

TENANT 'RIGHT TO BUY' PORTION OF A FARM TRUMPED WHEN THE WHOLE FARM IS SOLD?

Plattekloof RMS Broedery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd and Another (7836/2020) [2021] ZAWCHC 1 (4 January 2021)

In this case a lessee of two portions of a farm that consisted of six portions sought to exercise his pre-emptive right when the farm was sold as a whole. The pre-emptive right related to the two portions only and the lessee argued that, at the time of the sale to the third party, the owner of the farm was duty bound and contractually obligated to offer the two portions to him by virtue of the pre-emptive right. Such right however is not a restriction on the grantor to sell, but rather a 'right to buy' for the holder, in this instance, 'on the same terms and conditions or no less favourable than those offered by a third party'.

The Judgment can be viewed [here](#).

FACTS

Dahlia Investments Holdings (Pty) Ltd ('Dahlia') owns a farm near Riversdale. It consists of eight separately registered portions of land. Plattekloof RMS Boerdery (Pty) Ltd ('Plattekloof') is renting two of them ('the pre-emption properties') in terms of a five-year lease which terminates on 1 April 2023.

Clause 10 of the lease agreement affords Plattekloof, as lessee, a right of pre-emption. It provides:

"10. Right of First Refusal

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 ..."*

(Even prior to the lease agreement there were negotiations between the two parties in respect of the two leased portions: Dahlia had agreed in principle with Plattekloof, as long ago as early 2018, that Plattekloof would purchase the two portions for R4 million; Plattekloof had actually first indicated its interest in buying the land a year earlier, but nothing came of this as Dahlia believed it was not beneficial to dispose of the two portions separately.)

The character of the different portions making up the farm is not uniform. The land leased to Plattekloof does not have any buildings on it, but it contains a proportionately greater extent of arable land than the other portions. The arable land has been improved and well maintained by Plattekloof, while the land on the other portions, which has been left idle, has probably deteriorated. The other portions, however, have building improvements on them. The individual portions consequently do not lend themselves to valuation on a pro rata basis according to their hectareage. (However, 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 an approximate value of R7600 per ha and the combined value of the two portions subject to Plattekloof's right of pre-emption would consequently be some R 6,6 million. According to a formal valuation presented in court, the two portions leased by Plattekloof were more valuable per hectare than the other portions and valued at a market value of R6,14 million for both.)

Throughout the entire period of the lease, Dahlia was involved with attempts to sell its land, as a whole. Plattekloof was an active and engaged role player in the exercise. In November 2018 Dahlia sold the entire shareholding in the

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company to one Botha, but the transaction was later cancelled. In another instance in April 2019, Platteklouf engaged

with Dahlia about the submission of a so-called 'combined offer' for the shares in Dahlia in the amount of R16,5 million, with the idea that Platteklouf would then sell the remainder of the farm out of the company. On 1 June 2019, Platteklouf indicated in an email that it would be amenable to buying the whole farm for R17 million subject to various conditions. Later, Platteklouf confirmed that it was in talks with a third party to purchase the remainder. Platteklouf at that stage offered to buy the pre-emption properties for R5 million with an option until the end of 2019 to also buy the main portion for R12 million. It was apparent that Platteklouf's intention was to exercise the option only if it could find a buyer for the remainder for at least R12 million during that period. Dahlia replied to Platteklouf that it 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 as it would be difficult to sell the remainder after the portions were sold separately.

All these ideas and proposals came to naught.

In April 2020, Dahlia 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 ('Swellendam Plase') 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. The price represented a reduction of R1 million on the amount that Dahlia had hoped to realise, based on the bad condition of the six portions, i.e. those that were not leased. Dahlia declared that: *"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. The eight portions were sold as an indivisible transaction."*

Upon learning of the sale of the farm to Swellendam Plase, Platteklouf sought to enforce its right of first refusal. 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 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 Platteklouf and Dahlia about the purchase of the two leased portions by the former for R4 million.) This was unsuccessful.

Platteklouf thus approached the Court seeking an order that Dahlia must comply with its contractual obligation by delivering to Platteklouf a written notice offering to sell the leased properties to Platteklouf for R4 million on the same terms and conditions as those contained in the sale of farm agreement, which Platteklouf will then accept or reject within the stipulated time.

HELD

- 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, Dahlia would be obliged first to offer the two portions to Platteklouf separately on some or other determined basis. The lease was drafted by the Dahlia's attorneys. On its face the right of first refusal appears to have been worded in a way that would not constrain Dahlia's ability to dispose of the farm as a whole.
- Whether it actually had that effect is a question of construction. The pre-emption clause certainly did not bind Dahlia to offer the two portions to Platteklouf at any price if it received an acceptable offer for the remaining six portions on their own.
- The primary question in this case calls for the determination of Platteklouf'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

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offer to purchase or a contract of sale as an integral part of a larger package.

- Assuming that Platteklouf was not in breach at the time of any of its obligations under the lease, it is correct to accept 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 Dahlia. (The right of first refusal cannot be interpreted in a way 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. This is because the right of pre-emption grants the holder thereof the right to buy (the two pre-emption portions in this instance), and not a right to prohibit the sale if the grantor of the pre-emptive right decides to sell the whole property in terms of a 'package deal' contract.
- Upon the triggering of the right, Dahlia became obliged, according to the tenor of clause 10 of the lease, to give Platteklouf written notice specifying the terms and conditions of *the offer it had received from Swellendam Plase* and Platteklouf would thereafter have 14 days in which to indicate by written notice to Dahlia 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, Platteklouf would, in the circumstances of the offer made by Swellendam 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.
- The relief sought by Platteklouf is also inconsistent with the remedy to which it alleged it became entitled when Dahlia received what it considered to be an acceptable offer from Swellendam Plase (again assuming that Platteklouf was not in breach of the lease at the time). Platteklouf did not become entitled to acquire the pre-emption properties for R4 million; evidence showed that the pre-emption properties were in any event at least R 6-7 million in value.

CONCLUSION

For all these reasons the relief sought by Platteklouf could not be granted and the application was dismissed.