# RIGHT OF PRE-EMPTION OF LEASED PORTIONS: WHAT HAPPENS IF THE WHOLE PROPERTY IS SOLD TO A THIRD?

## Plattekloof RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd (667/2021) [2022] ZASCA 182 (15 December 2022)

*X leases two portions of a farm that consists of 8 separately registered portions. The lease contained a pre-emptive right in favour of X in respect of the leased premises. Is X's pre-emptive right triggered if all 8 portions are sold by the landlord, Y, to a third as a whole? Indeed, said the Court. But the next question is whether, in terms of the pre-emptive right, X has a pre-emptive right in respect of the whole or only in respect of the two leased portions? The Supreme Court of appeal discusses the considerations here and ultimately found that Y was obliged to honour the pre-emptive right and had to invite X to purchase the two portions at a value aligned to the amount offered in respect of the whole farm. The judgment is an interesting read.*

*The Judgment can be viewed here.*

## FACTS

In a 5-year lease agreement entered into in April 2013, Dahlia Investment Holdings (Pty) Ltd ("Dahlia") also granted to the tenant, Plattekloof RMS Boerdery (Pty) Ltd ("Plattekloof") a right of pre-emption of the leased premises. The leased premises were two separate portions of a farm owned by Dahlia, the whole farm consisting of 8 separate portions.

On 7 April 2020, Plattekloof sold all eight portions of the farm to Swellendam Plase (Pty) Ltd for an all-in purchase price of R17 million (the "Swellendam Plase offer"). The agreement did not allocate a purchase price per portion of the farm. The agreement recorded however that the farm was sold subject to the lease.

When Plattekloof learnt of the sale a few days later, its attorneys sent a letter to Dahlia claiming specific performance of clause 10 in which the pre-emptive right was recorded. It read as follows:

> *'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 … those offered by a bona fide third party to the Lessor and the Lessor shall deliver written notice …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 …'.*

Despite a subsequent exchange of correspondence between the attorneys of the parties, no resolution was achieved.

Dahlia subsequently approached the Court for an order for specific performance of his right to pre-emption in respect of the two leased properties, and claimed that Dahlia must be ordered to deliver a written notice offering to sell the two portions to Plattekloof for R4 million, on the same terms and conditions as those contained in the deed of sale between Dahlia and Swellendam Plase.

The question was what the wording of clause 10 meant: Did the parties intend that the right to pre-emption would be activated if Dahlia received an offer regarding only the two portions concerned? Or was the correct interpretation that it would be triggered if an offer in respect of the whole farm was received?



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The High Court Cape Town held that the sale of the whole farm triggered the option and that Plattekloof should, if it wished to do so, exercise the option to buy the whole farm. (See the summary and discussion here. Plattekloof appealed to the Supreme Court of Appeal.

## HELD

***Right of pre-emption was triggered***

- The High Court correctly found that the 'package deal' (the sale of all 8 portions as an indivisible transaction for a globular amount without differentiating between the respective portions' values) had triggered Plattekloof's pre-emptive right. Thus, Dahlia was contractually obliged to determine, in good faith, what portion of the Swellendam Plase offer pertained to the two portions, and make a subsequent offer to Plattekloof, as per clause 10 of the agreement.

- Clause 10 could not be interpreted to mean that the right of pre-emption would only be activated if Dahlia received an offer for the two portions on their own. On the ordinary meaning of the wording used in clause 10, Dahlia obtained an offer to purchase the Premises (as per the lease agreement), even though this was part of a wider offer. It is simply so that by entering into an agreement to sell the whole farm, the two leased portions are automatically included.

***Remedy***

- The High Court held that upon the triggering of the pre-emptive right, Dahlia became obliged to comply with clause 10 of the agreement, i.e. by giving Plattekloof written notice specifying the terms and conditions of the offer it had received from Swellendam Plase and confirming that Plattekloof would have 14 days in which to indicate whether or not it intended to acquire the property on same terms and conditions. In so doing, Plattekloof would 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 whole farm.

- This conclusion of the High Court was rejected because the right of first refusal had a specific content and the content of the right cannot change because of a breach thereof (by Dahlia in not giving the required notice to Plattekloof).

- The rights of the parties in these circumstances must be determined by a proper construction of clause 10. In terms thereof, Plattekloof has no more than the 'right of first refusal to purchase the Premises', that is, the two portions it leased from Dahlia.

- Thus, the correct interpretation of clause 10 in the circumstances is that Dahlia is contractually obliged to determine in good faith what portion of the Swellendam Plase offer pertained to the two leased portions and to offer that to Plattekloof.

***The value***

- In this regard, Plattekloof argued that there was agreement that the purchase price of the two portions was R4 million. The evidence showed that Swellendam Plase sought to purchase the entire farm at the fixed price of R17 million without differentiating between the portions; the eight portions were sold as an indivisible transaction. There was inadequate evidence to show that agreement was reached that the purchase price of the 2 portions was R4 million.



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## CONCLUSION

Accordingly, the main relief sought, being that Dahlia be directed to make an offer of R4 million failed.

Plattekloof had the right to a bona fide offer on the basis of that part of the R17 million that pertained to the two portions. Dahlia was thus directed to deliver to Plattekloof, within 10 days, a written offer, in terms of clause 10 of the lease agreement concluded by the parties on 13 April 2018, to purchase the leased premises, based on the deed of sale concluded by Dahlia and Swellendam Plase.



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