicated upon as a question of law in terms of Rule 33(1) of the Uniform Rules of Court, and he granted leave to the City Council to appeal to this Court against the declaratory order made by him.

It was not in issue that the notarial deed of 11 April 1957 and its subsequent registration against the

title deeds of the property, constituted a personal servitude over the property in favour of Escom. The deed imposed a burden upon the property, restricting the owner from exercising some of its normal rights of ownership. It was constituted in favour of a particular person viz Escom without reference to its ownership of land. In contrast to praedial servitudes, which are constituted in favour of the successive owners of the dominant land and burden the servient land irrespective of the identity of the owner, personal servitudes are essentially personal to the beneficiary. Our law, unlike the Roman Law, does not recognise a numerus clausus of personal servitudes. Rights similar to

those in the present case were recognised as personal servitudes in Smit N O v Die Meester 1959(4) SA 13(T) at 14 H; Vestin Eshowe (Pty) Ltd v Town Council of the Borough of Eshowe 1978(3) SA 546 (N) at 549 H and Adinvale (Pty) Ltd v Warmbaths Town Council 1981(3) SA 516 (T) at 518 G-H. Compare the earlier decisions in Rand Mines Power Supply Company v Johannesburg Municipality 1911 TPD 1131 at 1140 in fine and Electricity Supply Commission v Estcourt Town Council and Others 1932 NPD 631 at 648. For other personal servitudes recognised as such in our law see the cases referred to by Van der Merwe, Sakereg at p 360-361, to which may be added the decision in Bhamjee en 'n Ander v Mergold Beleggings 1983(4) SA 555(T). In the leading case on personal servitudes in our law, Willoughby's Consolidated

Co Ltd v Copthall Stores Ltd 1913 AD 267, a right to trade was recognized as a personal servitude. In his judgment SOLOMON JA said the following at p 286-287 :-

> "It is sufficient to say that the grant of a right to trade, whatever its exact scope may be, constitutes in my opinion a personal servitude over the land in favour of the grantee. I can see no difference in essence between such a right and a right of way, for example. In each case the owner of the right is entitled to make use of the land for a specific purpose. Voet (8.1.1) gives as examples of personal servitudes the right to pluck fruit, or walk about, or to dine on another man's property, and I can see no reason why the right to trade should not fall within the same category. And if this view be correct, it follows that Dawson's Stores acquired a personal servitude over the blocks of land of the Matabele Gold Reef and Estates Co, which, in order to give them a real right over the land, should have been registered by them against the title deeds of that company. Such a right, however, was essentially one personal to Dawson's Stores, which it alone could exercise, which it was not entitled to assign, and which, like any other rights attaching to the person, was limited in point of time by the life of that company."

Mr Shaw / ......

Mr Shaw, on behalf of the City Council, submitted, however, that not all personal servitudes are inalienable, but that it depended upon the nature of the rights under a particular servitude and the terms upon which the servitude was created, whether these rights could be transferred to a third person. As an example of rights under a servitude which were freely transferable, Mr Shaw referred to the right of enjoyment of a usufruct. Mr Shaw also relied on certain terms of the deed of servitude as indicating an intention that Escom could cede its rights to a third person. He consequently submitted that the rights under the present personal servitude were capable of cession to the City Council.

The whole question of the alienability of a usufruct and the subtle distinction between the usufruct itself and the right to enjoy the fruits, goes back to Roman Law. Usufruct was the oldest of the Roman Law personal servitudes, since it existed long before it was included in the concept of servitudes. It was only in Justinian's law (possibly already in late classical law) that it was recognized, together with usus, habitatio and operae servorum vel animalium, as personal servitudes. (Thomas, Textbook of Roman Law 195-205; Buckland, a Textbook of Roman Law from Augustus to Justinian, 3rd ed 268-270). A usufruct was regarded as inalienable

and / ....

and could not be transferred from the usufructuary to a third person so that the latter became usufructuary in place of the former. This is clear from Gaius 2.30 and is confirmed by texts such as Inst. 2.4.3 and D 23.3.66. In Inst. 2.4.3 Justinian, referring to the different ways of terminating a usufruct, states that it comes to an end if it is ceded to the owner of the property over which the usufruct is constituted, and adds in brackets that a cession to a stranger would be a nullity (nam extraneo cedendo nihil agitur). The Roman jurists distinguished between the usufruct itself and the right to enjoy the fruits of the property, so that, while the usufruct itself could not be alienated,

the / ....

the right to enjoy the fruits could be sold, let or donated. This is the context in which texts such as Inst. 2.5.1 (referred to by Mr Shaw), D 7.1.12.2 and D 7.1.38 should be read, as is clearly pointed out by Sande, Cession of Actions 5.34 (Anders's translation at p 73) in the following words :-

> "Lastly, purely personal rights, such as usufruct and habitatio, are not capable of cession. I assert that the right itself to a usufruct cannot be ceded or transferred to a stranger, for it cleaves to the person of the usufructuary; but the authority to retain possession of the property and the privilege of gathering the fruits, as long as the usufructuary enjoys the usufruct, can be sold and transferred by him. And this is the construction which must be placed on those texts which suggest that the usufructuary possesses the power to dispose of and cede his usufruct to a stranger (D 7.1.38 and Institutes 2.5.1)."

The Roman-Dutch writers were generally agreed that a usufruct itself was inalienable although the right to enjoy the fruits of the property could be transferred. What caused a considerable difference of opinion was the question whether, an attempted *cessio in iure* to a third person being illegal, it actually destroyed the usufruct which reverted to the dominus. Those who held this view, relied on texts such as D 23.3.66, while others, relying on texts such as Gaius 2.30 and Inst 2.4.3, were of the view that the cession was *ipso jure* void so that no alteration or change in the usufruct was produced which remained with the person who sought to alienate it. The latter view was the predominant

view / ....

view and would seem to be the correct one. See Sande op cit 5.35. Van Leeuwen, Censura Forensis 1.2.15.25 refers to the view held by Donellus and Cujacius that the purported cession of the usufruct destroys the usufruct, and goes on to state (Schreiner's translation at p 110):-

> "The view of these men, however, is nowhere received in practice, but the contrary rule has become established as the common one amongst all. The right ceded so far as it is not or cannot be transferred to the cessionary remains with him who makes cession. So that when a cession of a usufruct is made to a third party, it is not so much the right of usufruct itself as the right of taking the fruits that seems to be transferred."

Voet 7.1.32, which was relied upon by Mr Shaw, states that the usufructuary may grant the property for

enjoyment to another by sale, lease or grant on sufferance or for use, and adds that both lease and every other form of grant are terminated by the ending of the usufruct, even though the grant was made for a somewhat long period. That Voet is here referring to the right of enjoyment, as distinct from the usufruct itself, is made clear in another passage (7.4.3) where he disagrees with the view held by some that an attempted cession of a usufruct to a stranger extinguishes the usufruct, and relying on Inst. 2.4.3, says (Gane's trans, vol 2 at p 383):-

> "But a cession made to a stranger is a thing of no gravity, and does not efface the usufruct."

See also De Groot, 2.39.4; Van der Keessel ad Gr 2.39.5;

Schorer's notes on De Groot 2.39.3, a translation of which is to be found in Maasdorp's translation of De Groot, 3rd ed at p 517, Van der Linden 1.11.5 (Henry's translation at p 170) and Van der Linden's note on Voet 7.4.3, a translation of which appears in vol 2 at p 383 of Gane's translation of this passage.

Returning to the present case, the nature of the rights held by Escom under the servitude in question, although, in my view, as purely personal as those under a usufruct, are in other respects so different from those held by a usufructuary, that I doubt whether there is room in the present case for the fine distinction drawn in the case of a usufruct between the right of enjoyment and the right to the usufruct itself. In any event the City Council does

not / ....

not claim anything less than the full substance of the servitude in terms of the purported cession to it by Escom.

What is quite clear from the Roman and Roman-Dutch authorities to which I have referred, is that they regarded a personal servitude as inalienable. This was also the effect of the decision of this Court in Willoughby's Con= solidated Co Ltd v Copthall Stores Ltd, *supra*, which was followed in Hotel De Aar v Jonordan Investment (Edm) Bpk 1972(2) SA 400(A). I have already referred to what SOLOMON JA said in Willoughby's case about the nature of the rights under a personal servitude. In the course of his judgment in that case, INNES JA said very much the same at p 282 :-

> "From the very nature of a personal servitude, the right which it confers is inseparably attached to the beneficiary. *Res servit*

> *personae.* He cannot transmit it to his heirs, nor can be alienate it; when he dies it perishes with him."

This passage from the judgment of INNES JA was quoted with approval by VAN BLERK JA in the case of *Hotel De Aar v Jonordon Investment*, *supra*, which concerned a condition in a title deed prohibiting the transferee of the land from carrying on the trade or business of an hotel or club or from dealing in wine or spirituous liquor thereon. VAN BLERK JA said at p 405 D-F:-

> "Die kernvraag is, of the serwituut, wat aldus tot stand gebring is, 'n persoonlike serwituut of 'n erfdiensbaarheid is. Is dit eergenoemde, moet die serwituutreg geskep gewees het ten gunste van 'n besondere persoon of persone as die reghebbende(s) daartoe ongeag of hy of hulle die eienaar(s) van enige grond is (*Ex parte Geldenhuys*, 1926

> OPD 155 op bl 163). En soos INNES, R., sê in Willoughby's Consolidated Co., Ltd. v Copthall Stores, Ltd., 1913 AD 267 op bl 282, is juis om die persoonlike aard van die serwituut die toegekende reg onafskeidbaar verbonde aan die bevoordeelde. Res servit personae. Om dié rede kan hy die reg nie oordra aan sy erfgename of dit vervreem nie. Sterf hy gaan dit tot niet."

In an earlier case, Van der Merwe v Van Wyk NO 1921 EDL 298 (a decision of the Full Bench of that Court) it was held that a usufruct is such a personal right that it cannot be ceded to anyone but the owner of the property over which the usufruct exists, and that, consequently, it does not fall into the community of property between husband and wife. Finally, in this regard, I should refer to sec 66 of the Deeds Registries

Act, / ....

Act, No 47 of 1937, which gives full effect to our common law by providing that no personal servitude of usufruct, usus or habitatio, purporting to extend beyond the life= time of the person in whose favour it is created, shall be registered. Nor may a transfer or cession of such personal servitude to any person other than the owner of the land encumbered thereby, be registered.

It remains to deal with Mr Shaw's final submission that the rights under a personal servitude could be rendered alienable in terms of the agreement constituting the servitude. He referred to certain provisions in the deed of servitude from which, he submitted, it could be inferred that the parties intended Escom to have the power to cede its rights under the servitude to a third party. I am

unable to draw the inference contended for by Mr Shaw, and it is accordingly not necessary to decide whether a personal servitude could be rendered alienable by agreement between the parties. For his submission that the parties intended Escom to have the right of cession, Mr Shaw relied firstly on the fact that no reference was made in the deed of servitude to Escom's successors in title. I do not regard this fact as any indication of an intention to grant to Escom a right of cession. Mr Shaw next relied on the fact that the servitude was granted to Escom in perpetuity. In my view a provision of this kind means no more than that the servitude is intended to endure for as long as the statutory juristic

person exists. In the same way as a personal servitude in favour of a natural person is often expressly granted for the lifetime of that person, a personal servitude in favour of a juristic person is granted in perpetuity, intending no more than that it should last for as long as that beneficiary exists. I fail to see any indication in a provision of this kind of an intention to confer a right of cession on the person or juristic person in whose favour the servitude is created. In saying this I express no view on whether the rule in Roman-Dutch law that a personal servitude in favour of a corporation expires after one hundred years, still applies in our law (cf <u>Johannesburg Municipality v Transvaal Cold</u>

Storage Ltd 1904 TS 722 at 729 and South African Railways and Harbours v Paarl Roller Flour Mills Ltd 1921 CPD 62 at 69).

Mr Shaw finally relied on the fact that the City Council is an authorized undertaker for the supply of electricity, and submitted that the parties intended that if and when the City Council sold the property, Escom would have the power to cede the servitude to the City Council. While the City Council remained the owner of the servient land a cession to it would, of course, have extinguished the servitude by merger and in accordance with the maxim *nulli res sua servit* (Inst 2.4.3 and Voet 8.4.14). The deed of servitude does not refer to the City Council as a supplier of

electricity and there is not the faintest suggestion in the deed of servitude of any possible future use of the power line by the City Council, not even in a provision such as clause 17 of the deed which provides for a right of cancellation in the event of Escom abandoning the servitude or ceasing to be in beneficial occupation under the servitude. There is therefore no basis for Mr Shaw's contention.

For these reasons I am of the view that the rights under the servitude in question were not capable of cession and that the order appealed against was correctly granted.

The appeal is dismissed with costs.

W. VIVIER JA.

RABIE ACJ)
JANSEN JA)
JOUBERT JA) Concur.
BOSHOFF AJA)