

GIDEON JANSE VAN RENSBURG AND ANOTHER v JOHAN KOEKEMOER
AND OTHERS

Case Number: 2006/28207

Date of Judgment: 11 October 2010

SUMMARY

The parties concluded an oral agreement to allow the plaintiffs the servitude of *habitatio* on the first defendant's property. – The first defendant sold the property to a third party. – Exception taken to the particulars of claim disclosing no cause of action as an oral servitude constitutes an interest in land and must therefore be in writing to be of any force or effect. – Exception upheld and the plaintiffs granted leave to amend particulars of claim. – The plaintiffs filed notice of intention to amend the particulars of claim to which the defendant objected. – Amendments that are excipiable will not be granted. – Proposed amendment deleted claim to have a servitude of *habitatio* registered over the immovable property. – The amendment sought to enforce the personal rights against the first defendant arising from the parties' oral agreement in order to obtain a declarator alternatively an interdict preventing the first defendant from interfering with the aforesaid contractual rights. – The first defendant's contention that the proposed amendment still relies upon the enforcement of an invalid oral agreement, upheld. – Decision to the contrary in **Cowley v Hahn** 1987 (1) SA 440 (EDC) held to be clearly wrong. – Decision in **Felix and Another v Nortier NO and Others** [1996] 3 All SA 143 (SE) followed and applied. – Oral agreement also constitutes a donation of future entitlements which conflict with the writing provisions of section 5 of Act 50 of 1956. – Donation of rights in land also included in the definition of "Alienation" in Act 68 of 1981. – Claim also held to have prescribed. – Exception upheld with costs and the amendment refused.