

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

RODERICK BRIAN ARMSTRONG

(in his capacity as representative of

LLOYDS UNDERWRITERS) Appellant

and

SULIMAN M BHAMJEE Respondent

Coram: JOUBERT ACJ et MILNE, STEYN, F H GROSSKOPF JJ A

et NIENABER AJA.

Date of Hearing : 6 September 1990

Date of Delivery: 28 September 1990

JUDGMENT

JOUBERT ACJ :

/The

The respondent as insured instituted an action based on a fire insurance policy in the Witwatersrand Local Division against the appellant as insurer for payment of the sum of R35 000-00. The matter was heard by LEVY A J, who gave judgment in favour of the respondent on 21 June 1988 for the said amount. With leave of the Court a quo the appellant now appeals against its judgment.

The important facts forming the background to the dispute between the parties may be summarized as follows:

1. On 27 September 1924 H P Van Nieuwenhuizen by Deed of Transfer No 8791/1924 became the registered owner of Portion 8 of Portion A of the farm Kromdraai ("the portion of the farm") situate in the district of Witbank.
2. On 17 May 1926 H P Van Nieuwenhuizen by Notarial Deed of Lease of Trading Rights leased to Mrs S

R Stein and Mrs A Manasewitz as lessees the sole and exclusive trading rights over the portion of the farm (clause 1) for 1 year from February 1926; automatically renewable from year to year by the lessees (clause 2). The lessees were granted the right to select a suitable site 1 morgen in extent for the erection of suitable business and residential buildings with outbuildings (clauses 4, 9). The lessees were also granted the right to cede their interests in the lease to anyone without the written consent of the lessor (clause 6). At the termination of the lease the lessees had the right to break down and remove any of the buildings erected by them (clause 10). This agreement of lease was registered in the Deeds Office, Pretoria, on 25 November 1926 (Vol 4 p 221-227).

/4....

- 3 (i) By Notarial Deed of Cession, executed on 21 September 1945 and registered on 5 March 1946 in the Deeds Office, Pretoria, Mrs S R Stein ceded her half share in the lease of the sole and exclusive trading rights over the portion of the farm to the estate of the late M L Young (Vol 4 p 228-232).
- (ii) Because M L Young had during his lifetime sold to P F Roux his half share in the lease of the sole and exclusive trading rights his executors by Notarial Deed of Cession, executed on 21 September 1945 and registered on 5 March 1946 in the Deeds Office, Pretoria, ceded his said half share in the lease of the sole and exclusive trading rights to the estate of the late P F Roux (Vol 4 p 238-242).
- (iii) Because Mrs A Manasewitz had on 6 May 1931 sold her half share in the lease of the sole and exclusive

trading rights to the late P F Roux, she by Notarial Deed of Cession, executed on 21 September 1945 and registered on 5 March 1946 in the Deeds Office, Pretoria, ceded her said half share in the lease of the sole and exclusive trading rights to the estate of the late P F Roux (Vol 4 p 233-237).

(iv) The position then on 21 September 1945 was that the lease of the sole and exclusive trading rights over the portion of the farm was held by the estate of the late P F Roux.

4. By Notarial Deed of Cession, executed on 17 May 1946 and registered on 14 October 1946 in the Deeds Office, Pretoria, Mrs M C E Roux, widow of the late P F Roux, in her personal capacity as well as in her capacity as executrix testamentary in the estate of the late P F Roux, ceded in favour

of herself as beneficiary all the interest and title of her late husband in the Notarial Deed of Lease, dated 17 May 1926, in respect of the sole and exclusive trading rights over the portion of the farm (Vol 4 p 243-247).

5. By Notarial Deed of Cession, executed on 23 September 1949 and registered on 6 December 1949 in the Deeds Office, Pretoria, the estate of the late Mrs M C E Roux ceded her interest in the lease of the sole and exclusive trading rights over the portion of the farm to her son D J E Roux (Vol 4 p 248-253).
6. In pursuance of a sale entered into by him H P Van Nieuwenhuizen on 27 August 1953 by Deed of Transfer No 19194/1953 transferred the portion of the farm to Coronation Collieries Ltd subject to a reservation in favour of himself of all the trading rights over

/7....

the said property which had been leased in 1926 to Mrs S R Stein and Mrs A Manasewitz (Vol 4 p 254-257).

7. By Notarial Deed of Agreement No 881/1957 S, registered on 11 September 1957, D J E Roux, as the registered holder of the 1926 Notarial Deed of Lease, entered into an agreement with Coronation Collieries Ltd in terms of which clauses 4 and 9 of the said Notarial Deed of Lease were amended. According to the amendments the lessor under the said Notarial Deed of Lease would have no further right to select any further site or sites on the portion of the farm in addition to the three existing sites on two of which a trading store and a dwelling house had been erected. (Vol 4 p 261-266).
8. On 28 February 1964 H P Van Nieuwenhuizen died.

The date of his death was ascertained by the attorneys in the present proceedings at the request of this Court and was put before us by consent.

9. By January 1968 there already existed the business of a general dealer and a butchery, known as Kromdraai Kontant Winkel & Slaghuis, on one of the sites on the portion of the farm. (Vol 4 p 280-282).

10. On 7 September 1968 P F Roux (presumably a son of D J E Roux) as lessor entered into the following two separate leases, viz.

(i) with A E Bhamjee and A B E Bhamjee as lessees of "sekere konsessie regte" over the portion of the farm for a period of 5 years from 1 September 1968 (Vol 4 p 283-286); and

/9....

(ii) with Kromdraai Cash Store and Butchery
(Pty) Ltd as lessee of a shop and butchery
situated on a site of the portion of the
farm for a period of 5 years from 1 September
1968. (Vol 4 p 287-290).

11. On 7 March 1970 P F Roux (the only heir of the late
D J E Roux and executor of the estate of the latter)
and the respondent entered into a handwritten agreement
with an addendum thereto. In terms of the agreement
P F Roux sold to the respondent the trading rights,
which the late D J E Roux held by virtue of the
1949 Notarial Deed of Cession over the portion of
the farm, for an amount of R5 050-00. The addendum
recorded that the said purchase price was paid for:
- (1) the sale of the trading rights;
 - (2) the sale of all existing erected buildings;

/10....

- (3) all fixtures in the buildings;
- (4) all right, title and interest in the leases, dated 7 September 1968 between P F Roux as lessor and Kromdraai Cash Store & Butchery (Pty)Ltd, A E Bhamjee and A B E Bhamjee as lessees (Vol 4 p 302-304). The effect of this provision was that the respondent was to acquire the rights of P F Roux as lessor against the said three lessees under the two leases of 7 September 1968.

12. Disputes arose between the respondent and the said three lessees concerning the leases which gave rise to litigation between them in the Magistrates' Court, Witbank. Details of the litigation are not relevant to the present proceedings save to mention that the settlement of their disputes was

/11....

recorded in a Deed of Settlement, dated 19 May 1972, in terms of which the said three lessees acknowledged that P F Roux had ceded to the respondent his rights in the leases, dated 7 September 1968 (Vol 3p 163-165). The result was that the leases were to continue until their expiry on 31 August 1973. On their termination the said three lessees failed to exercise their options of renewal but continued to remain in unlawful occupation of the shop and the butchery. (Vol 3 p 209).

13. On 9 January 1974 Mrs A C E W Jansen van Nieuwenhuizen, a widow, entered into a written Agreement of Lease in terms of which she as lessor leased to A E Bhamjee (Pty) Ltd the trading and occupation rights over the portion of the farm for a period of 9 years and 11 months as from 1 September 1973 with an option

to renew for a further period of 5 years. (Vol 5 p 320-324).

14. During 1976 a fire destroyed the shop and the butchery. That was the first fire. A E Bhamjee (Pty) Ltd succeeded in recovering from S A Eagle Insurance Co Ltd as insurer an amount of R79 000-00. (Vol 2 p 115). A E Bhamjee (Pty) Ltd, which supplied all the necessary materials, had the shop and the butchery rebuilt at its expense.
15. Respondent successfully claimed damages in the Magistrate's Court, Witbank, against the said three lessees for their wrongful holding over the building from 1 September 1973 until 31 January 1977. Kromdraai Cash Store & Butchery (Pty) Ltd thereafter ceased to exist. A E Bhamjee and A B E Bhamjee appealed to the Transvaal Provincial

Division. A B E Bhamjee, however, ceased to occupy the shop before 20 November 1981. On 21 November 1981 the Transvaal Provincial Division as a Court of Appeal (per Melamet and Nestadt J J) dismissed the appeal of A E Bhamjee against whom was granted inter alia an order for ejection from the building housing the shop and the butchery. (Vol 3 p 167-190).

16. On 24 November 1981 A E Bhamjee was evicted from the building which was kept securely locked as its contents were under order of attachment in execution until it was destroyed by fire on 5 December 1981. That was the second fire (Vol 1 p 74 para (e)).

17. Respondent on 27 April 1982 successfully claimed in the Transvaal Provincial Division from A E Bhamjee

payment of R5 800-00 damages for unlawful occupation of the shop and the butchery from 1 February 1977 to 24 November 1981 (Vol 3 p 197-200).

What rights, if any, did the respondent have in regard to the building when it was destroyed by the second fire on 5 December 1981 ?

Originally H P Van Nieuwenhuizen was the registered owner of the portion of the farm by virtue of Deed of Transfer No 8791/1924. It was qua owner of the portion of the farm that he by Notarial Deed of Lease of Trading Rights in 1926 leased the sole and exclusive trading rights over the portion of the farm to Mrs S R Stein and Mrs A Manasewitz as lessees. The sole and exclusive trading rights formed part and parcel of his ownership of the portion of the farm. The Notarial Deed of Lease of trading rights created an ex contractu relationship between him and Mrs S R Stein and Mrs

A Manasewitz as lessees (including their subsequent cessionaries who derived their title as lessees from them). The legal position of H P Van Nieuwenhuizen, however, changed radically when he transferred in 1953 the bare ownership of the portion of the farm by Deed of Transfer No 19194/1953 to Coronation Collieries Ltd subject to a reservation in favour of himself of all the trading rights over the portion of the farm.

Such reservation of the trading rights in favour of himself and not in favour of a dominant tenement in law constituted a personal servitude in favour of H P Van Nieuwenhuizen.

Section 67 of the Deeds Registries Act No 47 of 1937 expressly sanctions the creation of a personal servitude by way of a deed of transfer in favour of the transferor. Henceforth H P Van Nieuwenhuizen was the registered holder of a personal servitude in respect of the trading rights over the portion of the farm. It is trite law that a personal servitude is

inalienable and terminates with the death of the holder thereof.

See Willoughby's Consolidated Co Ltd v Copthall Stores Ltd,

1913 AD 267 at p 282 per INNES J:

"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 he alienate it; when he dies it perishes with him. (Voet 8.1.4; Louw v Van der Post, etc.)."

See also Hotel De Aar v Jonordon Investment (Edms) Bpk,

1972 (2) SA 400 (A) at p 405 F. While H P Van Nieuwenhuizen

as the holder of a personal servitude was entitled to grant

a lease of the trading rights such a lease would have no binding effect on the owner of the portion of the farm after his death.

Neither Mrs S R Stein and Mrs A Manasewitz as lessees

nor their cessionaries as their successors in title

could acquire rights to the use of the trading rights after

the death of H P Van Nieuwenhuizen. Compare Voet 19.2.16:

-- vel fructuarius fundum fructuarium
 elocaverit in certum tempus, velut in
 quinquennium, & anno forte tertio ususfructus
 morte aliove modo finitus ad proprietarium
 revertatur; cum scire conductor debuerit
 conditionem ejus cum quo contrahebat,
 & prospicere hoc posse evenire, adeo
 utne sumtus quidem, quos fecit in fundum,
 quasi quinquenio fruiturus, recipiat
 pro rata. D 19.2.9.1.

(Gane's translation : If a usufructuary
 has let out for a definite time, say for
 five years, a farm held in usufruct,
 and perhaps in the third year the usufruct
 has been ended by death or in some other
 way [it] goes back to the proprietor.
 The lessee ought to have been aware of
 the position of him with whom he was
 contracting, and have foreseen that such
 a thing could happen; so much so that

/18....

he does not even recover a proportionate part of the expenses which he has incurred on the farm in prospect of enjoying it for the five years."

The effect of registration of the trading rights as a personal servitude in favour of H P Van Nieuwenhuizen appears from the following clear statement by HOEXTER JA in Frye's (Pty)Ltd v Ries, 1957 (3) SA 575 (A) at p 582 A-C:

"As far as the effect of registration is concerned, there is no doubt that the ownership of a real right is adequately protected by its registration in the Deeds Office. Indeed the system of land registration was evolved for the very purpose of ensuring that there should not be any doubt as to the ownership of the persons in whose name real rights are registered. Theoretically no doubt the act of registration is regarded as notice to all the world of the ownership of the real right which is registered.

That merely means that the person in whose name a real right is registered can prove his ownership by producing the registered deed. Generally speaking, no person can successfully attack the right of ownership duly and properly registered in the Deeds Office. If the registered owner asserts his right of ownership against a particular person he is entitled to do so, not because that person is deemed to know that he is the owner, but because he is in fact the owner by virtue of the registration of his right of ownership."

It is clear from the foregoing that H P Van Nieuwenhuizen's death on 28 February 1964 terminated his personal servitude of trading rights. Accordingly P F Roux was in law incapable of binding the owner of the portion of the farm by purporting to alienate the trading rights on 7 March 1970. He was also incapable in law of alienating

the building to the respondent by the same agreement. The building formed part of the portion of the farm which was owned by Coronation Collieries Ltd (superficies solo cedit). The agreement of 7 March 1970 accordingly conferred no legal title on the respondent vis-a-vis the owner of the portion of the farm in regard to the trading rights and the building with its fixtures. He could at the most have been a bona fide occupier of the building and its fixtures when it was destroyed by the second fire on 5 December 1981. Since he did not erect the building with his materials he had no rights to the materials comprising the building when it was destroyed on 5 December 1981. Furthermore no necessary or useful improvements were effected by the respondent on the portion of the farm. He therefore had no claim for compensation of such non-existing improvements. For the same reason he could not in the circumstances rely on a right

of retention.

On 3 December 1982 the defendant as insured sued the appellant as insurer under a fire insurance policy which was in force on 5 December 1981, when the second fire occurred, for payment of the insured amount of R35 000-00. In terms of the insurance policy (Annexure "A" Vol 1 p 11-39) the buildings on the farm Kromdraai were the subject matter insured against damage to the whole or part thereof by fire "whether resulting from explosion or otherwise". It was common cause that the reference in the insurance policy to "the buildings on the farm Kromdraai" related to the building with the store and the butchery on the portion of the farm.

Mr Fine, on behalf of the appellant, relied inter alia on Nafte v Atlas Insurance Co Ltd, 1924 W L D 239 at pp 245,246 for his contention that inasmuch as the insurance policy was not a "valued policy", which specified

/22....

the agreed value of the subject-matter insured, but an "unvalued" or "open" fire policy of indemnity the respondent was only entitled to recover the actual loss sustained by him which was not to exceed the insured amount of R35 000-00. The onus was on the respondent to prove the value of his actual loss subject to the limitation of the insured amount. The substance of his argument was that the respondent had failed to discharge the onus.

Mr Engelbrecht, on behalf of the respondent, argued that the respondent at all times honestly thought that he had a right to the building on the basis of the agreement of 7 March 1970. While he conceded that the respondent had no legal claim to the materials of the building after its demolition or destruction, he contended that the respondent's interest in the building consisted of the preservation of the integrity of the building itself because the latter enabled

him to generate an income from the rentals obtained from tenants. He relied strongly on the evidence of the respondent that he had at all relevant times until the occurrence of the fire on 5 December 1981 had the use of the building which enabled him to derive an income from the rentals collected from his tenants. Had the fire not destroyed the building the respondent would have continued to lease the building to tenants.

In reply Mr Fine countered by pointing out that the respondent had failed to insure his interest in the building, viz to collect rentals from tenants. Moreover, the respondent had failed to prove the value of his interest in the building.

All things considered, I agree with Mr Fine's contention that the respondent had failed to prove the extent of the actual value of his loss occasioned by the destruction of the building.

In the result the appeal is allowed with costs. The following order is substituted for the order of the Court a quo:

"The defendant is absolved from the instance with costs."

C P JOUBERT ACJ.

MILNE JA

STEYN JA

Concur.

F H GROSSKOPF JA

NIENABER AJA