

SUMMARY OF THE JUDGMENT

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>> PROPERTY LAW UPDATE

MUST A RIGHT OF FIRST REFUSAL (PRE-EMPTIVE RIGHT) IN RESPECT OF LAND REALLY BE IN WRITING?

Mokone v Tassos Properties CC and Another (CCT113/16, CCT291/16) [2017] ZACC 25; 2017 (10) BCLR 1261 (CC); 2017 (5) SA 456 (CC) (24 July 2017)

Yes and no. For long, and because of sound policy considerations, our law ruled that pre-emptive rights relating to the sale of immovable property must be in writing in order to be valid and binding. For example, a 12-month lease agreement contains a right of pre-emption in favour of a tenant. One further oral renewal of the lease follows and thereafter the landlord and tenant make a one-line entry on the 'old' lease mentioning it is extended for a further period. During this further period, the landlord sells the property subject to the lease. The lease expires and the tenant refuses to vacate, quoting the pre-emptive right that existed in the old lease. One of the findings in this matter was that the granting of a pre-emptive right is not an 'alienation' and therefore needs not comply with the "in writing and signed" requirements of the Alienation of Land Act, rendering the provision in the 'old' lease still valid. This is a dramatic change to the previous position. This despite, transparency and considerations relating to the accuracy of recall if the provisions of an agreement is not reduced to paper, still call for such agreements to be in writing.

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

FACTS

This matter deals with an application for leave to appeal concerning whether, amongst other things, a right of pre-emption contained in a written lease agreement is renewed automatically when the lease is extended and whether such renewal needs to comply with the formalities prescribed for a sale in the Alienation of Land Act 68 of 1981 (the Act).

In 2004, Ms Mokone entered into a written lease agreement with Tassos Properties CC (Tassos) for an initial period of one year. Ms Mokone had to date been conducting the business of a liquor store on the leased property. Clause 6 of the lease agreement gave Ms Mokone a right of pre-emption. After the effluxion of the initial period of one year, the parties orally agreed to extend the lease for another year and a few months. At the end of this extended period, a handwritten entry that read "3/5/06 extend till 31/5/2014 monthly rent R5 500" was made on the front page of the original lease agreement. This endorsement was accompanied by the signature of a representative of Tassos.

On 15 July 2009, Tassos entered into a deed of sale with Blue Canyon CC (Blue Canyon) in terms of which Blue Canyon purchased the property. The property was transferred to Blue Canyon on 1 March 2010. On 27 January 2012 Ms Mokone notified Tassos in

writing that she was exercising her right of pre-emption and tendered payment in the sum of R55,886.60 which she understood to have been the price for which Blue Canyon had purchased the property. Tassos refused to offer the property to her. It argued that the right of pre-emption had not been part of the extended lease and was therefore unenforceable. This gave rise to the first of two litigious matters, namely a dispute on a right of pre-emption.

Ms Mokone initiated action against Tassos and Blue Canyon in the High Court to set aside the sale and transfer of the property and to compel a sale to her. Alternatively, she sought damages. The basis of her claim was that the right of pre-emption was part of the extended lease agreement, that Blue Canyon had taken transfer well-aware of her right of pre-emption and that she was therefore entitled to the reversal of the transfer.

At the instance of the parties, the High Court separated issues and considered only the question whether the endorsement extending the lease had also extended the right of pre-emption. The High Court held that when a lease is renewed "*simpliciter*" (without more), only the terms that are "incidental" to the lessor and lessee relationship are renewed. Terms considered "collateral" to the relationship are not renewed, unless the parties indicate a clear intention to renew them as well. The High Court took the view that rights of pre-emption are collateral terms. It then held that the endorsement extending the lease did not specifically indicate that the parties were renewing the right of pre-emption and that this right had thus not been renewed. Ms Mokone unsuccessfully applied for leave to appeal in the High Court and Supreme Court of Appeal.

In the Constitutional Court, Ms Mokone advanced the following arguments. First, that the right of pre-emption was material to and an integral part of the written lease agreement and thus formed part of the extended lease agreement. Secondly, and in the alternative, Tassos and Ms Mokone intended to include the right of pre-emption when they extended the initial lease agreement by endorsing the front page of the document. Thirdly, and also in the alternative, considerations of fairness, equity, and pragmatism should lead to a conclusion that the right of pre-emption was included in the extended lease agreement.

Tassos and Blue Canyon opposed the application and argued that the endorsement extended only the period of the lease and not the right of pre-emption. They argued that Ms Mokone's conduct after the sale of the property did not suggest that she believed she had the right of pre-emption because she had waited more than 18 months after she learned of the sale before notifying Tassos in writing of her intention to purchase the property.

The second litigious matter involved an application by Blue Canyon to the Boksburg Magistrate's Court to evict Ms Mokone. Ms Mokone resisted the application on the

grounds that Blue Canyon's alleged ownership was under challenge in proceedings that were pending before the High Court. In consequence, she argued, Blue Canyon had no right to terminate her occupation. The Magistrate's Court dismissed the eviction proceedings however Blue Canyon later succeeded on appeal before the High Court. Special leave to appeal was refused by the Supreme Court of Appeal. In this Court, Ms Mokone persisted in the argument that the eviction should be held in abeyance until the action pending before the High Court has been finally determined. Blue Canyon contended that it served no purpose to delay the eviction because the action pending before the High Court was sure to fail. It also argued that because the endorsement that extended the lease was signed only by a representative of Tassos, it was invalid for failure to comply with the formalities stipulated in the Act which requires the signature of both parties. Blue Canyon further argued that, in refusing to stay the eviction, the High Court had exercised its discretion judicially, which meant it was unassailable.

HELD:

- The majority judgment took issue on the first of the two applications dealing with the present common law rule that when a term that is collateral to, and not an incident of, the relation of lessor and tenant, such term continues to operate during the period of extension of a lease only if it is clearly indicated that this is what the parties to the lease intended. This Court held that the rule unduly favoured lessors. The majority judgment held that it was unreasonable to expect ordinary lay people to be able to draw a distinction between terms that are "collateral to, and independent of, the lessor and lessee relation" and those that are incidental to this relationship.
- On the fact in the present matter, the Court held that in extending their lease, parties – without stipulating anything more – provide that all the terms of the lease, including terms that are collateral, and not incidental, to the lease are extended.
- On the second application, the majority held that the formalities in the Act apply to alienations of land as defined in the Act. A right of pre-emption did however not constitute an alienation of land, as defined.
- Consequently, it did not have to comply with the formalities imposed in the Act. The argument that the right of pre-emption was invalid for lack of signature by Ms Mokone on the extending endorsement was thus misconceived. In this regard, the majority overruled the judgment of *Hirschowitz v Moolman*.

The text above is from the Constitutional Court summary of the matter.

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