

The Madrassa Anjuman Islamia of Kholwad - - - *Appellant*

v.

The Municipal Council of Johannesburg - - - *Respondent*

FROM

THE SUPREME COURT OF SOUTH AFRICA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 2ND MARCH, 1922.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT CAVE.

LORD DUNEDIN.

LORD SHAW.

LORD PHILLIMORE.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal by special leave from a judgment and order of the Supreme Court of South Africa (Appellate Division) which affirmed a judgment and order of the Supreme Court of South Africa (Witwatersrand Local Division).

The facts giving rise to the appeal are stated in the judgment of the Acting Chief Justice as follows :—

“The appellants are members of the board of management of the Madrassa Islamia of Kholwad, a limited liability company incorporated in the Transvaal Province, which is registered as the owner of Stand No. 320, Vrededorp. This stand is held subject to the conditions laid down in Section 4 (b) of the Vrededorp Stands Act, 1907, one of which is that ‘the owner shall not permit any Asiatic, native or coloured person (other than the *bonâ fide* servant of a white person for the time being residing on the stand) to reside on or occupy the stand or any part thereof.’ In breach of this condition the said company allowed one of the appellants, Dangor, to reside on and occupy the stand in question, having leased it to him for the purpose of carrying on a general business. An interdict was thereupon obtained restraining the company from allowing Dangor or any other

Asiatic or coloured person to reside on or occupy the stand. Three days after the making of the application in June, 1917, and before the interdict had been granted, Dangor converted his business into a limited liability company, with a registered capital of £5,000 divided into 5,000 shares of the value of £1 each. Dangor himself is the sole director and manager of the company, and holds the majority of the shares, the remaining shareholders being all Asiatics or coloured persons. After the interdict had been granted the appellant company gave a lease of the stand to Dangor, Limited, and Dangor continues to carry on business there as before, his employees being all Asiatics or coloured persons. In these circumstances an application was made to the Witwatersrand Local Division alleging that the appellants had been guilty of contempt of Court in failing to comply with the order interdicting them from allowing Dangor or any other Asiatic or coloured person to reside on or occupy the stand, and praying that they be punished by fine or committal, or in such other manner as to the Court might seem fit. Upon this application the Court declared the respondents to have committed contempt of Court, and ordered them to pay the costs of the application."

An appeal to the Appellate Division of the Supreme Court against the order last mentioned was dismissed, and thereupon the present appeal was brought.

The facts are not in dispute. On the one hand, it is not alleged that Dangor (who is an Asiatic) or any of his Asiatic or coloured subordinates reside on the stand; but, on the other hand, it is admitted that they carry on business there daily, Dangor being in sole management and control, and that this takes place with the knowledge and permission of the appellants. In these circumstances the question to be determined is whether the stand is "occupied" by Dangor, either alone or with his Asiatic or coloured servants, within the meaning of Section 4 (b) of the Vrededorp Stands Act, 1907.

The word "occupy" is a word of uncertain meaning. Sometimes it denotes legal possession in the technical sense, as when occupation is made the test of rateability; and it is in this sense that it is said in the rating cases that the occupation of premises by a servant, if such occupation is subservient and necessary to the service, is the occupation of his master (*The Queen v. Spurrell*, 1865, L.R. 1 Q.B., 72). At other times "occupation" denotes nothing more than physical presence in a place for a substantial period of time, as where a person is said to occupy a seat or pew, or where a person who allows his horses or cattle to be in a field or to pass along a highway, is said to be the occupier of the field or highway for the purpose of Section 68 of the Railway Clauses Act, 1845 (*Dawson v. The Midland Railway Company*, 1872, L.R. 8 Exchequer, 8; *Luscombe v. Great Western Railway Company*, 1899, L.R. 2 Q.B., 313). Its precise meaning in any particular statute or document must depend on the purpose for which, and the context in which, it is used. In the present case it, appears reasonably clear that the word is used in the second or more popular sense above described. The Vrededorp Stands Act, 1907, commences with a recital that the Government of the late South African Republic had by certain resolutions authorised the issue

of stand licences on open stands on Government ground in the township of Vrededorp to indigent persons for the purpose of occupation by such persons, and proceeds to transfer the ground in question to the Municipal Council of Johannesburg and to entitle the registered holder of any stand to receive a grant of the freehold upon certain conditions, of which one is the condition above referred to. There is also a provision (Section 13) which prohibits an Asiatic, coloured or native person (with the exception above mentioned) from residing on or occupying any stand. It appears by the judgments of the South African Courts that the object of these provisions was to prevent any Asiatic, native or coloured persons, for sanitary and other reasons, from dwelling or being habitually among the indigent white population to whom the stands were granted; and that the converse aspect of this policy appears in the provisions of other statutes which exclude Europeans from occupying, trading or settling in native or similar locations. However this may be, it is plain, from the fact that the prohibition is made to depend on race or colour, that it is the physical presence of the persons described, and not their right of possession in a legal or technical sense, which the statute has in view. To use the words of the Acting Chief Justice, "what was objected to was the habitual physical presence of such persons on the stands"; and it is in this sense that the provision against "occupation" must be read. This conclusion is supported by the exception which is contained in the Act in favour of the *bonâ fide* servant of a white person for the time being residing on the stand, and also by the fact that the owner of a stand is prevented by another condition from subletting to any Asiatic, native or coloured person; for if "occupation" meant occupation as a tenant, this further condition would be superfluous.

This being the meaning of the condition in question and of the order founded upon it, it is plain that the order was infringed. Dangor, Limited, having no corporeal existence, could not occupy the stand in the above sense. It was occupied as well after as before the injunction by Dangor with his coloured staff. While Dangor was lessee he occupied it on his own behalf; when Dangor, Limited, became the lessee, Dangor continued to occupy it, but as manager and agent for Dangor, Limited, and on their behalf. The legal title to possession shifted, but the physical occupation was unchanged. There was, therefore, an infringement of the injunction, and the attempt to evade it was ineffective. Their Lordships concur on this point with the judgment of the Appellate Division.

Having regard to the above conclusion, it is unnecessary to consider the further question raised in the South African Courts—whether the conversion of Dangor into a limited company was ineffective according to the Roman-Dutch law, as being *in fraudem legis*. They, therefore, express no opinion upon this point.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed with costs.

In the Privy Council.

THE MADRASSA ANJUMAN ISLAMIA OF
KHOWWAD

v.

THE MUNICIPAL COUNCIL OF
JOHANNESBURG.

DELIVERED BY VISCOUNT CAVE.

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