PITFALLS IN EXERCISING A RIGHT OF FIRST REFUSAL

Tiekiedraai Eiendomme (Pty) Ltd v Shell South Africa Marketing (Pty) Ltd and Others (1206/2016) [2018] ZASCA 41 (28 March 2018)

In essence a right of first refusal in the hands of a tenant has two components: there is an undertaking by the landlord not to sell the property to a third party without giving the tenant the right of first refusal; and the landlord is obliged to offer the property for sale to the tenant at the price and on equal terms to that offered to the third party. Including a right of first refusal in a lease usually involves the obligation that all the detail of the third party's offer be made known to the tenant, otherwise he is not able to exercise his rights. This judgment supports this logic and illustrates how things can go wrong if the third party's full offer has not been presented to the tenant.

The Judgment can be viewed here.

FACTS

H L Hall & Sons (Group Services) (Pty) Ltd (Hall & Sons) had entered into a lease agreement with Shell South Africa Marketing (Pty) Ltd (Shell) in terms of which Shell was granted a right of pre-emption to purchase the leased property.
Clause 21 of the lease read:

> *'21. SALE*
> *At any time during the currency of this lease … the Lessor undertakes that it will not sell, or otherwise dispose of, the premises … thereof, to any third party without first having offered to Shell to sell or dispose of it, …, to Shell, on the identical terms and conditions in all respects upon which the Lessor was prepared to sell or dispose of it, …, to the third party, and to this end the Lessor further undertakes –*
> *21.1 that it will, before selling or otherwise disposing of the premises or any portion thereof to any third party, first offer to sell or dispose of its, or the portion thereof in question, to Shell in writing on the identical terms and conditions in all respects upon which it is prepared or is desirous of selling or disposing thereof to the third party;*
> *21.2 in the offer referred to in 21.1, furnish the terms and conditions in all respects upon which it is prepared or is desirous of selling or disposing thereof to the third party …;*
> *21.3 the offer referred to in 21.1 shall remain open for a period of 30 (thirty) days …;*
> *21.4 should Shell decline the said offer, or not accept it within the said period …, the Lessor will not thereafter dispose of the premises, …, to the said third party at a price lower or on terms and/or conditions more favourable …;*
> *21.5 failure on Shell's part to accept any offer made to it in terms of the foregoing shall entitle the Lessor to dispose of the premises … to the third party in question, but no-one else, upon terms not more favourable to such third party than the last offer refused by Shell ….'*

On 30 October 2014, Hall & Sons advised Shell that it had received an offer by Tiekiedraai for the purchase of the property. In the e-mail Hall & Sons stated that: *'(A)s you are aware Shell [has] a pre-emptive right to match this offer per the existing lease.'* Tiekiedraai's offer was attached to Hall & Sons' e-mail. This offer, in turn, read:

> *'Mr Lewis,*
>
> *RE: OFFER TO PURCHASE: PORTION 1 OF ERF 49, MATAFFIN TOWNSHIP*
> *The purpose of this letter is to confirm the recent discussions relating to the purchase of the above property.*
>
> *We hereby confirm:*
> *1. That the subdivision of Erf 49 has been approved.*
> *2. That a Filling Station is erected … which is presently leased to Shell in terms of a notarial long term lease.*
> *3. That your company has indicated that it is prepared to accept offers for the purchase ….*
> *4. That Shell has a right of first refusal.*
> *5. That an offer of R17 000 000.00 (Seventeen Million Rand), with VAT being zero rated, is hereby made to your company for the purchase of …*
> *6. That the offer as set out herein is subject to:*
> *6.1 the terms and conditions of the bond granted by Nedbank …;*
> *6.2 the purchase price in point 5 is the full purchase price …;*
> *6.3 that the offer is made in my capacity as director of Tiekiedraai Eiendomme …;*
> *6.4 …;*
> *6.5 that the offer as contained herein will be referred to Shell to enable them to exercise their right of first refusal;*
> *6.6 that in the event of Shell failing to exercise its first right of refusal to purchase, will a formal Sale Agreement be concluded upon acceptance of the offer as set out herein;*
> *6.7* ***that the further terms and conditions to be incorporated in the Sale Agreement to be agreed upon****.' (Our Emphasis)*

On 30 October 2014, Shell acknowledged receipt of Hall & Sons' aforesaid e-mail together with Tiekiedraai's offer and stated that they seriously considered it and would revert soon.

On 1 December 2014, Shell sent an e-mail to Hall & Sons advising that Shell was close to getting Board approval. Shell asked to be furnished with a draft of the sale agreement and suggested in the alternative that its attorneys draft one. Hall & Sons responded to Shell on 2 December 2014, recording that in terms of clause 21 of the lease agreement, the 30 day period within which Shell had to exercise its right of pre-emption had expired on 30 November 2014. Hall & Sons had accordingly prepared a sale agreement and sent it to Tiekiedraai.

On 3 December 2014, Shell sent a further e-mail to Hall & Sons advising that Shell had full board approval for the R17 million purchase price for the property plus VAT, and requested that the parties discuss the issue. Shell later addressed a further e-mail to Hall & Sons recording that the latter's e-mail and offer by Tiekiedraai forwarded on 30 October 2014 did not comply with clause 21 of the lease. It recorded further that only once Shell had sight of the sale agreement or an offer to purchase with all the terms and conditions spelled out, Shell had 30 days from the date of delivery to match the offer. In response and on the same day, Hall & Sons sent an e-mail to Shell enclosing a copy of the sale agreement it had purportedly concluded with Tiekiedraai.

On 9 December 2014, Shell sent an e-mail to Hall & Sons acknowledging receipt of the signed sale agreement between Hall & Sons and Tiekiedraai and averring that clause 17 thereof, which recorded that Shell had not exercised its pre-emptive right to purchase the property, was incorrect.

The key question that arose in this matter was whether the offer of 30 October 2014 complied with the terms set out in clause 21 of the lease agreement.

Tiekiedraai argued that the right of pre-emption (and the 30 day period) was triggered when Hall & Sons gave notice to Shell on 30 October 2014 of Tiekiedraai's offer to Hall & Sons to purchase the property. Shell on the other hand contended that such right was only triggered when the agreement of sale concluded between Tiekiedraai and Hall & Sons was sent to it on 5 December 2014. The Gauteng High Court held that Shell had validly exercised its rights and granted a declaratory order that the agreement of sale purportedly concluded between Hall & Sons and Tiekiedraai was deemed to have been concluded between Hall & Sons and Shell. Tiekiedraai appealed to the Supreme Court of Appeal.

HELD:

- The plain wording of Tiekiedraai's offer and clause 21 of the lease agreement indicated that:
    - From the outset, Shell had taken the position that the email of 30 October 2014 by Hall & Sons did not constitute notice in terms of clause 21, as it did not contain the identical terms and conditions in every respect upon which Hall & Sons were prepared to sell the property to Tiekiedraai. Indeed, Shell considered that Tiekiedraai's offer was an outline of the

basis upon which Hall & Sons were prepared to contract.

- It was clear from Tiekiedraai's offer itself that further terms were to be agreed upon as reflected by the words '…the further terms and conditions to be incorporated in the sale agreement to be agreed upon.'

- As such, viewed against the clear provisions of clause 21, the offer of 30 October 2014 omitted to reflect the identical terms and conditions in all respects upon which Hall & Sons was prepared to sell the property to Tiekiedraai. The offer merely contained a description of the property to be purchased, the parties seeking to contract, the purchase price, that Shell had a right of pre-emption and that the purchase price was to be financed by way of a bond.

- The court *a quo* was accordingly correct to find that the offer of 30 October 2014 did not comply with clauses 21 and 21.2 of the lease agreement and did not, as a consequence, trigger the commencement of the 30 day period within which Shell had to exercise its right pre-emption.

The appeal accordingly failed.

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