**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**
**WESTERN CAPE DIVISION, CAPE TOWN**

Case number: 7836/2020

Before: The Hon. Mr Justice Binns-Ward
Hearing: 6 October 2020
(Supplementary written submissions were made later.)
Judgment: 4 January 2021

In the matter between:

**PLATTEKLOOF RMS BOERDERY (PTY) LTD** Applicant

and

**DAHLIA INVESTMENT HOLDINGS (PTY) LTD** First Respondent
**REGISTRAR OF DEEDS** Second Respondent

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**JUDGMENT**
**(Delivered by email to the parties' legal representatives and posting on SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 4 January 2021.)**

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**BINNS-WARD J:**

[1] The first respondent company owns a farm near Riversdale called Plattekloof.[1] It consists of eight separately registered portions of land. The applicant rents two of them, namely Remainder of the Farm Hottentots Bosch, Farm 80 Riversdale, in extent 424,76 ha, and Portion 5 of Farm 90 Riversdale, in extent 443,1839 ha. The lease runs for a five-year period, terminating on 1 April 2023.

[2] Clause 10 of the lease agreement affords the applicant a right of pre-emption. It provides:

> 10. **Right of First Refusal**
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> 10.1 Provided that the Lessee has complied with all of its obligations under this agreement, the lessee shall have the right of first refusal to purchase the Premises on terms and conditions the same as nor (*sic*) no less favourable than those offered by a bona fide third party to the Lessor and the Lessor shall deliver written notice to the Lessor (*sic*) specifying the terms and conditions of such offer, and the Lessee shall have 14 (fourteen) days thereafter in which to accept or reject the offer by written notice, failing which the Lessor shall be entitled, subject to the Lessor (*sic*) commitments under this agreement, to dispose of the property to any third party on the terms originally offered for a period of 60 (Sixty) days, failing which this right of first refusal shall revive.

[3] On 7 April 2020, the first respondent entered into a deed of sale in terms of which it sold the entire farm (i.e. all eight portions) to Swellendam Plase (Pty) Ltd for R17 million. The agreement was a globular transaction; it did not ascribe a price to each of the constituent portions of the farm individually. It is therefore not possible to discern a transactional value for the two portions of the farm that are the subject of the right of pre-emption.

[4] The character of the different portions making up the farm is not uniform. The land hired to the applicant does not have any buildings on it, but it contains a proportionately greater extent of arable land than the other portions. The arable land, or at least part of it, has

[1] There is more than one farm bearing the name Plattekloof in the Riversdale area. The applicant is the owner of another farm of that name, which adjoins the first respondent's farm.

apparently been improved and well maintained by the applicant since it took possession in terms of the lease. If anything, the portions leased by the applicant are likely to have improved in value since the commencement of the lease by virtue of the land having been worked on since then, while the land on the other portions, which has been left idle, has probably deteriorated in quality and therefore diminished in value during that time.

[5] The other portions, however, have building improvements on them. There are two dwelling houses, a number of labourers' cottages, a dairy and a shed on the other portions of the land. The buildings are in varying states of repair.

[6] The individual portions consequently do not lend themselves to valuation on a pro rata basis according to their hectarage. It is worthy of mention, however, that were the whole farm nevertheless to be indiscriminately valued per hectare with reference to the agreed selling price of R17 million for the whole, the result would be a value of R7 615,46 per hectare,[2] and the combined value of the two portions subject to the applicant's right of pre-emption would consequently be R6 609 106,66.

[7] The first respondent put in evidence a formal valuation and correspondence pertaining to the negotiation of the possible sale of the farm or portions thereof to other interested parties to show that the portions leased by the applicant were more valuable per hectare than the other portions. The formal valuation, which was done as of 26 March 2020, attributed a market value of R6,14 million to the pre-emption property. The correspondence shows that a value as high as R7 million has been mooted for the two portions in the context of the first respondent's efforts to sell them. The effect of these indications of value only confirms the impression already formed, based on the distinguishing features of the various portions, that it would not

[2] The total area of the eight portions of the farm taken together is 2 232,3 ha.

be feasible or appropriate to apportion the price stipulated in the deed of sale per land measurement unit in relation to the whole.

[8] Upon learning of the sale of the farm to Swellendam Plase, the applicant sought to enforce the right of first refusal clause in its lease agreement by demanding that the leased property be sold to it. It proposed that the matter might be settled amicably on the basis that it would acquire the leased portions for R4 million and Swellendam Plase would take the other six portions for R13 million. Those figures were not plucked from thin air. They were predicated on Swellendam Plase's expressed interest, as recently as mid-March 2020, in acquiring the six portions for R13 million and on previous discussions between the shareholders of the applicant and the first respondent about the purchase of the two leased portions by the former for R4 million. They are, in essence, the formula for the relief sought by the applicant in these proceedings.

[9] The notice of motion was divided into two parts. In Part A, the applicant sought interim interdictory relief pending the determination of the final substantive relief applied for in Part B. The parties took an order by agreement from Le Grange J on 3 July 2020 disposing of the application for interim relief. The costs associated with the proceedings in respect of Part A were 'stood over for later determination'. In the absence of any argument to the contrary, I have taken that to imply that such costs would follow on the result of the application in Part B that is currently before the court.

[10] The applicant sought the following relief under Part B of the notice of motion:

> 1. That the first respondent is ordered to comply with his contractual obligation to applicant in terms of clause 10 of the lease agreement between the parties (attached to the founding affidavit as 'JAV1') by delivering to applicant, within seven days of this order, a written notice offering to sell the leased properties to applicant for R4 million on the same terms and conditions as those contained in the sale of farm agreement attached to the founding affidavit as 'JAV2'.
> 2. That applicant will have 14 days after receipt of the written offer contemplated by paragraph [B]1 , above, to accept or reject it by written notice to the first respondent.

3. That the first respondent be ordered to pay the costs of this application which includes the wasted costs occasioned by the June 4th cancellation.[3]
4. That the Honourable Court grant such further and /or alternative relief as it deems fit.

[11] Mr Gunther Schmitz, the sole director and sole shareholder of the first respondent company, had agreed in principle with Mr Albert Vermaak, a director and the sole shareholder of the applicant company, as long ago as early 2018 (before the execution of the deed of lease) that Vermaak or the applicant company would purchase the two portions for R4 million. (Vermaak had actually first indicated his interest in buying the land a year earlier, in February 2017, when he wrote to Schmitz saying '*Albert Engelbrecht* [the then longstanding tenant of the whole farm, and also a neighbouring landowner] *also told me that you are considering to sell the small portion of the farm which are mainly field. I can maybe help you to sell if you are willing to work around R5000 to R6000 per hectare, which is the current value of field in the area.*'[4]) Schmitz had made it clear, however, that he expected to realise R18 million (nett of agent's commission) for the farm as a whole, and that he was not prepared to proceed with the mooted sale until the water rights that he believed attached to the two portions[5] had been transferred to the remainder of the farm. It is evident that Schmitz was advised by his brother in March 2018 (also before the execution of the deed of lease) that it would be imprudent to sell off the two portions separately unless he also had a committed buyer for the rest of the farm.

[3] The wasted costs were those related to the preparation of application papers before the sale agreement was cancelled. Amended papers had to be drawn when it became known, very shortly prior to the issue of the application, that the sale to Swellendam Plase had been cancelled.

[4] A sale of the pre-emption property at the figures mentioned by Vermaak would give a purchase price in the range between R4 340 000 and R5 200 000, but this is not necessarily an accurate indication of Vermaak's estimation of the value of the land as not all of it was 'field', i.e. arable.

[5] In terms of the National Water Act 36 of 1998.

[12] Schmitz's efforts to dispose of the entire farm continued throughout the entire period between the execution of the deed of lease of the two portions to the applicant on 13 April 2018 and that of the deed of sale to Swellendam Plase two years later, in April 2020. Vermaak was an active and engaged role player in the exercise. Consideration was given during that time to the alienation being effected either by the sale of the land or by way of Schmitz selling the shares in the first respondent company.

[13] In November 2018 Schmitz sold the entire shareholding in the first respondent company to one Louis Botha, who thereafter took occupation of part of the farm. Botha failed to perform in terms of that agreement, however, and the transaction was cancelled, which precipitated long drawn out proceedings for his eviction.

[14] In April 2019, Vermaak spoke to Schmitz about the submission of a so-called 'combined offer' for the shares in the first respondent company in the amount of R16,5 million, with the idea that he (Vermaak) would thereafter sell the remainder of the farm out of the company. On 1 June 2019, he indicated in an email to Schmitz that the applicant would be amenable to buying the whole farm for R17 million subject to various conditions. He sent an email to Schmitz on 8 June 2019 referring to his (Vermaak's) endeavours to reach an arrangement with one 'Piet' (Uys) to buy the 'main section' of the farm for R11 million, which would leave him (Vermaak) '*in for R6 million for the remainder*'. Vermaak at that stage offered to buy the pre-emption property for R5 million with an option until the end of 2019 to also buy the main portion for R12 million. It was apparent that Vermaak's intention was to exercise the option only if he could find a buyer for the remainder for at least R12 million during that period.

[15] On 18 July 2019, Schmitz replied to Vermaak that he was happy with the price offered for the two portions but found the idea of granting an option on the remainder of the farm problematic. He pointed out that it would be difficult to sell the remainder if the portions that

the applicant was leasing were sold separately. Schmitz suggested that Vermaak go in with R5 million and get someone referred to as 'Takkies' (elsewhere referred to by Vermaak as 'Piet Takkies') to go in for the rest with R11 million.

[16] All of these ideas and proposals came to nought. I have described them in some detail to show that Vermaak was aware at the time the right of first refusal was granted that Schmitz wanted to dispose of the entire farm and that there might be issues with his ability to do so on the basis that the two portions let to the applicant be sold separately from the remaining portion. I think it is noteworthy in the circumstances that the pre-emption clause did not make provision that in the event of an acceptable offer being received for the whole farm, the first respondent would be obliged first to offer the two portions to the applicant separately on some or other determined basis. The lease was drafted by the first respondent's attorneys. On its face the right of first refusal appears to have been worded in a way that would not constrain the first respondent's ability to dispose of the farm as a whole. Whether it actually had that effect is, of course, a question of construction. The pre-emption clause certainly did not bind the first respondent to offer the two portions to the applicant at any price if it received an acceptable offer for the remaining six portions on their own.

[17] Vermaak heard from a local property agent, one Cornelis van Tonder, on or about 12 March 2020, that Swellendam Plase was going to purchase the six portions for R13 million. An email by Cornelis van Tonder to the first respondent's attorney on the same date, a copy of which was included as part annexure GS 19 to the answering affidavit made by Schmitz on behalf of the first respondent in these proceedings, suggested that Lourens van Eeden (Swellendam Plase) had an option to purchase the remainder of the farm for R13 million that he wished to exercise. No such option agreement has been produced, however, and Schmitz has denied that a firm agreement was in place. Van Tonder had previously been informed by Schmitz that Vermaak was willing to buy the two portions rented by the applicant for

R5 million. Van Tonder deposed to a confirmatory affidavit that, amongst other matters, confirmed the following averments in Schmitz's answering affidavit:

> 63. On 27 February 2020 Mr van Tonder informed me that his client (Mr van Eeden, via Swellendam Plase (Pty) Ltd) was interested in buying the remaining six portions for R13 million. This appears from the email attached hereto as "**GS 19**".
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> 64. We proceeded to engage in negotiations. After a further visit to the farm Mr van Eeden informed me that the value of the two portions leased by the applicant was higher than R5 million, while the remaining six portions were not worth R13 million. He would prefer buying the whole farm. Mr van Tonder subsequently informed me that the buyer wanted to purchase the whole farm and not only the remaining six portions separately (the relevant email correspondence is attached as "**GS20**").

It would therefore appear that even if Van Eeden or Swellendam Plase had been granted an option as stated in Van Tonder's email, they were not willing to exercise it because Van Eeden had concluded that the six portions were not worth R13 million.

[18] According to Schmitz, whose evidence in this respect is confirmed by Van Eeden, it was after the two men had inspected the farm together on 25 March 2020, when Schmitz, who lives in Cape Town, was there for the eviction from the property of the abovementioned Louis Botha, that agreement was reached on the sale of the whole farm for R17 million. Schmitz testified that the price represented a reduction of R1 million on the amount that he had hoped to realise for the farm. He stated '*We agreed to reduce the price for the whole farm to R17 million based on the bad condition of the remaining six portions. In agreeing on the purchase price for the farm as a whole, we did not differentiate between the six remaining portions on the one hand, and the two leased portions, on the other hand, save to the extent that the six remaining portions were, because of their condition and the funds that would be required to rehabilitate them, regarded as having a lower value as opposed to the two leased portions. As subsequently reflected in the Swellendam contract, the eight portions were sold as an indivisible transaction.*'

[19] Mr *Potgieter* SC, who appeared for the applicant, submitted that reference to the surrounding circumstances showed that it was obvious that the price of R17 million offered by Swellendam Plase comprised the R13 million that it had previously been willing to pay for the six portions and the R4 million that the applicant had indicated to the first respondent it would be willing to pay for the two leased portions. In my judgment the history summarised above does not bear out that contention. On the contrary, it is apparent that at the time that Schmitz was favourably inclined to disposing of the six portions to Swellendam Plase for R13 million, he (and Van Tonder, who was responsible for introducing Van Eeden to the proposition) were under the impression that Vermaak would buy the two portions leased by the applicant for R5 million. It was only by selling the whole farm to Swellendam Plase at a reduced price that Schmitz would be able to achieve his longstanding object of disposing of the property entirely. Schmitz had inherited his shareholding in the first respondent from his late mother, and had no interest in farming.

[20] The first respondent and Swellendam Plase were not amenable to the applicant's settlement proposal that it take the pre-emption property for R4 million and Swellendam Plase the rest for R13 million, but they had second thoughts, possibly for tax reasons, about the manner in which the transaction that they had concluded had been structured. Therefore, even before the institution of the current application, but at a stage when papers had already been prepared for proceedings to be instituted by the applicant (hence the claim for 'wasted costs' mentioned below), the first respondent and the third-party purchaser executed a deed of cancellation in terms of which the sale was cancelled.[6] It is no secret that they intend to substitute the cancelled sale of land agreement with a contract whereby Swellendam Plase will instead acquire Schmitz's shares in the first respondent. The substitute agreement, if

[6] This explains why it was not necessary for Swellendam Plase (Pty) Ltd to be joined as a respondent in the current proceedings.

concluded, would not impact on the pre-emption agreement for it would not involve the sale by the first respondent of any part of the farm. The applicant contends, however, that the cancellation of the sale agreement is irrelevant to its claim because its right to be offered the leased portions was triggered when Swellendam Plase indicated its preparedness to purchase the property on the terms and conditions set forth in the deed of sale. (The applicant did not assert any entitlement to an interdict prohibiting the sale by Schmitz of his shares in the respondent company.)

[21] The primary question in this case therefore calls for the determination of the applicant's position in terms of clause 10 of the lease when 'the premises' in respect of which it enjoys a right of pre-emption become the subject of an offer to purchase or a contract of sale as an integral part of a larger package. Counsel were agreed that there is no South African authority directly in point. They were also agreed, correctly so in my judgment, that the so-called 'Oryx mechanism', whereby the holder of a right of pre-emption may step into the shoes of a third party who contracts to acquire the subject property was not available in the circumstances of the applicant wishing to acquire only the leased portions.[7] Leaving aside any possible

[7] The label '*Oryx mechanism*' is derived from the name of the decision of the late Appellate Division in *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigte Bäckereien (Pty) Ltd en Andere* [1982] ZASCA 1 (28 May 1982); 1982 (3) SA 893 (A), in which it was held, differing in this respect from the view expressed by two of the judges of appeal (Botha and Potgieter JJA) in *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A); [1967] 3 All SA 367 (A), that the holder of a right of pre-emption had a right to specific performance to acquire the subject property if the contingency to which the right had been granted was realised. (*Owsianick* was a decision on an exception taken to the rights grantor's plea in that case, which was essentially to the effect that the exercise of the right had not been triggered on the facts. The court therefore did not have to determine whether the plaintiff in that case should be awarded the specific performance that he claimed. Ogilvy Thompson and Williamson JJA, having regard to the wording of the right of pre-emption clause, thought that specific performance was an available remedy, whilst the fifth judge on the panel, Wessels JA, refrained from voicing an opinion on the point as the nature of the plaintiff's exception did not directly raise it for determination.) In *Associated South African Bakeries* (at pp. 907D-908D), Van Heerden JA, consistently with his findings as to the position in the Roman-Dutch law, held that our law allows that (i) in the event of a seller concluding a sale with a third party in breach of a right of first refusal agreement, the grantee of the right of pre-emption can by unilaterally declaring its intention step into the shoes of the third party, with an agreement of sale thereupon deemed to come into being between the seller and the grantee and (ii) if transfer of the property has to the third party has already taken place, the grantee cannot pursue its right to obtain the property against the third party unless the latter took transfer of the property with knowledge of the right of pre-emption. The stepping into the shoes remedy involves the so-called 'Oryx mechanism'; see T. Naudé, *The Rights and Remedies of the Holder of a Right of First Refusal or Preferential Right to Contract*, (2004) 121 SALJ 636 at 637.

difficulties attendant on compliance with the statutory formalities in respect of agreements in respect of the alienation of land, this was because the contract concluded between the first respondent and Swellendam Plase was not for the sale of 'the premises', but was a globular transaction (or 'package deal') for the whole farm of which 'the premises' were just part. Furthermore, the concluded transaction did not determine a price for the pre-emption property considered on its own.

[22] The only reported judgment in the South African jurisprudence that bears to some extent informatively on the type of situation presented in the current case appears to be *Sher v Allan* 1929 OPD 137. The facts in that matter were that the plaintiff-lessee had leased a portion of land in Kroonstad that constituted only part of a registered erf. Clause 5 of the lease provided '*The lessor further agrees to give the lessee the first option to purchase the leased property, should he desire to sell the same during the continuance of this lease. Should the lessee not decide within fourteen days after receiving written notice to purchase, the lessor shall have the right to sell to any third party but such sale to a third party shall not interfere with the validity of this lease or any of the conditions thereof.*' The lessor sold the entire erf to a third party without first offering the leased portion in the manner stipulated in clause 5, and the lessee sued in damages for breach of contract. The court rejected the lessor's contention that the sale of the entire erf to a third party in disregard of the lessee's right of pre-emption in respect of the leased moiety did not, on a proper construction of clause 5, entail a breach of the lessee's right of first refusal.

[23] McGregor AJP defined the lessor's position in the circumstances as follows: '*What in fact was the subject of stipulation was the leased property - the half erf : it was in respect of this that the lessee had a privilege under the clause - and this had to be recognised by the*

*lessor, who could not, as it were, derogate from his own concession, or defeat its operation by his own act. If he wished to sell the whole, he could do so - provided, as to half of what he was willing to sell, he had respect to his undertaking to plaintiff; and his conduct would have to be regulated accordingly. He might either (if he could) arrange to sell the whole erf to plaintiff, or he might expressly give the lessee the preferent call in respect of the leased property, or he might seek to sell in such a way as to have a specific offer in respect of the leased moiety regarding which the plaintiff might interpose his preference, or he might hold his hand until no longer fettered by the lease. But, if the lessor chose to act during the pendency thereof, he could only do so in conformity with its terms and with due recognition of the plaintiff's rights thereunder. If we took a different view we might have this result: that, if the owner chose to sell all his properties at Kroonstad to a substantial purchaser in globulo, it might still be contended that the plaintiff had no cause to complain in that there was no desire to sell the leased half - which might seem to bring one into a somewhat metaphysical sphere.*'[8]

[24] The dicta in *Sher v Allan* might afford support for the notion that the first respondent might have incurred a liability in damages to the applicant had it disposed of the leased property to Swellendam Plase without first allowing the applicant the opportunity to acquire it. They also imply that the first respondent could not ignore the applicant's right of first refusal in respect of the leased premises when it entered into a contract with a third party for the sale of the whole farm that included those premises. By extension, they would also support the notion that the applicant could interdict the transfer of the leased premises to Swellendam Plase if it could show that the contract concluded by the first respondent with Swellendam Plase did not cater for or respect its right of pre-emption. They do not, however, afford authority for the remedy sought in paragraph 1 of Part B of the notice of motion, which is for the enforcement

[8] At pp. 144-145.

of a sale of the leased premises to the applicant at a price determined not by the terms of the sale to a third party but rather at a price to be fixed by deduction from the circumstances that surrounded the conclusion of the contract with the third party.

[25] It is important to note that the terms of the right of first refusal clause in *Sher v Allan* were materially different from those involved in the current matter. In *Sher v Allan*, the clause required the lessor to offer the pre-emption property to the lessee should he desire to sell it during the continuance of the lease. It was for the lessor, and not a third party offeror, to determine the terms upon which he wished to sell his property. I consider that it was the different wording of the clause in issue in that case that informed the court's decision that the lessor could not sell the pre-emption property as part of a package because that would defeat the preference he had granted in terms of clause 5 of the lease agreement. The distinction between the effect of the pre-emption clause in the current case, which might be said to have imposed a negative obligation on the lessor, viz. an obligation not to conclude an agreement of sale with a third party offeror without first offering the property to the lessee on the same terms and conditions as had been offered to it, and that involved in the matter of *Sher v Allan*, which imposed what might be called a positive obligation on the lessor, viz. an obligation, if he wished to sell the pre-emption property, to first offer it to the lessee on the terms he proposed to dispose of it, is confirmed, I think, by the analogy that McGregor AJP considered fell to be drawn between the latter case and the nature of the 'first refusal' analysed by Vaughan Williams LJ in *Manchester Ship Canal Co v Manchester Race Course Co* [1901] 2 Ch. 37 (CA).[9] In other words, the clause in *Sher v Allan* required the grantor to go to the holder if he wanted to sell the pre-emption property and say I have decided to sell the property for such and such amount and therefore, as required by our agreement, I hereby give you the opportunity to exercise your

[9] See *Sher v Allan* at p. 142. A clearer exposition of the relevant passage in the *Manchester Ship Canal Co* case is to be found in *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 933.

right of first refusal. The wording of clause 10 of the lease in the current matter does not have that import.

[26] The difference in the character of grantor's obligations under the contrasted preference clauses affects the type of remedy that would be indicated if the grantor were to act in breach of them. In the example in *Sher*'s case, the obviously appropriate remedy (before the conveyance of the property to a bona fide third party had occurred) would be a prohibitory interdict. In the current case, ignoring for the moment the complicating effect of the package deal sale to Swellendam Plase, the indicated remedy would be a claim for specific performance – in effect, the implementation of the 'Oryx mechanism'.

[27] Mr *Potgieter*, recognising the novelty in the applicant's claim in the context of the sale of the pre-emption property as part of a package deal including adjoining property that was not subject to the preference agreement, sought support for it in the approach favoured by Professor Tjakie Naudé in an article published in the South African Law Journal, '*Which transactions trigger a right of first refusal or preferential right to contract?*'.[10] Naudé framed the following questions for the purpose of the discussion: '*What is the effect of the sale of the pre-emption property as part of a larger package of properties (the so called 'package deal' situation)? Does such a sale trigger or breach the right of pre-emption? If so, must the holder be prepared to buy the entire package in order to exercise her right of pre-emption, because she must step into the shoes of the third party? Does she in any event have a right to buy the entire package, or only the pre-emption property, and if the latter, how is the price calculated? Or would a proposed package deal merely entitle the holder to an interdict prohibiting the grantor from selling until he receives a third party offer for the pre-emption property alone, which the holder can match?*'

[10] (2006) 123 SALJ 461.

[28] Professor Naudé acknowledges that South African case law gives no clear answers to these questions. It is apparent from his review of cases in the United States, which appears to have the richest jurisprudence on the topic, that they can be, and have been, addressed in a variety of ways. Naudé states that there are four conflicting views in the US case law on the effect of the package deal on the holder of the pre-emption right's position.[11] It is crucial, of course, when considering any of these various approaches, to remember that each one of them departs from or is founded upon a construction of the peculiar terms of the pre-emption agreement in issue in the given case. As the English Court of Appeal aptly emphasised in *Bircham & Co, Nominees (2) Ltd & Anor v Worrell Holdings Ltd* [2001] EWCA Civ 775 (22 May 2001) in para 22, '*the effect of a pre-emption clause depends upon its own particular terms*'. The various approaches described in Naudé's article do nevertheless afford a useful basis for a critical analysis of the conceptual considerations involved in determining the applicant's claim.

[29] The first approach, favoured by the Supreme Court of Nevada,[12] is that the package deal does not trigger the right of pre-emption because it entails the sale of something

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[11] The article by Bernard Daskal on which Naudé draws heavily for his own contribution (Bernard Daskal, '*Rights of first refusal and the package deal*', Fordham Urb.L.J. 461 (1995), accessible at https://ir.lawnet.fordham.edu/ulj/vol22/iss2/10 ) identifies *five* different approaches, some of them with subsets within them. Naudé furthermore suggests, with reference to Robert Flannigan, '*The legal construction of rights of first refusal*' (March-June 1997) 76 Canadian Bar Review 1, that there is also a discordant approach to the questions in the Canadian jurisprudence. Flannigan's article introduces his discussion of the situation with the following observation: '*Rights of first refusal tend to be drafted in seemingly straightforward terms. The typical provision requires the vendor to give the holder of the right the first opportunity to purchase the subject property on terms the vendor is willing to accept, usually terms specified in a bona fide offer from a third party. The ostensible simplicity of the typical provision, however, masks an expansive and often problematic default jurisprudence. In fact, a great deal of elaboration is required before it is possible to identify, even in a tentative way, the respective legal positions of the parties involved*'. Professor Flannigan's review of the Canadian jurisprudence led him to conclude (at p. 36) that '*Canadian courts have been hesitant to award specific performance as a remedy in the package sale context*'.

[12] In *Crow-Spieker #23 v Helms Constr. and Dev. Co.,* 731 P2d 348 (Nev. 1987). The judgment in *Crow-Spieker #*, in which 'Tract B' was the pre-emption property that was sold by the grantor (Robinson) to a third party (Helms) in a globular transaction involving a larger piece of land of which Tract B was a part, advanced the following alternative route to the Nevada Supreme Court's conclusion that the holder's claim had to fail: '*If, in the alternative, we viewed Helms' offer as an offer to purchase Tract B, # 23 did not match the terms and conditions of that offer. Robinson had no desire to sell only the smaller portion of his land. An offer for Tract B alone, and for less than its market value, was less favorable than the Helms' offer to purchase Tract B and all the*

completely different. It is an approach that was contended for by the defendant in *Sher v Allan*, and would appear to have been propounded by the first respondent in the current matter because it also took the line that the sale of the whole farm did not trigger the right of pre-emption pertaining to only two portions thereof. I have to agree with McGregor AJP's rejection of the approach as contrived, or as the learned judge put it, one that, on the facts of a case like the current matter, might '*bring one into a somewhat metaphysical sphere*'. A sale of the whole of a farm comprised of a number of sections or portions must, in and of itself, entail the sale of each and every one of those portions. The Nevada approach therefore does not commend itself.

[30] The second approach in the United States identified by Naudé holds that the package deal does not trigger the holder's right of pre-emption, but it does entitle him to interdictory relief prohibiting the grantor from selling the pre-emption property as part of the package.[13] It is not necessary to determine the question because the applicant has not sought interdictory relief other than on a *pendente lite* basis, but in my view it is not an approach that commends itself on principle. Interdictory relief is, after all, predicated on the infringement (actual or threatened) of a right. That begs the question then, if interdictory relief is available, as to the character of the right that is said to be infringed. If one is not to be taken into 'a somewhat metaphysical sphere', one must surely accept, as the court did in *Sher v Allan*, that the sale of something that includes the subject matter of the pre-emptory right necessarily also entails the sale of the matter that is the subject of the right, and therefore acts as a trigger for the exercise of the right.[14] It is a right to buy if the grantor wants to sell; not a right (*unless the terms of the*

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*other property, taking into account the relative values of the various portions of the tract. Thus, even if the right of first refusal was implicated, it was not validly exercised.*'

[13] This was the approach adopted by the New York Supreme Court in *New Atlantic Garden v Atlantic Garden Realty Corp.* 201 App. Div. 404.

[14] In *New Atlantic Garden* supra, the court took the view that the sale of the package did not trigger the right of pre-emption. It granted injunctive relief on the grounds that the package deal was of itself a transaction that would defeat the pre-emotion agreement and that a grantor was in principle not permitted to so order its affairs as to defeat its ability to carry out a pre-existing contractual obligation. In our law a pre-emption agreement generally

*conferring contract provide otherwise*) to prohibit the sale if the grantor is selling the property in terms of a package deal contract.[15] (Being a restraint of alienation, a pre-emption clause must be narrowly construed in favour of the preservation of the grantor's liberty to alienate his or her property; cf. *Robinson v Randfontein Estate Gold Mining Co. Ltd* 1921 AD 168 at 188 and *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 321E.) I consider that the holder would be entitled to a prohibitory interdict in such circumstances only if he or she could show that the package deal was a *male fide* manoeuvre to avoid honouring the right of pre-emption. It would be different, of course, if the terms of the contract bound the grantor to hold the pre-emption property available to be sold only on its own and not as part of a package with some of the grantor's other property.[16] I am unaware of any authority that holds such a rider falls to be implied in the grant of a right of first refusal. Whether a tacit term to that effect might be imputed would depend on the peculiar facts of the given case.

[31] I accept though that this reasoning does not answer the questions whether the holder whose right has been triggered by the sale of the pre-emption property as part of a larger package is then required to buy the whole package or only the component that is subject of the

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does not impose a positive obligation on the grantor to to sell the property see *Aronsen v Sternberg Brothers (Pty) Ltd* 1985 (1) SA 613 (A) at 622A-B, citing the following statement in *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 321F-G), '*A right of pre-emption, moreover, does not normally impose any enforceable obligation upon the grantor of the right, but merely restrains him from selling to a third party, save under the conditions prescribed in the agreement creating that right (Sher v Allan 1929 OPD 137 at 144)*'.

[15] Naudé states (*op cit* at 488) that a holder seeking interdictory relief to prohibit the sale of the pre-emption property '*cannot expect to prevent a package deal more profitable to the grantor without being willing to buy the property at a fair price*'. The difficulty that I have with that approach is that it goes outside the terms of the contract in terms of which the right of pre-emption was conferred. Those terms ordinarily provide that the sale of the pre-emption property will occur at the price that the grantor would be able to sell it at the time to a bona fide third party purchaser. That price would not necessarily correspond to what might objectively be determined to be 'a fair price'. And what would 'a fair price' connote? The market price? Or a price determined by also taking into account matters peculiar to the affected parties' idiosyncratic interests? In the circumstances apparently applied by some American courts, the injunctive remedy would appear to be based on a notional right that is different from that contractually conferred. It seems to me that the only way in which one could rationalise the approach in principle would be by holding it to be based on the implied or tacit implications of the grant of the right of first refusal particularly in issue. I believe that it would be difficult to do on a generalised basis.

[16] Which was how the court interpreted clause 5 of the contract in issue in *Sher v Allan* supra.

right of first refusal, and if the latter, how the price of the component is to be determined. I shall come to those questions presently.

[32] The third approach by the US courts discussed in Naudé's article is that the holder's right to exercise his right of pre-emption embraces the whole package.[17] My own view is that that would depend on the terms in which the right of pre-emption was conferred, and also, perhaps, the nature of the things being sold. As to the latter consideration, it seems to me in principle that if the nature of the things being sold readily permits of a pro rata allocation between the parts of the whole, particularly as to quantity and price, there is much to be said for the idea that the holder's right can be exercised in respect of the part of the package to which it relates without it being necessary for the holder to buy the whole of it. The imputation of a tacit term to that effect could quite readily suggest itself in those circumstances, but again the answer would depend on the peculiar facts of the given case. In the current matter the wording of clause 10 of the lease implies that if the pre-emption properties were the subject of a package deal offer by a third party, the applicant would be entitled to purchase them on the same terms and conditions as the package deal.

[33] Professor Naudé, citing Daskal,[18] says however, that '*requiring the holder to buy the entire package to exercise his right may prejudice the holder unfairly. It has also been said that the risk taken by the holder in respect of unconventional terms relates to the counter-performance undertaken by the third party and the method of payment, not to a collateral*

[17] The decision of the New York Supreme Court for Tomkins County in *Capalongo v Giles* 425 N.Y.S. 2d 225; 102 Misc 2d 1060 (1980) is cited as exemplifying this approach. The facts of a particular case might render this approach impracticable; see Keith T Smith and Shawn HT Denstedt, *Preemptive Rights and the Sale of Resource Properties: Practical Problems and Solutions*, 1992 30-1 Alberta Law Review 57, 1992 CanLIIDocs 224, http://canlii.ca/t/sl9b , retrieved on 2020-12-20, in which the authors opined '*The result in the Capalongo case becomes absurd where more than one party holds a right of first refusal in different portions, must the vendor then offer the whole package to each of the holders of rights of first refusal?*' In my respectful opinion it is misconceived to characterise the result of a judgment in one case as 'absurd' in the context of the postulate of entirely different facts in another notional case. The context will inform not only the question of the proper construction of the contracts concerned, but also the determination of the appropriate remedy.

[18] Daskal, '*Rights of first refusal and the package deal*' supra (note 7).

*agreement with respect to other properties which has nothing to do with the pre-emption property*'. 'Fairness' is the wrong criterion in my view. The issue is rather what the effect of the terms of the contract under consideration is. If the contract is unfair or prejudicial to one of the parties, that party has made a bad bargain. It is only when the unfairness is so unconscionable that it would be against public policy to enforce or uphold the term or contract that a court will relieve the affected party of it. And it does so by holding the contract, or the provision concerned if it is severable, unenforceable, not by crafting a new and fairer contract for the parties. Furthermore, I consider that it would not be an accurate characterisation to describe the sale of the farm as a package to Swellendam Plase as entailing the sale of the pre-emption property in one transaction and the sale of the other portions in terms of a 'collateral agreement'.

[34] As to the fourth approach, which Naudé says is '*preferred by the writers*' including himself, and is also the one contended for by counsel for the applicant: It gives the holder the right to purchase the pre-emption property alone upon the conclusion by the grantor of a package deal with a third party. The approach raises the obvious difficulty as to how the price of the pre-emption property is to be determined. Its supporters have argued that by entertaining a package deal the grantor has caused the impossibility of ascertaining the price he would have accepted for the pre-emption property alone, '*so that the grantor should not be able to complain about losing control over the price when the court fixes it at a reasonable amount*'.

[35] The difficulty I have with that argument is that it entails the court making a contract for the parties for the sale of the pre-emption property at a reasonable price, when the right of pre-emption did not vest the holder with a right to buy it at a reasonable price, but rather at a price determined by a third party offer that the grantor would be willing to accept.[19] The approach

[19] Flannigan op cit supra, at pp. 32-33, expresses the following opinion in support of the imputation of a fair market price: '*The remedy should be granted and the price to the holder should be the fair market value. This*

also seems necessarily to imply that the sale of the pre-emption property as part of a package was a breach of the pre-emption provision. If it is a breach which, as already mentioned, would depend on the terms of the actual contract in issue, then the remedy must surely be in damages or by way of a prohibitory interdict, not by way of some form of fair alternative performance that is not specific performance.

[36] Reverting then to the relief sought by the applicant. For the reason given above, and assuming that the applicant was not in breach at the time of any of its obligations under the lease, I consider that the right of first refusal conferred in terms of clause 10 of the lease was triggered when Swellendam Plase made an offer to purchase the entire farm on terms and conditions that were acceptable to the first respondent. I have explained why there was no merit in the first respondent's contention that the sale of the whole farm did not entail the sale of the pre-emption properties for the purposes of clause 10 of the lease. The respondent's allegation that the applicant had waived its rights under clause 10 is not supported by the evidence.

[37] Upon the triggering of the right, the first respondent became obliged, according to the tenor of clause 10 of the lease, to give the applicant written notice specifying the terms and conditions of the offer it had received from Swellendam Plase and the applicant would thereafter have 14 days in which to indicate by written notice to the first respondent whether or not it intended to acquire the property on same terms and conditions. In other words, in exercising the right to acquire the two erven on the same terms and conditions as the third party was prepared to do, the applicant would, in the circumstances of the offer made by Swellendam

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*price standard is implicit in the nature of a right of first refusal. The parties originally agreed that the price to the holder was to be what a third party would be bona fide willing to pay and what the vendor is willing to accept. This is nothing more than an expression of the notion of fair market value*'. The reasoning is superficially attractive, but it does not accord with reality or the plain import of most pre-emption clauses. It is notorious that bona fide contracts of sale of land commonly occur at prices at variance with the prevailing market value. It is the price stipulated in a bona fide offer that the grantor is willing to accept that generally applies if the right of pre-emption is exercised, not the fair market value of the pre-emption property.

Plase, have to purchase the whole farm for R17 million. It would have to take the whole package because the package deal reflected the terms and conditions upon which Swellendam Plase would acquire the pre-emption property. That would be to give effect to the plain meaning of the language of clause 10. The character of the constituent portions of the farm was such that the property did not lend itself to a pro rata allocation between the parts of the whole. The parties to the pre-emption agreement must have appreciated that when they concluded the agreement of lease including the right of first refusal.

[38] The relief sought by the applicant is inconsistent with the remedy to which I think it became entitled when the first respondent received what it considered to be an acceptable offer from Swellendam Plase, again assuming that the applicant was not in breach of the lease at the time. I do not consider that the applicant, on any approach, became entitled to acquire the pre-emption properties for R4 million. Its contention that the R17 million purchase price for the whole farm was constituted by the R13 million that Swellendam Plase had initially indicated it might be willing to pay for the six portions and the premium on that figure that it offered for all eight was not supported by the evidence.[20] Applying the rule in *Plascon-Evans*, as I have to in the context of the final relief sought by the applicant, I am bound to proceed on the basis of accepting the evidence that by the time that agreement was clinched between the first respondent and Swellendam Plase, the latter had come to the view that the six portions were not worth R13 million and that the pre-emption properties were worth more than the R5 million that its representative (Van Eeden) believed the applicant was willing to pay for them.

[39] It is also clear that even if the court were to have adopted the approach favoured by some of the commentators, described above as typified by the fourth of the differing approaches by the US courts to the problem of package deals including components subject to

[20] See paragraphs [17] -[19] above.

rights of pre-emption, the price of R4 million for which the applicant seeks by these proceedings to be able to obtain the pre-emption properties would not be a fair one. On the contrary, the indications are that the two portions of the farm leased by the applicant are probably worth between six and seven million rand. I think it may also be reasonably be inferred, although I acknowledge that this is speculative, that if the first respondent and Swellendam Plase were required to restructure their contract to give a separate price for the two erven leased by the applicant, the price that would be given would probably be in the R6 to 7 million range, and that the applicant would find it well-nigh impossible to establish that a determination of the price for the pre-emption properties at that level was not bona fide.

[40] For all these reasons the relief sought by the applicant cannot be granted and the application must be dismissed. It is therefore strictly unnecessary in the circumstances to consider the various preliminary points taken by the first respondent, but I shall do so briefly for completeness and in case the litigation is taken further. I did not deal with any of them at the outset of this judgment as their preliminary nature might ordinarily have warranted because I do not consider that any of them had any merit.

[41] The first respondent took the point that the applicant should have referred the dispute for informal dispute resolution, and if that failed, to arbitration. It relied on clause 2.2.7.9 of the lease agreement in support of the contention. The clause is to be found in the 'definitions' provision of the deed of lease. It purports to provide a definition of the term '*dispute resolution procedure*'. The term is not employed anywhere in the operative part of the agreement, however. There was consequently nothing in the point.

[42] The next preliminary point was that the application was premature. Schmitz pointed out that the sale of the farm to Swellendam Plase was subject to a suspensive condition and contended that as the condition had not been fulfilled, the right of pre-emption had not been triggered. There was no merit in the contention. The first respondent became obliged, in terms

of clause 10 of the lease, to offer the premises to the applicant on the same terms and conditions as those offered to it by a bona fide third party that it was willing to accept. It became obliged to make the offer to the applicant before concluding any agreement with the third party offeror.

[43] The first respondent also alleged that the applicant had not complied with all of its obligations under this agreement, which was a condition precedent to its entitlement to preference in terms of the right of pre-emption clause. In this regard, Schmitz alleged that the applicant had been in breach of clauses 3.4.1 and 3.4.3 of the 'General Conditions' set forth in annexure A to the lease agreement. Clause 3.4.1 obliged the lessee to '*prevent the spreading of alien plant species on the property*' and clause 3.4.3 obliged it to '*use the arable land for agriculture, bring in fertilizer, plant and harvest and maintain it as arable land*'. The only evidence that the first respondent adduced in support of its allegation that the applicant had been in breach of the lease in the aforementioned respects was the following statement by Vermaak in an email to Schmitz dated 8 June 2019 (annexure GS 2 to the answering affidavit):

> The value Dolf [a property agent] worked out for the portion I'm currently renting a year ago was R1m for the piece of mountain and R30k [per hectare] for dryland which was then 90 Ha of just usable dryland. So the total came to R3,7m. When I started there with the mindset you gave me [of] buying the farm I opened another 30Ha of the 70Ha available to open of dryland at my cost and obviously raised the value with R900k. When Louis [Botha] arrived I withdrew all my machinery and currently only farms (sic) the 120Ha of dryland.

The applicant denies having been in breach of the lease agreement. Vermaak testified that the withdrawal of the earthmoving machinery that he had been using to increase the area of land that could be used for dry crop planting merely meant that the applicant ceased its efforts to increase the area of arable land that was being worked. That does not imply that the applicant was not maintaining and using the arable land that was available to be used when the lease was taken. On the contrary, it is apparent that the applicant's use and maintenance of the land since it took occupation had improved the land and increased the value of the leased portions of the farm. Evidence in support of the allegation that the applicant had failed to prevent a spread of

alien species on the land was lacking. It is furthermore notable that there is no evidence that the first respondent ever complained that the applicant was in breach of the lease in the respects alleged. A breach of the lease in the aforementioned respects has not been made out.

[44] The first respondent also alleged that the applicant had been in breach of clause 3.10.1 of the General Conditions of the lease which forbade the lessee from subletting or permitting anyone else to occupy 'the Premises'. The first respondent claims that the applicant was in breach of this clause by having allowed the aforementioned Louis Botha to occupy one of the dwelling houses on the property. The applicant has denied the allegation. Vermaak testified in reply that Botha had obtained access to the dwelling house using a set of keys obtained from a property agent, one Van Rensburg, to whom they had been surrendered by the previous tenant of the farm, Albert Engelbrecht. Van Rensburg confirmed this. Vermaak furthermore pointed out that when he had complained to Schmitz about Botha trespassing on the portions of the farm leased by the applicant he had been told to take the matter up directly with Botha, whom Schmitz described as the applicant's 'new landlord'. It is notable that in relation to this matter too there is no evidence that the first respondent ever protested to the applicant about Botha's occupation of the dwelling house. I am inclined to accept the veracity of Vermaak's evidence.

[45] The issue can be disposed of adversely to the first respondent on an objective basis, however. As mentioned earlier, the leased property did not contain any building improvements. Both of the dwelling houses on the farm were on the area thereof that was not let to the applicant. The expression '*The Premises*' is defined in clause 1.2 of the General Conditions as meaning '*the Property <u>let in terms of this Lease</u> and all the LESSOR's fixtures and fittings therein or appertaining thereto*'. Clause 3.10.1 did not pertain to the land on which the dwelling houses stood, and therefore even if Vermaak did permit Botha to occupy one of them that would not constitute conduct in breach of the lease.

[46] The first respondent also applied for the striking out of certain matter in the applicant's founding affidavit. It persisted with the application only in respect of parts of paragraphs 28 and 29 of the affidavit, which contained some hearsay evidence concerning the aforementioned Mr van Eeden of Swellendam Plase. It is not necessary to determine the application. The allegations were in any event implicitly denied by Van Eeden in the supporting answering affidavit that he deposed to.

[47] I also do not propose to make any order as to the so-called wasted costs allegedly incurred by the applicant as a consequence of having to amend its papers to address the cancellation of the sale agreement between the first respondent and Swellendam Plase. As mentioned, the amendments were made to the draft founding papers before the application papers were issued by the registrar. In my view, the costs therefore in any event did not form part of the applicant's recoverable costs of suit. If I am wrong in that view, I in any event see no reason why the costs should not follow the result of the litigation in the ordinary course and be borne by the unsuccessful applicant.

Order

[48] In the result an order is made as follows:

> The application is dismissed with costs, including the costs reserved for later determination in terms of the interlocutory order made by Mr Justice Le Grange on 3 July 2020.

**A.G. BINNS-WARD**
**Judge of the High Court**

## APPEARANCES

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| **Applicant's counsel:** | **T.D. Potgieter SC** |
| **Applicant's attorneys:** | **MJ Vermeulen Inc.**<br>**Riversdale**<br><br>**Walkers Inc.**<br>**Cape Town** |
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