

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Dates : 26 February 20 April 2009

Case no: 38574/08

In the matter between:

W F KIDSON

FIRST APPLICANT

J C KIDSON

SECOND APPLICANT

and

JIMSPEED ENTERPRISES CC

FIRST RESPONDENT

JS SINCLAIR N.O.

SECOND RESPONDENT

REGISTRAR OF DEEDS PRETORIA

THIRD RESPONDENT

Habitatio – right does not lapse upon destruction of home – person entitled to habitatio may re-build home or alternative lodgings.

JUDGMENT

Van Rooyen AJ

[1] The Kidsons sold their farm in 1998 to the First Respondent (“Jimspeed”) for R450 000. A right of *habitatio* over the farmstead and outbuilding was reserved for Mr Kidson for as long as he lived.¹ He is married in community of property with the Second Applicant. This

¹ “Willem Fredrick Kidson shall for his lifetime be entitled to occupy the farm stall on the farm for his own benefit. He shall however be responsible for the maintenance and upkeep of the dwelling with outbuilding. The seller shall however not be entitled to lease the premises to someone else other than for occupation for his immediate family.”

right was duly registered against the title deed of the farm. Jimspeed, however, according to the Kidsons, made life unbearable for them and they packed up and left. Jimspeed thereafter sold the farm to Futurama 143 CC which, in turn, sold it to a family trust of which Mr JS Sinclair is the trustee (“Sinclair”). As a result of mining activities on the farm where the Kidsons have lived in the mean time, they have to leave the home in which they are presently living. They now wish to return to the house on their erstwhile farm. They had, earlier, discovered that Jimspeed had destroyed the house and outbuilding. They also heard that the farm had been sold to Sinclair. It is common cause that Jimspeed has been liquidated. The Kidsons describe themselves as pensioners who are struggling to make ends meet. They are unable to afford accommodation in town, “as the price for suitable accommodation is just too high.” They now seek the Court’s assistance in declaring that their rights still exist as registered.

[2] Sinclair is not prepared to permit the Kidsons any rights to the farm and states that he was unaware of the *habitatio* when he purchased the property from Futurama. *In limine* it was argued on his behalf by Mr *Greyling* that Futurama and the liquidator of Jimspeed should also have been joined in the present proceedings. Counsel also argued that the Kidsons had abandoned their rights by having left the farm and having sued Jimspeed in a magistrate’s court for damages and other remedies. Lastly it was argued that when the house was demolished the *habitatio* also expired. This was in accordance with the usual rule in cases of servitudes that when the servient tenement is destroyed, the right also expires.

[3] Ms *Erasmus*, for the Kidsons, argued that there was no evidence of abandonment and that the relevant parties had been joined. In fact, the papers were delivered to the firm which acted as the liquidator for Jimspeed and they had not reacted. She also argued that there was insufficient evidence of abandonment. She was, however, in doubt whether the *habitatio* had not fallen away, in the light of her reading of the authorities.

Evaluation

[4] Mr *GS Maritz*, on whose heads Ms *Erasmus* argued the matter, referred to *Salmon v Lamb’s Executor and Naidoo*² as authority for the proposition that the destruction of the dominant or servient tenement did not mean that the structure could not be rebuilt. The judgment, however, does not support this principle. It was held that when a wall of a hotel is

² 1906 EDC 351.

broken down so that the wall may be strengthened, the owner of that building is entitled to do that in spite of the fact that the roof of the neighbour was attached to that wall. The judgment does not go further than this and state that the owner of the roof may, afterwards, attach the roof to the wall again.

[5] I agree with Ms *Erasmus* that the Kidsons did not abandon the farmstead (incorrectly called a “farmstall” in the registered transfer of ownership). The mere fact that they approached the magistrate’s court serves to accentuate their belief in their right to *habitatio*. *Habitatio* has neither lapsed as a consequence of the fulfilment of the requirements of the Prescription Act 68 of 1969 nor was any cancellation of the personal servitude effected by any notarial deed as prescribed by section 68(1) or (2) of the Deeds Registries Act 47 of 1937. But for compliance with all the requirements of prescription, the mere non-user of the right of dwelling does not automatically lead to the disappearance or lapse of the right.³ It was also not necessary to have joined Futurama, who had sold to Sinclair. The question is not what took place in their negotiations and whether Sinclair knew about the *habitatio* or whether he might have a claim against Futurama, but whether the *ius in rem*, as registered, still exists objectively in spite of the destruction of the house and outbuilding by Jimspeed.

[6] *Habitatio* has since time immemorial been recognized as one of the personal servitudes, in addition to usufruct and use.⁴ In *Galant v Mahonga*⁵ Sampson J summed up the position well:

“I have already held that her right amounted to *habitatio*. At one time in Roman law it was doubtful whether *habitatio* was a distinct servitude; but Justinian (*Inst.* 2.5.2-5) decided to allow it to be classed among personal servitudes, although it seemed to the jurists to stand as a right by itself. See also *D.* 7.8.10 C 3.33. The Roman-Dutch authorities accepted this law. Grotius *Introduction* (2.44.8) treats *habitatio* under *usus*, and recognises the right to let. Van der Linden, *Institutes* (1.11.6) includes it under personal servitudes, and there never has, I think, been a doubt that it is so regarded in our law to-day. A personal servitude differs from a real servitude because it is attached to a person and not to a dominant tenement; but the right comprises a part of dominium and is for that reason a *jus in re* which founds an action *rei vindicatio*. The plaintiff, therefore, can sue in this action for the recovery of her right against any owner of the land subject to the right.

In regard to the claim for damages for the invasion of plaintiff's right and deprivation of the enjoyment of her servitude by defendant's action, it was contended that she had suffered the loss of her home and had had to

³ Voet 7.8.8.

⁴ Cf *D* 7.8.1-23; De Groot *Inleidinge* 2.44.4-10 and especially 2.44.8 and Voet *Commentarius ad Pandectas* 7.8.6; Van Leeuwen *Het Rooms Hollands Recht* (1664) 1.11.6; also see Josson *Schets van het Recht van de Zuid-Afrikaansche Republiek* (1897) 463; Van der Merwe *Sakereg* (1989) 524.

⁵ 1922 EDL 69, 79-80 .

pasture her stock elsewhere. No special damages were proved or claimed in argument, but, general damages on the above basis were asked for. Now *habitatio* is treated in the authorities as akin to use, and use was restricted to bare enjoyment, and to what is necessary to enable the free use to be enjoyed. Justinian (*Inst.*, 2.5.2.) extended to *habitatio* the right to receive a guest in the house (I presume temporarily) and allowed the owner of the servitude to reside in the house with his wife and children, and such persons as might be in his employ, and by a decision allowed the power to let the right of inhabiting to others. Voet *ad Pand.* (7.8) does not throw any light on the extent of the right in regard to the question at issue in this case, and indeed the general trend of the Roman-Dutch writers is to leave the matter where Justinian placed it.”

[7] Personal servitudes have been classified, since Roman times, with praedial servitudes, as limited real rights. In spite of the personal servitude’s connection to a particular person (it cannot be transferred or inherited) it is for all other purposes a real right and, as such, legally recognized property which is protected as an asset by private law remedies. All real rights have a *res* as object. A *res* is of a tangible nature and does not amount to a mere air-space. Air or space can, accordingly, never qualify as an object of a *ius in rem*. Even in the sectional titles legislation the ownership of one of the sections is described with reference to at least the middle of the walls, roof and floor between the sections.⁶

[8] The object of the right to *habitatio* (right of free residence) is the land which is subject to the limited real right of *habitatio*. That is why it is registered against the title deed of the *land* with cadastral precision as to which part of the land is subject to the *habitatio* (as in the conditions in Annexure B in the present matter, read with the diagram 1126/199).The object of the limited *ius in rem* is accordingly not the air which is encircled by the “four” walls of the farmstead, but the land on which it is located. That is why the rented room in *Kain v Khan*⁷ is not in itself the *res*, since it is part of the building and, *superficies solo cedit*.⁸ The entitlements of the holder of the right of *habitatio* may, however, in that case be defined with reference to the particular room as part of the building attached to the land as object of the real right.

[9] When the person who has the right of *habitatio* abandons the right, it lapses. As a personal servitude it also lapses on the death of the holder of the *habitatio*. Before that the

⁶ S 5(3)(d) and (e) of the Sectional Titles Act 95 of 1986. See Van der Merwe and Sonnekus *Sectional Titles, Share Blocks and Time-Sharing* (Vol I) par 3-5.

⁷ 1986 (4) SA 251(C).

⁸ *Omne quod inaedificatur solo cedit* (Just *Inst* 2.1.29) and *superficies solo cedit* (Gai *Inst* 273). See Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 641.

holder of the right may, of course, reach an agreement with the owner of the burdened property to abandon his limited real right and to accept as a *quid pro quo* some compensation for this waiving of his limited real right. This does not amount to a “transfer” of the limited real right to the owner, but will have the consequence that the erstwhile burden encompassed in the limited real right falls away and the entitlements of the owner of the then unburdened ownership will automatically return to the original unburdened position, thanks to the elasticity of the real right of ownership.

[10] Van der Keessel states that according to De Groot’s discussion of servitudes when either the servient or dominant land perishes, the right also lapses.⁹ He, however, states that according to a statute of Harlem the servitude would not lapse where one of them is destroyed by fire or in another manner and would consequently automatically revive should the servient building be re-erected. Elsewhere, in 2.39.14, he refers to usufruct and states that where the character of the servient tenement changes, for example, as a result of a flood becomes a riverbed, the servitude lapses. However, when the situation returns to normal, the servitude comes to life again. To my mind the essential element for the lapse of the *habitatio* would be when a fundamental change in the land makes it impossible to exercise a right of *habitatio*. This is so since the land on which the house is situated is the true object of the real right. When this approach is adopted, it would, with respect, be inconsistent to accept that when the house burns down or is otherwise demolished, the right falls away.¹⁰ The true test should be whether it has become impossible to rebuild because, as a result of the mutation to the land itself, the land has become incapable of supporting any structure which can be utilised as a dwelling. This would be supported by the Digest text underlying this thinking: “Rei mutatione interire usum fructum placet.”¹¹ I am of the opinion that the two Van der Keessel texts referred to support this approach: only when the servient tenement becomes incapable of serving, the servitude lapses. But the incapability must lie in the land itself, not in the structure built on it. If the structure is destroyed and the land retains its original capacity to be burdened as in the past, the servitude does not lapse.

[11] Generally it would also be inequitable to benefit the owner of the servient tenement by cancellation of the limited real right as a burden to his ownership due to the mere destruction

⁹ *Praelectiones ad De Groot* 2.37.5.

¹⁰ *Contra* Van der Merwe *Sakereg* 535.

¹¹ *D* 7.4.5.2.

of the building utilised as dwelling. The *ius in re aliena* limits his or her ownership until the death of the person entitled to the *habitatio*. Why must it fall away by way of mere coincidence or destruction of the structure on the land if it does not entail a mutation of the land (*rei mutatione*) as object of the right itself?

[12] As indicated above, the owner of the burdened property can always seek to reach an agreement with the holder of the limited real right to abandon his right against a reasonable mutually agreed *quid pro quo*, but he need not necessarily enjoy the benefit of an unburdened ownership just because an uncontrolled bush fire (or a negligent or malicious predecessor in title) destroyed the structure that served as dwelling for the holder of the *habitatio*.

[13] Mr *Maritz* argued in his heads, that the Court may also order the present owner of the land or the liquidator to restore the farmstead and the outbuilding. Given the liquidation of Jimspeed as the purported entity responsible for the demolition of the farmstead as dwelling, this would seem academic even if that act of demolition fulfilled all the requirements of a delict. The present owner can, however, under no circumstances be burdened with a quasi vicarious liability for damages resulting from a previous owner's unlawful acts. Re-building is, in any case, not included in the Notice of Motion. It is also foreign to *habitatio* as a limited real right, to entitle the holder of the servitude to claim any positive action from the owner of the servient property. The core of the owner's duty is, indeed, inaction: *Servitutum non ea natura est ut aliquid faciat quis . . . sed ut aliquid patiatur aut non faciat*.¹²

[14] The above line of thinking is supported by decisions of the German Courts, which were confronted with the question whether the devastation which the Second World War had brought about, removed the servitudes (*Wohnrechte*) which existed before the war.¹³ Some lawyers argued that, as would be the case with a lessee who cannot compel the landlord to re-erect the bombed building because the contract of lease lapsed with the destruction of the leased object, the destruction also put an end to the right to *habitatio*. Westermann,¹⁴

¹² D 8.1.15.1 read with Voet 8.3.12. Voet 8.4.17 founds an exception in the case of the *servitus oneris ferendi*. Cf. Sonnekus and Neels *Sakereg Vonnisbundel* (1994) at 550-551 and 579-580 and Van der Merwe *Sakereg* 535. This consequence of the general principle of passivity was reaffirmed in *Low Water Properties (Pty) Ltd and Another v Wahloo Sand CC* 1999 (1) SA 655 (SE).

¹³ Cf. Westermann *Sachenrecht* (1960) 613 discussion of *eg* BGH 7, 268 at 272 and BGH 8, 58 at 63; Wolf E *Lehrbuch des Sachenrechts* (1979) 553; Wilhelm *Sachenrecht* (1993) 625; Baur *Lehrbuch des Sachenrechts* (1981) 276.

¹⁴ Op. cit. §123.1.4

however, convincingly argues that the object of the *ius in rem* was never the house as an integral part of the land, but that the burden rested on the *land* and that is why the *habitatio* is registered against the land. “Die einseitige Abstellung auf die ‘Belastung des Gebäudes’ ... übersieht, daß grundsätzlich das Grundstück belastet ist. ‘Eine Haftung an bestimmten Räumen’ ... ist nicht gegeben”¹⁵ The land as object was not destroyed. The homestead is not an independent *res*; it is fully dependent on the land on which it was erected. Wolf¹⁶ motivates it well: “Die mögliche inhaltliche Beschränkung auf einen Teil eines Gebäudes ändert nichts daran, daß das Wohnungsrecht *am ganzen Grundstück besteht*”(emphasis added). The destruction caused by the bombardment did not destroy the right when the bricks fell.

The manner in which the person who is entitled to the *habitatio* will exercise his rights to set up a suitable structure to serve as dwelling is entirely dependent on him or her. He or she may not be hindered in the process by the owner of the burdened land to exercise his or her right. It is clear, however, that the holder of the right of *habitatio* cannot compel the owner of the burdened land to re-erect a structure to serve as dwelling because that would be contrary to the abovementioned principle of passivity.¹⁷

[15] In the light of the above, the following conclusion is reached on the application of the applicants:

1. When the farmstead and outbuilding were destroyed by Jimspeed the right to *habitatio* did not lapse.
2. Applicants did not abandon their right.
3. It is irrelevant that Sinclair was not aware of the right to *habitatio*. It is still registered against the title deed that forms part of the public registers at the Deeds Office.
4. The fact that the condition only explicitly benefits Mr Kidson is irrelevant. The Kidsons are married in community of property and rights which he enjoys fall in the community of property. However, the right is limited to his life and when he dies, the *habitatio* lapses.

¹⁵ Westermann (613) – the fixation with the tainted formulation as if the right to free residence is dependent on certain rooms or areas misses the important point that it is the land that is burdened as object of the real right, not the area within a certain room or building.

¹⁶ Op. cit. 553.

¹⁷ I wish to express my sincere gratitude to Prof Jean Sonnekus (University of Johannesburg) for providing me with several of the texts quoted in this judgment.

5. The Kidsons are entitled to all the rights which *habitation* grants them which would include the right to reach by vehicle the place where the house was on the land of Sinclair (if the road has been destroyed, it may be remade by the Kidsons as a *via necessitatis* or if that is no longer possible, an alternative route must be made available to them by Sinclair). *Habitation* includes the right to have all the benefits which existed when the right was vested. The Kidsons are, accordingly, entitled to restore the *status quo*. If they are unwilling to restore the house in exactly the same form, they would be entitled to build an alternative structure or even place a prefabricated structure or a wooden house on the place where the previous structure had been. It need not even be an immovable structure, and could for example be a caravan home. They have a right to *habitation* on the said piece of land by whatever means. Of course, if certain Statutes or Regulations are applicable to structures on that land, they would have to abide by them. If they build an immovable structure, the structure becomes the property of Sinclair; obviously subject to the right of *habitation*.
6. Because some doubt was said to have existed originally concerning the entitlement of the holder of the right of *habitation* to utilise the yard of the farmstead for purposes of a small vegetable or fruit garden etc, reference is made to the explicit text in *Digesta* 7.8.12.1 that confirms that the dweller is entitled to utilise the property for this purpose for his own subsistence, but is not entitled to sell any produce to a third party.¹⁸

ORDER

1. That the “Certificate of United Title” (Sertifikaat van Verenigde Titel) attached as Annexure “B” to the application in this matter and issued by the Registrar of Deeds

¹⁸ Praeter habitationem quam habet, cui usus datus est deambulandi quoque et gestandi ius habebit. sabinus et cassius et lignis ad usum cottidianum et horto et pomis et holeribus et floribus et aqua usum, non usque ad compendium, sed ad usum, scilicet non usque ad abusum: idem nerva, et adicit stramentis et sarmentis etiam usum, sed neque foliis neque oleo neque frumento neque frugibus usum. sed sabinus et cassius et labeo et proculus hoc amplius etiam ex his quae in fundo nascuntur, quod ad victum sibi suisque sufficiat sumptuum et ex his quae nerva negavit: iuventius etiam cum convivis et hospitibus posse uti: quae sententia mihi vera videtur: aliquo enim largius cum usuario agendum est pro dignitate eius, cui relictus est usus. sed utetur his, ut puto, dumtaxat in villa: pomis autem et oleribus et floribus et lignis videndum, utrum eodem loco utatur dumtaxat an etiam in oppidum ei deferri possint: sed melius est accipere et in oppidum deferenda, neque enim grave onus est horum, si abundant in fundo.

on the 10th August 1999, and more specifically paragraph B on pages 3-4 thereof, is valid and in force.

2. That First and Second Applicants are entitled in terms of the aforesaid Registration, until First Applicant passes away, to exercise their right of *habitatio* on the land on which the farmstead and outbuilding stood by re-building the structures or by utilizing alternative means of abode, whether it be movable or immovable.

3. The Applicants are entitled to all other rights to which they were entitled when they occupied the original farmstead and outbuilding, inter alia, a right of way over the property of the Second Respondent to the land where the farmstead and outbuilding were situated, the right to construct sewage and drainage facilities and the right to connect to an electrical source, if such source was used when the title deed was registered. Electric costs would be for the account of the Applicants. If there had been a water source for the farmstead at the time of the registration of *habitatio*, such source may once again be used, even if the source falls outside the yard of the farmstead.

4. The applicants are also entitled to utilize the yard for purposes of a small vegetable and fruit garden for personal use.

5. The second respondent must pay the costs of this application.



JCW van Rooyen
Acting Judge of the High Court

20 April 2009

For the Applicant Ms Nadine Erasmus (heads by GS Maritz) instructed by Marais Basson Inc
c/o Savage and Jooste & Adams Attorneys Pretoria.

For the Second Respondent PJ Greyling instructed by Brauckmann Jooma p/a Serfontein
Viljoen & Swart, Pretoria.