

FURTHER CASES IN PERSONAL SERVITUDES

Introduction

As we have discussed, a **praedial** servitude is a real burden on land constituted in favour of another piece of land. It passes from one owner of land to another in perpetuity until it is extinguished.

The characteristics of a **personal** servitude differ in the following respects –

1. A personal servitude is registered in favour of a particular **person** in his or her (or its) own capacity – **not** in his capacity as an owner of land.
2. As a consequence, the servitude does not exist in perpetuity. It exists only for as long as the person in whose favour it is registered.¹ There is some uncertainty about whether a juristic holder of a personal servitude loses it after 100 years, or when the person ceases to exist. That question has yet to be decided. (**See Durban City Council v Woodhaven 1987 (3) SA 555 (A) at 562H**)

1. As we shall see, destruction of land which holds the benefit of a praedial servitude also extinguishes the praedial servitude – but the death of a person is far more certain than the destruction of land.

3. A personal servitude can, in principle, be established over movable as well as immovable property. A praedial servitude, of course, attaches only to land.

Like a praedial servitude, however, a personal servitude does not come into existence until it is registered. In the case of moveable property, a notarial deed setting out the property and the nature of the servitude to which it is subject must be lodged with the Registrar of Deeds.

There is no closed list of personal servitudes, but the most often cited ones are **usufruct** (the right to use and enjoy property including the right to take its fruits or proceeds), **usus** (the right to use and enjoy property excluding the right to take its fruits or proceeds), **habitatio** (the right to reside on land and/or buildings).

Holders of personal servitudes are placed under certain legal duties. For example, the case of a **usufruct**, these are:

1. To act with reasonable care in respect of the property in which he has an interest;
2. If the owner requires, to keep an inventory of the property and give security for its return in a fit state when the usufruct terminates; and
3. Effect ordinary repairs and bear ordinary expenses associated with the use and enjoyment of the property.

The rights and duties of holders of personal servitudes are dealt with in more detail at **LAWSA (2 ed) Vol 24 paras 593 to 608**

Much of the case law on personal servitudes has dealt with the issues of their duration, whether they can be alienated and the nature of the burden that they can cast on servient land.

Willoughby's Consolidated Co Ltd v Cophall Stores 1913 AD 267

In this case the appellant ("Willoughby's") was a landowner. It had purchased land over which was registered a personal servitude in favour of Dawson's Stores. In terms of the servitude, Dawson's Stores had the right to trade on Willoughby's land. Subsequently, the respondent ("Cophall") bought all of Dawson's Stores' assets, including the right to trade on Willoughby's land.

Willoughby's then brought an application for an order declaring that Cophall did not acquire the right to trade it now claimed.

In deciding an appeal arising from the application, the Appellate Division found as follows:

1. There is no closed list of personal servitudes. "*The books usually deal mainly . . . with usufructus, usus and habitatio. Now, the right of trading upon the*

property of another amounts to the right of using and occupying that property or part of it for the specified purpose. And that right (when not embodied as a condition in a lease) seems to me theoretically capable of being granted and registered as a personal servitude.”

2. A personal servitude is, however, incapable of alienation. *“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.”*

Durban City Council v Woodhaven Ltd and others 1987 (3) SA 555 (A)

The decision in Copthall Stores – that a personal servitude is inalienable – was confirmed in **Durban City Council v Woodhaven**. In this case Durban City Council granted a personal servitude to Escom. The servitude gave Escom the right to lead wires over Durban City Council land along a route defined in the deed. Woodhaven Ltd then purchased the land. After a while, Woodhaven’s directors noticed that Escom was dismantling its power lines and removing their foundations. Woodhaven then wrote to Escom to ask whether it intended abandoning its servitude. Escom confirmed that it did.

However, Durban City Council decided that it wanted to lead power lines over Woodhaven’s land and asked to take cession of the servitude back from Escom. Escom agreed.

Woodhaven then applied to the High Court for an order declaring that Escom had in fact abandoned its servitude and that, in any event, it was not legally possible for Escom to cede its servitude to the Durban City Council.

The High Court upheld that application in part. It declared that it was impossible to cede a personal servitude and postponed the question of whether the Escom had in fact abandoned its servitude for the hearing of oral evidence. Durban City Council then appealed the High Court's decision.

In the appeal, counsel for Escom argued that not all servitudes are inalienable. He relied on the distinction between a personal servitude itself and the benefits acquired under the servitude. The argument was that, while it may be true that a servitude cannot itself be ceded, the particular rights forming part of the servitude may in fact be ceded by its holder. For example, the holder of the usufruct can cede to third parties various parts, or incidents, of his use of the property which forms part of the usufruct – while still retaining the usufruct. An example might be the cession of a rights to the profits earned from farming on part of the land subject to the usufruct.

In this case, so Durban City Council argued, it would be possible for Escom to cede the right to lead cables over Woodhaven's land to Durban City Council while at the same time retaining the servitude.

The Appellate Division disagreed. While accepting the possibility that a usufructuary may cede certain of his rights to third parties, Vivier JA held that –

“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 claim anything less than the full substance of the servitude in terms of the purported cession to it by Escom.” (at 561 E-F).

The Court seems to have held that, while it may be possible to cede certain rights which form part of a servitude to third parties, where the cession would itself amount to the transfer of the whole servitude, it will not be permitted.

Consider whether this decision is correct. Is it really correct that a party cannot cede its interests under a personal servitude to another party? Is cession an alienation? Both counsel for Durban City Council and the Court in this case appear to have assumed that it was. Is that correct? Would it be different if Escom leased the servitude to Durban City Council? Is it possible to lease a servitude?