



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 667/2021

In the matter between:

PLATTEKLOOF RMS BOERDERY (PTY) LTD

APPELLANT

and

DAHLIA INVESTMENT HOLDINGS (PTY) LTD

RESPONDENT

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

Coram: VAN DER MERWE, GORVEN and MOTHLE JJA and WINDELL and MALI AJJA

Heard: 3 November 2022

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 am on 15 December 2022.

Summary: Contract – pre-emptive right in respect of two of eight portions of farm – offer by third party to purchase farm – activated right of pre-emption – appellant's remedy – enforcement of respondent's contractual obligation to determine in good faith what portion of global purchase price pertains to two portions and to deliver offer to appellant accordingly.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Binns-Ward J, sitting as court of first instance):

1 The order of the high court is varied only to the extent that the dismissal of the application is set aside.

2 The respondent is directed to deliver to the appellant, within 10 days of the date of this order, 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 the respondent and Swellendam Plase (Pty) Ltd on 7 April 2020.

3 The appellant is directed to pay the costs of the appeal, including the costs of two counsel.

JUDGMENT

Van der Merwe JA (Gorven and Mothle JJA and Windell and Mali AJJA concurring):

[1] This appeal concerns a pre-emptive right in respect of immovable property that the respondent, Dahlia Investment Holdings (Pty) Ltd, granted to the appellant, Platteklouf RMS Boerdery (Pty) Ltd. The appellant launched an application in the Western Cape Division of the High Court, Cape Town (the high court), for an order enforcing compliance with the right of pre-emption. The high court (Binns-Ward J) dismissed the application with costs. Its judgment is reported as *Platteklouf RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd and Another 2021 (2) SA 527 (WCC)*. The appellant's appeal is with the leave of this court.

Background

[2] The respondent is the owner of a farm in the district of Riversdale in the Western Cape that carries the name Plattekloof (the farm). It consists of eight separate portions. The appellant owns an adjoining farm. Mr Gunther Schmitz is a director and the sole shareholder of the respondent. Mr Albert Vermaak, in turn, is a director and the sole shareholder of the appellant.

[3] Two of the eight portions of the farm are described as: the remainder of the farm Hottentots Bosch no 80 (424,6700 hectares in extent); and portion 5 of the farm Platte Kloof no 90 (443,1839 hectares in extent) (the two portions). On 13 April 2018, the appellant and the respondent concluded a written lease agreement (the lease). In terms thereof the appellant rents the two portions for a period of five years ending on 1 April 2023.

[4] Clause 10 of the lease (clause 10) provides for a right of pre-emption, in these terms:

'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, 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 on the terms originally offered for a period of 60 (Sixty) days, failing which this right of first refusal shall revive.'

[5] Mr Schmitz inherited the shareholding in the respondent. He is a businessman who resides in Cape Town. He has no interest in farming. Since 2017, therefore, he attempted to sell the farm or the shares in the respondent. In terms of a deed of sale concluded on 7 April 2020, the respondent sold the farm to Swellendam Plase (Pty) Ltd (Swellendam Plase) for a global purchase price of R17 million. The deed of sale

recorded that the farm was sold subject to the lease, but did not allocate a purchase price per portion of the farm.

[6] The appellant learned of this sale on 16 April 2020. In a letter to the respondent dated 20 April 2020, the appellant's attorney conveyed that he held instructions to claim specific performance of clause 10 and invited the respondent to make an offer to the appellant in terms thereof in respect of the two portions. Despite a subsequent exchange of correspondence between the attorneys of the parties, no such offer was forthcoming.

[7] The appellant consequently approached the high court. The appellant claimed that the respondent be ordered to comply with clause 10 by delivering a written notice offering to sell the two portions to the appellant for R4 million, on the same terms and conditions as those contained in the deed of sale between the respondent and Swellendam Plase. The appellant also asked for an order affording it a period of 14 days to accept or reject that offer.

[8] In the meantime, on 4 June 2020, the respondent and Swellendam Plase in writing agreed to cancel the deed of sale. In the answering affidavit Mr Schmitz explained that the reason for the cancellation was that the respondent had been advised that the sale of the shares in the respondent would provide tax advantages over those of the sale of the farm. Counsel for the respondent rightly did not contend that the cancellation of the deed of sale was of any significance in the matter.

[9] The main issue before the high court concerned the proper interpretation of clause 10 and the consequent application thereof to the facts. I shall return to its findings in this regard. The respondent, however, raised various other defences to the enforceability of clause 10. One of these was that the appellant had failed to comply with its obligations in terms of the lease and that therefore the proviso in clause 10 was not fulfilled. The high court rejected all of these defences and these findings were not challenged before us.

Discussion

[10] It follows from what I have said that the following passage in GB Bradfield *Christie's Law of Contract in South Africa* 8 ed (2022) at 77, is apposite to the determination of the appeal:

'Regarding breach of the preference contract, there are essentially two issues. The first is whether in the given circumstances the right of preference was "triggered" and, if so, the second is what remedies the right holder has in the event of breach of the contract granting the preference right. The answers to these questions depend on the terms on which the right has been granted, and these terms vary.'

Trigger

[11] The first question is whether the high court correctly held that the 'package deal' had 'triggered' the appellant's pre-emptive right. In this regard one has to ask whether the sale of the farm gave rise to an obligation on the part of the respondent to make an offer to the appellant in terms of clause 10. That would be the case if the conduct of the respondent breached the provisions of clause 10. As I have said (and the high court recognised), the answer depends in the first place on an interpretation of clause 10 in terms of the ordinary well-known principles of construction of contracts.

[12] Ultimately the question is whether clause 10 means that the right of pre-emption would only be activated if the respondent receives an offer for the two portions on their own. I do not think so. First, on the ordinary meaning of clause 10, the respondent obtained an offer to purchase the 'Premises', even though it was part of a wider offer. This, I think, is illustrated by *Sher v Allan* 1929 OPD 137.

[13] There the defendant leased half of an erf to the plaintiff. In terms of the lease agreement, the defendant granted the plaintiff 'the first option to purchase the leased property, should he desire to sell the same during the continuance' of the lease. The defendant sold the whole erf without notice to the plaintiff. The plaintiff consequently sued the defendant for damages and the question arose whether the sale of the whole erf constituted a breach of the option in respect of the leased property.

[14] McGregor AJP answered the question in the affirmative. He said at 143:

‘For by selling the whole erf the defendant must needs *ex necessitate rei* be selling the half; and being a free agent herein he must be taken to have desired that which his act implied and involved. He could not – as a matter of ordinary possibility – sell the whole without selling the half’.

And at 144 he trenchantly stated:

‘If we took a different view we might have this result: that, if the owner chose to sell all his property at Kroonstad to a substantial purchaser *in globulo*, it might still be contended that the plaintiff had no cause to complain in that there was no desire to sell the leased half – which might seem to bring one into a somewhat metaphysical sphere.’

[15] Secondly, upon such a construction the right of pre-emption would be circumvented or rendered nugatory by adding something to an offer to purchase the two portions. That would be so unbusinesslike and insensible that the parties could not have intended it. For these reasons I agree with the high court’s finding that the rights of the appellant in terms of clause 10 had been activated. I therefore turn to the issue of remedy.

Remedy

[16] The high court determined the content of the rights of the appellant in these terms:

‘Upon the triggering of the right, the first respondent became obliged, according to the tenor of clause 10 of the lease, to give the applicant written notice specifying the terms and conditions of the offer it had received from Swellendam Plase and the applicant would thereafter have 14 days in which to indicate by written notice to the first respondent 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, the applicant 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.’

[17] I am unable to agree with this conclusion. The decision of this court in *Brocsand (Pty) Ltd v Tip Trans Resources and Others* [2020] ZASCA 144; 2021 (5) SA 457 (SCA) para 17, serves as a convenient starting point:

‘Brocsand’s right of first refusal had a specific content. It was the right “to enter into a new agreement with the Holder for the appointment . . . to render mining services in respect of the Minerals on the Property”, that is, a right against Full Score in the respect of laterite and sand on Red Hill. As a matter of logic, the content of a right cannot change because of a breach thereof, not even when the breach takes place by collusion.’

See also para 25. The appellant’s rights must, of course, be determined by a proper construction of clause 10.

[18] In terms of clause 10 the appellant clearly has no more than the ‘right of first refusal to purchase the Premises’, that is, the two portions. In context the expressions ‘such offer’ and ‘the offer’ refer to the offer that the respondent is obliged to make to the appellant for the purchase of ‘the Premises’. That offer has to be the same or not less favourable than that which a bona fide third party offered in respect of the two portions. Thus, the respondent is contractually obliged to determine in good faith what portion of the Swellendam Plase offer pertained to the two portions and to offer that to the appellant.

[19] As I have indicated, the appellant contended that the evidence proved that the respondent and Swellendam Plase had agreed on a purchase price of R4 million for the two portions, it being the fair and reasonable price thereof. I therefore proceed to analyse the relevant evidence.

[20] Over the period from December 2017 to 11 April 2018, various discussions took place between Mr Vermaak and Mr Schmitz, during which the latter indicated that the respondent would be prepared to sell the two portions for R4 million. On 13 April 2018, as I have said, the lease was concluded. In subsequent discussions up to 10 January 2020, various possibilities in respect of the sale to the appellant of the shares in the respondent, the farm or the two portions were mooted, but nothing came thereof.

[21] During February 2020 Swellendam Plase, represented by Mr Lourens van Eeden, showed an interest in acquiring the remaining six portions (other than the two portions) of the farm. Mr van Eeden inspected the farm on several occasions. On 6 March 2020, Mr Schmitz phoned Mr Vermaak. Mr Schmitz indicated that there was a purchaser for the six portions. He enquired whether the appellant would still be

interested in purchasing the two portions for R4 million. Mr Vermaak responded in the affirmative. On 12 March 2020, Mr Vermaak had a similar conversation with Mr Cornelis van Tonder, an estate agent appointed by the respondent. Mr van Tonder disclosed that the prospective purchaser of the six portions was Swellendam Plase.

[22] On the same day, Mr van Tonder sent an email to Mr Schmitz, stating that Mr van Eeden (Swellendam Plase) had an option to purchase the six portions and that he wished to exercise that option ('wil hy graag daardie opsie uitoefen'). No such document was produced in the evidence and it is unclear what exactly Mr van Tonder intended to convey to his client. It did appear from the record that in an email to the respondent's attorney dated 27 February 2020, Mr Schmitz enquired whether he could sign 'the option document'. Be that as it may, during separate conversations on 14 March 2020, both Mr van Tonder and Mr van Eeden informed Mr Vermaak that Swellendam Plase would pay R13 million for the six portions.

[23] In the answering affidavit Mr Schmitz explained what happened thereafter, as follows:

'We proceeded to engage in negotiations. After a further visit to the farm Mr van Eeden informed me that the value of the two portions leased by the applicant was higher than R5 million, while the remaining six portions were not worth R13 million. He would prefer buying the whole farm. Mr van Tonder subsequently informed me that the buyer wanted to purchase the whole farm and not only the remaining six portions separately (the relevant email correspondence is attached as "GS20").

On 25 March 2020 I went to the farm for the eviction of Mr Botha. On this day I also inspected the condition of the buildings and the land together with Mr van Eeden. We agreed to reduce the price for the whole farm to R17 million based on the bad condition of the remaining six portions. 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 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. As subsequently reflected in the Swellendam contract, the eight portions were sold as an indivisible transaction.'

The further visit alluded to, took place on 19 March 2020, in the presence of Mr van Tonder. In their affidavits, both Mr van Eeden and Mr van Tonder confirmed the evidence of Mr Schmitz.

[24] The appellant urged us to reject the evidence set out in the previous paragraph and to find that the purchase price of R17 million for the farm had been arrived at by adding R4 million to the offer of R13 million for the six portions. The argument was based on a weighing of probabilities. It is trite, however, that motion proceedings are not designed to determine probabilities and that it is not permissible to decide genuine disputes of fact in motion proceedings. In the result, the version of the respondent in respect of disputed facts has to be accepted for purposes of the determination of an application, unless that version is so far-fetched or clearly untenable as to warrant its rejection out of hand. See *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 26. I am by no means satisfied that the respondent's evidence could be rejected merely on the papers.

[25] It follows that the main relief claimed, namely that the respondent be directed to make an offer of R4 million for the two portions, must fail. In its heads of argument in this court, the appellant for the first time attempted to raise a ground for alternative relief. That was that the high court should have determined a reasonable price for the two portions, if needs be after hearing oral evidence in that regard. Apart from the procedural obstacles in its way, the contention is untenable simply because the appellant has no such right. As I have said, the appellant has the right to a bona fide offer on the basis of that part of the R17 million that pertains to the two portions, nothing less and nothing more.

[26] Finally, the question arises whether this should be the end of the matter. The proper interpretation of clause 10 was central to the proceedings in the high court and in this court. That the applicant claimed to be entitled to an offer in the amount of R4 million for the two portions, made no material difference hereto. That claim was based on what the appellant perceived to be the facts. This court has spoken on the issue and it would appear quite senseless to require the appellant to commence proceedings afresh to decide this issue.

[27] What weighs heavily with me in this regard is that as far back as 20 April 2020, the respondent was formally and correctly invited to make an offer in terms of clause 10. To this day, it has not done so. It would not be difficult for the respondent to comply

with a direction to make an offer in terms of clause 10. The respondent fully set out what had transpired and, during July 2020, it obtained a detailed valuation of each of the eight portions of the farm as on 26 March 2020. The valuation was confirmed under oath. After all, as was said in *Mokone v Tassos Properties CC and Another* [2017] ZACC 25; 2017 (5) SA 456 (CC) para 59:

‘Court-coerced compliance by the grantor will be doing nothing more than to require her or him to honour what she or he had bargained for. It will not be an imposition.’

[28] As this would nevertheless constitute the granting of an indulgence to the appellant, there is no basis for varying the costs order of the high court. And the appellant should be directed to pay the costs of the appeal, including the costs of two counsel. I therefore do not think that the proposed order would cause prejudice to the respondent and its counsel did not allude to any.

[29] These considerations have persuaded me that in the particular circumstances of this case, the interests of justice require that the respondent be directed to comply with clause 10. For these reasons, I make the following order:

1 The order of the high court is varied only to the extent that the dismissal of the application is set aside.

2 The respondent is directed to deliver to the appellant, within 10 days of the date of this order, 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 the respondent and Swellendam Plase (Pty) Ltd on 7 April 2020.

3 The appellant is directed to pay the costs of the appeal, including the costs of two counsel.

C H G VAN DER MERWE
JUDGE OF APPEAL

Appearances

For appellant:

T D Potgieter SC

Instructed by:

M J Vermeulen Inc c/o Walkers Inc,
Cape Town
Hill McHardy & Herbst, Bloemfontein

For respondent:

R Goodman SC (with P van Zyl)

Instructed by:

Barnaschone Attorneys, Cape Town
McIntyre & Van der Post,
Bloemfontein.