



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 89496/2014

DATE: 22/05/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED: YES / NO

DATE

SIGNATURE

In the matter between:

SHELL SOUTH AFRICA MARKETING (PTY) LTD

Applicant

and

H L HALL & SONS (GROUP SERVICES) (PTY) LTD

First Respondent

K2014/49699/07 t/a TIEKIEDRAAI EIENDOMME (PTY) LTD

Second Respondent

REGISTRAR OF DEEDS, PROVINCE OF MPUMALANGA

Third Respondent 10

JUDGMENT

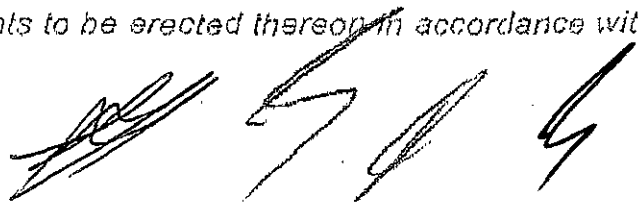
BERTELSMANN J:

- (1) The Applicant is Shell South Africa Marketing (Pty) Ltd (previously known as Shell South Africa (Pty) Ltd), a company with limited liability, duly registered and incorporated as such according to the company laws of South Africa with

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registration number 61/00645/07 and its principal place of business and registered head office situated at Twickenham Building, The Campus, 57 Sloane Street, Bryanston, Johannesburg.

- [2] The First Respondent is H L Hall and Sons (Group Services) (Pty) Ltd, a company with limited liability duly registered and incorporated as such according to the company laws of South Africa with registration number 1921/006878/07, having its registered address situated at KPMG Forum, 33 Van Rensburg Street, Nelspruit.
- [3] The Second Respondent is K2014/49699/07 t/a Tiekledraai Elendomme (Pty) Ltd in the agreement (a company to which only a registration number can be allocated as to date) which is a company with limited liability duly registered and incorporated as such according to the company laws of South Africa, having its registered address situated at Halls Gateway, Mataban, Nelspruit, Mpumalanga.
- [4] The Third Respondent is the Registrar of Deeds for the province of Mpumalanga, with its business address situated at 25 Bell Street, Nelspruit.
- [5] The Applicant leased from the First Respondent during November 1991 a portion of Portion 13 of the farm Riverside. The leased property is described in a written agreement of lease which the parties entered into as *"that portion of the property measuring ± 6550 (six thousand five hundred and fifty) square metres, more fully described on the plan annexed hereto, marked "A", together with the buildings and improvements to be erected thereon in accordance with*



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the plans and specifications annexed hereto, marked "B", agreed between Shell and the Lessor (comprising a garage, filling and service station)".

[6] The lease provides that the Applicant shall have beneficial occupation of the premises for an initial period of 20 years, with an option to further renew the lease for a further 10 years.

[7] Clause 21, headed "SALE" provides for a right of pre-emption, granted by the Lessor, the First Respondent, to the Applicant as Lessee:

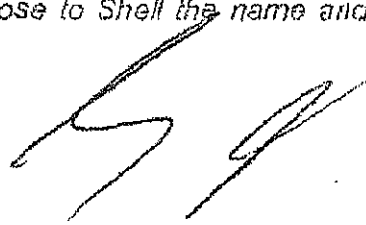
(p. 58) "At any time during the currency of this lease or any extension thereof the Lessor undertakes that it will not sell, or otherwise dispose of, the premises or any portion thereof, to any third party without first having offered to Shell to sell or dispose of it, or the relevant portion thereof, to Shell, on the identical terms and conditions in all respects upon which the Lessor was prepared to sell or dispose of it, or the relevant portion thereof, to the third party, and to this end the Lessor further undertakes -

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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;

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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, save that it shall not be obliged to disclose to Shell the name and address of the third party;



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21.3. the offer referred to in 21 and 21.1 shall remain open for a period of 30 days, [thirty], from the date of receipt thereof by Shell;

21.4. should Shell decline the setoff, or not accept it within the said period of 30, [thirty] days, the Lessor will not thereafter dispose of the premises, or the portion thereof in question, to the said third party or at a price lower or on terms and/or conditions more favourable in anyway at all, to such third party, the price, terms and conditions upon which the offer was made to Shell in terms of 21.1.

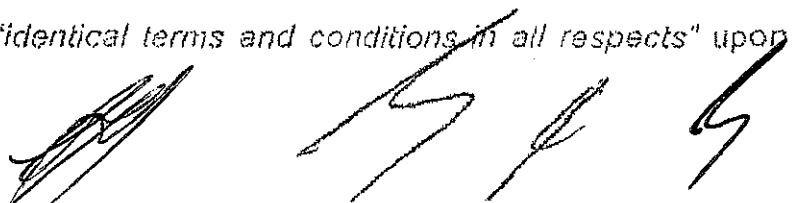
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21.5. failure on Shell's part to accept any offer made to it in terms of the foregoing shall entitle the Lessor to dispose of the premises, or the relevant portion thereof, to the third party in question, but no one else, upon terms not more favourable to such third party than the last offer refused by Shell, upon condition that any such sale or disposal shall not be concluded without first binding the third party to the terms and conditions of this lease. Failure on Shell's part to accept any such offer shall in no way affect the obligations undertaken by the Lessor as set forth elsewhere herein."

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[8] It is this right of pre-emption that the Applicant seeks to enforce in this application, which is opposed by the First and Second Respondents. Clause (p.58)

21 and 21.1 clearly determine that Shell is entitled to be aware of all clauses of a proposed purchase agreement the First Respondent as owner intends to enter into with the intending purchaser before it is obliged to consider whether to exercise its right of pre-emption. Strong support for this conclusion is found in the use of the words "identical terms and conditions in all respects" upon



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which the seller, First Respondent, is prepared to sell.

- [9] When the First Respondent entered into negotiations with the Second Respondent during October 2014 for the sale of the premises it sent the following message to Shell at page 84 and 85 of the papers from Hubert De Haas, with his address, dated 28 October 2014 to H L Hall and Sons [Pty] Ltd for the attention of Mr Craig Lewis. In other words, this is the offer which was received from the second respondent by the first respondent of which a copy was then sent to the applicant:

"Mr Lewis,

RE: OFFER TO PURCHASE: PORTION 1 OF ERF 49,
MATAFFIN TOWNSHIP

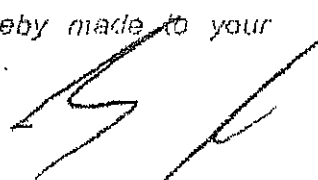
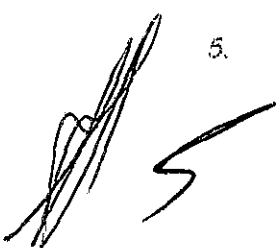
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The purpose of this letter is to confirm the recent discussions relating to the purchase of the above property.

We hereby confirm:

1. *That the subdivision of Erf 49 has been approved.*
2. *That the filling station FS is erected upon portion 1 of Erf 49 and 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 of portion 1 of Erf 49, Matafan Township.*
4. *That Shell has the right of first refusal.*
5. *That an offer of R17 million, [Seventeen million rand], with VAT being zero rated, is hereby made to your*

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company for the purchase of:

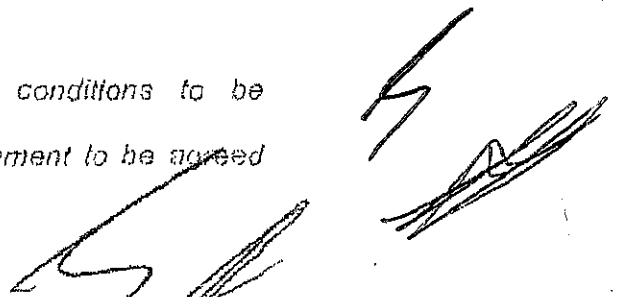
- 5.1. Portion 1 of Erf 49 whereupon a Shell filling station is erected;
- 5.2. The notarial long term lease agreement concluded with Shell;
- 5.3. The site license.

6. That the offer as set out herein is subject to:

- 6.1. The terms and conditions of the bond granted by Nedbank, a financial institution, subject to the normal lending criteria for commercial loans of a similar nature;
- 6.2. The purchase price in point 5 is the full purchase price with the exception of transfer and conveyancing costs;
- 6.3. That the offer is made in my capacity as director of Tiekiedraai Eiendomme (Pty) Ltd, registration number 2014/49699/07;
- 6.4. That an order for the sale to be zero rated Tiekiedraai must be VAT registered;
- 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 a 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.

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Kindly acknowledge receipt.

Yours faithfully,

HUBERT DE HAAS

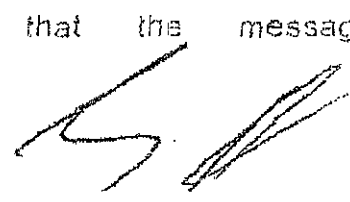
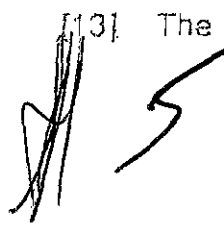
(in my capacity as director and duly authorised thereto)".

(p. 58)

[11] This notification did not comply with clause 21 and 21.1 and expressly recorded that the full and complete terms of the intended contract had not yet been defined. Consequently, the fact that the Applicant was informed of the existence of the as yet uncompleted and still to be finally negotiated draft agreement between the First and Second Respondents on 30 September 2014 did not trigger the commencement of the 30 day period within which the applicant had to exercise its pre-empted option. That this was the Applicant's view, is clear from the email messages that passed between Mrs Ryder on behalf of the Applicant and Lewis on behalf of the First Respondent on pages 86 to 92 of the papers. 10

[12] The First Respondent's reliance on the email of 30 October as having given proper notification to the Applicant to place it on terms to exercise its right of pre-emption within 30 days of that date is misplaced. First Respondent's argument that it contained all that was necessary to inform the Applicant of the intended transaction is incompatible with the express words of clause 21 and 21.1. (p. 58) 20

[13] The Second Respondent's argument that the message of



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30 October constituted substantial compliance with the clauses I have quoted must founder on the same rock. The first time there was compliance with these clauses was 5 December 2014 when the final contract signed by the first and Second Respondents was sent to Mr Ryder. The Applicant immediately exercised its right of pre-emption upon receipt thereof.

- [14] It follows that the Applicant must succeed. The order that was proposed, namely, that the Applicant will step into the shoes of the Second Respondent is not controversial and was not contested in argument.

- [15] An order is consequently made in terms of the draft order dated 20 May 2015 which reads as follows: (pp. 331-332)

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"Having read the papers and heard counsel in the matter an order is made in the following terms:

(pp. 101-117)

1. *It is declared that the agreement, RS15, to the founding affidavit, is deemed to have been concluded between the First Respondent as the seller and the Applicant as purchaser;*
2. *The First Respondent is ordered to take all necessary steps to ensure transfer of the property into the name of the Applicant;*
3. *In the event of the First Respondent failing to take all necessary steps within 10 days from demand by the Applicant of the First Respondent to take such steps, then and in that event the deputy Sheriff is authorised to sign all necessary documents for and on behalf of the First Respondent to ensure that the property, Portion 1 of Erf 49 Mataffan Township is transferred into the name of the Applicant;*
4. *Costs of the Applicant to be paid by the Respondent jointly and severally the one to pay the other to be absolved, the cost of the*

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*application will include the costs of both parts A and B of the
application and the appearances associated therewith."*

Signed at Pretoria on this ____ day of _____ 2015.

E BERTELSMANN

Judge of the High Court

A handwritten signature in black ink, appearing to be a stylized 'S' or 'B' followed by a flourish.A handwritten signature in black ink, appearing to be a stylized 'S' or 'B' followed by a flourish.