



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: 7608/ 2023

In the matter between:

MARIUS JOHANNES WILLEMSE

APPLICANT

And

WESSEL MARTHINUS CRONJE

FIRST RESPONDENT

ANNA PETRONELLA CRONJE

SECOND RESPONDENT

TARTOUWA (PTY) LTD

THIRD RESPONDENT

Before: The Hon. Ms Acting Justice Ralarala

Heard: 05 August 2024

Delivered: 18 September 2024

JUDGMENT

RALARALA, AJ

INTRODUCTION

[1] In this matter the applicant seeks an order enforcing a pre-emptive right in respect of farm properties in his favour against the respondents and certain further declaratory relief related to the aforesaid enforcement of the pre-emptive right.

[2] The applicant's right of first refusal stems from a joint will of the first respondent's grandparents. The will that vested the applicant with the right of first refusal to lease and buy the first respondent's farm properties before the said properties are sold to a third party, in Afrikaans provides as follows:

“3.5 Indien enigeen van die trusts of persone genome in 3.1 sy of haar plaaseiendom wil vervreem of verhuur, moet hy of sy eers die eiendom vir dieselfde prys aan ons oorblywende seuns en daarna aan ons skoonseuns aanbied, alvorens dit aan n' buite persoon verkoop of verhuur word,”

An English loose translation reads:

“If anyone of the trust or persons named in 3.1 intends to alienate or rent out his or her farm property, he or she shall first offer the property at the same price to our remaining sons and thereafter to our sons-in-law, before the sale or lease of it to an outside person.”

The application is opposed by the first respondent who is the registered owner of the said farm properties.

[3] The applicant is the son in law of the testator and the first respondent is the grandson of the testator, the second respondent is the daughter in law of the testator and the mother of the first respondent, while the third respondent is a prospective buyer of the said farm properties. The order sought by the applicant is in the following terms:

“ 1. That the applicant’s pre-emptive right in terms of Conditions 1B and 2B of the title deed on T16732/2010 (“the titled deed”) in respect of the properties Portions 24 (Portion of Portion 8) and Portion 25 (Portion of Portion 12) of the Farm Tartouwa no 296, Hassequa Municipality, division of Riversdale, Western Cape (“ the properties”), has been triggered on 31 January 2023 when the first and third respondents had entered into the deed of sale in respect of the properties annexed to the founding affidavit, marked annexure “A”;

2. that the exercise of the applicant’s pre-emptive right by means of the written and signed offer, annexed to the founding affidavit marked annexure “B” *alternatively* /and or annexure “C”, accords with the provisions of title deed condition B, and constituted a proper exercise of his pre-emptive right in respect of the properties provided for in conditions B in title deed no 16732/10 *alternatively* shall the first respondent be ordered to make an offer to applicant within 10 days of the order herein , to purchase the properties on the terms set out in the deed of sale that the first respondent had concluded with the third respondent;

3. that the lease agreement entered into between the first respondent and the third respondent on 25 April 2022 in respect of the properties as per annexure “D” had been entered into in breach of title deed conditions 1B and 2B, and stands to be set aside;

4. that the second respondent by consenting to the sale of the properties to the third respondent as evident from annexure “A”, has irrevocably waived her right of usufruct registered in her favour in respect of the properties *alternatively* is deemed to have waived the title deed conditions 1B and 2B;

6. (*sic*) that such further/ alternative relief be granted to the applicant as the court may deem meet.”

FACTUAL BACKGROUND

[4] The genesis of this saga is a joint will of Wessel Marthinus Cronje and Andrea Cornelia Cronje which was accepted by the Master of the High Court in terms of the Wills Act 7 of 1953. To fully comprehend the issues to be determined in this application, it is necessary to outline the background of the facts.

[5] The first respondent as the grandson of the testator, inherited the farmland subject to an usufruct as well as pre-emptive rights, both of which form part of the subject matter of this application. Upon the death of the testator, Wessel Marthinus Cronje, who, predeceased his wife Andrea Cornelia Cronje, the relevant portions of the farm were registered in the name of the first respondent with the second respondent's right of usufruct and the applicant's right of pre-emption thereto.

[6] The joint will provided for a pre-emptive right to lease and buy the farm property to the testators' remaining sons and thereafter sons in law, prior to leasing or sale of the properties to an outsider. The first respondent's title deed in respect of the said farm properties mirrors the said provision of the joint will in this regard.

[7] Notwithstanding, the contents of the afore mentioned will, the farm properties were leased to the third respondent without affording the applicant the right to exercise his pre-emptive right. Notably, the lease agreement provides a right of first refusal to the third respondent in the event that the first respondent wishes to sell the properties. Pursuant, thereto, the first respondent proceeded to sell the farm properties to the third respondent without prior affording the applicant the opportunity to exercise his pre-emptive right. The third respondent made an offer to purchase which was accepted by the first respondent and two sale agreements were concluded.

[8] Pursuant thereto, the applicant was informed of the sale agreement and invited to make an offer to purchase the properties on similar terms. In the event of the applicant or any other person who derived the same right from the joint will of the testator, electing not to exercise the pre-emptive right, they were requested to consent to a waiver of the right. The applicant elected to exercise the right and

conveyed his intentions and presented the first respondent with an offer to purchase, which was at variance with that made by the third respondent. The difference manifested in the applicant's offer to purchase pertaining to only the farm properties with the exclusion of the farm implements; immovable property improvements and livestock amongst other things. Ultimately, culminating into the purchase price offered by the applicant varying from the total amount offered by the third respondent. It is that offer to purchase in the exercise of the right of pre-emption and the related usufruct to the farm properties that are subject of this application.

ISSUES TO BE DETERMINED

[9] The crisp questions to be determined in this judgment are the following: first is at what stage was the applicant's pre-emptive right triggered; whether the applicant in the exercise of his pre-emptive right is entitled to determine the terms of the sale of the properties, to the extent that it differs from the terms of the sale concluded between the first and the third respondents. Second, whether the conclusion of a lease agreement between the first and the third respondents was in breach of the pre-emptive right. Third, whether the second respondent's consent to the sale of the farm properties between the first and third respondents amounted to an irrevocable waiver of the second respondent's right of usufruct.

APPLICANT'S SUBMISSIONS

[10] The applicant asserts that, upon the death of the testator, the relevant portions of the farm were registered in the first respondent's name with the second respondent having a right of usufruct thereto.

[11] The applicant avers that the pre-emptive right in respect of the farm and the usufruct in favour of the second respondent created by clauses 3.5 and 3.1.1 of the joint will are also contained as conditions A and B respectively in the title deed. The first respondent contends that he did not take note of the aforementioned pre-emptive rights as he had not been living on the farm and the second respondent managed the farm until his return in 2013. Moreover, no indication was given that any of the family members wished to purchase any farm bequeathed to the other

beneficiaries. In 2016 due to a financial strain the first and the second respondents decided to lease the farm.

[12] On 20 February 2023 the applicant received an email correspondence from Mrs Elizna Lotz of M. J Vermeulen Inc., attorneys practising in Riversdale, informing him and other addressees to this particular correspondence, that the first respondent had received an offer to purchase the properties subject to the pre-emptive right, at a price of R10,5 million with a suspensive condition allowing the purchaser 35 days from the date of acceptance of the offer, to procure finance for R 8, 5 million. The email also conveyed that, in the event they had interest to purchase the farm properties they were invited to furnish M.J Vermeulen Inc. with a written offer to purchase the properties on similar terms. In the event they were not keen to purchase the properties they were requested to sign a waiver of the pre-emptive right which would be registered with the Deeds Office.

[13] The applicant asserts that the email contents did not divulge that an offer to purchase the properties for R8 ,5 million had been received and accepted by the first respondent on 31 January 2023. The applicant was also not informed that a second sale agreement was concluded by the first and third respondents in respect of farm equipment and stock amongst other things at the consideration of R2 million.

[14] Pursuant thereto, the applicant's intention to exercise his pre-emptive right to procure the properties was conveyed to the first respondent. Upon request the applicant received the title deed from which he learnt, *inter alia*, of the lease agreement concluded between the first and the third respondents. In a letter addressed by Ms Lotz it was conveyed that the purchase price was R10, 5 million, comprising of R8,5 million in respect of land and R2million in respect of the "los goed" and farm implements. It was further stated in the letter that the purchase of the "los goed", and the land was as agreed between the first and third respondents, inseparable.

[15] The letter was silent regarding the nature and terms of the sale agreement between the first and third respondents. In particular, that it relates to the two separate sale agreements and that the sale has not been entered into between the

same parties. The sale agreement in respect of the farm properties annexure "A" to the founding affidavit between the first and the third respondent, was also co- signed by the second respondent, by so doing, the second respondent effectively, waived her right of usufruct as regards the properties in respect of the first respondent.

[16] The applicant denies that the two sale agreements are inseparable and inter-dependant of each other. In amplification of this point, the applicant posited that he adopted this view due to the fact that, two sale agreements which are annexures "A" and "L" to the founding affidavit, made no reference to each other in their respective contents. The applicant in the replying affidavit, avers that the sellers in respect of the two sale agreements are not the same in that the second respondent co-signed annexure "A", the sale agreement in respect of the two farm properties and the first respondent's wife, Yolande Cronje co-signed the sale agreement annexure "L" relating to the farm improvements.

[17] The applicant further contends that the immovable improvements effected to the farmland became and formed part of the farmland by virtue of its permanent attachment to the land, and selling such improvements separately from the farm is untenable in law. The applicant asserts that the sale of the farm implements, farm equipment and live stock form part of the first respondent's and Yolande Cronje's communal estate and thus sale of these assets required her signature.

[18] Additionally, the applicant contends that on proper interpretation of Conditions B of the title deed annexure "F" to the founding affidavit, the applicant's pre-emptive right and the exercise thereof could not be made subject to the purchase of anything other than the two properties subject to the pre-emptive right as provided for in the title deed. Moreover, the applicant asserts that, the pre-emptive right to the farmland cannot be circumvented by attaching more things to an offer to purchase the land subject to the right of pre-emption. The applicant maintains that the trigger event was the sale agreement in respect of the farmland concluded between the first and third respondents as per annexure "A".

[19] The applicant through his attorneys, conveyed his willingness and intention to exercise his pre-emptive right and proceeded to provide the respondents' attorneys

with a written and signed offer to purchase at the price and on terms provided for in the deed of sale entered into with the third respondent in respect of the farm properties. The said offer to purchase being at a consideration of R8,5 million which pursuant to receipt thereof on 05 April 2023 the respondents' attorneys conveyed to the applicant's attorneys that the offer to purchase was rejected.

RESPONDENT'S SUBMISSIONS

[20] The first respondent, responding to the applicant avers that, the sale agreement concluded with the third respondent was structured such that it comprises two written agreements. It is further asserted that, it was always within the contemplation of the parties that the sale of the farm would be inextricably linked to the sale of the movable assets on the farm and the immovable improvements to the farm, such as the homestead, sheds and boundary fences.

[21] The sale agreement, the respondents assert, is structured into two, one pertaining to the sale of the farmland for R8 5million and that regarding the sale of movable assets and immovable improvements for R2 million. The first and third respondents convened a meeting on 27 January 2023 wherein it was resolved that it would make commercial sense to structure the sale in two different written agreements, one relating to the sale of farmland and the other relating to the movable, and immovable improvements. This resolution having been motivated by the benefit they stand to derive from the depreciation in value of the movable assets and immovable assets. The process also involved the first respondent's accountants to ensure that the sale structure agreed upon would conform with the first respondent's farming business. The first respondent contends further, that he was ignorant to the fact that his ownership of the farm is subject to a right of pre-emption in favour of others, including the applicant. The first respondent averred that he had always intended to sell the farm as a going concern for a sum not less than R10.5 million, however, the applicant adopted the view that he is entitled to purchase the farm at a discount of R8.5 million and significantly below its market value.

[22] The first respondent opposes the application, it is averred, because the trigger event entitling the applicant to exercise his right to pre-emption was the R10.5 million

sale agreement of the farm, between the first respondent and the third respondent. It is the first respondent's further contention that the implementation of the sale agreement was motivated by commercial considerations and did not amount to an amendment of their initial agreement. The first respondent elaborates further, that the sale is a so called zero rated VAT sale, as there are no transfer duty payable, the parties, as they are both VAT registered in this case, would account for VAT.

[23] Since the farm is sold as a going concern VAT is rated at zero percent. The first and third respondents' actions in their two agreement structure, instead of a single agreement, used a stratagem that was foresight driven. This was based on the notion that, the purchaser may benefit in future through the daily depreciation of particular assets as an expense in the farming enterprise. Ultimately, this would enable the purchaser to claim the annual depreciation in the said assets over years as an expense in their income tax return. In light of the afore mentioned, it is asserted that the applicant is entitled to exercise his right of pre-emption and purchase the farm for R10.5 million.

APPLICABLE LEGAL PRINCIPLES AND ANALYSIS

[24] The principles regarding pre-emptive rights are well established in our law. A pre-emptive right creates an obligation on the registered owner of the property to offer the property to the holder of the said right first, should the owner decide to sell it. Essentially, the exercise of the pre-emptive right is at the behest of the owner of the property. The SCA in *Deon Nel v Petrus Jacobus de Beer & Another* (406/21) [2022] ZASCA 145; 2023(2) SA 170 (SCA) (26 October 2022) considering the question of pre-emptive rights, referred to *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967(3) SA 310 (A), where the court observed as follows:

“A right of pre-emption is well known in our law. . . and it is to be distinguished from an option to purchase . . . The granter of the right of pre-emption cannot be compelled to sell the subject of a right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right.”

[25] In *Mokone v Tassos Properties* 2017(5) SA 456 para 56, the court observed as follows:

“In the event that the conduct of the grantor of the right of pre-emption has culminated in the sale of land to a third party, it seems necessary to understand the import of the so- called Orynx mechanism. This was expressed thus:

In the event that a seller concludes a contract of a sale with a third party in breach of a right of pre-emption, the [holder of the right of pre-emption] may, through a unilateral declaration of intent, step into the position of the third party. A contract of sale is then deemed to have been between the seller and the holder of the right of pre-emption.”

[26] In *Plattekloof RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd* (667/2021) [2022] ZASCA 182 (15 December 2022) at paragraph 10, the SCA in the determination of an appeal on this point, quoted an extract from *GB Bradfield Christie’s Law of Contract in South Africa* 8 ed (2022) at 77:

“Regarding breach of 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.”

[27] In the instant matter, the applicant’s pre-emptive right encapsulates a right to lease the farm properties provided for in clause 3.5 of the joint will and so registered under Conditions 1B and 2B of the title deed, in terms of which the farm properties in question are registered in the first respondent’s name. It is common cause that the first respondent did not offer the farm properties to the applicant for purposes of concluding a lease agreement or sale agreement to the holders of the pre-emptive right, upon formulating the intentions to lease and sell the relevant properties. It is so

that the first respondent claims to have been ignorant of the right, notwithstanding that it is derived from his grandfather's will that bequeathed to him [the first respondent] the said farm properties and later became registered in his title deed. I agree with the applicant, the first respondent's account in this regard is preposterous and cannot be justified.

[28] The parties, are not in agreement as to when the applicant's right of pre-emption was triggered. The applicant's view is that the 'trigger' was the conclusion of the sale agreement as envisaged in annexure 'A' [to the founding affidavit] by the first and third respondents on 31 January 2023. The first respondent contends the trigger is the decision of the first respondent to sell the farm which decision he made on 27 January 2023. The other diverse aspect in this regard manifests in the parties' perceptions. The applicant's view is that the R8.5 million farm properties' sale agreement which annexure 'A' embodies, activated his pre-emptive right and not the agreement pertaining to the sale of movables and immovable improvements. The SCA in *Plattekloof, supra*, and the High Court [the court aquo], determined that the package deal offer triggered *Plattekloof's* pre-emptive right. At paragraph 12 the court remarked as follows:

"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."(underlining supplied)

[29] What can be extracted from the preceding passage is that the event that activates or triggers the pre-emptive right would be the receipt of the offer by the grantor of the pre-emptive right as opposed to the conclusion of the sale agreement. In *casu* the offer was made on 26 January 2023, and the sale agreement was finalised on 31 January 2023. My view is that based on the *Plattekloof* judgment the offer that occurred on 26 January 2023 triggered the applicant's pre-emptive right to the farm properties and not the conclusion of the sale agreement as asserted by the applicant. For it was at that stage that the first respondent was obliged to approach

the applicant, given that it was opportune for the applicant to exercise his pre-emptive right, but the first respondent failed him in that regard.

[30] Nevertheless, pursuant to the conclusion of the sale agreement with the third respondent on 31 January 2023, the first respondent afforded the applicant the opportunity to exercise his right of pre-emption. The applicant has made an offer to purchase to the first respondent, however, the said offer has been rejected by the first respondent, on the basis that the applicant has not matched the third respondent's offer. Invariably, the applicant's exercise of his pre-emptive right is a unilateral declaration of his intent to step into the shoes of the third respondent, and buy the properties at a predetermined price. *Van Aardt And Another v Weehuizen And Others* 2006(4) SA 401 at 408 para 14; *Associate South African Bakeries (Pty) Ltd v Orynx & Vereinigte Backereien (Pty) Ltd en Andere* 1982 (3) SA 893(A) at 907E-F.

[31] Basically, the offer is based on the terms offered by the third party. The applicant argues that the written offer would be in terms on which the pre-emptive right was granted in the title deed Condition B thereof. The first respondent argued that on 03 January 2023 an offer was received from the third respondent for purchase of the farm properties for R9 million which was rejected by the first respondent. A second offer of R10.5 million was received on 25 January 2023, from a neighbour which was also not accepted, however, that formed the basis of a subsequent offer from the third respondent the next day for the same amount. Crucially, the applicant in reply did not address this particular issue, thus it remains uncontroverted. The offer was accepted and based on the offer the second respondent agreed to waive her right of usufruct in respect of the properties. The formulation of the sale agreement was adopted by the parties in light of it making business sense.

[32] The applicant contends that all immovable improvements effected to the farmland form part of the farmland and the separate sale of such immovable improvements is untenable in law. At the hearing Mr Van der Merwe argued on behalf of the applicant, that the first respondent is forcing the applicant to an offer to purchase not only the farm properties but the movables and immovable

improvements, which amounts to the burdening of the pre-emptive right. In this regard, reliance was sought on *Plattekloof supra*. In *Plattekloof* the right of first refusal was in relation to two portions of a farm that became subject of a sale of eight portions of the farm with a third party. The pre-emptive right was in terms of a certain clause 10 embodied in a lease agreement which expressly indicated that the pre-emptive right was in respect of the two portions of the farm. The SCA after consideration of the High Court's interpretation of the relevant clause, determined that the appellant's right of first refusal was in respect of the two portions of the farm and not the entire package deal, meaning, inclusive of the six other portions that are the subject of the sale agreement with the third party.

[33] It is necessary, therefore to interpret the document from which the applicant derives his pre-emptive right. The latter originates from the testators last will and testament. The relevant parts of the will reads as follows:

“ AANSTELLING ERFGENAME

3.1 Indien die Testateur die eersterwende van ons mag wees, smelt ons, ons boedels saam en bepaal dat dit soos gevolg as een saamgevoegde boedel beredder en verdeel moet word:

3.1.1 Aan ons kleinseun Wessel Marthinus Cronje bemaak ons plaas eiendome beskryf as Gedeeltes 25 (gedeelte van gedeelte 12) van Tartouwa Nr 296, Groot 114, 5235 hektaar en Gedeelte 24(gedeelte van gedeeltes 9) van Tartouwa Nr 296, Groot 85, 6533 hektaar met alle verbeterings daarop.”(underlining supplied)

[No English translation provided]

The proper approach is as adopted by the court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) ([2012] 2 All SA 262; [2012] ZASCA 13) Page 603 para18

“ . . . 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 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 . . . The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.” (underlining supplied)

[34] Discernment necessitates that the clause 3.5 of the will be considered in conjunction with clause 3.1 of the will for the full appreciation of the pre-emptive right. Clause 3.5 of the will, makes reference to clause 3.1 and in clause 3.1.1 the testator bequeaths the farm properties as described therein with the improvements effected thereon. Thus, these clauses should be read together. The testator pertinently expressed that Portions 24 (Portion of Portion 8) and Portion 25 (Portion of Portion 12) of the farm already had improvements effected thereon and thus it follows that the properties upon being alienated, the improvements would form part thereof. Against this backdrop, I formulate a view that the testator was acutely aware, that the pre-emptive right would apply to the properties and the improvements thereof. Notably, the applicant also has full appreciation thereof as demonstrated in paragraph 32 above, and this in fact partially gives credence to his earlier argument. Most significantly, in interpreting wills, the wishes of the testator must be implemented or given effect. In that process the court will ascertain from the language used in her or his last will and testament in order to give effect to the said wishes. *King and Others N.N.O. v De Jager and Others* 2021 (4) SA 1 (CC) at para

[34]. In my mind, the testator similarly envisaged that the farm properties would evolve with the times and more improvements would be effected as time goes on. Thus, the applicant's argument that the improvements added are burdening the pre-emptive right holder is not sustainable.

[35] This matter is quite distinguishable from *Plattekloof* in that in *casu* the plaintiff is afforded the opportunity to exercise his pre-emptive right on the farm properties as provided in the will and the title deed. There are no other immovable properties involved in the sale as is the case in *Plattekloof*, which makes sense why the SCA determined that the pre-emptive right would be burdened if the right holder would step into the shoes of the third party and buy six other portions of the farm he holds no pre-emptive right to. Comparably, in *Plattekloof* the lease agreement clearly expressed that the right of pre-emption was in relation to two portions of the farm that were the subject of the lease agreement.

[36] In the current matter the movables and immovable improvements are part of the two farm properties to which the applicant has a pre-emptive right. Importantly, the will is silent on the manner the farm properties and its improvements would be sold, whether in terms of a unitary inclusive sale agreement or multiple sale agreements. Clearly this decision the testator left with the owner of the farm properties, in this case the first respondent. Thus, the afore stated argument proffered by Mr Van der Merwe for the applicant is indefensible, in my view.

[37] At the hearing of this matter, Mr Van der Merwe argued that the testator provided for the leasing of the farm properties in his last will and testament, indicative of the fact that he foresaw that the beneficiaries would not be farming themselves. Ostensibly even prior to the testator bequeathing the farm properties to the first respondent, the first respondent's parents were operating a farming enterprise on the relevant farm properties. Crucially, the first respondent's assertions that his father, the testator's son utilised the farmland as grazing land for dairy cows and established a drilling enterprise, which business the second respondent later continued with pursuant his death, was not controverted in reply. Thus, in my view, dispels the argument proffered by Mr Van der Merwe. Mr Bothma, Counsel for the respondents argued that the sale agreement in the manner it is structured makes

business sense therefore, that the sale of the properties would be as a going concern. I am inclined to agree with counsel for the respondents' argument, that the applicant is not entitled to select which part of the sale agreement he wishes to rely on, in that in the exercise of the right of pre-emption, his is to replace the third respondent in the sale agreement without more. In the premises, the applicant's contention that the sale agreement as it stands is tantamount to circumventing his pre-emptive right has no basis.

[38] It is timely at this stage to deal with a matter of detail which in my view commands consideration, of what the terms of the sale agreement are that in the exercise of the pre-emptive right the applicant would be subject to. In my mind, the first respondent in now granting the applicant the opportunity to exercise his right of pre-emption in respect of the sale agreement, such conduct is not at all a signal creating a legitimate expectation that the existing terms of the sale agreement will be obliterated or altered or tailor made to meet the applicant's requirements or fancy. The matter is also different from one where the pre-emptive right is not "a stepping into" on the same terms and makes provision for negotiations of the terms of the sale agreement or purchase price where room exists for further negotiations. *Mokone v Tassos Properties* 2017 (5) SA 456 (CC) at para 85.

[39] The first and third respondents had resolved to conclude a sale agreement of the farm properties formulated in two agreements which were the terms that they contend make commercial sense and ideally suited to their needs at the time. This is also confirmed by Ms Sandra van Jaarsveld Director of Fynbos Accountants. The status *quo*, is that there is not a shred of evidence suggesting that the first and the third respondents in their actions when formulating the terms of the sale agreement, were not acting in good faith or that the terms so formulated, are beyond the bounds of commercial reason and that they are solely composed for the purpose of prompting indifference or frustrating the applicant in the exercise of his right. *Seteriou v Retco Poyntons (Pty) Ltd* 1985(2) 922 at 932 para I to J. As borne by the papers the first and the third respondents in the formulation of the terms of the sale agreement paid no consideration to the applicant. Applicant's argument is implausible, in my view.

[40] The expectation is that pursuant to demanding the offer the applicant upon accepting it he would not only step into the shoes of the third respondent, but squarely fit therein where the terms of the sale agreement are not in conflict with the provisions that underpin the pre-emptive right. Evidently, the terms of the sale agreements are not in conflict with those on which the pre-emptive right was granted.

[41] One more aspect that requires consideration. The applicant also asserted that, the applicant was deprived the right of first refusal by the first respondent to lease the said properties. In amplification of this contention, the applicant posits further that, the first respondent leased the farm properties to the third respondent without prior affording the applicant the opportunity to exercise his right of first refusal. In the premises, the applicant asserts that the lease agreement entered between the first and the third respondents on 25 April 2022, was entered into in breach of Condition B of the title deed and thus stands to be set aside. The respondent in responding to this contention submits that the applicant was not oblivious to the lease agreement between the respondents. The lease, is said to be strictly speaking between the second respondent and the third respondent a right emanating from the usufruct and the usufructuary is not bound by the provisions of clause 3.5 of the will. Invariably, in the case of first refusal, if the landlord decides to lease the properties, she or he must give the holder of such a right the opportunity of refusing the lease on the same terms and conditions agreed upon between the landlord and any third parties.

[42] Mr Bothma argued that in view of the second respondent's usufruct on the properties, the first respondent could only lease the properties, subject to permission granted by the second respondent. Normally, the remedy available to the applicant in these circumstances is that of specific performance. I inter-pose to point out that the relief sought by the applicant is not a claim of specific performance based on Condition B of the title deed, which is to make an offer to lease the farm properties. Cancellation of the lease agreement is a remedy available to the applicant.

[43] It is apposite at this juncture to deal with what a usufruct actually entails in this context. A usufruct is a legal right to occupy or use or rent out a property for the usufructuary's benefit. In this instance the testator bequeathed the farm properties to

the first respondent subject to the second respondent's usufruct, to make sure she has the means to take care of herself in her life time. In the circumstances although the testator bequeathed the farm properties to first respondent, he assumed the role of a bare dominium or registered owner of the property without the right to use or benefit from it until waiver thereof the second respondent's death. It follows therefore that the right to lease the properties is at this point in time solely vested in the second respondent as the usufructuary and not on the first respondent.

[44] Clearly, this is a situation of competing rights, however, in the examination of the language used in the will and the formulation of its clauses, it is an inescapable fact that sequentially, the usufruct precedes the right of first refusal, in the sense that it is contained in clause 3.1.1 and the applicant's right of first refusal is contained in clause 3.5. According to the structure of the will, the usufruct is bequeathed first and the nature of this right and the circumstances thereof dictate that its exercise would precede the exercise of the right of refusal, and that of the registered owner. For practical purposes, discernment demands that the exercise of the right of usufruct should precede that exercise of the right of refusal. My reasoning is that the exercise of the usufructuary right is not depended on any eventuality of certain events as its adversaries are. It is an unconditional right, even the registered owner's right to the property, its exercise is dependent on the waiver of such usufructuary right or the death of the usufructuary. Sensibly, any lease agreement of the farm properties would be at the behest of the usufructuary or with her permission, free from the right of first refusal applicable in respect of the first respondent. Therefore, my sense is that, in the life time of the usufructuary the registered property owner's right to exercise the same rights as that enjoyed by the usufructuary are in abeyance. In this case the rights would automatically vest on the first respondent on remarriage of the second respondent or at her death. In my view, in this instance the applicant's right of first refusal in respect of the lease would only come to a realisation in the event of death of the usufructuary or waiver thereof. The first respondent only has the right to sell the farm properties and that is subject to the pre-emptive right.

[45] There is no dispute about this principle. The first respondent correctly contends that the usufructuary is not bound by the provisions of clause 3.5 of the will and the conclusion of the lease agreement was purely in exercise of her usufructuary right.

Similarly, there is no material dispute regarding the cogency of the latter argument, I say this because the applicant merely proffers a debilitated response that fell short of addressing the gravamen of the first respondent's contention in this regard. He merely states, that, the first respondent is disingenuous in his assertion that the lease agreement is between the second and the third respondent and calls for proof of how the rental monies have been paid. My view is that, the argument advanced by the applicant that the conclusion of the lease agreement on 25 April 2024 is in breach of his right of first refusal to lease the property is indefensible.

[46] One final issue for determination is the irrevocable waiver of the usufructuary right. The SCA in *Road Accident Fund v Mothupi* [2000] ZASCA 27;2000(4) SA 38(SCA) at 15 stated that:

“Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form the starting point invariably is the will of the party said to have waived it. . .”

The first respondent categorically stated in his answering affidavit that the second respondent was only acquiescent to the waiving of the usufructuary right on the basis that the purchase price of the farm was R10.5 million. From this it can be easily comprehensible that the intention of the usufructuary is in clear terms in that her intention was not to unconditionally denounce her right. Clearly, if the sale price is not achieved the intention was not to waive her usufructuary right. While it was the applicant's contention that the second respondent has irrevocably waived her usufructuary right when the sale agreement was signed, in his reply the applicant asserts that the first respondent's aforementioned averment is irrelevant to the adjudication of the relief sought. In my view, the reply proffered by the applicant in this regard, was not only perplexing, but more importantly it failed to meaningfully engage the respondent's response in this regard.

[47] Demonstrably, the applicant belatedly abdicates his initial perspective of the irrevocable waiver of the usufructuary right. In any event, it has become abundantly clear that the applicant's contention in this regard is unsustainable. In my view, it is

plain from the uncontroverted assertions of the first respondent, that it was not the second respondent's will to irrevocably waive her usufructuary right when the sale agreement was concluded, a proviso was that R10.5 million should be the purchase price. *Road Accident Fund v Mothupi supra*.

[48] The cumulative effect of these factors impels the conclusion that the application including the declaratory relief sought herein should fail and the applicant's pre-emptive right be exercised in respect of the terms of the sale agreement between the first and the third respondent.

ORDER

[49] In the result I make the following order:

[49.1] The application is dismissed with costs, such costs to include costs of counsel on C scale.

N E RALARALA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv D.L. Van der Merwe

Instructed by Roux Attorneys

For the Respondents: Adv P. Bothma

Instructed by M J Vermeulen Inc.