THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 593/2013

In the matter between:

CHRISTOFFEL WESSEL JACOBUS VAN DEVENTER **APPELLANT**

and

IVORY SUN TRADING 77 (PTY) LTD **RESPONDENT**

Neutral citation: *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* (593/13) [2014] ZASCA 169 (4 November 2014)

Coram: Mpati P, Majiedt and Pillay JJA, Schoeman and Fourie AJJA.

Heard: 3 September 2014

Delivered: **4 November 2014**

Summary: Right of pre-emption established through a testamentary disposition – not offered to appellant as holder of right in terms of conditions registered against title deed of property – grantor of right failing to first offer property for sale to appellant – whether right prescribed within three years of grantor's decision to sell or whether grantor obliged to make written offer to appellant prior to commencement of running of prescription – not proved that the right of pre-emption had prescribed or that appellant waived his right of pre-emption.

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Vorster AJ) sitting as court of first instance.

1 The appeal is upheld with costs.

2 The order made by the court below is amended as follows:

(a) Paragraphs 2, 3 and 7 are set aside.

(b) Paragraph 6 is set aside and substituted with the following:

'(a) Eerste verweerder word gelas om eiser se koste van die geding te betaal met uitsondering van die verspilde koste van die uitstel, welke koste deur tweede verweerder betaal moet word.

(b) Eiser word gelas om tweede verweerder se gedingskoste te betaal met uitsondering van die verspilde koste van die uitstel voormeld.'

JUDGMENT

Schoeman AJA (Mpati P, Majiedt and Pillay JJA and Fourie AJA concurring.)

[1] The issue in this appeal is whether a right of pre-emption, acquired by virtue of a testamentary disposition and registered against the title deed of a farm, prescribed prior to the appellant exercising such right.

The pleadings

[2] The respondent, Ivory Sun Trading 77 (Pty) Ltd, issued summons as plaintiff, against Mr J J van Deventer (Johannes), the first defendant, and the appellant, as second defendant, for a declaratory order that a valid agreement of sale in respect of a farm existed between the respondent and Johannes as a result of the exercise of an option on 30 March 2007. The respondent also sought ancillary relief relating to the transfer of the property to him and for payment of a debt. No relief was sought against the appellant except for a costs order in the event that he defended the matter.

[3] The appellant pleaded that the respondent was not entitled to transfer of the farm as the appellant had entered into a valid contract with Johannes pursuant to a right of pre-emption registered against the title deed of the property.

[4] The respondent averred in the particulars of claim that the appellant's right of pre-emption had prescribed. The court a quo upheld this contention and granted the relief prayed for by the respondent. The appellant appeals with leave of this court.

Background

[5] The appellant and his brother, Johannes, were both beneficiaries in the will of their parents. The farm Dartmouth (the farm) was bequeathed to Johannes, while another farm was left to the appellant. The bequest to Johannes was subject to a life usufruct in favour of the surviving testator, their mother, Mrs van Deventer. The testamentary disposition in respect of the farm contained a further condition that Nugent JA,[1] in this court, previously translated as:

'If [Johannes] after the death of the survivor, decides to sell [Dartmouth] then our son Christoffel [the appellant] . . . must be given the first option to purchase the said property

[1] *Van Deventer v Van Deventer* [2006] SCA 144 (RSA) para 1.

at the Land Bank valuation as established at the time of the sale. The option must be exercised in writing within a period of 60 (sixty) days after the option has been given.'[2] This right of pre-emption was registered against the title deed of the farm in the Deeds Office.

[6] The chronology of the common cause events leading to the action instituted by the respondent is as follows. In September 2003, during the life of Mrs van Deventer, Johannes granted a written option to Dr Willem Abraham Cronjé (Cronjé), or his nominee, to buy the farm for an amount of R2,4 million, subject to the conditions and servitudes registered against the property. In October 2003 an attorney, Mr Miguel van Niekerk de Bruin (De Bruin), wrote to the appellant's attorney, Dr Van der Westhuizen, on behalf of Johannes and Cronjé, and informed him that Johannes had given an option to Cronjé to purchase the farm and requested the appellant to waive his right of pre-emption; failing which the option would be cancelled.[3] At that stage the appellant and Johannes had an acrimonious relationship and did not talk to each other.

[7] In November 2003 the appellant responded that he elected not to waive his right of pre-emption and informed De Bruin that, since Johannes had decided to sell the farm, the appellant was entitled to a written option to buy the farm at Land Bank valuation. In February 2004, the surviving parent, Mrs van Deventer passed away. In April 2004 Johannes notified the appellant that he was no longer interested in selling the property and undertook to let the appellant know if and when he changed his mind. When the appellant raised questions regarding the option of Cronjé, De Bruin informed the appellant that they were not obliged to keep the appellant

[2] The original Afrikaans condition reads: 'Indien ons gesegde seun, na die afsterwe van die langslewende van ons sou besluit om ons voormelde plaaseiendom te verkoop sal ons seun CHRISTOFFEL WESSEL JACOBUS VAN DEVENTER die eerste opsie gegee word om die gemelde eiendom te koop teen die Landbank waardasie soos vasgestel ten tye van sodanige verkoping. Die opsie moet skriftelik, binne 'n periode van 60 (sestig) dae nadat sodanige opsie gegee is, uitgeoefen word.'

[3] All the correspondence was done between the parties' attorneys and I will refer to the attorneys only when relevant.

informed, but that they would do so in the event of Johannes deciding to dispose of the property. This was, to the knowledge of De Bruin, Johannes and Cronjé false, as Johannes intended to sell the farm to Cronjé and continued to extend the option to Cronjé from time to time. Furthermore, Johannes entered into a new lease agreement with a trust of which Cronjé was a trustee, in terms of which Johannes let the farm to the trust for a period of five years, from 1 October 2004, with an option to renew the lease for a further four years and nine months. This lease agreement also granted a right of pre-emption to the trust. In my view the inference is unavoidable that this long-term lease was entered into specifically to make it as unattractive as possible for the appellant to exercise his right of pre-emption.

[8] In the meantime Johannes offered the farm to the appellant at R600 000 more than Cronje's option-price. The appellant, however, insisted on buying the farm at Land Bank valuation. When the Land Bank was requested to value the farm, it refused to do so on the basis of internal policy principles.

[9] In the beginning of 2005 Johannes launched an application for a declaratory order that the condition requiring him to offer the farm to the appellant, at the Land Bank valuation, was invalid, due to the fact that the condition was impossible to fulfil as the Land Bank value could not be determined. The appellant and Cronjé were the respondents in that application, although the litigation was funded by Cronjé. The high court found against Johannes, who appealed to this court. His appeal was unsuccessful.[4]

[10] On 29 March 2007 the respondent, as the nominee of Cronjé, exercised the option to purchase the farm. De Bruin withdrew as the attorney of Cronje and Johannes, due to a conflict of interest. Mr Petrus Gerhardus

[4] Supra fn 1.

Uys (Uys), the respondent's new attorney, informed the appellant in May 2008, 14 months after the event, that the respondent had exercised the option. He informed the appellant that they were of the opinion that Johannes had to give the appellant an option to buy the property at Land Bank value and enquired whether that had been done. Van der Westhuizen informed Uys that the appellant would assist the respondent in buying the property, provided that the respondent pay a market related price of approximately R7,6 million.

[11] In February 2010 Johannes granted a written option to the appellant to buy the farm at the Land Bank value. Subsequently the appellant and Johannes entered into an agreement of sale on 25 March 2010.

The issues

[12] The first issue to be determined in this appeal is the true meaning of the right of pre-emption that has been registered against the title deed of the farm and the nature of such a right. A further issue for determination is whether the obligation of Johannes to offer the farm to the appellant is a debt susceptible to prescription, and if so, whether it had prescribed.

The interpretation of the clause

[13] Counsel for the respondent argued that the only possible interpretation of the clause is that as soon as Johannes decided to sell, the right of pre-emption came into force. From that date the appellant was entitled and indeed obliged, if he wanted to exercise his right of pre-emption, to enforce his right. This he could do by either instituting action for specific performance, bringing an application for a declaratory order, or by interdicting Johannes from entering into a contract and transferring the farm to Cronjé or his nominee. Prescription would commence running from that date, so it was contended

[14] The clause must be interpreted according to the law relating to the interpretation of contracts and documents. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] Wallis JA said the following:

'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

Therefore, it is necessary to objectively determine whether the clause required Johannes to grant the appellant a written option before the appellant could exercise his right of pre-emption or whether the right could be enforced immediately upon the appellant acquiring knowledge of Johannes' decision to sell the farm.

The nature of the right

[15] The right of pre-emption is a personal right that is not converted into a real right through registration in the Deeds Office, but the registration against the title deed of the property has certain practical consequences. In the title on 'Things',[6] C G van der Merwe stated:

'First, the registrar of deeds will be reluctant to perform an act of registration inconsistent with such a registered personal right. If a right of pre-emption has for instance been registered against the title deeds of the land, the registrar will not allow transfer to any person other then the pre-emptor unless the written consent of the latter has been supplied to him. Second, third parties will more readily have actual knowledge of the existence of

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[6] 'Things', 27 *Lawsa* 2 ed para 69.

the personal right once it has been registered. The doctrine of notice will thus in appropriate circumstances prevent a third party from establishing a real right in respect of such land.'

[16] In matters where the right of pre-emption was not registered, but third parties had knowledge of such a right, it has been described as a personal right with 'saaklike werking',[7] in other words, that it had the effect of a real right. The position would be the same where a right of pre-emption had been registered against the title deed of a property.

[17] The right of pre-emption in the instant matter is not a *pactum de contrahendo*, which has been described as 'an agreement to make a contract in the future',[8] as it has been regulated through a testamentary disposition.

A debt that is due.

[18] The respondent's case was that the claim of the appellant had prescribed, in that three years has passed since Johannes' decision to sell the farm came to the appellant's notice in terms of the provisions of s 11(*d*) of the Prescription Act 68 of 1969 (the Act). Section 12(1) of the Act provides that subject to subsections (2), (3) and (4) (which do not affect the present case) '. . . prescription shall commence to run as soon as the debt is due'.

[19] The respondent's counsel referred us to the case of *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & another* [9] as an example and authority for the submission that a right of pre-emption may prescribe, in other words, that Johannes' obligation was a debt. The facts of *Dithaba* differ materially from the facts of the instant matter. In *Dithaba* the right of pre-emption was contained in a contract and it was the grantor that raised prescription vis-à-vis the grantee after the grantor had sold and transferred mineral rights to another entity. The court held that the right of pre-emption had prescribed

[7] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* 1982 (3) SA 893 (A).
[8] *Hirschowitz v Moolman & others* 1985 (3) SA 739 (A) at 765.
[9] *Dithaba Platinum (Pty) Ltd v Erconovaal Ltd & another* 1985 (4) SA 615 (T) at 630D and further.

due to the fact that the wording of s 12(3) of the Act, as it was at the time, precluded the interruption of prescription. It is the party relying on prescription that has to allege and prove the date of the inception of the period of prescription.[10]

[20] I will accept, without deciding, that the obligation of Johannes to perform in terms of the appellant's right of pre-emption constituted a debt. It must then be determined when such debt became due.

[21] In *Umgeni Water v Mshengu*[11] Ponnan JA set out the position in determining whether a debt is due:

'. . . According to s 12(1) of the Act, prescription shall commence to run "as soon as the debt is due". The words "debt is due" must be given their ordinary meaning. [*The Master v IL Back & Co Ltd* 1983 (1) SA 986 (A) at 1004F.] In its ordinary meaning a debt is due when it is immediately claimable by the creditor and, as its correlative, it is immediately payable by the debtor. Stated another way, the debt must be one in respect of which the debtor is under an obligation to pay immediately [See *Western Bank Ltd v SJJ van Vuuren Transport (Pty) Ltd & others* 1980 (2) SA 348 (T) at 351 and *HMBMP Properties (Pty) Ltd v King* 1981 (1) SA 906 (N) at 909 and the cases there cited.].

[6] A debt can only be said to be claimable immediately if a creditor has the right to institute an action for its recovery. In order to be able to institute an action for the recovery of a debt a creditor must have a complete cause of action in respect of it. The expression "cause of action" has been held to mean: "every fact which it would be necessary for the plaintiff to prove, . . . in order to support his right to judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved"; or slightly differently stated "the entire set of facts which give rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action. Such cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action. [*Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 and the cases there cited by Corbett JA; see also *Truter & another v Deysel* 2006 (4) SA 168 (SCA) paras 16, 18 and 19.]'

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[10] *Gericke v Sack* 1978 (1) SA 821 (A) at 827H--828A.
[11] *Umgeni Water v Mshengu* [2010] 2 All SA 505 (SCA) para 5-6.

[22] The respondent argued that the appellant's right of pre-emption was triggered by the decision of Johannes to grant Cronjé an option to buy the farm in October 2003, which was communicated to the appellant in November 2003. The right therefore, so the argument went, prescribed in November 2006.

[Para 24 deleted]

[23] To determine whether the debt was due, the appellant had to have a complete cause of action in respect of such debt. This means, according to *Umgeni Water* and the cases cited therein, that every fact necessary to prove and support the appellant's right to judgment had to exist for the appellant to be able to institute action for specific performance.

Interruption of prescription

[24] Section 15(1) and (6) of the Act provide:

'**Judicial interruption of prescription**

(1) The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt.

. . .

(6) For the purposes of this section, "process" includes a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice referred to in any rule of court, and any document whereby legal proceedings are commenced.'

[25] According to the respondent the appellant could have prevented the running of prescription by an interdict, a declaratory order or an action for specific performance. I will discuss the proposed remedies to determine if the mentioned remedies would have interrupted prescription.

Interdict

[26] The requirements for the granting of a final interdict are trite. The

appellant would have had to establish (a) a clear right (b) unlawful interference with that right, actually committed or reasonably apprehended and (c) the absence of any other satisfactory remedy.[12]

[27] In the instant matter the appellant would not have been able to prove that there was an injury committed or reasonably apprehended. Injury in this sense means an infringement of the appellant's right and the resultant prejudice.[13] The correspondence between at first, De Bruin, and then Uys and the appellant's attorney, made it clear that the appellant's right that had been registered against the title deed was recognised and the constant refrain was that the appellant must either waive such right or that Johannes was obliged to submit a written offer to the appellant. Uys wrote a letter in this vein to the appellant as late as August 2008, a date when the right of pre-emption, according to the respondent, had already prescribed.

[28] The appellant could therefore not have successfully applied for an interdict as he would not have been able to prove unlawful interference with his right to purchase the property. His right was protected by the fact that it was registered against the title deed of the farm and he could not have suffered any prejudice.

[29] Furthermore, an application to interdict Johannes from transferring the farm to the respondent would have been a process served on the debtor, but I am of the view that it would not be a means 'whereby the creditor claims payment of the debt', even if such an application could have been successful. An interdict would have prevented Johannes from transferring the farm to the respondent, but would not have advanced the transfer of the farm to the appellant in any way.

Declaratory order

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[12] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[13] *V & A Waterfront Properties (Pty) Ltd v Helicopter and Marine Services (Pty) Ltd* 2006 (1) 252 (SCA) para 21.

[30] It is clear from the previous proceedings and all the correspondence between the parties that there was no dispute between the parties that the appellant had a registered right of pre-emption. There could have been no doubt as to the existence of such right especially where this court, in November 2006, pronounced that the right of pre-emption was valid.

[31] Although an existing dispute is not a prerequisite for the granting of a declaratory order, there are two steps that must be investigated before a declaratory order can be granted. These are: firstly, that the applicant has an interest in any existing, future or contingent right or obligation and secondly, if such interest exists, whether an order would be appropriate.[14] However, if no dispute exists, a court might refuse to exercise its discretion in favour of an applicant.[15]

[32] In this instance a declaratory order was granted confirming the validity of the pre-emption clause that was taken on appeal, during the time the respondent avers prescription was running against the appellant. I am of the view that no court would have granted an application for a declaratory order during the time when the same clause was registered against the title deed and was the subject of an appeal to this court.

[33] In *Cape Town Municipality & another v Allianz Insurance Co Ltd*[16] two actions were consolidated and each plaintiff claimed an order declaring *Allianz* liable to indemnify the plaintiffs against all loss or damage suffered as a result of two storms. The issue was whether service of a process claiming a declaratory order that the debtor was liable to indemnify it, rather than a claim for payment of a debt, interrupted the running of prescription. Howie J stated (at 334H – I):

'1. It is sufficient for the purposes of interrupting prescription if the process to be

[14] *Ex parte Nell* 1963 (1) SA 754 (A) at 759A-B.
[15] *Nell* at 760A-B.
[16] *Cape Town Municipality & another v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C).

served is one whereby the proceedings begun thereunder are instituted as a step in the enforcement of a claim for payment of the debt.

2. A creditor prosecutes his claim under that process to final, executable judgment, not only when the process and the judgment constitute the beginning and end of the same action, but also where the process initiates an action, judgment in which finally disposes of some elements of the claim, and where the remaining elements are disposed of in a supplementary action instituted pursuant to and dependent upon that judgment.'

[34] In *Peter Taylor & Associates v Bell Estates (Pty) Ltd*[17] Tshiqi JA analysed *Allianz* when discussing the effect of an application to join a party on the interruption of prescription. She stated (para14):

'[14] Howie J gave three further reasons why his view was consistent with the purpose underpinning the Prescription Act. The first was that there was no basis for an inference that the plaintiffs' actions for the declarators were intended to be no more than a means of obtaining an "advisory opinion". Rather, he said, the actions were "instituted as steps in the enforcement of [the plaintiffs'] rights to an indemnity, that is to say, with the eventual object to get defendant to implement the indemnity", and not "as 'foot in the door' manoeuvres to keep prescription at bay". Secondly, the plaintiffs' cause of action "is the self-same cause of action as that which would found any subsequent related litigation aimed specifically at obtaining an order for payment of money".'

[35] The respondent submitted that the appellant should have instituted an action for a declaratory order to interrupt prescription, but it is clear that the sole purpose would have been as 'foot in the door manoeuvres to keep prescription at bay'. For his right was spelt out in the *caveat* and there was no dispute regarding the appellant's right; the sole purpose for a declaratory order would have been to interrupt prescription and not as a necessary step in acquiring the farm. I am of the view that in the circumstances of this case, even if successful, a claim for a declaratory order would not have interrupted prescription.

Specific performance

[17] *Peter Taylor & Associates v Bell Estates (Pty) Ltd* 2014 (2) SA 312 (SCA).

[36] In *Hirschowitz*[18] Corbett JA said the following with regard to the exercise of a right of pre-emption and specific performance:

'It seems to me that in order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor failing to recognise or honour his right, to claim specific performance against the grantor (assuming that [h]e has such a right), the right of pre-emption itself should comply with the Formalities Act. Were this not so, the anomalous situation would arise that on the strength of a verbal contract the grantee of the right of pre-emption could, on the happening of the relevant contingencies, become the purchaser of land. This would be contrary to the intention and objects of the Formalities Act.' (My emphasis.)

[37] Specific performance can only be ordered if the holder of such right had been presented with a written offer which had then been accepted. According to the wording of the right as contained in the title deed and its context, it is clear, viewed objectively, that an option had to be given which complied with the formalities as prescribed in s 2(1) of Alienation of Land Act 68 of 1981. If such an offer was not presented the appellant would not have been able to exercise his right, or claim specific performance.

[38] Therefore, the appellant did not have a complete cause of action for specific performance as Johannes did not make a written offer to the appellant to exercise his right of pre-emption.

[39] In the premise I am of the view that the respondent failed to show that there was a trigger event that initiated the running of prescription. The trigger event according to the wording of the clause would be the granting of a written option and in that event, the right to purchase, if not exercised, would lapse in sixty days.

[40] The respondent also raised the appellant's alleged waiver of his right and estoppel as reasons why the appellant's right of pre-emption had lapsed. The trial court did not deal with these aspects as it held that the appellant's

[18] Fn 8 supra at 767F-I.

right had prescribed. It is therefore incumbent upon this court to deal therewith.

Waiver

[41] In order to succeed with waiver, the respondent had to prove that the appellant decided to abandon his right, with full knowledge of such right and that his decision was conveyed to the respondent. In *Meintjes NO v Coetzer & others*[19] Leach JA said the following with regard to waiver:

'In order to succeed, the first and second defendants were obliged to show that the deceased, with full knowledge of her right to reclaim the two portions of the farm (or, put differently, her rights of the ownership in those portions), decided to abandon such claim, whether expressly or by her conduct. As was observed by Innes CJ more than three-quarters of a century ago, an observation which remains as valid today as it did then, a waiver is a question of fact which is always difficult to establish. (*Laws v Rutherfurd* 1924 AD 261 at 263.)'

[42] In *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd*[20] Botha JA said:

'It is clear, in my opinion, that a creditor's intention not to enforce a right has no legal effect unless and until there is some expression or manifestation of it which is communicated to the debtor or in some way brought to his knowledge.'

[43] In this instance the respondent's attorneys were fully aware that the appellant had not abandoned his right of pre-emption. Both De Bruin and Uys testified that they were aware that the appellant's contention was that the farm had to be offered to him in writing at Land Bank value. He did not deviate from this viewpoint. No evidence was presented that the appellant in any way manifested a stance that he had abandoned his right or that he was not going to exercise that right. I am of the view that the respondent failed to prove that the appellant waived his right.

Estoppel

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[19] *Meintjes NO v Coetzer & others* 2010 (5) SA 186 (SCA) para 24.
[20] *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634H.

[44] Estoppel by representation would mean that the appellant was estopped, or barred, from denying the truth of a representation by conduct made by him to the respondent, while the respondent, believing in the truth of the representation, which belief was reasonable, acted on it to his detriment.[21]

[45] In *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*[22] the requirements for establishing estoppel were stated thus:

'Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so.'

[46] If the averments and the evidence led on behalf of the respondent are tested against the requirements for estoppel, it is clear that the reliance on estoppel is misplaced. The evidence of both the attorneys of the respondent was clear: the appellant insisted on a written option before he would exercise his right of pre-emption. It was clear that the trust of which Cronjé was a trustee and Johannes deliberately entered into a long-term lease, with the option to renew such lease, with the intention of making it as unattractive as possible to the appellant to exercise his right of pre-emption. Neither Cronjé, nor the respondent presented evidence that indicated that they were in any way prejudiced by the conduct of the appellant. He was entitled to insist on a written option.

[47] It follows that the appeal has to succeed. The order of the court below also dealt with other aspects that are not related to the *lis* between the appellant and the respondent. Such orders will remain.

[48] The following order is made:

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[21] *South African Broadcasting Corporation v Coop & others* 2006 (2) SA 217 (SCA) para 64.
[22] *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) para 7.

1 The appeal is upheld with costs.

2 The order made by the court below is amended as follows:

(a) Paragraphs 2, 3 and 7 are set aside.

(b) Paragraph 6 is set aside and substituted with the following:

‘(a) Eerste verweerder word gelas om eiser se koste van die geding te betaal met uitsondering van die verspilde koste van die uitstel, welke koste deur tweede verweerder betaal moet word.

(b) Eiser word gelas om tweede verweerder se gedingskoste te betaal met uitsondering van die verspilde koste van die uitstel voormeld.’

_____

I Schoeman
Acting Judge of Appeal

APPEARANCES

For Appellant:	PA van Niekerk SC Instructed by: Dr Hardus van der Westhuizen Inc, c/o Johann de Wet Attorneys, Pretoria Symington & De Kok, Bloemfontein
For Respondent:	BC vd Heever SC Instructed by: De Klerks Attorneys, c/o Couzyn Hertzog & Horak Attorneys, Pretoria Phatshoane Henney Inc, Bloemfontein