

IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)**JOHANNESBURG****CASE NO:** 35238/12**DATE:** 2012-10-18

10 In the matter between

DENVER AUTO BODY REPAIRERS CC

Applicant

and

STAND 637 ISANDO CC

First Respondent

TERACO PROPERTIES (PTY) LTD

Second Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

J U D G M E N T

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WILLIS, J:

[1] This is an application in terms of which the applicant seeks to enforce a right of first refusal (otherwise known as a pre-emptive right) which, it is common cause, it had in respect of a property known as

Earth 637 Isando, Extension 1 Township, Registration Division, IR, Province of Gauteng, which measures 5 173 square meters.

[2] It is common cause that the first and second respondents entered into an agreement in terms of which the first respondent sold the second respondent the property in question, subject to a significant suspensive condition. This suspensive condition was that the applicant did not exercise the right of first refusal, which the applicant had in its favour.

10 [3] Despite voluminous papers and despite some tension in the arguments, it is clear that the issue turns on a simple point: did the applicant exercise its right of first refusal in terms of the agreement or did it not? Critical to the issue is a letter is sent by Mervyn Smith, written on behalf of the applicant, on 6 July 2012 to the first respondent. In that letter, the following appears:

“We confirm that we act on behalf of Denver Auto Body Repairers CC, and that all correspondence is to be addressed to our offices directly.”

The letter continues with a protest:

20 “Although the agreement of sale is not an offer as contemplated by clause 16 of the agreement of lease, this omission of a concluded agreement of sale as opposed to an offer flies in the face of clause 16 aforesaid. Our client regards your conduct as a repudiation of the lease, which repudiation our client does not accept. You are advised that our client intends to purchase the

property at a commercially realistic or market-related price. You are called upon to submit to our client an offer of sale for our client to consider.”

[4] By no stretch of the imagination, can this be regarded as an acceptance or an exercise of the right of a first refusal. Not only is it a statement of an intention rather than an actual acceptance of the terms and conditions of the sale, but it contains a protest and an attempt to negotiate to reach a “commercially realistic or market-related price”.

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[5] Later, on 3 August 2012, Mervyn Smith, attorneys again acting for the applicant, address a letter to Möller and Pienaar, the attorneys acting for the first respondent, in which they offer to purchase the property in the name of another legal entity. That legal entity is Rajaca Investments CC, not the applicant.

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[6] We cannot ‘lift the corporate veil’ in a matter such as this. It is trite that separate legal personality is a strongly entrenched principle in our law. It cannot operate as compliance with the agreement conferring a right of first refusal if the party having that right decides, unilaterally, that somebody else can exercise its rights of pre-emption on its behalf. Mr *Cohen*, who acts for the applicant, then referred me to a letter dated, 10 August 2012. He drew my attention to the fact that the letter for the attorneys, acting on behalf of the first respondent, records:

“Our client notes your indication that it exercises its right to

purchase the property as it was offered to Teraco Properties (Pty) Ltd.”

That is an interesting clause, but the letter goes on to say:

“An offer by Rajaca Investments CC does not constitute an acceptance by Denver Auto Body Repairers CC, as envisaged in the lease agreement. The offer to purchase should be from Denver Auto Body Repairers ... Your client’s difficulty to raise funding in Denver Auto Body Repairers CC is not our client’s concern. As you correctly pointed out, it is different legal entities and Denver Auto Body Repairers CC has the right to demand transfer of the property on the same terms and conditions as Teraco Properties (Pty) Ltd, not Rajaca Investments CC.”

[7] Against this background, the applicant has failed to make out a case.

There is only one appropriate order that can be made. It is the following:

The application is dismissed with costs.