

**EFFECT OF THE DESTRUCTION OF A DWELLING ON THE  
PERSONAL SERVITUDE OF *HABITATIO***

*Kidson v Jimspeed Enterprises CC*  
2009 5 SA 246 (GNP)

**1 Introduction**

It would appear that modern South African legal literature on the right of habitation (*habitatio*) as one of the conventional forms of personal servitudes is extremely sparse. In the normal property law curriculum applicable to personal servitudes, it is customary to allocate the lion's share of available time to usufruct (*ususfructus*), thereafter to gloss over the rights of use (*usus*) and, finally, merely to refer to *habitatio* in rather cursory fashion. This trend is reflected in the most recent leading property law textbooks, which normally contain the bare, concise definition of *habitatio* as the right of the servitude holder (and his or her family) to live in a building, usually mentioning in addition that the servitude holder is obliged to exercise his right *salva rei substantia*, as well as pointing out the advantage of this type of servitude over the personal servitude of use, in that the former entitles the servitude holder with the entitlement to let or sublet the premises in question to a third party, whereas the latter precludes such an arrangement (see Van der Merwe and De Waal "Servitudes" 24 *LAWSA* (1st reissue 2000) 352; see further Badenhorst *et al Silberberg and Schoeman's The law of property* (2006) 341; Du Bois *et al Wille's Principles of South African law* 610–611; Mostert *et al The principles of the law of property in South Africa* (2010) 248; Van der Walt and Pienaar *Introduction to the law of property* (2006)

241; Delpont and Olivier *Sakereg vonnisbundel* (1985) 589; cf, however, Van der Merwe *Sakereg* (1989) 523–524 who discusses the historical background and clearly distinguishes between this personal servitude and those of usufruct and use; also Sonnekus and Neels *Sakereg vonnisbundel* (1994) 641–642, as well as Van Schalkwyk and Van der Spuy *General principles of the law of things* (2008) 248–249, who pay more detailed attention to certain aspects of *habitatio*).

Even the case law in respect of the servitude of *habitatio* is scanty, if one were to scrutinise the references to decided judgments in the abovementioned textbooks. The last judgment of note, dealing exclusively with *habitatio*, was *Arend v Estate Nakiba* 1927 CPD 8 (where the court erroneously referred to this servitude as a personal *right* (see the criticism of Sonnekus and Neels 645; Delpont and Olivier 589)). The most recent judicial expression on the concept of *habitatio* was uttered in *Felix v Nortier* 1994 4 SA 498 (SE), where the right of habitation in question was likewise described as a mere personal right, a fact alluded to by Van der Merwe and De Waal (352 fn 1 *in fin*). It should, however, be noted that in this judgment Erasmus J did not hold that the *servitude* of *habitatio* amounted in general to a mere personal right; the right of habitation *in casu* was a mere personal right, because the parties never intended it to be a burden upon the land of the grantor and therefore refrained from having it registered against the title deed of the land in question (see 501I).

In view of this dearth of modern jurisprudence on the subject of *habitatio* as a personal servitude, one can expect a likelihood of references to the old authorities in order to clear up uncertainties that may arise in the context of ascertaining the precise nature and ambit of this restricted real right. Such likelihood in fact materialised in the judgment of Van Rooyen AJ who even made additional use of references to foreign legal literature in the course of his judgment.

## 2 Facts and judgment

The first applicant (Kidson) reserved a personal servitude of *habitatio* for himself, entitling him to occupy the farmstead with outbuilding on the farm that he had sold to Jimspeed (the first respondent) in 1998, for the rest of his natural life. This right was subsequently registered against the title deed of the farm, thus conforming to the requirements for the creation of the servitude in question. The plaintiff and his wife later abandoned the dwelling where they had continued to live after the sale as a result of the conduct of the defendant which allegedly made life there unbearable for them. Following this, Jimspeed sold the farm to Futurama 143 CC which, in turn, sold it to a family trust of which the second respondent (Sinclair) was the trustee. Misfortune had in the meantime struck a second time for the appellant and his wife who were pensioners struggling to make ends meet. They were forced to leave the home on the farm which they had in the mean time occupied, due to mining activities in the immediate vicinity. Because they were unable to afford accommodation in town, they decided to return to the homestead on the farm in respect of which the appellant had originally obtained the personal servitude of *habitatio*. It would appear that their situation thereafter only worsened, as they had to discover that Jimspeed destroyed the house after they had left it previously, that Jimspeed itself had

subsequently been liquidated and that Sinclair was at that stage in charge of the premises (247J–248D).

The worst blow to the aged couple came when Sinclair refused to acknowledge the existence of the *habitatio*, arguing that: (i) he had been unaware of its existence when he had purchased the farm; (ii) the Kidsons had abandoned any rights to the farm when they had left it originally; and (iii) when the house had been demolished, the servitude of *habitatio* simultaneously expired (248E–F).

After considering the relevant facts and legal position, Van Rooyen AJ issued an order to the following effect (254B–F):

- 1 The certificate of united title – pertaining to the farm over which the personal servitude of *habitatio* had been granted – embodying the registered restricted real right was still valid and in force.
- 2 The Kidsons were entitled, for as long as the grantee (Mr Kidson) lives, to exercise a right of *habitatio* on the land in question, “by rebuilding the structures or by utilizing alternative means of abode, whether it be movable or immovable”.
- 3 The Kidsons were entitled to all other rights to which they had been entitled when they occupied the original farmstead and outbuilding.
- 4 They were entitled to make use of the farmyard for purposes of cultivating their own vegetable and fruit garden for personal use.

In effect this amounted to a full restoration of the applicant’s original legal position before he and his wife had been forced off the farm by the conduct of Jimspeed. It is suggested that none of these conclusions reached by the court can be substantiated on the facts and the applicable legal principles, as will now be argued.

### 3 Critical evaluation

#### 3.1 Preliminary remarks

The main issue which occupied the court’s attention was whether the destruction of the buildings had the effect of terminating the restricted real right of *habitatio*. It is evident that the other arguments raised by the respondent were not seriously pursued.

In respect of the argument that the Kidsons had abandoned the farmstead and had thus in effect abandoned their right of *habitatio*, Van Rooyen AJ concluded that no such abandonment occurred (253C). He omitted any reference to authority in this regard, but mentioned that the mere fact that the applicants had previously claimed damages and applied for alternative relief in the magistrate’s court “serve[d] to accentuate their belief in their right to *habitatio*”. Furthermore, the right had also not lapsed due to extinctive prescription or cancellation in terms of a notarial deed as prescribed by section 68(1) or (2) of the Deeds Registries Act 47 of 1937, or due to non user (with reference to Voet *Commentarias ad Pandectas* 7 8 8 in respect of the latter) (249C–D).

Objectively judged, it is hard to believe that Sinclair could seriously have been advised to raise the defence that he had been unaware of the existence of any personal servitude of *habitatio* over the property, as this totally ignores the most basic of principles applicable to the nature and effect of a registered real right, like the personal servitude in question (cf 250C–E 252A–C). Van Rooyen AJ thus, justifiably, did not even waste any ink in substantiating his conclusion that it was “irrelevant that Sinclair was not aware of the right to *habitatio*” and that “[i]t is still registered against the title deed that forms part of the public registers at the Deeds Office” (253C). However, what should not be overlooked, is that mere registration in the Deeds Registry of such right against the title deed of the property does not furnish unassailable proof of the existence of the servitude in question: if the servitude did in fact terminate upon destruction of the dwelling on it, the owner of the property can have the servitude cancelled: this is due to the negative system of registration obtaining in South Africa in terms of which the accuracy of the records in the Deeds Registry is not guaranteed. (Cf *Cape Explosives Works Ltd v Denel (Pty) Ltd* 2001 3 SA 569 (SCA); Mostert *et al Principles of the law of property* 313; see also the German judgment 7 BGHZ 268 274 (to which the court later indirectly refers; see para 3 2 *post*): “Ist aber das Wohnrecht erloschen, so ist das Grundbuch unrichtig geworden, und der Kläger kann die Löschung der Eintragen verlangen.”)

Van Rooyen AJ deemed it necessary to comment as follows (most probably *ex abundanti cautela*) on the fact that although the right of *habitatio* had been granted explicitly to the first applicant, his wife (the second applicant) was also entitled to it (253D, italics supplied):

“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.”

It is suggested that the spouse of the holder of this type of personal servitude does not become entitled to the right of habitation solely as a result of a marriage in community of property: the court’s abovementioned substantiation could in fact create such an impression. The effect of this would be that a spouse married out of community of property (or even children) of the servitude holder would have no entitlements under the right of *habitatio*. Since the times of Justinian this has never been the law: *habitatio* allows for the “owner of the servitude [*sic*] to reside in the house with his wife and children, and such persons as might be in his employ . . . for if they were excluded the servitude might be a useless one” (*Galant v Mahonga* 1922 EDL 69 79–80; see also *I 2 5 2*). *In casu* Mrs Kidson’s entitlements thus originated in a substantive rule of law which has its origin in Roman law and which was received unaltered in Roman-Dutch and modern South African law (see eg *Galant* 79 where Sampson J commented that it had been “the general trend of the Roman-Dutch writers” to leave matters concerning *habitatio* “where Justinian placed it”).

### 3 2 *Destruction of the dwelling and its effect*

The first applicant’s first line of attack was based upon a rather wide interpretation of the old case of *Salmon v Lamb’s Executor and Naidoo* 1906 EDC 351 for supporting the proposition that the destruction of a structure on either the

dominant or the servient tenement “did not mean that the structure could not be rebuilt” (248H). The way in which this argument is portrayed in the words of Van Rooyen AJ and his decision that *Salmon* went no further than authorising an owner of a house to break down a wall supporting roof beams of an adjacent building, when the object of the demolition of the wall was to strengthen and build it up, is rather confusing. It should have been mentioned that this old judgment essentially dealt with the question whether an urban servitude of letting in a beam (*servitus tigni inmittendi*) which had been terminated by reason of *merger* revives when the original dominant and servient tenements are acquired by different owners (see eg Sonnekus and Neels 553–554) and was for that reason alone not applicable to the set of facts at hand. Further comments on the futility of this argument are of a purely academic nature and will not be pursued in the light of its rejection by the court.

The court thought it fit to render a basic exposition of the rules applicable to *habitatio* (249E–250E) with reference to common-law texts (*D* 7 8 1–23; De Groot *Inleidinge* 2 44 4–10; Voet *Commentarius ad Pandectas* 7 8 6; Van Leeuwen *Het Roomsche Hollandsche recht* 1 11 6), a lesser known textbook from the old Transvaal Republic (Josson *Schets van het recht van de Zuid-Afrikaansche Republiek* (1897) 463), CG van der Merwe’s rather outdated (but nevertheless outstanding) standard textbook on modern South African property law (*Sakereg* (1989) 524) and the old judgment of *Galant v Mahonga supra* (249 fn 4). Van Rooyen AJ reiterated the fact that *habitatio* is classified as a restricted *real* right, drawing attention to the aspect which normally confuses undergraduate students, namely, that this servitude benefits a particular *person*, for which reason it is classified as a personal servitude, on which aspect our courts have not always been cautious, in that the personal nature of the servitude has occasionally been thought to reflect the nature of the servitudinal right itself, resulting in a finding that such servitude is a personal right (see eg *Felix v Nortier supra*; *Cowley v Hahn* 1987 1 SA 440 (E); cf Van der Walt and Pienaar *Law of property* 237).

Van Rooyen AJ lays an early foundation to his ultimate conclusion regarding the effect of the destruction of the dwelling which had been inhabited by the applicants in terms of the servitude of *habitatio*, by stating (250D):

“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*.”

As an example of this principle the court referred to section 5(3)(3)(d) and (e) of the Sectional Titles Act 95 of 1986 which deals with the ownership of a sectional title owner with reference to the middle of the walls, roof and floor between the sections. It is to be doubted whether the above words were intended to express a negative opinion as to the old question whether our law of property acknowledges incorporeals as things (cf Mostert *et al Principles* 21ff) – holding, in accordance with the views of authors like Van der Merwe *Sakereg* 37, Wille’s *Principles* 412 and Van Schalkwyk and Van der Spuy *Law of things* 6–7, that our law does not recognise the concept of *res incorporales*. The context of the problem which arose in this case points to the fact that the court was called upon

to decide on the nature of a particular corporeal *res* as the legal object of the servitude of *habitatio*. Van Rooyen AJ correctly stated that the object of this servitude was the land itself on which the farmstead was situated and that “[t]he object of the limited *ius in rem* is accordingly not the air which is encircled by the ‘four walls’ of the farmstead” (250F). His reasoning is based upon the age-old precept of *superficies solo cedit* (for which he referred to *Gai Inst 2 73, Inst Just 2 1 29*, as well as *Kain v Khan* 1986 4 SA 251 (C)) which implies that everything which is attached to land forms part of the land itself and loses its individual character.

However, at this stage the judge made it clear that the ambit of the *entitlements* of the holder of the real right of *habitatio* may be circumscribed by referring to a particular room as part of a building attached to the object of the right in question (250G). Applying this reasoning, one could *a fortiori* conclude that the use of an entire farmstead, like the one occupied by the Kidsons, comprised the entitlements flowing from the personal servitude. The precise ambit of the entitlements of the servitude holder, described with reference to the dwelling in question, will normally be easy to ascertain because, as Van Rooyen AJ explained, such servitude “is registered against the title deed of the *land* with cadastral precision as to which part of the land is subject to the *habitation* (as in the conditions in Annexure B in the present matter, read with the diagram 1126/199)” (250E–F). What this in effect means is that one can pinpoint the *content* (which is not identical to the *object*) of the servitude of *habitatio* – *viz* the servitude holder’s entitlements – as having application to a precisely circumscribed area on the surface of the land in question (the true object of the *habitation*), easily determinable from a surveyor’s map. *In casu* this would be the area of land included within the ‘four corners’ of the original farmstead (as distinct from the air-space encircled by its walls).

With reference to two texts of the major Roman-Dutch writer, Van der Keesel (*Praelectiones* 2 37 5 and 2 39 14), Van Rooyen AJ expressed himself as follows (251F, italics supplied):

“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.”

What now falls to be evaluated, is whether the quoted authority in fact justifies such a conclusion. At face value, it is suggested that the support claimed by Van Rooyen AJ from the high authority of Van der Keessel is in fact lacking. The relevant texts bear this out (Pretoria translation by Van Warmelo *et al* (1964):

*Praelectiones* 2 37 5: “Dit staan weliswaar in die algemeen vas dat deur die tenietgaan van hetsy die heersende hetsy die dienende erf die diensbaarheid (as synde ’n hoedanigheid van die erwe) tenietgaan. Tog bevat die keur van Haarlem van 1708 (art. 65) ’n uitsondering, want daar word bepaal dat ’n stedelike diensbaarheid nie uitgewis word deurdat die een of ander huis deur brand of op ’n ander manier verwoes word nie.”

*Praelectiones* 2 39 14: “Indien die voorwerp van ’n vruggebruik te niet gaan, word die vruggebruik uitgewis, bv. indien ’n hele stuk grond deur die oorstroming daarvan van aard verander en dit miskien ’n rivierbedding word; maar indien die

vorm van die grond nie verander is nie en die water later (na sy loop) terugkeer, word die vruggebruik herstel. *Indien 'n gebou afbrand . . . bly die vruggebruik selfs nie ten aansien van die bouperseel oor nie.* En ek is geneig om te dink dat daar ook op dié plekke waar daar 'n besondere bepaling is dat stedelike erfdiensbaarhede nie a.g.v. die vernietiging van een van die huise te niet sou gaan nie, op hierdie reël geen uitsondering bestaan nie [thus referring to the *keur* of Haarlem mentioned in 2 37 5, quoted above]. Want dit wil skyn asof daardie reël van die uitsonderingsreg nie tot sy logiese konsekwensies gevoer moet word nie aangesien dit 'n besondere bestaansrede in die geval van stedelike erfdiensbaarhede het, wat dikwels nie sonder die allergrootste ongerief deur die heersende erf ontbeer kan word nie” (italics supplied).

One could probably fill several pages to dissect these two texts thoroughly, with reference to aspects like, on the one hand, the similarity between usufruct (the type of personal servitude discussed here by Van der Keessel) and *habitatio*, and, on the other hand, the difference between the two and the effect of this on utilising these texts in the context of *habitatio*. However, it will be sufficient for our purposes to take note of only two aspects: (i) Old local legislation, like the *keur* of Haarlem (referred to in both texts), supporting the view that destruction by fire of a building does not terminate a usufruct *in respect of the building itself*, is not a recognised source of South African law (cf Merula *Manier van Procederen* 1 4 6 3; see *Discount Bank v Dawes* (1829) 1 Menz 38); on the contrary, one may even say that “the enactment of these special ordinances rather goes to prove that the rule of the general or common law is the other way” (per Kotzé JP in *Salmon v Lamb’s Executor and Naidoo* 371). Furthermore, Van der Keessel himself explained at the end of the second text quoted above that one should avoid drawing conclusions on the strength of the exception presented by the Haarlem local statute (s 65), because there were pressing reasons why such type of rule had been promulgated for application to urban servitudes. (It is noteworthy that Van der Merwe, in a note on the present judgment (“Extinction of personal servitude of *habitatio*” 2010 *THRHR* 657 660), refers to the exception contained in the *keur* of Haarlem to support his opinion that “the same exception should apply in the case of a right of habitation which is established to provide a residence to the holder for the rest of his or her life”, for to hold otherwise would, in his opinion, cause grave hardship to the servitude holder. He therefore applies the reasoning of the Haarlem statute, which ultimately leads him to a conclusion in accordance with the court’s own approach. It would seem that the relevance of the applicability of that local statute did not feature as an important aspect of his line of thought. The difference between my approach and that of Van der Merwe essentially lies in my negative appraisal of the relevant *source materials* in point, *vis-à-vis* his clear acceptance thereof.) (ii) The italicised sentence in *Praelectiones* 2 39 14 most definitely creates the impression that if a building as such, to which the entitlements under a usufruct (which is a much more encompassing personal servitude than *habitatio*) pertain, is destroyed, the servitude itself terminates. This, to my mind, would *a fortiori* be the position in respect of the lesser servitude of *habitatio*. Taken as such, this part of the text flies in the face of the court’s interpretation, which reads as follows (251C):

“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.”

My proposed interpretation under (ii) also accords (strange as it may seem at first glance) with the view of Van der Merwe (cf *Sakereg* 535, and authorities quoted in fn 586), who expresses himself as follows:

“Aangesien persoonlike diensbaarhede nie in beginsel ewigdurend is nie, word nie gereedelik aanvaar dat die herstel van die dienende erf in die vorige toestand die gewese serwituut laat herleef nie.”

Van Rooyen AJ merely mentions Van der Merwe’s contrary opinion, without offering any comment on it (251 fn 10). It is suggested that Van der Merwe is supported by the institutional writers on which he relies for this statement (Voet *Commentarius* 7 4 10; De Groot *Inleidinge* 2 39 14; Huber *Heedensdaegse Rechtsgeleertheit* 2 40 14; and Van der Keessel *Praelectiones* 2 39 14).

The strongest authority against the court’s interpretation is in fact the text from Hugo de Groot’s *Inleidinge* 2 39 14 (on which Van der Keessel based his abovementioned opinion). Lee’s translation of this passage (1926) reads as follows (vol I 239):

“[Usufruct is lost] [s]econdly, by destruction of the subject of the usufruct, as by a flood which changes the character of the land, or by a house being burned down; for in that case no usufruct remains over the site, for the usufruct was not of the site, but of the building.”

The interesting aspect of this text is that De Groot even substantiates the reason for the termination of the usufruct over a house (as opposed to the site to which the house attaches): “the usufruct was not of the site, but of the building”. The analogy of usufruct in such a situation with *habitatio* is obvious. Reading this text of the grand master of our Roman-Dutch common law, one cannot but come to the conclusion that De Groot would not have afforded the servitude holder who was entitled to utilise a house in terms of the servitude granted to him or her, a usufruct (or *habitatio*, as in the present case) over the area of land – determinable with cadastral precision – where the destroyed house once stood. On this point Van Rooyen AJ’s interpretation of the Van der Keessel texts cannot be reconciled with the *ipsissima verba* employed by the old authorities themselves. It would seem that the argument that a house cannot be regarded as a *res*, distinct from the land on which it was built (in terms of the *superficies solo cedit* rule), did not preclude such a conclusion by the Roman-Dutch writers. To endeavour at this stage in time to ascertain the real reason for De Groot’s (with whom Van der Keessel agrees) conclusion that the destruction of a building to which the holder of a usufruct (or *habitatio*) may lay claim for purposes of occupation, would probably require a fundamental study of De Groot’s property doctrine, which cannot be practically pursued here. However that may be, to my mind one need not necessarily draw the conclusion from this text that De Groot regarded a house as a separate entity, removed from the land on which it is built: it is quite possible that he would have regarded the mere fact that the holder of the servitude has been prohibited from exercising his or her specific entitlements in terms of the servitude by the destruction of the subject-matter which could be utilised (such as a house), as sufficient to terminate the servitude in question. (One should always bear in mind that the principled distinction between a

subjective right, such as a real right, and the entitlements that form the content of such a right is a creation of the doctrine of subjective rights which only came to its full development during the twentieth century. In trying to explain the rules postulated by our institutional writers in terms of our modern conceptions, we shall invariably tread the path of anachronistic conclusions – something which is to be avoided as far as possible.)

A further aspect which one should bear in mind, is that the common-law authorities referred to deal specifically with the question whether a personal servitude which expired because of the destruction of the subject-matter to which it pertained, *revives* when the land is restored to its original state (as where property subject to a usufruct was inundated by water and later dried out again), or where a house which had been destroyed by fire, was rebuilt. Plain logic tells us that the question of revival of the rights in question can only be relevant, if the rights have indeed been terminated. In other words, it is implicit in the wording of all the texts referred to that the servitude in question *was in fact terminated*. Everything rather hinged around the question of their revival. It should be borne in mind that this question was never discussed in the present case: the court's interpretation of the relevant common-law authority was in fact to the effect that the applicant's personal servitude had *never* lapsed, in spite of the destruction of the dwelling. Had the respondent rebuilt the farmstead, the texts quoted would have been of more direct relevance, but that was not the case.

A further reason furnished by the court for maintaining the Kidsons' servitude of *habitatio* reads (251G–H):

“[I]t 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 of the building utilised as a 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 of the land if it does not entail a mutation of the land (*rei mutatione*) as object of the right itself?”

To my mind this brings us to the heart of the matter: It is evident that factors like the constrained financial position of the applicants, the fact that they were elderly people in need of a roof over their heads and the fact that their presence on the farm for obvious reasons would not detrimentally affect the financial position of the respondent must have weighed heavily with the court. Doubtlessly, helping them under these circumstances would be conscience-soothing in a “fuzzy” kind of way, but that is not the way in which courts normally administer justice. Had this indeed been the case, all legal certainty would fly out the window and citizens would be subjected to the whims and fancies of individual presiding officers. Furthermore, such a course of action could even be in direct contravention of section 34 of the Constitution which determines that “[e]veryone has the right to have any dispute that can be resolved by the application of *law* decided in a fair public hearing before a court” (italics supplied).

The question which now arises, is how a presiding judicial officer can in fact administer the *law* in an *equitable manner*: is there, for example, a difference between the position in our new constitutional democracy, and that of the past? A cursory glance at our Bill of Rights will immediately reveal that the

well-known sections 39(2) and 173 do in fact introduce a new era in the way in which the courts are to apply the relevant sources. They read as follows:

“39(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

“173 The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

Although the court does not explicitly refer to these sections, it is suggested that Van Rooyen AJ's line of thinking displays some measure of compatibility with the measures contained in it. He definitely interpreted the common law in a way that accorded with what he perceived to be an equitable solution and even relied on some foreign law (German) textbooks. If one thus proceeds from the premise that the court, at least unwittingly, acted in accordance with section 173, followed the imperative contained in section 39(2) of the Constitution and even considered foreign law in accordance with long-standing usage (see *Wille's Principles of South African law* 110ff), it falls to be considered whether this was done in the correct way.

As regards the way in which the common law was applied, there is a recent example of how the Supreme Court of Appeal deviated sharply from an existing, certain legal rule with its roots in the common law, which rule had even been confirmed by the erstwhile Appellate Division as far back as 1920: in *Linvest CC v Hammersley* 2008 3 SA 283 (SCA) Heher JA held that in spite of the fact that the rule in question was unassailable (289G), modern civilised legal practice favoured a flexible approach to the relocation of servitudes and the interests of justice (referring in particular to s 173 of the Constitution) required a change in the established South African law on the subject (291C–D 292C–E). Thus, the well-known rule of servitudes that the owner of a dominant tenement is under no obligation to relocate the route of a servitude of right of way if requested to do so by the owner of the servient tenement was altered by the court in the sense that, subject to certain proviso's, the owner of the dominant tenement will in future be obliged to accept such proposed relocation. This judgment was heavily influenced by the position obtaining in modern Dutch, Belgian, German and Scots law (290B–292D). Although Heher JA did not in so many words refer to section 39(2) of the Constitution, it is beyond doubt that this subsection formed the extended basis on which this type of judgment can be justified. One need not ponder too deeply to realise that legal certainty concerning the rule in question bowed to the “interests of justice” and that a further stone was laid in ‘transforming’ our courts from courts of law to becoming courts of equity.

Can it be said that Van Rooyen AJ's judgment is to be explained on the same basis as that of *Linvest*? At first blush it would seem that such is indeed the case. However, in the present case the court endeavoured to interpret the Roman-Dutch texts to attain a meaning that cannot be derived from them on a plain reading of the *ipsissima verba*. Thus, unlike Heher JA who rejected the established common-law rule in *Hammersley*, van Rooyen AJ accepted the common-law rule pertaining to the effect of destruction of the subject-matter of *habitatio*,

albeit as interpreted by him in a rather anachronistic way, to conform to his notions of justice. In this aspect the two judgments can be distinguished.

Noteworthy is the use by Van Rooyen AJ of foreign legal principles to support his conclusion that destruction of the building does not necessarily terminate the right of *habitatio* in respect of it: in this respect he refers to German literature and even quotes from two leading German property law textbooks (Westermann *Sachenrecht* (1960) 613 and Wolf *Lehrbuch des Sachenrechts* (1979) 553). The gist of these quotations is that the object of the *Wohnungsrecht* (akin to our *habitatio*) is not the specific rooms or building that can be utilised in terms of the servitude, but the *Grundstück* (land on which it is situated). It is clear that this creates the impression that destruction of the building has no effect on the existence of the *Wohnungsrecht* and that this provided Van Rooyen AJ with additional material to justify his conclusion that the applicant's *habitatio* survived unscathed, and could be exercised in respect of the area where the farmstead once stood (which can be determined with cadastral precision). However, an overview of the points of view of other modern German authors reveals that there is no consensus on this point. It would appear that the current position in German law in respect of the question concerning the termination of *Wohnungsrecht* (in terms of § 1093 *BGB*) is not to be reconciled with the arguments submitted by Westermann and Wolf (which followed the destruction wreaked on German cities during the Second World War, circumstances that most probably influenced German legal thought in the post-war years when thousands were left homeless as a result of enemy bombardments). Baur *Lehrbuch des Sachenrechts* (1987) accounts for the present position in Germany, expounded by the *Bundesgerichtshof* (BGHZ 7, 268; 8, 58), (which he regards as unsatisfactory ("unbefriedigend"), akin to the other two authors mentioned above) as follows (284, italics supplied):

"Streitig ist die Rechtslage, wenn das mit dem Wohnrecht belastete Gebäude zerstört wird. Diese nach dem Krieg beteuerte Frage wurde *überwiegend* ... dahin beantwortet, daß das Wohnungsrecht mit der völligen Zerstörung des Gebäudes erlischt und der Eigentümer auch nicht verpflichtet ist, das Gebäude wieder aufzubauen oder das Wohnungsrecht an dem wieder errichteten Haus erneut einzuräumen."

Wilhelm (*Sachenrecht* (2002) 665) states in general terms:

"Das Wohnungsrecht erlischt nach dem allgemeinen Erlöschungsgründen und weiter durch Zerstörung des Gebäudes, auf das es sich bezieht. Weil der Eigentümer dem Berechtigten gegenüber nicht zum Wiederaufbau des Gebäudes verpflichtet ist, lebt es auch nach einem solchen Wiederaufbau nicht wieder auf."

From these two quotations it emerges clearly that the current position which obtains in Germany is to the effect that destruction of the building as subject-matter of the *Wohnungsrecht* terminates the servitude in question. Even when the original building is later rebuilt, the real right of the erstwhile servitude holder does not revive. (This is indeed stated clearly and unequivocally in the leading case BGHZ 7 268 (later confirmed in BGHZ 8, 58): "Das dingliche Wohnrecht i. S. des § 1093 BGB erlischt mit der vollständigen Zerstörung des Gebäudes." One can hardly imagine a clearer statement of such simple rule.) Further on this aspect, it is noteworthy that in a later edition of one of the German textbooks

from which Van Rooyen AJ quoted – Westermann – that specific passage has even been omitted (see eg 1988 ed 374: “Zu den Schwierigkeiten, die durch die völlige Kriegszerstörung eines mit einem Wohnrecht belasteten Gebäudes durch Kriegseinwirkungen entstanden sind, vgl. die Voraufgabe.”) Finally, a standard commentary on the German Civil Code, like that of Erman (*Handkommentar* (1981) vol 2 385), simply mentions the position obtaining in practice, as expounded above. We may now rightly pose the question: why should a South African court be swayed by German authors whose opinions do not reflect present German law? Certainly, a reference to foreign law in the first place assumes a reference to the law in force in such country and not to the *de lege ferenda*

arguments of textbook authors. (It is noteworthy that s 617 of the French *Code Civil*, which is also firmly rooted in the Roman law tradition, similarly provides that the total loss of the thing upon which a usufruct was established, extinguishes the usufruct altogether. By analogy this could be relied on in respect of the more restricted right of *habitatio*.)

As mentioned before, this judgment “reinstates” the applicants in their previous position: “The Kidsons are, accordingly, entitled to restore the *status quo*” (253F). This entailed, *inter alia*, entitlements to use a road to reach the exact spot where the farmstead once stood, as well as to restore the house, or build an alternative structure (subject to any possible statutory measures applicable to the erection of buildings), or even to “place a prefabricated structure or wooden house” there and further, failing these, to place a caravan on that spot (*ibid*). Finally, the applicants were accorded the entitlement to utilise the farmyard for purposes of their subsistence, on the strength of *D 7 8 12 1* (the full Latin text was quoted in full: 254 fn 18). It is quite understandable that the court wished to grant them this last-mentioned entitlement, in view of the practical circumstances, but unfortunately the Digest text referred to does not substantiate such grant. The part of that text referred to deals exclusively with the personal servitude of *usus*, which entails much wider entitlements than those falling under *habitatio*.

The granting of an entitlement to the applicants to erect their own structure or even to utilise a prefabricated structure, wooden house or caravan for purposes of habitation also calls for some comment. It is well established that no duty rests on the owner of the servient tenement to re-erect the dwelling after it has been destroyed. This is in conformity with the general “passivity” rule applicable to servitudes which requires the owner of the servient tenement merely to refrain from interfering with the servitude holder’s exercising his or her entitlements, and not to perform any positive act (*D 8 1 15 1*; see 252C). However, this general rule in respect of the duties of the owner of a servient tenement in itself is not in itself indicative of any entitlement to which the servitude holder may lay claim. Certainly, one can argue that in order to exercise the normal specific entitlements comprising a right of *habitatio*, for example to live in a certain building on land with one’s family, to furnish accommodation there to a servant and to receive guests, certain ancillary entitlements will for reasons of pure logic have to be assumed *ex necessitate*, like making use of an access road, using

water from a borehole if there is no municipal water available on the farm for his own benefit etcetera. (See the exact wording of the instrument in which the servitude under discussion had been granted (248 fn 1: “Willem Frederick Kidson shall for his lifetime be entitled to occupy the farm stall [*sic*, meaning ‘farmstead’]. He shall however be responsible for the maintenance and upkeep of the dwelling with outbuilding.”). It is suggested that an entitlement to build an own structure or even to utilise a movable living unit in the event of the destruction of the original dwelling – as was allowed in this case – is not a normal ancillary entitlement attaching to *habitatio* (and it would certainly be a forced construction to interpret Kidson’s *duty* of maintenance and upkeep as an *entitlement* to rebuild etc). Had this been the case, the (old) sources doubtlessly would have contained directives to this effect, which is completely lacking. The court’s decision to recognise this entitlement was based solely upon the argument resting on the general rule of *superficies solo cedit*, combined with the normal rule pertaining to personal servitudes that allows the servitude holder his or her entitlements for life. In reality it ignores, as has been shown, common-law texts to the contrary (highlighting the fact that the entitlements of a servitude holder in terms of a servitude like *habitatio* are specified) and rests on an unreliable comparative methodology.

Although it is not intended to pursue the matter any further, a final remark on this aspect may be apposite: One practical difficulty attaching to the decision that the holder of the right of *habitatio* may exercise his or her habitation rights within the boundaries demarcated by the original structure, was obscured by the simplicity of the situation which arose in this case: here only one servitude holder and his wife had exercised entitlements in respect of the area of land which could be determined with cadastral precision. What would have been the position in the event of rights of *habitatio* accorded to, say, five different persons in five different apartments in a five-story building? Would each now be able to lay claim to one-fifth of the area of the land demarcated by the four corners of the original multiple-storey building? It is in fact due to this type of uncertainty that the German courts have decided to call it a day for those holders of *Wohnungsrechten* who were left roofless after the destruction of their apartments during the Second World War. (Cf *BGHZ* 7 268 271: “Das bestehen des Wohnrechts könne von solchen Zufälligkeiten nicht abhängig sein.”)

#### 4 Conclusion

A judgment like this leaves the objective observer with mixed feelings. The particular facts cry out for an evaluation that justice was indeed eminently done, and that this was indeed achieved by a dexterous application of the general principles of property law, on the basis of common-law authority and through guidance attained by comparative research. However, as has been demonstrated, the reliance placed on the relevant Roman-Dutch authorities, as well as on the arguments of German textbook writers was not justified. Our institutional writers and German case law simply do not bear out the court’s decision that the personal servitude of *habitatio* survived the destruction of the farmstead.

This evaluation may possibly be countered by the argument that a deviation from the strict rules of the common law can be justified by applying the measures contained in sections 39(2) and 173 of the Constitution, to achieve “justice” as was done in the judgment of *Hammersley*. To this some would probably add the argument that the fundamental socio-economic right to adequate housing contained in section 26 of the Constitution could have had an indirect effect in the court’s judgment which eminently advanced the housing conditions of the applicants. To justify this type of argument reference could be had to areas of the law of delict, where the Constitutional Court acted in conformity with section 39(2) of the Constitution to develop the common law to promote the spirit, purport and objects of the Bill of Rights. Examples are to be found in the judgment in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) where the fundamental rights to life (s 11), human dignity (s 10) and freedom and security of the person (s 12) swayed the Court in finding that the state had owed the appellant a duty of protection, which it had breached, thus paving the way to the state’s liability for injuries sustained by the appellant; and the judgment in *K v Minister of Safety and Security* 2005 6 SA 419 (CC) in which the so-called “standard test” for determining whether an employee acted in the scope and course of his or her employment was extended to establish state liability for intentional acts of police officers which would in the past have been regarded as “frolics of their own”, by taking into account the protective obligations of members of the police force as spelled out in the Constitution and the South African Police Service Act 68 of 1995, as well as the impact of the *Carmichele* judgment which highlighted the paramount importance to women of freedom from the threat of sexual violence and South Africa’s duty under international law to prohibit all gender-based discrimination. However strong the urge may be to yield to this line of argumentation, it is obvious that no such argument was presented in this case on the applicants’ behalf. It is quite clear that the applicants were advised to concentrate on the existing law pertaining to *habitatio* and that their success can be ascribed to the Court’s particular interpretation of the “normal” sources. Had the court not interpreted the sources in this way, it would perhaps have been more inclined to consider the entire matter from a constitutional perspective.

The *crux* of my criticism against Van Rooyen AJ’s judgment lies, in the final analysis, in the fact that clear authority dealing with the particular circumstances was ignored to the advantage of a construction based on the application of broad principles. The judge did indeed valiantly endeavour to explain that the primary common-law source he relied upon (Van der Keessel) supported his reading of the text, but it has been shown that such reading of that source cannot be justified. When one is confronted by text materials of the kind which presented them in this case, it will always remain a salutary principle to keep the old adage of *D* 50 17 1 in mind, to prevent oneself from affording precedence to your own opinions (however justified they may be on ideological, equitable, jurisprudential or other grounds), when clear indications of a contrary state of affairs are present:

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“Non ex regula ius sumatur, sed ex iure quod est regula fiat.” (The law must not be derived from a rule, but a rule must arise from the law as it is: Watson’s translation (1985).)

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