IN THE SOUTH GAUTENG HIGH COURT (JOHANNESBURG)

Case Number: 2006/28207

In the matter between:

GIDEON JANSE VAN RENSBURG	First Applicant
ALIDA JANSE VAN RENSBURG	Second Applicant
And	
JOHAN KOEKEMOER	First Respondent
ANDRE TERBLANCHE	Second Respondent
THE REGISTRAR OF DEEDS	Third Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER ~~JUDGES~~: YES/~~NO~~
(3) REVISED ✓

11/10/2010
DATE

SIGNATURE

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 Fick Road, Florentia, 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:

> "11. 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 Kockemoer die eiendom sou koop;
>
> 11.2 die verbandspaaiemente 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 eiesers gratis in die eiendom sou woon en geen huurgelde of ander vergoeding betaalbaar sou wees nie, 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 plaintiff's 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 1 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."

[8] Louw AJ associated himself with the criticism that has been expressed against the judgment in **Cowley v Hahn** 1987 (1) SA 440 (EDC) wherein Mullens J held that a *usufructus* is a mere personal right. [1] This statement of law is clearly wrong. In **Felix and Another v Nortier NO and Others** [1996] 3 All SA 143 (SE) at 153D – J it was decided that section 2(1) of the Alienation of Land Act was also applicable to servitudes. M. C. J. Bobbert in an article entitled "Kennisleer", supports the view that an oral servitude is unenforceable against the successor in title of the servient tenement even though such successor had notice of the oral agreement. In such cases the doctrine of notice ("kennisleer") finds no application. [2]

[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.

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[1] The judgment in **Cowley v Hahn** has been criticised by Van der Walt 1987 THRHR 343, Broedt 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).

[2] See 1996 TRW 36 at p 42 and point 5 at p 44.

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, het die Eerste Verweerder 'n skriftelike verkoopsooreenkoms ten opsige van die eiendom met die Tweede Verweerder gesluit 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 hul 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 toekomstige verpligtinge soos in **paragraaf 11** hierbo uiteengesit.
>
> 20. Alternatiewelik tot paragraaf 19 hierbo het die Eisers 'n duidelike 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 duidelike reg daar.
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> 22. Die Eisers het geen alternatiewe remedie, buiten die regshulp wat hierin versoek word, tot hulle beskikking nie.
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> 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 duidelike reg daardeur geraak word.

24. Geen regshulp word teen die Tweede Verweerder gevorder nie, buiten vir koste in die geval van opponering.

DERHALWE 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 11** 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 geding;

4. Verdere en/of alternatiewe 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 His 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.

7. The Plaintiffs, by their intended amendment, seek to introduce a new cause of action based upon the First Defendant's alleged repudiation of the oral agreement.

8. The alleged repudiation occurred during or about 2006.

9. The Plaintiffs intend to introduce the new cause of action more than four years subsequent to the alleged repudiation and as such, the Plaintiffs are attempting to introduce a new cause of action which has already prescribed in terms of the provisions of the Prescription Act, No 68 of 1969.

10. Wherefore the First Defendant prays that the Plaintiffs' intended amendment be disallowed with costs."

[12] It will be noticed that the change of tack proposed in the amendment was to change the relief sought arising out of the oral agreement of servitude. The relief now claimed is one of specific performance of the oral agreement alternatively an interdict prohibiting the first respondent from continuing with actions which would interfere with the applicants' right of residence for the rest of their lives as orally agreed to with the first respondent. The question to be answered is whether the proposed amendments disclose a justiciable cause of action entitling the applicants to enforce the oral agreement of servitude alternatively to interdict the first respondent from conduct which may interfere with the applicants' rights flowing from the oral agreement of servitude.

EVALUATION

[13] In my view the short and simple answer to the question posed in the preceding paragraph is to be found in the judgment of Louw AJ. In my respectful view, he correctly held the judgment in **Cowley v Hahn** to be clearly wrong. The weight of authority is overwhelmingly in favour of such a conclusion. This is so because a servitude is, in its inception when agreed to by the parties, a real right which can only be enforced

against the grantor once it is registered against the immovable property's title deed. Subsequent to registration against the title deeds, it becomes a real right against all the world. The requirements for a right or condition in respect of land to be "real" (as opposed to "personal"), were set out by Streicher JA as follows:

> "[12] In terms of s 3 of the Deeds Registries Act all real rights in respect of immovable property are registerable. To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied:
> (1) the intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and
> (2) the nature of the right or condition must be such that the registration of it results in a subtraction from *dominium* of the land against which it is registered." [3]

[14] What the intention of the creator of the servitude was, is a matter for evidence. It is, however, clear that a right to reside on immovable property, is in fact "a subtraction from *dominium*" of the immovable property. [4]

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

[4] This 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:

> "His 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 servitudal 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 habitate 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 Nestadt J (as he then was) in **Lorentz v Melle** 1978 3 SA 1044 (T) at 1050H – 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."

[15] In this regard the statement of Innes CJ in **Willoughby's Consolidated Co Ltd v Coptholl Stores Ltd** 1918 AD 1 at 16 is, in my view, conclusive. It was there said:

> "Now a servitude, like any other real right, may be acquired by agreement. Such an agreement, however, though binding on the contractual parties, does not by itself vest the legal title to the servitude in the beneficiary, any more than a contract of sale of land passes the *dominium* to the buyer. The right of the beneficiary is to claim performance of the contract by delivery of the servitude, which must be effected *coram lege loci* by an entry made in the register and endorsed upon the title deeds of the servient's property."

[16] In my view the weight of authority is also in favour of the conclusion that a servitude to live on immovable property for life, is indeed an "interest in land" as contemplated by the Alienation of Land Act, 68 of 1981. In section 1 of this Act dealing with definitions, the word "Land" is defined to "include, in Chapters I and III, **any interest in land**,..." The relevant section for current purposes is section 2(1) of the Act which reads as follows:

> "2(1) No alienation of land after the commencement of this section shall, subject to the provisions of section 28[5], 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."

[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. [6] 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

[5] Section 28 is irrelevant for present purposes.
[6] See Silberberg and Schoeman's "The Law of Property" Fourth Edition, p 336, note 101.

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 negatiewe kritiek ontlok, wat oortuigend aantoon dat die uitspraak – op die bedoelde aspek altans – inderdaad verkeerd is...Van der Walt (349) verduidelik dat die feit dat bepaalde serwitute as *persoonlike serwitute* bestempel 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 serwituutbevoegdhede aan die reghebbende in sy *persoonlike hoedanigheid* toekom, sonder eiendomsreg op enige heersende saak.
>
> Erfdiensbaarhede, sowel as persoonlike diensbaarhede (soos vruggebruik, *usus* en *habitatio*), verleen dus aan die reghebbende 'n beperkte *saaklike reg* (*jus in re aliena*) wat die eienaar so *dominium* in die beswaarde eiendom *pro tanto* verminder...[7] Daar is ook by ons regskrywers 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 kennelik 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 CJ in **Registrar of Deeds (Transvaal) v The Ferreira Deep Ltd** 1930 AD 169 at 180:

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[7] For this proposition Erasmus J relied on **Willoughby's Consolidated Co Ltd v Copthall Stores Ltd** 1913 AD 267; **Lorentz v Melle and Others** 1978 (3) SA 1044 (T) at 1049C; **Barclays Western Bank Ltd v Comfy Hotels Ltd** 1980 (4) SA 174 (ECD) 178C – D.

[8] For this proposition Erasmus J relied on Van der Merwe, *Sakereg* Second Edition 461 and 515; Kleyn and Boraine, *Silberberg and Schoeman's, The Law of Property* Third Edition 48/9 and 386; Delport en Olivier, *Sakereg Vonnishundel* 434; LAWSA volume 25, paragraph 62, 63 and 64; Erasmus, Van der Merwe en Van Wyk, *Lee en Honoré Family, Things and Succession* Second Edition paragraphs 366, 367 and 368.

> "That personal rights, *jura in personam,* are not capable of registration is a truism. [9] The definition of such rights excludes their registration. But that does not apply to the class of personal rights which are known as *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 (*onera realia*). 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.

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[9] As contained in section 63 of the Deeds Registry Act No 47 of 1937.

[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
JUDGE 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.