IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12994/18

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED: **21 SEPTEMBER 2020**

21/9/20

In the matter between:

AARIFAH SECURITY SERVICES CC	APPLICANT
and	
JAKOITA PROPERTIES (PTY) LTD	FIRST RESPONDENT
NU-LINE ELEVATOR PRODUCTS (PTY) LTD	SECOND RESPONDENT
REGISTRAR OF DEEDS JOHANNESBURG	THIRD RESPONDENT
NU-LINE PROPERTIES (PTY) LTD	FOURTH RESPONDENT

JUDGMENT

000-1

[HEARD REMOTELY VIA ZOOM PLATFORM 1 SEPTEMBER 2020]

SNYCKERS AJ:

INTRODUCTION

1. This application concerns the validity of an asserted exercise of a pre-emptive right, or right of first refusal, in respect of the purchase of immovable property. It is in particular concerned with the formal manner in which such a right is to be exercised, and when it can be said to have been exercised.

2. By the time the matter came before me in motion court, there were two contending agreements of sale concluded by the first respondent (Jakoita) as the seller of commercial immovable property.

3. One agreement of sale was a deed executed in December 2017 with the second respondent (Nu-Line). There is a dispute between the parties whether the purchaser in the Nu-Line agreement was the second respondent or the fourth respondent (represented by the second). This dispute was not addressed before me and was not material to the issue I was called upon to decide. It may or may not become important in the outstanding disputes between the parties. I make no finding in this regard. I refer to the purchaser and the second and fourth respondents as "Nu-Line", agnostic as to the question which of them is the purchaser to the December 2017 deed.

4. The other agreement was one executed in April 2018 with the applicant (Aarifah) as purchaser. This agreement appears to have been concluded between the deposing of the first answering affidavit of Jakoita in April 2018 and the deposing of the second answering affidavit of Jakoita in May 2018;

although it is not referred to in the second answering affidavit. It is referred to in, and attached to, Aarifah's replying affidavit.

5. The validity of the April 2018 agreement (referred to as ZK26), and the full circumstances of its execution, are not before me. This is a curiosity that arises from the procedural route the application took. More about this below.

6. At issue before me was whether Aarifah had validly exercised a right of pre-emption that had been conferred upon it in a lease agreement relating to a portion of the property at issue, in relation to which Aarifah was the tenant and Jakoita the landlord. The outcome of this dispute would apparently determine the consequences for Aarifah, Jakoita and Nu-Line in relation to their contending agreements, given the doctrine *qui prior est in tempore potior est in iure.*[1]

FACTUAL CONTEXT AND PROCEDURAL HISTORY

7. Jakoita, as owner of a commercial building, marketed it for sale in 2017. Aarifah was a potential purchaser but ended up executing a lease as tenant of a portion of the building. This was in September 2017. The lease was to run from 1 October 2017 to 1 October 2020. Clause 18 of the lease contained the following right of pre-emption:

[1] See for example *Ingledew v Theodosiou* 2006 (5) SA 462 (W).

"Should the landlord want to sell the property 67 Voortrekker Edenvale the tenant will have first option to buy and will be given 48 hrs to respond".

8. In December 2017, Jakoita executed a deed of sale as seller with Nu-Line as purchaser. The purchase price was R2,150,000 (two million one hundred and fifty thousand rand). Agent's commission of R150,000 was said to be payable by the seller. A deposit of R215,000 was payable and the period within which it was to be paid left blank. The balance of R1,935,000 was payable within fifteen days of signature. Occupational rental by the party enjoying possession without transfer in the amount of R15,000 per month was agreed. There was also a clause to the effect that *"Seller to confirm if there are any suspensive conditions in the title deeds".* A clause that made the sale conditional upon the vacation of the property by the existing tenant had been deleted. The deed expressly recorded that the property was being let to tenants at R6,500 per month (this referred to Aarifah's lease).

9. On 16 January 2018, Mr Robert Pereira ("Pereira") of Jakoita sent an email to Mr Zeyn Khan ("Khan") of Aarifah. Khan describes himself as *"a member"* of Aarifah. He was clearly the principal, but it is not stated whether he was the sole or even the main member as far as members' interest was concerned. This is relevant to the dispute about the identity of the purchaser in the Aarifah offer, something considered below. Pereira and Khan were the individuals acting as between Aarifah and Jakoita.

10. The email of 16 January advised Khan of the "offer" from Nu-Line (it was referred to as an OTP). The Nu-Line OTP was attached to the email. The email

contained the following, after confirming a discussion "yesterday" about having received this "offer" during the December holidays:

"I will further request from all parties for a report on the buyers process and therefor ability to proceed successfully with the purchase as stated in the OTP and will forward same to you timeously.

The rental agreement entered into with Jakoita Properties does however allow you first option to buy, as per clause 18. Of the lease agreement. **[sic]** *This letter serves to inform you as per clause 18 you may have a 48 hour period to indicate your intentions."*

11. The email ended with *"Kind Regards Rob Pereira"*.

12. Khan responded by email on 16 January 2018:

"Thank you for the time to meet with me yesterday to discuss the offer to purchase that you have received for 67 Voortrekker Street, Edenvale and our options available.

As per our current lease and the clause that we have inserted, it is admirable that you have honoured this and allowed me the opportunity to have the first option to respond accordingly.

This mail serves as confirmation that I will definitely be willing to put forward an offer and sign an OTP in this regard to purchase the property."

13. The email ends off after "Kind Regards" with a standard email "signature" of *"Mr Zeyn Khan"* and some telephone numbers, a web address, and an email address, followed by the logo *"Ewing Security"*.

14. The respective versions of Khan and Pereira on the precise sequence of events surrounding the discussions and submission of offers from Khan are

unfortunately somewhat obscure. In paragraph 15 of the founding affidavit, Khan says the following:

"Pursuant to the e-mails and further discussions between Rob Pereira and myself, representing the Applicant and the First Respondent respectively, the First Respondent requested me to put in an offer to purchase on the same terms and conditions as per ZK3 [**the Nu-Line OTP**] *save that I should include a purchase price of R2 million and pay the agents commission."*

15. Khan proceeds to allege that he duly completed an OTP, attached as "ZK4", and sent it to Pereira. He says he signed it on 20 January 2018, and then proceeds to refer to an email received from Pereira on 23 January 2018 to the following effect:

Good Morning Zeyn,

As discussed I have met with attorney yesterday and put forward all you docs and mine [sic].

I am sorry but I am still waiting for their reply. Please see attached. Maybe let's give them till end then f business and then get together tomorrow to finalize everything.

We can't all be up in air for this long. My apologies from r the delays

[sic]

16. The obscurity enters because Pereira denies the allegations in paragraph 15 of the founding affidavit, points out that the OTP "ZK4" was signed only on 29 January 2018, and says it was emailed to him for the first time on 29 January 2018. What "*all you docs*" referred to in the 23 January email would then be was left obscure. Be that as it may, there is no denial in reply that the OTP "ZK4" was first sent to Pereira on 29 January 2018, and this appeared to be common cause before me.

17. And so, on 29 January 2018, Khan sent a copy of the OTP "ZK4" to Pereira by email, saying *"Please find attached OTP as per our discussion this morning. Await your soonest response in moving forward."*

18. The OTP "ZK4" was a standard form *"offer to purchase which constitutes a deed of sale"*, on Hortors stationary, signed by Khan. It offered to purchase the property for a purchase price of R2m. It designated the purchaser as *"Mr Zeyn Khan 7803235155082 c/o Aarifah Security Services CC."* It designated Jakoita, properly described, as the seller. It described the property and provided:

> *"This offer shall become a final and binding sale upon acceptance hereof by the Seller on or before* ***28th February 2018*** *[**date filled in in ink**] on the _____ Acceptance of this offer by the Seller shall be effected by the Seller signing one copy of this agreement and, before the date and time mentioned above, either handing such copy to the Purchaser or his authorised representative or else posting such copy to the Purchaser by prepaid registered post addressed to him at the address appearing beneath his name at the commencement hereof."*

19. In this ZK4 OTP, a cash amount of R250,000 was made payable on or before 10 February 2018 to be held in trust in an interest bearing account to the benefit of the Purchaser until registration of transfer. The balance of R1,750,000 was to be paid on registration, to be secured by approved bank guarantee on or before 28 February 2018. Occupational rental was stated as *"to be agreed upon"*. The term dealing with agent's commission was marked "N/A". Under special conditions, there was what appeared to be an incoherent contracted echo of the condition found in the Nu-Line OTP: *"N.B. Seller to confirm if there are any suspensive deeds."*

20. To this, Pereira replied on the 30th of January, also by email:

"I have received your OTP yesterday afternoon. I have taken a look and all seems to be in line. I will contact Cinzia this morning to get feedback."

21. The reference to Cinzia was to Cinzia Bocchiola of Jakoita's conveyancing attorneys, Lazzara Leicher.

22. Still on 30 January 2018, Pereira forwarded to Khan an email received from the conveyancing attorneys. In this email, various differences between the ZK4 OTP and the Nu-Line OTP were tabulated. The different purchase prices were stated. One was told that the deposit under the "existing offer" was R215,000 payable within two days and that *"this amount has been paid"*, whereas the deposit under the *"offer from tenant"* was R250,000 payable on 10 February and *"this amount remains payable"*. One was referred to the balance of R1,935,000 being due in 15 days under the existing offer, and *"this amount has been paid"* and that under the tenant's offer the balance of R1,750,000 was payable by 28 February and remained outstanding. The email also stated that the commission was R150,000 under the existing offer and R13,000 *"commission to rental agent as per lease"* under the tenant's offer. The email from the attorneys asked for further instructions.

23. It may be noted that the reference to a deposit being payable within two days in the Nu-Line OTP appeared to be incorrect. The period when the deposit was to be paid was left blank in that deed (presumably as it had already been paid on signature).

24. The founding affidavit does not indicate what Khan's response was to the last email of 30 January, or what, if anything, happened before Pereira sent Khan another email on 6 February.

25. In the main answering affidavit deposed to by Pereira (there was a shorter answer apparently filed in response to the interdictory relief urgently sought), Pereira states that, after Khan sent him the email on 16 January intimating that an offer would be forthcoming, and no offer was forthcoming in the 48 hour period, Jakoita *"thereafter accepted the second respondent's offer to purchase and instructed attorneys Lazzara Leicher to attend to the transfer..."*. The affidavit next deals with receipt of the ZK4 OTP on 29 January, but before doing so says *"The further discussions which took place between myself and Khan were not in terms of the provisions of clause 18."*

26. It is not clear what Pereira means by his statement that Jakoita *"thereafter"* accepted the Nu-Line offer – it had already been accepted in December 2017.

27. Be that as it may, Pereira states that, when he received the ZK4 OTP from Khan on 29 January, he advised Khan that he had already accepted the Nu-Line offer. Pereira then gives the following account of what apparently occurred around 30 January:

"I duly advised the Applicant that I would not be accepting its offer to purchase. It was at this point in time that Mr Kahn telephonically contacted me and proposed that I accept his lesser offer and he would settle that balance of the monies in cash so as to avoid paying a higher transfer duty to SARS. I rejected his verbal proposal outright for reasons which should be self-

evident. Not only would this expose me contractually but I would also be a party to a fraud on the South African Revenue Services ("SARS")."

28. For his part, Khan's version resumes on 6 February 2018, with an email from Pereira, which, according to Khan, *"raised the issue of commission"*. The 6 February email reads:

"Sorry I did not get back to you yesterday regarding your offer.
As it turns out on the lease agreement Mike from Property Coza has added a clause in our lease agreement that states Property coza must get a 7% commission if I am to take your offer. That 7% I think puts us out of touch with what we are trying to achieve. Property coza has already been in contact with the people involved in my first offer.
Zeyn before I sit in a position which is not favorable for ***[sic]*** *I must inform you that I must take the first offer from my line.*
I will be informing Cinzia to continue with the transfer and continue with my previous offer.
I hope this mail finds you well. I hope you understand."

29. Where precisely the reference to R13,000 commission in terms of the lease, mentioned in the attorneys' comparison, came from, was not made clear. It seems that the impression that an offer from Aarifah exercising the clause 18 right would not entail agent's commission was a mistake, as the lease provided for commission for 7% payable in the event the tenant were to purchase the property. Bear in mind that Khan's allegations about agreeing to pay R2m and "paying the commission" were denied by Pereira.

30. In response to this email of 6 February, Khan sent an email to Pereira on the same day, stating:

"My apologies but I do not fully understand what you are referring to below?

If Mike (Property.co,za) has included this as a condition so be it and this will have to be paid over by me in order to match the current offer on the table and I will need to adjust my OTP accordingly stating this. This as per my calculation amounts to R140k.

Be that as it may, you can decide in which way you would like to proceed."

31. To this Pereira replied, also on 6 February:

"I have made my intentions clear I would like you to purchase. I have signed and I am legally obligated to the other offer unless you can bring better OTP then I have no option.
I am currently in India but I will send rnario to mohamed the morning then we talk through mario please"

32. The reference to Mohamed was a reference to Mohamed Randera of Aarifah's attorneys of record. It is not clear from the papers who "Mario" was.

33. Khan alleges that after the 6 February exchanges,

"Further oral discussions and meetings ensued between the First Respondent and myself in which the First Respondent again undertook to sign the offer, ZK4".

34. This is denied by Pereira, who says:

"It was at this point in time that the Applicant telephonically contacted me and advised me that he did not want to revise his offer to purchase and that I should accept same as is so that he could avoid paying transfer duties to SARS on the full amount and use cash to settle the

shortfall. As I would never be a party to any attempt to defraud any party, let alone SARS, I rejected the offer and advised the Applicant that I was proceeding with the Second Respondent's offer to purchase which I had already accepted."

35. In the replying affidavit, Khan denies the allegations relating to cash and SARS and states the following:

"I deny that I offered to pay the amount in cash as stated and further that I offered to pay the amount to avoid transfer duty or to defraud the South African Revenue Service (SARS). I simply offered to pay the amount in the lease in respect of commissions. The clause in the lease is the clause pursuant to which commissions are payable. The fact that I took this attitude is apparent from the email sent by me on the 6th February 2018."

36. This particular factual dispute seems incapable of resolution on the papers, at least not in favour of an applicant. It does seem clear that no further OTP, including any commission amount payable, was ever submitted (at least until ZK26 was executed in April 2018).

37. Attorneys stepped in in March 2018. On 15 March 2018, Attorney Mohamed Randera sent a letter of demand to Jakoita. It recorded the lease, the clause 18 right, and the fact that Aarifah had been advised by Jakoita that it had sold the property to a third party and was offered the 48 hour opportunity to exercise its right of pre-emption. The letter stated that *"our client duly exercised its pre-emptive right to purchase the property within the stipulated time frame."* It continued to assert that Aarifah's right superseded that of the third party, and to demand an undertaking that steps would not be taken to proceed with

transfer to Nu-Line, threatening urgent court proceedings if such steps were taken. A letter was also directed at Nu-Line, putting it on notice.

38. Correspondence ensued with attorneys for Nu-Line, who demanded proof and detail as to the timeous exercise of the pre-emptive right; a response was furnished simply asserting timeous exercise.

39. Jakoita and Nu-Line then set about proceeding to instruct transfer when proceedings were launched urgently, on 3 April 2018, with Part A and Part B relief. Part A was interdictory. Part B was final. Part B sought an order declaring that a sale had been concluded between Aarifah and Jakoita on the same terms as the Nu-Line OTP, and seeking transfer under it, alternatively, cancellation of the Nu-Line OTP and an interdict against any sale of the property without compliance with clause 18.

40. The Part A interdictory relief was granted on 10 April 2018, with costs in the cause of Part B.

41. Part B proceeded, but spawned an application to amend the relief sought and an application to strike. The amendment sought to delete the declarator of a deemed sale and now sought transfer in terms of the agreement concluded between Jakoita and Aarifah in April 2018. The application to strike concerned the allegations relating to this second sale. In the meantime, the fourth respondent had been joined, given the contention that it was the relevant Nu-Line purchaser.

42. The application to amend the relief sought was granted and the application to strike was dismissed. The respondents were afforded the opportunity to file further affidavits dealing with the case based on the agreement ZK26 concluded in April 2018. Aarifah was ordered to pay the costs of the Nu-Line respondents in the interlocutory application.

43. The following orders formed part of the order of 18 October 2019 in the interlocutory application:

"4. The filing of further affidavits in the application are suspended pending determination of the separated issue referred to infra.

5. The issue on the papers, whether in January 2018 the Applicant validly exercised its right of pre-emption in terms of clause 18 of the lease agreement, is separated from and will be heard and determined prior to the remaining issues in the matter."

44. What came before me was only this "issue on the papers" that had been separated for prior determination in the order of 18 October 2019.

45. As will appear below from the way the argument developed, this created difficulties in properly adjudicating this issue on the papers, blind to the issues and potential issues revolving around ZK26 in relation to which further affidavits are still to be filed and another determination might yet eventuate.

46. The costs of the interlocutory application as between Aarifah and Jakoita were reserved for the court determining the separated application. Counsel [illegible] agreed that, given that the merits of the strike out and amendment were not

before me, and given that the merits of the new case pursuant to the amendment, based on ZK26, were also not before me, I was not in a position to determine the costs of the interlocutory application as between Aarifah and Jakoita. They were *ad idem* that such costs should be "*in the cause*." I assumed from this that they meant in the cause of this application, rather than in the cause of the application potentially to be determined on ZK26. Particularly as the further issues might become academic depending on the outcome of this application, it would be perilous to leave any cost orders hanging.

CONTENDING POSITIONS AND ISSUES

47. It was Aarifah's case in the papers, and at least initially in argument before me, that the email communication from Khan to Pereira of 16 January 2018 constituted the exercise by Aarifah of its right of pre-emption, upon the terms of the Nu-Line OTP.

48. Various contentions were advanced against this by Jakoita and Nu-Line.

49. The main theme was that Aarifah had not exercised its right under clause 18 within 48 hours as required. There were several sub-themes to this.

50. One contention can be dismissed rather summarily. Jakoita argued that the 48 hour period had already commenced when the lease was executed, as it was clear from the papers that Jakoita was at that time "desiring to sell" the property. I shall not waste too much time and ink on dealing with this contention, save to

say that to me the wording of clause 18 clearly contemplated an eventuality that was still to arise and some or other form of notification on the part of Jakoita to Aarifah of its desire to sell that would trigger the 48 hour period. Furthermore, the conduct of the parties in implementing the clause left little room for any interpretation that the period of 48 hours commenced immediately upon the execution of the lease, a consideration that has lately assumed more prominent significance in the construction of contracts than in years gone by.[2] In short, clause 18 would have looked very different if it had been seriously intended to entail a need to exercise a right of first refusal within 48 hours of the execution of the lease in September 2017.

51. More fundamentally, it was contended that the email of 16 January suffered from various fatal defects as a candidate for the exercise of the clause 18 right. The following main points were raised by the respondents:

51.1. The email communication of 16 January 2018 did not purport to make, or to accept, a clear offer on the terms of the Nu-Line OTP; at most, it indicated a willingness to make an offer, which was to follow.

51.2. The email communication of 16 January 2018 in any event could not be a valid exercise of a right of pre-emption with respect to the sale of land, as it failed to comply with the formalities of the Alienation of Land Act 68 of 1981.

[2] See for example *Unica Iron & Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) para 21.

51.3. The offer that then did follow, ZK4, transmitted on 29 January 2018, was made long after the expiry of the 48 hour period.

51.4. The offer that was made, namely ZK4, was made designating Khan, not Aarifah, as purchaser.

51.5. The offer that was made, ZK4, was on terms more favourable to Aarifah than the Nu-Line OTP – especially as it was made for an amount of R150,000 less by way of purchase price (or, if the equivalent value in the pocket of Jakoita were to be considered, without indemnifying Jakoita against agent's commission, which in the case of Nu-Line was R150,000 and in the case of Aarifah was R140,000). There were also the other differences in relation to payment of the deposit and balance tabulated by the attorneys in the 30 January email (and the difference in respect of occupational interest).

51.6. Despite a clear demand from Jakoita on 6 February for a "better OTP" with reference to the matter of the missing commission, and despite an indication of a willingness to pay commission from Aarifah, there was never another offer submitted by Aarifah that made provision for commission.

51.7. Aarifah must in any event be taken to have abandoned or waived its pre-emptive right, to the extent it was still extant, by its responses to the emails of 6 February, in that –

51.7.1. in response to the email of 15:08 advising that Jakoita was constrained to proceed with the Nu-Line offer in light of the commission situation, Aarifah responded that it was willing to pay the 7% commission but "[b]*e that as it may, you can decide in which way you would like to proceed";* and

51.7.2. when this elicited the email, still on 6 February 2020, insisting that *"I have signed and I am legally obligated to the other offer unless you can bring better OTP then I have no option"*, no better OTP was forthcoming; instead, the attorneys' letter of 16 March was sent, insisting that the right had been validly exercised.

51.8. Whatever the status of the interactions between Aarifah and Jakoita from 29 January 2018 onwards, culminating in the apparent agreement executed in April, these were negotiations to achieve a competing sale with that of Nu-Line, and could not be seen as ways of exercising the right of first refusal or pre-emption in clause 18.

EXCURSUS ON PRE-EMPTIVE RIGHTS AND FORMALITIES IN THE CONTEXT OF SALES OF IMMOVABLE PROPERTY

52. Pre-emptive rights, or rights of first refusal, come in many shapes and forms. A common variant is the bland, vague and standard unelaborated right, mainly

negative in character, to prohibit the grantor of the right from selling the object of the right to a third party without first having given the grantee (or holder) of the right the opportunity to purchase on terms that are no less favourable than the terms on which the grantor seeks to sell to the third party. I put several terms here as neutrally as possible, given the many interesting questions that have arisen around their precise import over the years.

53. The first important aspect of a right of pre-emption, as opposed to an option properly so-called, is that, unlike an option, it is an enforceable right with respect to a sale despite the absence of any determination of the price or terms on which it is to be exercised. It is this that makes a right of pre-emption in the bland and general terms of clause 18 a perfectly valid and enforceable right, whereas, had it purported to be an option, flowering into a sale upon its mere exercise without more, it would have been void for not containing the *essentialia* of a contract of sale.[3]

54. The primarily negative character of the right at issue has over the decades given rise to several long-standing debates, that raged in the highest courts. In a series of decisions,[4] the nature of the right was extensively addressed. This included the degree to which the holder's remedies were purely negative or included positive remedies, and in particular, whether the holder could compel the grantee to "make an offer" by way of a decree of specific performance of the "right to an offer" entailed by the pre-emptive right, a proposition that had found favour with

[3] See *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A).
[4] *Oswianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A); *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A); *Hirschowitz v Moolman & Others* 1985 (3) SA 739 (A).

Ogilvie-Thompson JA, but was ultimately the object of "*grave doubt*" ("*sterk twyfel*") on the part of the majority decision in *Oryx*.[5]

55. In *Oryx*,[6] a case that concerned the right in the context of the sale of movables (intangible shares), the seminal "stepping into the shoes" remedy was established, as an endorsement by the then highest court of the kind of positive right that the holder did enjoy – where a grantor, in violation of a right of pre-emption, sold the object to a third party without allowing the grantee the opportunity first to buy, the grantee could, by a "*unilateral declaration of will*" ("*eensydige wilsverklaring*") adopt the third party's sale as if an offer had been made to it on the terms of the third party's sale.

56. The effect of *Oryx* was addressed and explained in *Hirschowitz v Moolman*.[7] *Hirschowitz* ultimately decided a narrow question, namely whether the covenant that embodied the pre-emptive right needed to comply with the statutory formalities of the sale in relation to which it was granted. This question was answered in the affirmative in *Hirschowitz*. In the process of doing so, Corbett JA for a unanimous court pointed out that *Oryx* had itself left open the question whether the remedy of a unilateral declaration of will provided for in *Oryx* was available in the context of agreements of sale that were subject to bilateral statutory formalities, such as sales of immovable property. Although Corbett JA

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[5] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 919H.

[6] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A).

[7] 1985 (3) SA 735 (A), particularly as summarised at 762.

was prepared to assume that such a remedy was capable of being exercised in respect of such agreements, he did express the following thoughts in this regard:[8]

> *"There are certain difficulties. It is true that the appellant's [**holder**] declaration of intent was written and signed by him. Even if this be regarded as the acceptance of an offer, which by operation of law was deemed to be made to appellant when the option was granted to Dorstfontein [**third party**], it is arguable that what the Formalities Act requires (where the contract consists of a separate offer and acceptance) is an offer and acceptance in the ordinary contractual sense, ie a written and signed offer in fact (and not merely notionally) made by one party and a written and signed acceptance by the person to whom it was directed. It is also true that first and second respondents **[grantors]** signed the written lease containing the option to Dorstfontein, but the offer contained in this option was in fact made to Dorstfontein and not to the appellant. It is not necessary, however, to decide this question for there is, in my opinion, a more fundamental difficulty confronting the appellant, viz the fact that the contract granting the right of pre-emption was not signed by one of the persons against whom appellant seeks to enforce the right of pre-emption."*

57. Two decisions critical to the instant case followed on *Hirschowitz*. They are the decision of Swain J in *Van Aardt* [9] and the decision of the Constitutional Court in *Mokone*.[10]

58. *Van Aardt* took up Corbett JA's misgivings set out above and held that for a valid sale of immovable property to come about pursuant to the purported exercise of the *Oryx* remedy, there needed to be both an offer and an acceptance, tailored to the sale by the grantor to the holder, both complying with the statutory formalities.

59. *Mokone* overruled the requirement established in *Hirschowitz* that the covenant embodying the pre-emptive right, with respect to a sale of land, had to comply with the formalities. However, an important part of the reason for this finding on the part of the majority was that there was nothing that precluded the perfection

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[8] At 763H-764A. The case was decided on the legislation preceding the Alienation of Land Act, but on the basis that the principles were the same.

[9] *Van Aardt and Another v Weehuizen and Others* 2006 (4) SA 401 (N).

[10] *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC).

of the right, including the exercise of the remedy contemplated in *Oryx*, to be concluded by way of bilateral compliance with the formalities:[11]

> *[54] Now, let us have a close look at that reasoning. The fundament of the reasoning is that inexorably the holder of the right of pre-emption can become a purchaser in terms of the right only through means that fall foul of the formalities. It is this that gives rise to the anomaly to which the court is referring. I do not see why — upon the occurrence of the contingencies that trigger an entitlement to exercise the right — the holder cannot exercise it in a manner that complies with the requisite formalities. The holder may simply make a signed written offer to purchase. If the grantor accepts the offer in writing under signature, a sale that meets the formalities will come into being. If she or he does not, the holder of the right may seek a declarator by a court that she or he is entitled to the exercise of the right and a mandamus requiring the grantor to accept the offer in writing. If the relief is warranted, it must be granted. That is nothing more than holding the grantor to the parties' agreement.*
>
> *[55] It may happen that the sale by the grantor to a third party may be in terms that do not correspond with those in which the right of pre-emption was granted. The question arises as to whether the written offer by the grantee must be in the terms on which the grantor sold to the third party or in those on which the right was granted. That question was not argued before us. I think it prudent not to decide it.*
>
> *[56] In the event that the conduct of the grantor of the right of pre-emption has culminated in the sale of land to a third party, it seems necessary to understand the import of the so-called Oryx mechanism. This was expressed thus:*
>
> **'In the event that a seller concludes a contract of sale with a third party in breach of a right of pre-emption, the [holder of the right of pre-emption] may, through a unilateral declaration of intent, step into the position of the third party. A contract of sale is then deemed to have been between the seller and the holder of the right of pre-emption.'**
>
> *[57] I see no reason in principle why the notion of the holder of the right 'step[ping] into the position of the third party' cannot be achieved in a manner that does not bypass the requisite formalities. That may be achieved either consensually or through coercion by court. The idea of a 'unilateral declaration of intent' is understandable in the circumstances. It is consonant with the notion that, subject to whatever the law may be held to be on ordering or not ordering specific performance, the grantor of the right is liable to coercion."*

60. In my view, the effect of these decisions is that the law, in the relevant respect, is now the following:

[11] Paragraphs 54 to 57; see also paras 59 and 60.

60.1. One should distinguish the covenant embodying the pre-emptive right, and acts that turn it into an agreement of sale between the grantor and the grantee.

60.2. The covenant embodying the pre-emptive right, even in respect of the sale of land, need not comply with the formalities. It is binding if it is proved as a contract deliberately concluded, conferring a personal right.

60.3. The only way in which the pre-emptive right can become an agreement of sale between grantor and grantee is if both execute it in writing, in compliance with the formalities. There must accordingly be an offer and an acceptance, both in writing and signed.

60.4. The holder may enforce its pre-emptive right by submitting an offer that complies with the formalities if it were accepted, and compelling the grantor to countersign it, or having the registrar or some other official authorised to countersign if the grantor fails to do so, in the event that the grantor fails to countersign the holder's offer.

61. For present purposes it is important to find that the current law after *Mokone* is that the way the holder exercises the right of pre-emption in the context of sales of land is by submitting a signed offer to the grantor (on terms no less favourable to the grantor than the contending offer, or on whatever terms the right allows) that complies with the formalities. Further remedies then depend on whether the grantor signs such offer or not. Should the grantor decline to do so, the holder cannot adopt the attitude that it is without more entitled to transfer as if it 000-23 sale – it must first achieve the completion of the sale by compelling the grantor to

accept the offer in conformity with the formalities. This conclusion, apart from arising from paragraph 54 of *Mokone*, appears to me to flow also from *Van Aardt*[12] and from the endorsement of *Hartsrivier* [13] in *Rogers v Philips*,[14] the latter itself endorsed in the majority decision in *Mokone*.[15]

APPLYING THE PRINCIPLES TO THE FACTS

(a) *The 16 January email from Khan*

62. Counsel for Aarifah was constrained to concede two propositions:

62.1. Any offer made by Aarifah in exercising its pre-emptive right had to comply with the formalities of the Alienation of Land Act.

62.2. Because of section 13(1) of the Electronic Communications and Transactions Act (ECTA),[16] the email of 16 January 2018 could not be said to comply with the Alienation of Land Act.

63. Section 13(1) of ECTA requires a special designated electronic signature for any document to comply with a statutory requirement that something be executed in writing. A "normal" signature, such as one finds at the foot of an email, whilst it

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[12] Para 14.
[13] *Hartsrivier Boerderye (Edms) Bpk v Van Niekerk* 1964 (3) SA 702 (T).
[14] 1985 (3) SA 183 (E) at 187E: *"This case, however,* [i.e. **Hartsrivier**] *lays down that the pre-emptor, in order to bind the owner who wishes to sell land, must make an offer in writing so that a valid written contract can result."*
[15] Paras 49 and 50.
[16] Act 25 of 2002.

might suffice for a formality requiring a signature laid down in contract, cannot suffice if the signature is required by statute.[17] More fundamentally, however, sections 4(3) and 4(4) read with Schedules 1 and 2 of ECTA make it clear that its provisions can in any event not be employed to validate deeds of sale under the Alienation of Land Act.[18]

64. On the principles set out above, then, the principal submission of Aarifah, that its 16 January 2018 email must be regarded as the effective exercise of its right of pre-emption, cannot be sustained. It matters not, for purposes of this conclusion, whether the email must be tortured into an offer to purchase on the terms of the Nu-Line offer, as contended for by Aarifah, despite its express terms referring to an intention to make an offer, followed by the offer ZK4, in different terms, that expressed itself as an offer that would be accepted by the Seller in a certain way within a certain period.[19]

65. Nor does it matter for this conclusion whether, as contended for by Jakoita, the offer *and the written acceptance of the offer by Jakoita* had to have occurred within the 48 hour period for Aarifah to have exercised its pre-emptive right. I return to this submission below.

66. Without some fancy footwork, that would be the end of the issue I was called upon to decide.

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[17] See *Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash & Another* 2015 (2) SA 118 (SCA).
[18] *Spring Forest* para 16 read with footnote 8.
[19] The submission of ZK4 after the 16 January email goes a long way towards confirming the proper interpretation of the 16 January email as doing no more than to intimate that something like ZK4 was coming. As counsel for Nu-Line correctly submitted, if Aarifah wanted to have its 16 January email taken as an offer on the terms of the Nu-Line OTP, or even more radically, an acceptance of an offer deemed to have been made to it on the terms of the Nu-Line OTP, it should have made this unequivocal, even without consideration for the problem of formalities.

(b) The Attorney's letter of 16 March 2018

67. There was, however, fancy footwork.

68. Counsel for Aarifah submitted that, by the latest on 16 March 2018, an offer complying with the formalities had been made, in the attorneys' letter of demand of 16 March, signed in the conventional fashion, asserting that Aarifah had exercised its right.

69. Jakoita and Nu-Line understandably objected that this was not the case they were called upon to meet. Even the separation order framed the issue as whether the pre-emptive right had been exercised in January 2018. Nevertheless, if a sustainable case on this basis was made out in the papers, it would deserve some attention. For the time being, I assume in favour of Aarifah that it was open to it to advance this case in argument.

70. I leave aside the complication that the letter was scanned and emailed to Jakoita, and that there was no proof of "submission" to Jakoita of an offer complying with the formalities.[20] If a holder of a pre-emptive right were to sign an offer within the prescribed period for exercising the right, and then telephone the grantor to advise it of the offer, even of the fact that it was signed, but the offer itself were not delivered or at least despatched to the grantor within the relevant period, I have difficulty seeing how this would amount to "making the offer" that complied

[20] See s4(3) and 4(4) of ECTA.

with the formalities within the period set for exercise. It would seem to me that it would not. The tenor of the judgments considered above would suggest that this would not suffice.

71. Fundamentally, however, the 16 March letter was sent long after the 48 hour period expired, if this period was triggered by the notification on 16 January 2018 that Jakoita had received the "offer" (signed the deed of sale) from Nu-Line. The same would apply to ZK4, which, albeit signed in the conventional way, was also scanned and emailed, but for the first time on 29 January 2018.

72. If clause 18 required Aarifah, in order to exercise its right of pre-emption, to take the first step of making a compliant written offer within 48 hours, then, if the 48 hour period commenced on 16 January, the 29 January offer and the 16 March letter would both be too late to serve as an exercise of the right.

73. It is also highly artificial to regard the letter as constituting an offer to purchase, made by the attorneys on behalf of Aarifah, with the requisite authority to do so, as required by the Act. For one thing, this was the furthest thing from their contemplation or that of Aarifah. For another, what were the terms? Was it the terms of the Nu-Line OTP? This is difficult to accept given the intervention of ZK4 and the email exchanges in February about the commission. Was it ZK4, but with R140,000 added by way of commission?

74. And what is one to make of the not insignificant problem that ZK4 designated Khan himself as the purchaser?

75. These puzzles are a good illustration of the social and legal purpose served by the principles established in the cases set out above – that the exercise of a pre-emptive right in relation to the sale of land must be attended by the formalities that attend the sale of land.

76. I do not, however, agree with counsel for Jakoita that, for the valid exercise of the right, Aarifah was required, not only to despatch its compliant offer within the 48 hour period, but also to achieve the execution of its offer by Jakoita. This would entail the rather startling result that the holder would lose its right, even if it sent the compliant offer within the period required for its exercise, but did not manage to compel the grantor to countersign the offer *"in time"*. I think this goes too far, and Nu-Line, correctly, in my view, did not make common cause with this submission. One must distinguish the steps required to be taken for a valid exercise of a pre-emptive right, on the one hand, from the further steps that are required to be taken to make the exercise of the right capable of creating a deed of sale. The fact that the latter requires bilateral compliance, whether voluntarily or coerced by a court, does not mean the former does as well.

(c) "respond"

77. We have arrived at the point where it must be accepted that, if the right under clause 18 had to be exercised within 48 hours of the email received from Jakoita on 16 January, advising of the Nu-Line OTP, then it was not effectively exercised, whatever happened between Aarifah and Jakoita after that.

78. But this leaves an issue I debated with counsel, namely what was to be made of the decree in clause 18 that Aarifah had to "respond" within 48 hours?

79. Pre-emptive rights may, as I have said, assume several forms. Some regulate in some detail the steps that must be taken to trigger them. Others stipulate nothing more than that someone has a right of first refusal. This one requires the tenant to "respond" within 48 hours. In fact, it states that, should there be a desire to sell, the tenant will have the first option to buy and will be *"given 48 hours to respond"*.

80. I put to counsel that this may well simply require an informal response, along the lines of the 16 January email, which would then attract an obligation on the Seller to engage with the tenant in relation to the exercise, within a reasonable time, of the option to buy.

81. This, as Jakoita submitted, was not Aarifah's case. It is fair to say it was common cause that the "48 hours to respond" referred to a period for the exercise of the pre-emptive right. But that is not necessarily fatal for this being the correct interpretation of the clause.

82. Nevertheless, on reflection, I think the parties were correct to proceed from the common assumption that the period in question was to be fit into the recognised rubric of a fixed period for the exercise of the pre-emptive right. This, as counsel for Nu-Line submitted, made commercial sense of the clause, a significant element in favour of an interpretation.[21]

[21] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 18.

83. The clause did not, as counsel for Nu-Line pointed out, give rise to an entitlement to commence negotiations. It gave rise to an entitlement to exercise a pre-emptive right, and to do so within a fixed period. This must mean to do that which the law now requires be done by the holder in the case of sales of land – submit a compliant written offer.

(d) No 48 hours until Seller made an offer – ***Van Deventer***

84. There was more fancy footwork.

85. Counsel for Aarifah submitted that, in order for Jakoita to trigger the pre-emptive right, it was obliged to make an offer to Aarifah on the terms of the Nu-Line offer, complying with the formalities of the Alienation of Land Act.

86. This would mean that the occurrence of the contingency provided for in clause 18 was insufficient for the 48 hour period to commence, and even notification of the occurrence of the contingency was insufficient, because Aarifah was entitled to expect an offer from Jakoita, which it, Aarifah, then had 48 hours to accept. Applying *Van Aardt* and *Mokone*, then, and with hints of the "obligation to make an offer" that Ogilvie-Thompson JA had held was capable of being exacted by specific performance, but the majority in *Oryx* strongly doubted was so capable, the onus was on Jakoita as grantor to make the offer.

87. There is concededly some suggestion of such an obligation in the passages from Lubbe quoted with apparent endorsement in *Mokone*.[22]

88. But, as counsel for Jakoita pointed out, the strong doubt expressed in *Oryx* has not been dispelled in any subsequent decisions. The cases strongly support the notion that the holder wishing to enforce its right must make an offer, not that there is no right to exercise until an offer has been made to it. One must distinguish the vexed question whether an offer can be exacted from the grantor from the different question whether the right need not be exercised unless and until such an offer has been forthcoming.

89. I am not aware of any authority to the effect that even the *coming into effect of the contingency giving rise to the right to exercise the pre-emption* must itself comply with the formalities in the event that the contract in question contemplates notification of the holder for the contingency to be triggered, as this one concededly appears to do.

90. Aarifah relied heavily on the decision in *Van Deventer* [23] in this regard.

91. The relevant aspects of this decision are somewhat bedevilled by the ghost of Ogilvie-Thompson JA's right to specific performance to exact an offer, and the agnosticism expressed about the existence of this right by the unanimous court in *Hirschowitz* after the strong doubts in this regard from the majority in *Oryx*.

92. In *Van Deventer* the third party, to whom an option had been granted contrary to a pre-emptive right over a farm, brought proceedings to compel transfer in terms

[22] Para 62.

[23] *Van Deventer v Ivory Sun Trading (Pty) Ltd* 2015 (3) SA 532 (SCA).

of his option. The seller and the holder were brothers. They communicated with each other only through attorneys. The seller's farm had been bequeathed to him subject to a pre-emptive right held by his brother to buy the farm "at a Land Bank valuation". The seller wanted to sell the farm to IST, and granted IST an option to purchase the farm. He asked his brother to waive his right, saying that, in the event of refusal, he would be compelled to cancel the option to IST. The brother refused. The Land Bank was unwilling to offer valuations, and this necessitated a journey to court, all the way to the Supreme Court of Appeal, as the seller adopted the attitude that this meant the right of first refusal had fallen away for being impossible to implement. The Supreme Court of Appeal did not agree with the seller. He was stuck with the pre-emptive right. Eventually, he sold the farm to his brother, ostensibly pursuant to the pre-emptive right. There, as in this case, there were then contending sales, and whether the pre-emptive right had been validly exercised determined priority. IST contended that the brother's right to exercise his pre-emptive right had prescribed, as he had purported to exercise it more than three years after the relevant trigger event had arisen.

93. Back to the Supreme Court of Appeal went the matter. The relevance for Aarifah's argument in the present case was the finding that the holder brother's right (or debt) to exercise the pre-emptive right had not prescribed, because, in order for the holder brother to have been able to sue on his right, *he would first have needed to have received an offer from the seller brother.*

94. At first blush, this appears to support Aarifah's argument. It is, however, against the grain of the authority cited above. What seems clear from the decision, however, is that it was essentially a matter of interpreting the specific wording of

the right at issue in that matter. The right was expressed as follows, as translated by Nugent JA in the first appeal:[24]

> *"'If [Johannes] after the death of the survivor, decides to sell [Dartmouth] then our son Christoffel [the appellant] . . . must be given the first option to purchase the said property at the Land Bank valuation as established at the time of the sale. The option must be exercised in writing within a period of 60 (sixty) days after the option has been given."*

95. Schoeman JA, for a unanimous court, held as follows:[25]

"[36] In Hirschowitz Corbett JA said the following with regard to the exercise of a right of pre-emption and specific performance:

'It seems to me that in order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor failing to recognise or honour his right, to claim specific performance against the grantor (assuming that [h]e has such a right), the right of pre-emption itself should comply with the Formalities Act. Were this not so, the anomalous situation would arise that on the strength of a verbal contract the grantee of the right of pre-emption could, on the happening of the relevant contingencies, become the purchaser of land. This would be contrary to the intention and objects of the Formalities Act.'

[My emphasis.]

[37] Specific performance can only be ordered if the holder of such right had been presented with a written offer which had then been accepted. According to the wording of the right as contained in the title deed and its context, it is clear, viewed objectively, that an option had to be given which complied with the formalities as prescribed in s 2(1) of the Alienation of Land Act 68 of 1981. If such an offer was not presented the appellant would not have been able to exercise his right, or claim specific performance.

[38] Therefore, the appellant did not have a complete cause of action for specific performance, as Johannes did not make a written offer to the appellant to exercise his right of pre-emption."

96. The first problem seems to be that two different kinds of "specific performance" were at issue in these passages. The first "specific performance" in the quote from *Hirschowitz* was that assumed agnostically in that case to exist, namely of a right to compel the grantor *to make an offer*. The second specific performance

[24] Para 5 footnote 2.
[25] Paras 36 to 38.

referred to in paragraph 37, was specific performance to enforce the sale which would have occurred pursuant to an offer and acceptance of the offer.

97. Paragraph 37 of *Van Deventer* seems to be authority only for the proposition that there was no right to specific enforcement of the latter kind unless and until there had been an offer in terms of the pre-emption right, which was then accepted by the holder, and that this meant the relevant debt in question had not prescribed.

98. Be that as it might, paragraph 39 does appear on the face of it to support Aarifah's reasoning:

> *"[39] In the premise I am of the view that the respondent failed to show that there was a trigger event that initiated the running of prescription. The trigger event, according to the wording of the clause, would be the granting of a written option, and in that event the right to purchase, if not exercised, would lapse in 60 days."*

99. But the critical point here was that the right in question obliged Johannes to give his brother an option to buy at the Land Bank valuation, and that his brother would then have 60 days "*after the option has been given*" [26] to exercise his right. The "*giving of the option*" was to make an offer at the Land Bank valuation.

100. It was clear in *Van Deventer* that the mechanism prescribed in the right envisaged a step to be taken by the seller brother to "give the option at the Land Bank valuation". This was held to entail the furnishing of a valid offer. Without this, the period of 60 days had not started running, nor could the claim prescribe.

[26] "nadat sodanige opsie gegee is".

101. The case does not lay down the general principle contended for by Aarifah – that, in order to trigger a pre-emptive right that must be exercised within a given time period after a contingency arises, the seller must in fact first make a valid offer consistent with the pre-emptive right.

102. Nor do the words of clause 18 in the instant case demand a reading similar to that adopted in *Van Deventer*. Here, there was no specified pricing mechanism (like a Land Bank valuation) at which the option was to be "given", nor, more importantly, was the 48 hour period formulated with reference to the step of giving the option. What was to be "given" here was a period (48 hours), i.e. an opportunity, not the option itself – the tenant was said to "have" such option once the seller desired to sell.

103. In any event, this case based on *Van Deventer* led Aarifah, and this application, into choppy waters. I asked counsel where the grantor's offer was in the instant case. Counsel was constrained to argue that the first offer from Jakoita that triggered the right was made on 12 April 2018, when ZKS26 was signed, which was then signed in acceptance five days later by Aarifah.

104. There are several difficulties with this.

105. First, we have moved far from the case advanced in the papers. In fact, as counsel for Nu-Line pointed out, the application asserting that the right of pre-emption had been exercised, and seeking relief based on this, was launched on 3 April 2018, some weeks before, according to this argument, the right was even triggered for the first time.

106. Second, it is difficult in the circumstances to decide what to make of what was going on in January and February 2018, with the email exchanges on the 16th and 23rd, followed by ZK4 and the interactions about better offers, culminating in the demand in March, if the window period for exercising the right of pre-emption had not even opened yet.

107. Third, Aarifah would now have moved to a point of asking this court to find, on the "separated issue", that the right of pre-emption had in fact been exercised by means of the execution of the deed of sale, ZK26, in relation to which the parties were still to file affidavits. I would have to make a finding in the teeth of the separation order that the incomplete evidence in relation to ZK26 was sufficient to constitute exercise of the pre-emptive right.

108. Fourth, Aarifah's acceptance of ZK26 did not occur within 48 hours of the offer on 12 April 2018, but only five days later. If Nu-Line were entitled to say the attempts in January or March were too late, why can it not say so with respect to the attempt in April?

109. It is true that, after *Mokone*, nothing stops the parties from concluding, or amending, a pre-emptive right in respect of the sale of land informally. But the terms of the lease contained a no variation except in writing clause. If the execution of ZK26 amounted to a tacit written variation of the 48 hour period, this would have occurred after the period had expired, something the third party could validly invoke.

110. For the several reasons set out above, the submission in respect of the window period falls to be rejected.

(e) *Invoking ZK26 as subsequent conduct?*

111. Aarifah had another point on ZK26.

112. It was argued that ZK26 was good evidence by way of subsequent implementing conduct, of what the parties intended in respect of the right of pre-emption, and that this resurrected the argument considered above on what was meant by "respond". ZK26 confirmed that the parties did not intend the right of pre-emption to have been properly exercised within 48 hours – but that as long as an intimation was given within 48 hours, they were free to finalise the resulting contract even months later, in formalising the exercise of the pre-emptive right.

113. Reliance was placed on the wording of clause 20 of ZK26 to the following effect:

> *"This agreement is a formalization of the agreement concluded between Aarifah Security Services CC and Jakoita Properties (Pty) Ltd*".

114. This handwritten clause appears to bear the initial of one of the parties only (apparently the Aarifah representative), whereas the previous handwritten clause, in a different handwriting, bears the initials of both. This is some indication of the perils of deciding this application on the contents of ZK26 when further affidavits are still to be filed about it.

115. Be that as it may, it appears to me that, where a contending purchaser's rival rights are at issue, the subsequent conduct of the parties to the pre-emptive covenant must be approached with caution when it comes to the question whether the pre-emptive right was properly exercised. This is not quite the situation that gave rise to the proposition laid down in *Aussenkehr Farms* [27] that a third party could not set up its own interpretation based on the wording of a contract the contracting parties to which agreed on a different meaning.

116. It can hardly be the case that the period for the exercise of the pre-emptive right could expire, and the seller and grantor could thereafter agree amongst themselves that it had in fact not expired, for the rival third party purchaser to be non-suited in its contending right based on this re-creation of history by the grantor and holder. In *Van Deventer*, the court did not suggest it was not open to the third party to challenge the exercise by the brother of his pre-emptive right merely because the brothers had proceeded to conclude a sale.

117. It should also be borne in mind that, unlike the situation in *Aussenkehr,* in the instant case it is Jakoita's case, as one of the parties to the contract, that the right of pre-emption had *not* been exercised. For reasons that appear obscure and in relation to which enlightenment was not forthcoming, Jakoita is apparently contending that the sale to Nu-Line enjoys priority, apparently leaving it exposed to a claim by Aarifah on the ZK26 sale, should it prevail in this contention, whereas, if Aarifah were to prevail on the present dispute, it would seem unlikely that the execution of the Nu-Line deed in December 2017 would create a liability on the part of Jakoita, as Nu-Line was apparently aware of the terms of the lease.

[27] *Aussenkehr Farms (Pty) Ltd v Trio Transport CC* 2002 (4) SA 483 (SCA) paras 25 and 26.

I must not be taken to make findings in this regard. I merely point to further reasons why it is perilous indeed to base any findings in this round of litigation on the contents of ZK26.

(f) Stringing along?

118. The case is disquieting in some respects.

119. It appears that, on 16 January 2018, Aarifah was intending to exercise its pre-emptive right, and the parties then acted towards each other as if the to and fro that ensued in January and February was a way of having the pre-emptive right perfected, or at least of trying to do so. And then, after the interdict, they concluded a sale. Can the grantor of a pre-emptive right give notice of the trigger event, receive notification of an intention to exercise the right, co-operate in negotiating terms with the holder, and then turn around and say the period for exercise is over if a proper compliant offer had not been received in the specified period?

120. I suppose there are several answers to this.

121. First, this is in principle no different to engaging orally with someone for the sale of land and then at the last moment pulling out. A pre-emptive right to the sale of land is a formal animal that, like a sale of land itself, must be exercised according to its terms, given the potential of creating rights *in rem* and the kinds of contending successive sales that may arise such as in these cases. The cases discussed above relating to the formalities required for perfecting the right would

make little sense if the right could nevertheless be held to be validly exercised to bind the seller in some way, without actually being validly exercised.

122. It is possible that cases may arise where a right is frustrated by the conduct of the seller, or someone is fraudulently misled to his detriment, and fictional fulfilment or something akin to it may be asserted.[28] No such case was made out here.

123. Second, however, in the instant case it must be borne in mind that, even if, contrary to the findings above, Aarifah were entitled to rely on Jakoita's conduct after the 16 January email, to the effect that Jakoita would await a formal offer from Aarifah to perfect its pre-emptive right, this could never be a right to commence a series of negotations, which, if ultimately yielding a sale, must be taken to be the implementation of the pre-emptive right. ZK4 on 29 January 2018 was not good enough, as, even leaving aside its other deviations from the Nu-Line offer, it was based on the mistaken view that it could offer R150,000 less than Nu-Line because no commission was payable, when in fact commission was payable.

124. Third, after Aarifah was confronted with the need to make a better offer, it failed to do so. The furthest it went was to write an equivocal email in which it expressed a willingness to pay an additional R140,000 by way of commission, but then also told Jakoita *"Be that as it may, you can decide in which way you would like to proceed".*

[28] See, for example, cases such *as Du Plessis NO v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA).

125. It is inexplicable, from Aarifah's point of view, why the 6 February exchanges were not followed up with a better offer before the demands were issued in March. It must be remembered that Jakoita's version on oath, via Pereira, is that Khan refused to increase his offer and wanted instead to pay the commission by way of cash and not to reflect this on the offer. This is a respondent's version in motion proceedings for final relief, and is at least consistent with the non-eventuation of any better offer from Aarifah.

CONCLUSION

126. I am grateful to all three counsel for the high calibre of their submissions and the quality of the debate, which assisted me greatly in deciding some difficult questions.

127. The answer to the separated issue on the papers, with some slight revision to the question so as not to restrict it to the month of January 2018, is accordingly the following:

> "The applicant did not exercise its right of pre-emption in terms of clause 18 of the lease concluded in September 2017".

128. Given the way the notice of motion has been amended with the deletion of the original prayer (a), the import of which I had to glean from the heads of argument in the amendment applications, there is no specific prayer at issue before me in

the notice of motion to grant or to dismiss. I am instead merely to answer the question posed for determination as a separated issue in this application by the order of 18 October 2019.

129. I accordingly make the following order by way of a determination of the separated issue:

1. **It is declared that the applicant did not exercise its right of pre-emption in terms of clause 18 of the lease concluded in September 2017.**

2. **The applicant is directed to pay the costs of the first, second and fourth respondents, this to include the costs of the first respondent in the interlocutory application that yielded the order of Keightley J on 18 October 2019.**

21/9/20

Frank Snyckers

Acting Judge

21 September 2020

Date of Hearing: 1 September 2020 [Zoom]

Judgment Delivered: 21 September 2020

APPEARANCES:

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