

SOUTH AFRICA / JUDGMENT

# Van Rensburg and Another v Koekemoer and Others (2006/28207) [2010] ZAGPJHC 91; 2011 (1) SA 118 (GSJ) (11 October 2010)

[2010] ZAGPJHC 91

## COURT

South Gauteng High Court, Johannesburg

## BEFORE

C J Claassen

## CASE / FILE NUMBER

2006/28207

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## REPORTABLE

## IN

## THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

## Case

Number: 2006/28207

DATE: 11/10/2010

In  
the matter between;  
GIDEON  
JANSE VAN  
RENSBURG.....  
First  
Applicant  
A  
LID A JANSE VAN  
RENSBURG.....Second  
Applicant  
And  
JOHAN  
KOEKEMOER.....First  
Respondent  
ANDRE  
TERBLANCHE.....Second  
Respondent  
THE  
REGISTRAR OF  
DEEDS.....Third  
Respondent

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**JUDGMENT**

C. J. CLAASSEN J:

[1] In this case the following question requires to be answered: "Does an oral agreement granting a servitude over immovable property contravene the writing provisions of the Alienation of Land Act No 68 of 1981?"

[2] The first and second applicants are an elderly married couple residing at 72 Pick Road, Florcntia, Alberton, Gauteng. Their

daughter is married to the first respondent. The first respondent is, therefore, their son-in-law.

[3] Some time ago the applicants experienced financial difficulties. It was then orally agreed between them (as owners of the land) and the first respondent that the latter would purchase the aforesaid immovable property subject to granting the applicants the right to reside there for the rest of their lives. A written deed of sale was duly completed and the property transferred into the name of the first respondent. Subsequent to such transfer, strained relations developed in the marriage of the first respondent and the applicants' daughter. The first respondent then sold the immovable property to the second respondent (who is not opposing the relief sought), in disregard of the oral servitude of residence.

[4] The applicants as first and second plaintiffs instituted an action against the first and second respondents, as defendants, claiming

registration of the right to live in the house situate on the property for the rest of their lives as a servitude of habitatio. The applicants relied on a right to register such servitude against the immovable property arising from the oral agreement. This agreement is pleaded by the applicants in their particulars of claim as follows:

"II. Die eisers aan die een kant en die eerste verweerder en Anna-Marie Koekemoer aan die ander kant, het derhalwe gedurende 1994 en te Alberton 'n mondelinge ooreenkoms met mekaar gesluit dat:

11.1 die eerste verweerder en Anna-Marie Koekemoer die eiendom sou koop;

11.2 die verbandspaaielemente en ander koste ten opsigte van die eiendom betaal sou word uit die gesamentlike fondse van die eerste verweerder en Anna-Marie Koekemoer;

11.3 die eisers vir die res van hulle lewens die eiendom as hulle woonplek souk on behou;

11.4 Die eiendom op die naam van die eerste verweerder en/of Anna-Marie Koekemoer geregistreer sou word;

11.5 die eisers gratis in die eiendom sou woon en geen huurgelde of ander vergoeding betaalbaar sou wees me, welke insluit eiendomsbelasting;

11.6 die eisers egter wel die maandelikse water- en elektrisiteits uitgawes sou moes betaal ("die ooreenkoms")(Emphasis added)

[5] It is common cause that the immovable property had not yet been transferred into the name of the second respondent when the aforesaid action was instituted.

#### THE FIRST EXCEPTION

[6] The first respondent excepted to the applicants' particulars of claim on the basis that it disclosed no cause of action. He raised five exceptions to the particulars of claim. The matter came before P. F. Louw AJ who handed down a judgment on 27 July

2010. In this judgment Louw AJ rejected the second to fifth exceptions but upheld the first exception. He made the following order:

"1. The first exception is upheld with costs.

2, The plaintiffs particulars of claim are set aside.

3. The plaintiffs are, if so advised, afforded 30 days within which to deliver new particulars of claim."

[7] The first exception was framed as follows:

"1.1 The Plaintiffs rely on an oral agreement in terms whereof the Plaintiffs allegedly obtained a right of habitatio over immovable property.

1.2 The right of habitatio amounts to an interest in land as defined in section I of the Alienation of Land Act, 68 of 1981.

1.3 In the premise, the oral agreement amounts to an oral agreement for the alienation of land.

1.4 In terms of the provisions of section 2 of the Alienation of Land Act 68 of 1981, no alienation of land after the commencement of that section would be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.

1.5 The Plaintiffs' particulars of claim accordingly discloses no Cause of action in that the agreement upon which they rely is of no force and effect as it is not in writing nor signed by either of the parties and as such is in conflict with the provisions of the Alienation of Land Act,"

[9] I have no reason to disagree with the conclusions of Louw AJ. In my respectful view, his was a well-reasoned judgment. In his judgment he granted the applicants leave to file amended particulars of claim which they duly did within the prescribed time. The first respondent again excepted to the proposed amendment of the applicants' particulars of claim on the basis that it still disclosed no cause of action.

#### SECOND EXCEPTION

[10] In their notice in terms of Rule 28 of the Uniform Rules of Court the applicants gave notice of several amendments of which only the last is of concern. In the proposed amendment they seek to delete paragraphs 14, 16 and 17 of the original particulars of claim substituting the following:

"15. Op 'n datum gedurende 2006, die presiese datum synde aan die Eisers onbekend, bet die Eerste Verweerder 'n skriftelike verkoopsooreenkoms ten opsigte van die eiendom met die Tweede Verweerder gcsluit ingevolge waarvan die Tweede Verweerder die eiendom van die Eerste Verweerder gekoop het

16. Bykomend tot die inhoud van paragraaf 15 hierbo het die Eerste Verweerder gepoog om die Eisers uit die eiendom te sit.
17. Die Eerste Verweerder se optrede soos in paragrawe 15 en 16 hierbo uiteengesit, stel 'n repudiasie van die ooreenkoms daar.
18. Die Eisers aanvaar nie die Eerste Verweerder se repudiasie van die ooreenkoms nie. Die Eisers hou die Eerste Verweerder aan die ooreenkoms.
19. Uit hoofde van die ooreenkoms is die Eisers geregtig om die eiendom vir die res van hulle lewens te bewoon op die basis soos in paragraaf 11 hierbo uiteengesit. Die Eisers het al hulle verpligtinge soos in paragraaf 11 hierbo uiteengesit, nagekom en tender nakoming van al hulle toekomsige verpligtinge soos in paragraaf 11 hierbo uiteengesit,
20. Alternatiewelik tot paragraaf 19 hierbo het die Eisers 'n duidlike reg ('clear right') teenoor die Eerste Verweerder verkry om die eiendom vir die res van hulle lewens te bewoon op die basis soos in paragraaf 11 hierbo uiteengesit.
21. Die Eerste Verweerder se optrede soos in paragraaf 15 hierbo uiteengesit stel 'n benadeling ('injury') van die Eisers se duidlike reg daar.
22. Die Eisers het geen alternatiewe remedie, buiten die regshulp wat hierin versoek word, tot hulle beskikking nie.
23. Gevolglik is die Eisers geregtig op 'n finale interdik wat die Eerste Verweerder verbied om op so 'n wyse met die eiendom te handel dat die Eisers se duidlike reg daardeur geraak word.
24. Geen regshulp word teen die Tweede Verweerder gevorder nie, buiten vir koste in die geval van opponering.

#### DERHALWH EIS DIE EISERS:

1. 'n Verklarende bevel dat die Eisers geregtig is om die eiendom vir die res van hulle lewens te bewoon op die basis soos in paragraaf II hierbo uiteengesit.

2. Alternatiewelik ;n bevel dat die Eerste Verweerder verbied word om op so 'n wyse met die eiendom te handel dat die Eisers se duidelike reg om die eiendom vir die res van hulle lewens te bewoon op die basis soos in paragraaf 11 hierbo uiteengesit aangetas word.

3. Koste van die gcding;

4. Verdere en/of altcmatiewe regshulp.” (Emphasis added)

[11] The first respondent objected to the proposed amendment on the basis that it would establish, if granted, an excipiable pleading. The first respondent alleged that the amendment would be excipiable if granted, as no cause of action was disclosed therein. The second exception was termed as follows:

"1, The First Defendant excepted to the Plaintiffs' particulars of claim inter alia on the ground that the agreement which the Plaintiffs intend to enforce creates a right over land and as such, the agreement has to be in writing in accordance with the provisions of the Alienation of Land Act, 68 of 1981,

2. On 27 July 2010 1 Us Lordship Mr Acting Justice Louw upheld the exception on the ground as set out hereinabove and granted the

Plaintiffs 30 days within which to amend their particulars of claim,

3. The notice of amendment purports to be an amendment in accordance with the judgment of His Lordship Mr Acting Justice Louw.

4. The intended amendment:-

4.1 intends to withdraw the conclusion in law set out in paragraph 14 that

the agreement provides for a right of habitatio; and 4.2 inserts further averments to amend the nature of the relief sought,

5. The agreement relied upon by the Plaintiffs is still an agreement which allows the Plaintiffs to live on the property for the rest of their lives and as such, amounts to a right over the property as defined in the Alienation of Land Act 68 of 1981.

6. The particulars of claim in terms of the intended amendment would accordingly amount to the enforcement of an oral agreement in contravention of the Alienation of Land Act.

[17] Once it is concluded that a servitude such as habitatio or usus or usufructus constitutes a subtraction of the dominium in land it follows that any agreement granting such right has to be in writing and signed by the parties upon pain of being declared invalid in terms of the aforesaid sections. For the same reasons, mineral rights are also to be in writing to be valid.<sup>6</sup> Units in a sectional titles scheme are also defined as "land" in section 1 of the Alienation of Land Act. All formalities pertaining to the sale and purchase of units have to comply with section 2(1) of the Act. In the light of these analogous situations, it seems incongruous that a servitude of habitatio, usus or usufructus? orally concluded can be valid and enforceable. In

each instance there is a measure of depravation of the owner's title to the immovable property. As such they have to be in writing and signed by the parties to have any force whatsoever,

[18] The aforesaid conclusion is fortified by the decision in *Felix v Nortier supra*. In that case Erasmus J was called upon to decide on exception the validity of a servitude of habitatio which was orally concluded. At page 148e - i the learned judge said as follows:

"Cowley het negaliewe kritiek ontlok, wat oortuigend aantoon dat die uitspraak - op die bedoelde aspek altans - indcrdaad verkeerd is...Van der Walt

(349) verduidelik dat die feit dat bepaalde serwitute as persoonlike serwitute bcstempel word, niks met die saaklike aard van die serwituutreg te doen het nie, maar verwys na die feit dat bepaalde serwitute daardeur gekenmerk word dat die scrwituutbevoegdhede aan die reghebbende in sy persoonlike hoedanigheid toekom, sonder eiendomsreg op enige heersende saak,

Erfdiensbaarhede, sowel as persoonlike diensbaarhede (soos vruggebruik, usus en habitatio), verieen dus aan die reghebbende Ln bepcrkte saaklike reg (jus in re alkna) wat die eienaar so dominium in die beswaarde eiendom pro tanto verminder,,. 7Daar is ook by ons regsrywers eenstemmigheid te dien effekte. 8

Die stelling in *Cowley v Hahn* dat 'n persoonlike serwituut van vruggebruik (dus ook woonreg) 'n persoonlike reg behels, is kennklik strydig met alomerkende algemene

beginsel. Ek bevind derhalwe, met eerbied, dat die uitspraak verkeerd is sover dit op die gesegde foutiewe uitgangspunt gegrond is"

[19] The conclusion of Erasmus J is in line with the statement by Lord de Villiers CT in *Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd* 1930 AD 169 at 180:

7 For this proposition Erasmus J relied on *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1913 AD 267; *Lorentz v MelJe and Others* 1978

(3) SA 1044 (T) at 1049C; *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980

(4) SA 174 (ECD) 178C - D.

For this proposition Erasmus J relied on Van der Merwe, *Sakereg* Second Edition 461 and 515; Kleyn and Boraine, *Sitberberg and Schoeman's. The Law of Property* Third Edition 48/9 and 3S6; Delport en Olivier, *Sakereg Vaymixbundel* 434; LAWSA volume 25, paragraph 62, 63 and 64; Erasmus, Van der Mcrwe en Van Wyk, *Lee en Honore Family, Things and Succession* Second Edition paragraphs 366, 367 and 368.

"Thai personal rights, jura in personam, are not capable of registration is a truism.<sup>9</sup> The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known jura in personam ad rem acquirendam. As contracts, with few

exceptions, give rise only to personal rights, this class of right, although relating to immovable property, is a personal right until registration, when it is converted into a real right by such registration. The same applies to burdens upon land, encumbrances of immovable property (onefa reatia). They are personal until registration, when they become real,"

The conclusion of an oral agreement of residence for life on land, provides no right of habitatio. Registration thereof is an indispensable prerequisite for the validation of such personal servitude.

[20] There is an additional reason for holding the proposed amendment excipiable. It is evident from the contents of paragraphs 15 to 24 thereof that the plaintiffs do not seek to allege that the oral servitude was obtained because of some quid pro quo^ be it the payment of a purchase price or the exchange of other rights. The proposed amendment relies expressly on the contents of paragraph 11 of the particulars of claim. In paragraph 11.5 it is expressly alleged that the plaintiffs were afforded the right of residence

"gratis" and without the need to pay rentals or any other remuneration. In effect, the proposed amendment can only be

interpreted as relying on the personal servitude of habitatio having been donated to them by the first respondent. In terms of section 5 of Act 50 of 1956, donations of future entitlements have to be in writing to have any force or effect. The proposed pleading conflicts with this provision. In addition the word "alienation" of land in Act 68 of 1981 is defined to include a donation. Any donation of an interest in land must as of necessity also be in writing and signed by the parties. The proposed amendment therefore conflicts with the Alienation of Land Act even if the amendment is to be interpreted as a donation.

[21] In my view I am bound by the findings of Louw AJ in this case as far as he found that the oral agreement relied upon by the applicants in paragraph 11 of the particulars of claim, is rendered of no force or effect by the provisions of section 2(1) of the Alienation of Land Act. In the present instance the proposed amendment is still reliant upon the source of the applicants' rights being an oral agreement amounting to a servitude. It is specific performance of that oral agreement which is sought alternatively the proposed amendment relies on that oral agreement to establish a clear right entitling the applicants to an interdict. That being the case I am of the view that the exception on this ground against the proposed amendment is well taken.

## PRESCRIPTION

[22] The second question which has to be answered is whether the amendment introduces a new cause of action. If so, then cadit quaestio as the right would have become prescribed. If not, it is apparent that the applicants are still attempting to enforce the oral agreement in respect of an interest in land. By seeking to amend in the manner which the amendment is framed, the applicants are in effect seeking to appeal the judgment of Louw AJ in regard to the validity of an oral servitude agreement.

## CONCLUSION

[23] For the aforesaid reasons I am of the view that the exception in all of the above respects was well taken and should be upheld, I therefore make the following order:

- 1 . The exception is upheld with costs.
2. The amendment is refused.
- 3.

The applicants are granted leave to further amend the particulars of claim that had been struck out within 30 days from the date of this order, if so advised.

DATED THE 11th DAY OF OCTOBER 2010 AT JOHANNESBURG

C. J. CLAASSEN

JUDG E OF THE HIGH COURT

Counsel for the Applicants: Adv J. W. Steyn Counsel

for the First Respondent: Adv J, G. Dobie

Attorney for the Applicants: Le Roux Mathews & Du Plessis Attorneys

Attorney for the First Respondent: Greta Eiser Attorneys

Argument was heard on 22 September 2010.

1The judgment in *Cowley v Hahn* has been criticised by Van der Walt 1987 THRHR 343, Brccdt 1987 THRHR 357 and Scott 1987 De Jure 181, A similar mistake was also made in *Kruger v Gunter* 1995 (1) SA 344 (N) (discussed by Van der Spuy 1995 De Jure 458) and in *Denel (Pty) Ltd v Cape Explosive Works Ltd* 1999 (2) SA 419 (T) at 435B -■ E (discussed by Badenhorst 2000 THRHR 499). The latter case was overruled on appeal to the Supreme Court of Appeal in *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA).

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See 1996 TRW 36 at p 42 and point 5 at p 44,

3See *Cape Explosive Works Ltd v Denel (Pty) Ltd* supra at 578C H; and *Erlux Properties (Pty) Ltd v Registrar of Deeds and Others* [1991] ZASCA 187; 1992 (1) SA 879 (A) at 885B.

4This is to be distinguished from the personal rights in existence between the lessor and the lessee of immovable property. In Such instance the personal rights of the lessee are against the lessor only, who may not necessarily be the owner of the property. In this regard Louw AJ, when confronted with the fact that oral leases of land are binding and need not be registered against the title deed of the immovable property, responded as follows: "I lis argument was thus simply that a lease also subtracts from the competencies of use and the enjoyment of the owner of the leased property, just like the servitude envisaged in the contract and it is absurd to require all

leases to be subject to the Act. In my view this argument misconceived the real ('saaklike') nature of the servitude. It is precisely this aspect of a servitude right that distinguishes it from a personal or contractual right, such as a lease. Whilst the competencies of use and enjoyment in both cases (habitation and lease) vest for the time being in the lessee or habitator, the lessee's right is purely personal and enforceable only against the lessor (whoever that might be, owner or not) whilst the habitator has an authentic, primary right to habitats which is not dependent on the title of any other person. A servitudal, real right is not a derivative right but a primary one. The right of habitation (or any other personal servitude) thus detracts from the available competencies that constitute ownership whilst the right of the lessee burdens the lessor with a personal obligation. The first is a right or interest in land and applies against the whole world whilst the second is a right against a person. Although the natures of real and person rights differ fundamentally, the contents of a given person's right may be identical to a given real right - see the judgment of NestadL J (as he then was) in *Lorentz v Melle* 1978 3 SA 1044 (T) at I050H - 1051C. But this does not detract from the fact that a personal right is enforceable against a particular person only (the other contractant) whilst a real right - limited or not - is enforceable against the whole world. The Act applies only to real rights including personal servitudes, not personal rights."

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5Section 28 is irrelevant for present purposes.

6See Silberberg and Schocman's 'The Law of Property' Fourth Edition, p 336, note 101.

7For this proposition Erasmus J relied on Willoughby's Consolidated Co Ltd v Copthall Stores Ltd 1913 AD 267; Lorentz v MelJe and Others 1978

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9As contained in section 63 of the Deeds Registry Act No 47 of 1937,

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