

Notes on the real rights cases

Lorentz v Melle 1978(3) SA 1044 (T)

1. The case concerns a condition registered against the title deeds of two properties. The condition is known as the ‘township clause’. The township clause was one of several similar clauses in the original notarial deed that sub-divided the property, creating reciprocal rights and obligations for the owners of the two properties. The other clauses were the ‘minerals’ clause, the right to pre-emption, grazing, hunting, the right to dry wood, water and a right of way. Note the difference between clause 9 and clause 11 of the notarial deed (p 1046 of the judgment). What does this tell us about the intention of the original owners: does this indicate an intention that the ‘township’ clause should bind successors in title? Make sure you know what each of the constituent elements of the phrase ‘heirs, executors, administrators or assigns’ means. (This is the phrase used in the 1922 amendment to the original notarial deed).
2. Who are Lorentz and Melle? In the court a quo there were 21 respondents. Who were these respondents? (Hint: see the bottom of p1046 and the top of p 1047.)
3. Melle went to court to obtain a declaration that the township clause was not binding. She also wanted the clause removed from the deeds register. Why? What was her motivation for going to court?
4. See p 1048: ‘Respondent’s case [ie, Lorentz’s case] was based on two alternative submissions. The first was that what was created by the notarial deed was a praedial servitude. In this event, the applicant was not entitled to any of the orders sought’. Why? If the township clause *was* a praedial servitude why did this mean that Melle would lose the case? (See the analysis of the law of praedial servitudes on p 1049—50.)
5. See p 1051. Lorentz argues that the clause is analogous to a ‘fruits’ clause. A fruits clause is capable of being a servitude and is therefore a real right. The right to claim a share of the profits from development of the adjacent land, Lorentz argues, is a right to the fruits (ie, the income) of that land. Therefore it is a servitude. This argument is rejected by the court. See p 1052. There is, it holds, no ‘equation’ (ie, no analogy) between the township clause and that of picking fruits. Why not? What is the difference? (See also 1055)
6. Note that Lorentz has an alternative argument (p 1055). This is that even if the township clause is not a real right it nevertheless binds all the ‘heirs, executors, administrators or assigns’ of the original parties. This meant, the argument went, all successors in title. The court distinguishes two parts to the township clause: the duty to pay the share of the profit and the right to claim them. (p1057) The rights can be freely transmitted, but the duties cannot unless they are the duties attached to real rights (p 1058). Since the township clause is not a real right the duties it imposes bind only the original contractants.
7. What then is a real right? The crucial holding is at 1052, occurring in the discussion of the ‘fruits’ argument:

The right (and obligation) under consideration, so it appears to me, is essentially a personal one sounding in money and cannot be equated to the servitudes referred to. Test the matter, says Mr *Kirk-Cohen* on behalf of the applicant, by postulating the insolvency of Van Boeschoten or Lorentz after the establishment of a township and the sale and transfer of erven therein and the receipt of the proceeds by one of them. What claim other than a personal one would the other owner have had? I think counsel is right in saying that the answer "none" is indicative of no real right having been established and this for the reason that the conditional obligation to pay attaches of necessity not to the land (which is not burdened) but merely to the owner thereof. *His rights are curtailed but not in relation to the enjoyment of the land in the physical sense.*

Pearly Beach Trust v Registrar of Deeds 1990 4 SA 614 C

PB Trust wanted to register three clauses in a deed of sale against the title deeds of the land sold. The Registrar objected, arguing that the clauses did not comply with the requirements of s 63(1) of the Deeds Registries Act: '(n)o deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration'.

The clauses provided for a third party to "receive from the transferee and/or its successors in title":

- a. a third share of the net consideration received for any issue of rights to prospect for minerals on the property
- b. a third share of any amount of compensation received in consequence of an expropriation of the property
- c. a third share of any consideration received from a (voluntary) alienation of the property to the state

1. See the discussion of the authorities at 615—616. In particular *Ex parte Pierce* 1950 (3) SA 628 (O) was relied on as authority for the registration of a right entailing payment of money. See the discussion at 616:

Ex parte Pierce (supra) was concerned with the question as to whether a certain clause in a will created real rights which were accordingly registrable against the title deeds of the properties concerned. The clause in question read as follows:

'Should any minerals or precious stones or base metals or oils be found on any of the farms..., then the profit derived therefrom shall be divided equally between my five children or their children by representation, should any of them at such time be deceased. Upon the death of all my said five children this condition cease and lapse.'

Brink J held that the rights created thereby were registrable. At 635D - E the learned Judge said:

'I hold the view that an obligation to pay money imposed on the owner of land qua owner out of the proceeds of the land may well be regarded as a diminution of the ownership and as creating real rights. . . .

At 636B His Lordship added:

'In my view, where land is bequeathed to a legatee subject to the condition that after a stated period the property must be sold and the proceeds divided among certain persons, the condition imposed amounts to a diminution of the legatee's

right of ownership and is registrable as conferring real rights on the ultimate beneficiaries.'

2. The court also appeared to place some reliance on the dictum in *Lorentz v Melle* requiring that in addition to a right being a subtraction from the dominium it should also constitute a curtailment of the right of the owner to the enjoyment of the land in a physical sense. (617)
3. In the end, the decision relies more on the reasoning in *Pierce* than that in *Lorentz*. The court holds that one of the rights of ownership is the *ius disponendi* or the right to dispose of the property (usually in exchange for money). If this right is limited in the sense that the owner is prevented from obtaining the full proceeds of the disposition it can be said that one of the rights of ownership has been restricted (ie the owner must give up some of the profit received from the disposal of the property). The obligations here are binding on successors in title and are not terminable at will. So all three rights were registered.
4. Note that the case is authority for the proposition that one can claim registration of a right to claim money from a landowner qua landowner (ie, because they are a landowner). So in effect the decision goes against *Lorentz v Melle*, though it apparently cited it approvingly. Note also that the court was faced with three distinct rights here. Yet it paid no attention to the fact that right (a) is distinct from rights (b) and (c) insofar as their effect is concerned, preferring to treat them as indistinguishable. But the situation in which the owner grants mineral rights differs materially in its effect from the situation where the owner has property expropriated or sell property to the state in expectation of an expropriation. When one grants mineral rights one remains the owner of the land. In the case of expropriation, the state takes transfer of the land. According to the clause, a third share of the compensation is due. But the owner is not the owner any more. The reason for paying over the money is precisely that the owner is not the owner. So it is a logical impossibility that the "real" right is a right attached to the land, since it does not bind the landowner by virtue of his ownership of the land, but precisely because he is no longer the owner. The right has nothing to do with the land any more.

Cape Explosive Works Ltd v Denel (Pty) 2001 (3) SA 569 (SCA)

1. There were some significant differences in wording between the Deed of Sale and the Deed of Transfer. (See para 2 and para 3) What is a Deed of Sale and how is it different from a Deed of Transfer? The crucial difference in wording was the omission of the phrase 'successors in title' from the Deed of Sale.
2. The case turns on clause 6 and 7 of the Deed of Sale and on the corresponding conditions 1 and 2 of the 1973 Deed of Transfer. These are respectively an obligation to use the land for the development of armaments and to offer the land for re-purchase by the original seller should the owner be unable to comply with condition 1. These were registered against the title deeds of the property (T 40652/74 – see para 4). But then the original property was added to another property and condition 2 (the right to re-purchase) was left out of the new title deeds (T33717/77 and afterwards).

Condition 1 was stated in the 1977 title deed to be applicable only to a fragment of the property. This was, the court a quo held, an error. (see para 7) These facts and holdings were not in issue on appeal in the SCA.

3. What was in issue was the High Court's holding that clause 6 (the armaments development obligation) was a land use restriction and therefore a restriction on Armscor's right of ownership. But it could not be registered because the parties did not intend it to bind successors in title (this is because clauses 6 and 7 did not mention successors in title, but condition 1 and 2 did). As for clause 7 this was a purely contractual obligation that did not burden the ownership of the land in a physical sense. Why did the High Court focus on the Deed of Sale and not the Deed of Transfer? What did the SCA hold about this aspect of the court a quo's judgment? (See paras 10 and 11)
4. The SCA then proceeds to analyse conditions 1 and 2 of the Deed of Transfer. It was argued for Denel that condition 2 imposes a positive duty (to inform the seller that the property was no longer being used for making armaments). It could not therefore be registered because of the rule that servitudes consist only of negative duties and not positive duties. This argument is rejected. How does the court analyse the conditions (particularly the relationship between them)? (see para 14 and 15)
5. The court finds that condition 1 and 2 were inseparable from each other and imposed a use restriction. Why is a use restriction clearly a subtraction from the dominium of the owner of the land?
6. Para 16 onwards of the judgment deal with other issues. Note only at para 16 the holding that a negative system of land registration means that if real rights are omitted from the deeds register by mistake they can be restored. Their omission does not mean that the rights are lost or that they are not real rights.