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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NO: 115148-2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 22/8/25

SIGNATURE

In the matter between:

ARBEIDSAAMHEID BOERDERY CC
(Registration Number: 2001/020071/23)

APPLICANT

and

PROC CORP 202 CC
(Registration Number: 2002/039012/23)

FIRST RESPONDENT

GOLDEN BAY PROPERTIES 341 (PTY) LTD
(Registration Number: 2017/534328/07)

SECOND RESPONDENT

VAN DER MERWE ATTORNEYS INCORPORATED

THIRD RESPONDENT

REGISTRAR OF DEEDS POLOKWANE

FOURTH RESPONDENT

JUDGMENT

MULLER J:

[1] The applicant is the lessee¹ of a property described as Portion 2 of the farm Breda Registration Division LQ Ellisras District Limpopo held under deed of transfer T[...].² The first respondent is the owner and also the lessor of the property.³ A written lease agreement was concluded in 2016, with expiry date on 30 April 2026. Clause 14 of annexure A to the lease provides:

“Die partye plaas Hiermee op rekord dat die HUURDER die eerste opsie het om die Eiendom van die VERHUURDER te koop in die geval waar die VERHUURDER sou besluit om die Eiendom te verkoop. Indie geval waar daar ‘n aanbod om te koop deur ‘n derde party gemaak word ten aansien van die eiendom sal die HUURDER die reg hê om dieselfde aanbod te gelyk. Sodanige opsie sal uitgeoefen word onderworpe aan ‘n aparte Opsie om te Koop of n’ Koopooreenkoms wat tussen die Partye gesluit sal word.

Die HUURDER word hiermee verplig om sy opsie om te koop binne 3 (Drie) maande nadat die betrokke Eiendom in die mark kom, uit te oefen. In die geval waar die HUURDER weier of versuim om sy opsie hierin behoorlik uit te oefen, sal die opsie verval.”

¹ Henceforth called “the lessee”. The controlling mind/member is CC Carstens who is the deponent to the founding and replying affidavit.

² Henceforth called “the property”.

³ Henceforth called “the lessor”. The controlling mind/member is JA Le Roux who is the deponent to the answering affidavit.

[2] It is common cause that clause 14 grants a right of first refusal. In *Robinson v Randfontein Estates Gold Mining Co Ltd*⁴ Innes CJ described such a right as:

“[Now] a contract not to sell to a third person without giving the other contracting party an opportunity of purchasing at the price offered is analogous to a *jus retractus* or contractual right of *naasting* (Schorer, Note 380; Voet 18.3 sec 10). Such an agreement being in restraint of alienation is narrowly construed; and according to Voet, does not prevent the owner from freely disposing of the subject matter by way of gift or testamentary disposition. And, of course, it can only operate if and when the owner is willing to sell and has received an outside offer.”⁵

[3] In *Hartsrivier Boerdery (Edms) Bpk v Van Niekerk*,⁶ De Vos J explained that:

“The essence of a “right of first refusal” is that the giver thereof binds himself to the procurer of the right not to sell the object of the right to a third party unless the holder of the right has been given a reasonable opportunity and has nevertheless not offered to purchase.”⁷

The learned judge further explained that the respective obligations of the parties are:

“Die onderlinge verpligtings van die partye kragtens die verlening van die voorkoopsreg aan die eiser was dan as volg, kragtens klousule 10 van die kontrak soos aangehaal in para 5⁸ van die deklarasie: as verweerder wil verkoop

⁴1921 AD 168; *Sher v Allan* 1929 OPD 137,140.

⁵ p 188,189.

⁶ 1964 (3) SA 702 (T)

⁷ Translation of the headnote at p 702.

⁸ “5. Klousule 10 van gemelde kontrak (waarin na die verweerder verwys as die ,verhuurder’) en na die eiser as ,die verhuurder’ het die volgende bepalings bevat.

Indien die verhuurder te enige tyd gedurende die huurtermyn of by die verstryking daarvan sou besluit om die plaas te verkoop dan sal die huurder die eerste reg van weiering besit om die gemelde plaas te koop”

gee hy kennis aan die eiser dat hy wil verkoop an dan moet die eiser binne 'n redelike tyd meedeel as hy wil koop.⁹

[4] Similarly, in *Sher v Allan supra*, the court referred with approval to *Manchester Ship Canal Co v Manchester Race Course Co* (1901, 2 Ch 37; 84 LTR 436). It was emphasised that:

“Furthermore, under a clause of this kind it is not for the donee in the first instance to submit his offer; it is for the owner (the donor of the “first option”) to lay before the donee by his written notice something in respect of which his (so-called) option – his choice or preference or first refusal – shall operate. It was put this way in an English case *Homfray v Fothergill* (LR 1 Eq 575): “The right arises and comes into active operation as soon as the notice is given “– and though one might feel some doubt as to the word “arises” the question indicates the importance with which the Court there attached to the notice. Now here apparently no notice of offer of the character in question was given to the plaintiff.””¹⁰

[5] The lessor, in the present matter, has entered into a contract of sale with the second respondent. The third respondent, a firm of attorneys, has been instructed to effect transfer. Upon discovering the sale, the lessee launched the present urgent application seeking an interim interdict to prevent transfer of the property pending the finalization of an action/application to be instituted for a *declarator* that the right of first refusal has not lapsed together with other relevant relief. The application is opposed by the lessor. The second and third respondent did not otherwise participate.

[6] Counsel for the lessor argued that, properly interpreted, clause 14, indicates that the right has lapsed and therefore no enforceable right remains to justify interim or final

⁹ 706A-C.

¹⁰ p142-143.

relief.¹¹ Counsel for the lessee contended that the right remains intact and that a *prima facie* right has been established.¹²

[7] The parties, as stated, are agreed that clause 14 constitutes a *pactum de contrahendo*. The Constitutional Court has observed that contractual terms in a document, such as the lease, should be understood in their ordinary sense, in context, and in a manner that accords with commercial purposes. A businesslike interpretation must be given to clause 14.¹³

[8] The lessee conducts farming activities on the property and wishes to continue beyond the expiry of the lease. Clause 14 was plainly intended to give the lessee in particular, the first opportunity to purchase the property should the lessor decide to sell.

[9] The lessor contends that the right must be exercised within a period of three months “nadat die betrokke Eiendom in die mark kom” which, it is argued, means from the date the property was marketed.

[10] The words “Die HUURDER word hiermee verplig om sy opsie om te koop binne 3 (Drie) maande nadat die betrokke Eiendom in die mark kom, uit te oefen. In die geval waar die HUURDER weier of versuim om sy opsie hierin behoorlik uit te oefen, sal die opsie verval.” must, however, be read contextually and in the light of the principle underlying a right of first refusal.

[11] Clause 14 does not expressly require that the property be placed on the “open market” by marketing the property by means of public listing; online platforms or advertisements by estate agents.

¹¹ *Olympic Passenger Service (Pty) Ltd* 1957 (2) SA 382 (D) 383C-G; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 32 (CC).

¹² *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813 (W) 832J-833B; *Simon NO v Air Operations of Europe AB and Others* 1999 (1) SA 217 (SCA) 228F-I.

¹³ *Makone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC) par 29; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) par18.

[12] On a proper interpretation, the three months period begins to run (against the lessee) once two conditions are satisfied: (a) the lessor has made known to interested parties, including the public that the property is available for purchase; and (b) the lessor has notified the lessee accordingly. Only then does the right arise. The so-called “trigger date” is thus the date of notice to the lessee.

[13] The evidence adduced for the lessee is that in April 2024, Le Roux informed Carstens that a third party had shown interest in purchasing the property for R4.5m. Carstens reminded Le Roux of the lessee’s desire to purchase if the lessor decided to sell the property. Le Roux responded that the lessor would only consider marketing the property after completion of certain building works and assured him that there was merely an expression of interest.

[14] Thereafter no communication was received from the lessor in connection with the possible sale of the property. The lessee was neither informed that the property was for sale nor that it was advertised. No prospective purchaser contacted the lessee or viewed the property. The building works were completed in September 2024.

[15] On 9 December 2024, the lessee received a letter from Schabort and Potgieter attorneys requesting a copy of annexure A to the lease agreement and a meeting to discuss certain aspects of the lease. A copy of the document requested was forwarded to the attorneys on 11 December 2024.

[16] On 17 January 2025 a further letter was received from the same attorneys, pointing out that clauses 13 and 14 are missing from the annexure supplied, and alleging certain purported breaches of the lease.

[17] In February 2025, the son of Carstens expressed interest in purchasing the property, with a potential offer scheduled at a meeting set for 20 March 2025.

[18] At the meeting on 20 March 2025, the alleged breaches of the lease were discussed. Le Roux indicated that the lessor was no longer interested in selling the property and preferred to continue with the lease. The parties discussed rental escalation and agreed that the lease would be extended beyond 30 April 2026. The potential offer of the son was not pursued.

[19] On 8 May 2025 the lessor's attorneys addressed a letter to the lessee stating:

- "1. We refer to the above subject and to previous discussions between the parties.
2. Kindly take note that our client has decided to sell the property and we are informed that our client has received an offer for the property.
3. You are invited to submit an offer to our client in writing as soon as possible.
4. We trust that you find the above in order so and naturally, all rights remain reserved."

[20] On 19 May 2025 the lessee forwarded a reply to the letter that stated:

"I refer to the letter received on 8th May
We are considering all our options and will reply soon."

[21] On 31 July 2025 the lessee's attorneys wrote to the lessor's attorneys, stating:

"Ons klient is begerig om die eiendom te koop en sal ons graag 'n afskrif van die huidige koopkontrak van u ontvang.
Ons vertrou u vind voormeld in orde en verneem graag van u in die verband."

[22] On the same day, the lessor's attorney responded that their mandate had been terminated and that correspondence should be directed to the lessor.

[23] On 4 June 2025 a similar request was sent to third respondent, the lessor's new attorneys.

[24] The third respondent replied that it had been instructed to effect transfer of the property into the name of the second respondent who had purchased the property after it had been on the open market since April 2024. It was further stated that the lessee was aware of this and that his right has lapsed.

[25] This was denied by the lessee's attorneys who requested a written undertaking that the transfer the property would not proceed. No such undertaking was provided, prompting this urgent application followed.

[26] The lessor, in opposition, alleged that the lessee lacked *bona fides* and merely sought to delay matters to hold on to the property pending the finalisation of an action (not an application).

[27] The lessor reiterated that the option had to be exercised within three months from the date the property was marketed, and that marketing need not be public.

[28] The lessor contended that the property had been in the market since the beginning of 2024 and was marketed by word of mouth (by Le Roux) resulting in a letter of intent received from Hancolodi Konstruksie (Pty) Ltd on 17 April 2024, though no final offer materialised.

[29] Around the same time, Hans Burger allegedly made an offer of R4.5m to purchase the property without viewing the property. Burger allegedly informed Le Roux that he had grown up on the farm and would like to visit the family graveyard. Burger was informed that they can arrange for him to visit the property as soon as the lessor completed the building works.

[30] Carstens informed Le Roux that he is aware that Burger (who had phoned him) is interested in purchasing the property. Carstens objected to third party viewing. No mention was made of the lessee's right of first refusal during their conversation. Carstens enquired if the lessee will be entitled to continue with the lease if the property is sold. Le Roux advised him that *huur gaat voor koop*. The lessor contends that the lessee, accordingly, became aware of the property being marketed during April 2024. Nothing was heard from Burger after he had made the offer to purchase.

[31] Le Roux during the second week of October 2024 informed Carstens that another person, without mentioning his name, showed interest to purchase in the property. This person was Don Emslie who represented the second respondent. Once again Carstens raised concerns about the continuation of the lease emphasising that his farming operation could not simply be uprooted in an email dated 15 October 2024. He stated in an email dated 24 October 2024:

“Middag Eddie

Na aanleiding van ons gesprek vroeër die week.

Angesien ons huur kontrak geldig is tot 30 April 2026 voel ek dit is noodsaaklik dat jy jou kopers moet inlig hieroor

Die boerdery het vanaf 2016 gegroei tot waar daar nou 'n boerbok stoet, Boran stoet en 'n groot skaap boerdery is. Daai is ook nog buffels en ander wild wat sal moet skuif. Die Buffel projek is beplan om elke jaar 'n bult e jag as die basisse hard is. Die laaste bul sale eers in 2026 reg wees.

Jy kan dus verstaan dat ons nie net kan oppak nie.

Dan is daar nog die water problem. Al die boorgate saam maak nie eers een tenk per dag vol nie. Dis tog die verhuurder se plig om water aan die huurder te voorsien. Ons ry vandag water van Willie af aan met 'n 1000 l tenk. Dit gaan ons heelwat aan diesel kos.

Ek heg 2 paragrawe van aanhangsel A (kontrak) aan.”

[32] The lessor argued that the reference to “jou kopers” in the email indicates knowledge that the property is on the market and that the right had lapsed.

[33] On 17 February 2025 Carstens wrote to the lessor’s previous attorneys recording that his son is interested in making an offer. The lessor argued that this confirmed that Carstens had realised the right had lapsed.

[34] The lessor therefore contended that the right had lapsed by the end of July 2024, alternatively, January 2025. The lessee denied this and insisted that Carstens was never informed that the property was formally on the market.

[35] Carstens again repeated that Le Roux advised him during April 2024 that there might be a party who is interested to purchase the property but that the lessor would not consider any offer since the building works had to be completed first. The lessor was informed during that discussion that should the property be placed on the market that the lessee will exercise his right.

[36] The lessee also denied that a certain Hans Burger contacted Carstens, asserting that it was a different person, called Linton Burger, seeking to visit the graves of family members on the property and to arrange a funeral.

[37] The lessee denied being told in October 2024 that a person is interested to purchase the property. Carstens asserts that Le Roux phoned him in October 2024 to inform him that should the lessor decide to put the property on the market and should the lessee not be able to purchase the property the lessee would be required to vacate the property within three months from the date that the property is sold. No mention that the property is on the market was made to him. The email of 24 October 2024 was written in reaction to this conversation.

[38] The potential offer by Carstens’s son must be viewed in light of the ongoing correspondence between the parties since December 2024.

[39] The test for interim interdicts was set out in *Webster v Mitchell*.¹⁴

“The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts, obtain final relief at the trial. The facts set up in contraction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to ‘some doubt’. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right to be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.”¹⁵

[40] Notably no mention was made in the letter dated 8 May 2025 from Schabort and Potgieter, that the right had lapsed. The lessee argued that the letter containing the invitation to make an offer was nonsensical if the right has lapsed.

[41] The lessor, (on his version) invited offers from third parties without notifying the lessee in breach of clause 14. The lessee was easily accessible and email and by phone and at the property. The impression is that the lessor deliberately elected not to inform the lessee of his decision to sell.

[42] The lessor’s claim that Le Roux marketed the property by word of mouth is unconvincing and also the allegation that Hans Burger in fact made an offer to purchase the property for R4,5m without even viewing the property which in itself is improbable. It is rather unusual for a serious purchaser who stands to pay a considerable amount if the offer is accepted not to view the investment he is about to make even if he had

¹⁴ 1948 (1) SA 1186 (W) 1189.

grown up on the farm. Importantly, as stated before, the written offer is not attached and the lessee was not told that an offer of R4.5m was made. No reason why Burger's offer of R4.5m was not accepted is proffered. The absence of the document that embodies the offer cast serious doubt on the credibility of Le Roux.

[43] The letter of 8 May 2025 is significant; it for the first time notified the lessee of an offer and the lessor's decision to sell the property. The invitation would not have been extended if the lessor was of the view that the right had lapsed. Although the lessor knew full well that the lessee had the right to match the offer, he nevertheless withheld the identity of the third party who had made the offer as well as the terms and the purchase price from the lessee. Such conduct is *mala fide*. The probabilities suggest that a contract of sale with the second respondent had been concluded prior to May 2025 at the time when Le Roux informed Carstens in vague terms that somebody showed interest in the property.

[44] Furthermore, between December 2024 and May 2025, the lessor never once raised the issue of lapse. The lessee exercised his right on 31 July 2025 in writing, within the three months of 8 May 2025.

[45] I am satisfied that the lessee has established a strong *prima facie* right. The balance of convenience overwhelmingly favours the lessee. The lessee conducts substantial farming activities. To relocate would be costly and would not only cause inconvenience but irreparable harm financially to the lessee. An interdict as prayed is the only relief suitable to safeguard rights of the lessee and that a proper case has been made for the relief claimed in the notice of motion.

[46] I am minded to add to the order prayed that the order shall lapse if the application/action is not instituted within the period of twenty days.

[47] Although both parties requested a costs order in their favour (depending on the outcome of this application) I am of the considered view that the costs should stand over for determination by the trial court.

ORDER

1. The matter is treated as one of urgency and that for the purposes thereof, condonation is granted for the non-compliances with the normal rules of court with regard to service, form and time-periods as contemplated in Rule 6 (12);
2. The first and third respondents are interdicted and prohibited from passing transfer of the property known as “Portion 2 of farm Breda, Registration Division L.Q, Ellisras District, Limpopo held under Title Deed Number T[...]” to the second respondent or any other party, pending the institution and finalisation of an application or action to declare that the Applicant’s right of first refusal has not lapsed and to compel the first respondent to allow the applicant to exercise its right of first refusal, which application or action is to be instituted within a period of 20 (twenty) days from date of this order;
3. This order will lapse if the action/application is not instituted within the period of 20 days.
4. The costs of this application are reserved.

G.C MULLER

**JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES:

FOR THE APPLICANT : ADV R. DE LEEUW

INSTRUCTED BY : VERMAAK BEESLAAR INC, ATTORNEYS

FOR THE RESPONDENT : ADV RIAAN GRUNDLINGH

INSTRUCTED BY : VAN DER MERWE ATTORNEYS, INC

POLOKWANE HIGH COURT