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

JUDGMENT

Not Reportable

Case No: 2024-146823

In the matter between:

PEGASUS TREASURY (PTY) LTD

Applicant

and

MICHAEL JOHN MURPHY

First Respondent

PIERRE MARAIS MURPHY

Second Respondent

REGISTRAR OF DEEDS, CAPE TOWN

Third Respondent

Case No: 2024-146848

In the matter between:

PIERRE MARAIS BADENHORST

Applicant

and

PEGASUS TREASURY (PTY) LTD

First Respondent

MARCEL PHILIP JOUBERT

Second Respondent

STILLA MIA O'REILLY JOUBERT

Third Respondent

**ALL THOSE UNLAWFULLY OCCUPYING
AT 1[...] K[...] WAY, KENROCK COUNTRY ESTATE
HOUT BAY, 7806**

Fourth Respondent

CITY OF CAPE TOWN

Fifth Respondent

Heard: 8 September 2025

Delivered: 11 September 2025

Summary: pre-emptive right of first refusal for sale of immovable property; waiver;
eviction

ORDER

1. The application for specific performance in Case No. 146823/24 is dismissed with costs, including the costs of two counsel on scale C.
2. The eviction application in Case No 146848/24 is granted with costs of two counsel, on scale B, to be paid by the first to third respondents.
3. The first to third respondents in the eviction application in Case No 146848/24 are directed to vacate the property at 1[...] K[...] Way, Kenrock Country Estate, Hout Bay

by 30 November 2025, failing which, the Sheriff is authorised to evict them on Monday, 1 December 2025

JUDGMENT

Judgment handed down electronically by circulation to the parties' legal representatives on email and released on SAFLII

HOFMEYR AJ:

Introduction

- 1 This case concerns a property in Hout Bay. The question is who owns it.
- 2 At the end of 2024, the property, erf 8[...] in the township of Hour Bay, more commonly known as 1[...] K[...] Way, Kenrock Estate, Hout Bay, Western Cape, was owned by Mr Murphy.
- 3 For some time, the property was leased to an entity, Pegasus Treasury (Pty) Ltd, and inhabited by Mr Joubert and his daughter.
- 4 The lease agreement that operated between Mr Murphy and Pegasus in late 2024 had a clause giving Pegasus a pre-emptive right of first refusal in the event that the property was sold. It read as follows:

“The tenants have the right of first refusal should the owner wish to sell the property and they will have 48 hours to respond to any offer and either match or increase the offer.”

5 On 22 October 2024, Mr Murphy concluded an agreement of sale with Mr Badenhorst. The agreement of sale is referred to in the papers as “the Badenhorst OTP”.

6 The Badenhorst OTP had a condition in clause 27 that referred to the pre-emptive right given to Pegasus. It said:

“It is recorded that the existing tenant enjoys a right of first refusal to purchase the property and that the acceptance of this offer is conditional upon the tenant being unable to exercise their right of first refusal as per clause 4 of the addendum to lease dated 12/4/2024”

7 After the Badenhorst OTP was concluded, Pegasus was alerted to the sale on 24 October 2024 and given 48 hours to exercise the right of first refusal.

8 Within the 48 hour period, Pegasus’s representative, Mr Joubert, sent an email to Mr Murphy and Mr Badenhorst, as well as the appointed conveyancing attorneys, STBB, and the estate agent.

9 In his email, Mr Joubert raised a number of complaints about the Badenhorst OTP. He referred to it as the “supposed offer”. He said that there were multiple clear defects and questionable aspects of the agreement. He then said that the appointed conveyancers, STBB, had “a clear conflict of interest” because Pegasus was a longstanding client of the firm. He stated that STBB were, therefore, precluded from acting in the matter.

10 But despite all these complaints and criticisms, he also said the following:

“Lastly, pending the above, and to the extent necessary, for the avoidance of doubt, we hereby confirm that we intend exercising, and hereby do exercise our right of first refusal, on the exact same terms as those set out

in the offer presented (save that the share of commission due to Lance Properties stands to fall away)."

- 11 It is common cause between the parties that no signature appears on the email and that the email was not accompanied by any signed document containing Pegasus's offer to purchase the property.
- 12 Despite the absence of any signature on Mr Joubert's email or any signed document containing the terms of sale, after Mr Joubert's email of 26 October 2024, the parties appear to have conducted themselves on the basis that Pegasus *had* exercised its right of first refusal during the relevant 48 hour period.
- 13 On Friday, 1 November 2024, Mr Joubert, acting as Pegasus's representative, sent a copy of the Badenhorst OTP to the parties, with a number of amendments made to it. Although the purchase price and amount of the deposit remained the same, he made the entire agreement subject to a condition that was more fully set out in correspondence between the parties. In that correspondence, he raised numerous criticisms about the state of disrepair of the property and he reserved a right to claim a reduction of the purchase price. This amended offer from Pegasus is referred to in the papers as "the Pegasus OTP".
- 14 On Monday, 4 November 2024, Fairbridges Wertheim Bekker, the attorneys acting for Mr Murphy, sent Pegasus an email with yet a further sale agreement attached. This was a copy of the Pegasus OTP but with the new clauses, which Mr Joubert had added, now deleted so that the agreement would be on the same terms as the original Badenhorst OTP that Mr Murphy had accepted. This document that Mr Murphy signed on 4 November 2024 with Pegasus as purchaser and Mr Murphy as seller is referred to in the papers as "the Murphy OTP".

- 15 The parties cannot agree on which is the operative agreement of sale: the Badenhorst OTP, the Pegasus OTP, or the Murphy OTP?
- 16 Mr Badenhorst and Mr Murphy say that the Badenhorst OTP is operative. Pegasus is not entirely clear about which OTP operates. Its notice of motion refers vaguely to “the sale” between it and Mr Murphy but does not identify the document(s) which encapsulate that sale. Despite this vagueness in its case, it claims to be recognised as the owner of the property.
- 17 Against those broad facts, two applications came before me.

The two applications

- 18 The first was Mr Badenhorst’s application to have Pegasus evicted from the property because, according to Mr Badenhorst, his OTP is valid. As a result, he took transfer of the property on 4 December 2024 and he wants Pegasus out so he can take occupation of his property.
- 19 The second application was a specific performance application, launched by Pegasus in which it claims relief declaring that “the sale” between Pegasus and Mr Murphy is valid, binding and enforceable and then directing that transfer of the property to Pegasus be effected.
- 20 Although this is the sequence in which the applications were launched – with the eviction preceding the specific performance application, all the parties agreed that it made sense to deal with the specific performance application first because it holds the key to determining who the current owner of the property is. Once that is established, the eviction application will follow course, subject to the considerations of justice and equity for eviction.
- 21 I shall therefore deal with the specific performance application first.

Specific performance

The legal requirements for exercise of the right of first refusal

- 22 In *Aarifah*, the Gauteng High Court had occasion to revisit the legal requirements for the exercise of a pre-emptive right involving a sale of immovable property.¹
- 23 Having traversed the development of our law on this issue over a half century, the High Court summarised the legal position as follows:
- 23.1 One should distinguish the covenant embodying the pre-emptive right, and acts that turn it into an agreement of sale, between the grantor and the grantee.
- 23.2 The covenant embodying the pre-emptive right, even in respect of the sale of land, need not comply with the formalities. It is binding if it is proved to be a contract deliberately concluded, conferring a personal right.
- 23.3 The only way in which the pre-emptive right can become an agreement of sale between grantor and grantee is if both execute it in writing, in compliance with the formalities. There must, accordingly, be an offer and an acceptance, both in writing and signed.
- 23.4 The holder of the pre-emptive right may enforce it by submitting an offer that complies with the formalities if it were accepted, and compelling the grantor to countersign it, or having the registrar or some other official authorised to countersign if the grantor fails to do so.²
- 24 In this case, it is the last of these four requirements that has particular relevance. In order for Mr Joubert to have exercised Pegasus's right of pre-emption in the 48 hour window between 24 and 26 October 2024, he need to have submitted an

¹ *Aarifah Security Services CC v Jakoita Properties (Pty) Ltd and Others* 2021 (5) SA 207 (GJ)

² *Aarifah* para 60

offer for the property that complied with the formalities for the sale of land if accepted.

25 Section 2(1) of the Alienation of Land Act 68 of 1981 says that no alienation of land shall be of any force or effect unless it is in writing and signed.³

26 Thus in order for Mr Joubert lawfully to exercise his right of pre-emption, he needed to have submitted an offer for the property, during the 48 hour period from 24 Octboer 2024, that was in writing and signed. But all that Mr Joubert did in that 48 hour window was to send an email, unsigned, in which he said that he was exercising the option. He did not submit a written offer with that email, let alone one that was signed.

27 As a result, Mr Joubert failed to comply with the legal requirements for a valid exercise of his pre-emptive right.

28 When I put this difficulty to Mr Hodes SC, who appeared for Pegasus together with Ms Titus, he fairly conceded that *Aarifah* sets out the applicable legal requirements. But he said Pegasus could overcome its implications because of an argument based on waiver.

29 In Pegasus's heads of argument, the issue of waiver was advanced in the following terms.

29.1 A few days after the 48 hour window for exercising the pre-emptive right had passed, and on 4 November 2024, Mr Murphy's attorney had sent an email to Mr Joubert in which she referred to "the exercised right of first refusal". In that same email, she attached the signed Murphy OTP.

³ *Rockbreakers and Parts (Pty) Ltd b Rolag Property Trading (Pty) Ltd* 2010 (2) SA 400 (SCA) paras 5 to 7

29.2 According to Pegasus, this conduct amounted to a “clear waiver” of any reliance on the 48 hour window provided for in the right of first refusal”.

30 I have grave doubts whether conduct, which takes place *after* the expiry of a period for which a right existed, could ever constitute a waiver of a time limit on that right because when the conduct purportedly constituting the waiver occurred, there would have been no right in existence capable of being waived.

31 However, I do not have to make a definitive finding on that issue for two reasons.

31.1 The first is that Pegasus’s waiver point was never pleaded on the papers.

31.2 It is trite that a defence of waiver must be pleaded so that it can be traversed in the evidence before court.⁴ Waiver was not raised in Mr Joubert’s affidavits so it was not an issue that Mr Murphy was called on to address in the evidence. For Pegasus legitimately to rely on waiver to avoid the difficulties presented by the legal position as articulated in *Aarifah*, at a minimum, it would have had to raise the issue squarely on the papers. It did not do so.

31.3 But beyond this, the second, and more fundamental, reason why the waiver defence does not assist Pegasus is that even if the point had been adequately pleaded, and even if Mr Murphy’s attorney’s email of 4 November 2024 could somehow be found to have constituted an extension of the period within which Pegasus had to exercise the pre-emptive right, at no point after 26 October 2024 did Pegasus ever submit a written offer for the property on the same terms and conditions as the Badenhorst OTP.

31.4 The pre-emptive right given to Pegasus in its lease agreement was a right to *match or increase* an offer already received by Mr Murphy. But the Pegasus OTP was not an offer on the same or better terms than the

⁴ *Pretorius v Agricultural Research Council* 2023 JDR 1783 (SCA) para 13, referring to *Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO, and Another* 1965 (4) SA 373 (A) at 381B-C

Badenhorst OTP. On the contrary, it was materially worse offer. As I highlighted above, Mr Joubert made the Pegasus OTP subject to certain reservations that had been set out in a spate of correspondence between the parties. These reservations concerned a complaint about an inflated purchase price, to the value of R550,000 as well as numerous complaints about defects in the condition of the property which, according to Mr Joubert, may require as much as R500,000 worth of repairs.

- 31.5 The Pegasus OTP was, therefore, never an offer that *matched* the Badenhorst offer as was required under the pre-emptive right. It was a lesser offer that potentially exposed Mr Murphy to claw backs after acceptance for damages for defect repairs and reductions of the purchase price. By contrast, the Badenhorst OTP had none of these claw backs, none of these reservations. The property was sold voetstoets for R9.5 million – no more and, importantly, no less.
- 31.6 Thus even if, contrary to my first finding on waiver, the period for exercising the right of pre-emption had been extended, at no point did Pegasus make an offer for the property that matched the Badenhorst OTP.⁵
- 31.7 It was for this reason that, when Mr Murphy responded to the Pegasus OTP, he deleted the additional conditions that Pegasus had added. He was only willing to entertain an offer from Pegasus that was actually on the same terms and conditions as the Badenhorst OTP.
- 31.8 In its papers and argument, Pegasus endeavoured to down play the amendments that Mr Joubert had introduced in the Pegasus OTP. It argued that none of the handwritten annotations that Mr Joubert had added to the Badenhorst OTP were material.
- 31.9 But Mr Joubert's own contemporaneous conduct gives the lie to this argument.

⁵ This finding makes it unnecessary for me to traverse an additional issue that arose on the papers. The issue was whether Pegasus had paid the deposit for the property timeously. As Mr Hodes fairly conceded in argument, if Pegasus never validly exercised its pre-emptive right, the rest of the disputes fall away as a matter of logic.

- 31.10 When Mr Joubert was endeavouring to find a firm of attorneys to pay over the deposit under the Pegasus OTP, he engaged in some revealing correspondence with Werksmans Attorneys. On 13 November 2024, in an email to Werksmans, he referred to the Murphy OTP that he had received on 4 November 2024 and described it as the latest version of the sale “agreement”. Mr Joubert placed inverted commas around the word “agreement” – thereby signally that it was *not* an agreement. Inverted commas are used when an author wants to convey that the thing he is describing is not that which it purports to be. By placing inverted commas around “agreement”, Mr Joubert was conveying that it was something less than an agreement.
- 31.11 But Mr Joubert did not stop at the use of this literary device in his correspondence, he went on and told Werksmans that the Murphy OTP had “various amendments” that were made and signed by the seller but which were “not yet accepted nor counter signed by us”. In other words, he told Werksmans that Pegasus had *not* agreed to the terms of the Murphy OTP.
- 31.12 This contemporaneous correspondence is the clearest indicator of Pegasus’s attitude to the Murphy OTP. That OTP differed from the Pegasus OTP. So much so, that Pegasus had not been willing to accept its terms or counter sign it. So Pegasus was unwilling to conclude a sale of the property on the terms of the Murphy OTP.
- 31.13 But the problem Pegasus faces in adopting this stance is that all that the Murphy OTP did was to remove the amendments that Pegasus had made to the Badenhorst OTP. So, in substance, the Murphy OTP was the Badenhorst OTP *without* Pegasus’s materially inferior terms.
- 31.14 And Pegasus was *not* willing to accept those materially different terms. So Pegasus never, in fact, submitted an offer that matched the Badenhorst OTP.

Summation on pre-emptive right

- 32 Between 24 and 26 October 2024, Pegasus had the right to match or better the Badenhorst OTP. The law requires that right to be exercised in a particular way because it relates to a sale of land and sales of land must comply with certain formalities in order to be legally binding.
- 33 During that 48 hour window, Pegasus was required to submit an offer for the property in writing and signed. But all that Pegasus did during that period was to send an unsigned email saying that it was exercising its right. It did not provide a written signed offer. It therefore failed to exercise its pre-emptive right.
- 34 And Pegasus's reliance on waiver does not assist it to overcome its own failure to exercise its pre-emptive right for two reasons. Waiver was not pleaded and, worse, even if it had been, Pegasus still failed to submit a written offer that matched the Badenhorst OTP.
- 35 As a result, I find that Pegasus failed to exercise its pre-emptive right. This means that Pegasus failed to step into the shoes of Mr Badenhorst and only the Badenhorst OTP remains as the valid, binding agreement of sale between the parties. The necessary consequence of this is that the specific performance application must fail because Mr Badenhorst is the owner of the property.
- 36 In an effort to resist this conclusion during a debate in argument, Hodes SC for Pegasus raised the issue whether the Badenhorst OTP was, itself, valid. He commented that he had noted that, at the place for the purchaser's signature in the Badenhorst OTP, there was simply the typed name of Mr Badenhorst filled in on the signature line. When this point was raised during the hearing, I asked Mr Hodes to direct me to the place in the papers where this basis for invalidating the Badenhorst OTP had been taken. I was not directed to it during Mr Hodes' address.

37 However, when Mr Sievers SC, who appeared with Ms Liebenberg for Mr Badenhorst, commenced his address, he began, to his credit, by taking me to an averment in the papers dealing with the issue of Badenhorst's signature. He said that if I called up the replying affidavit, and turned to the ad seriatim section of that affidavit, I would find the following sentence:

"Save to deny that the Badenhorst OTP was signed by Mr Badenhorst, the contents of these paragraphs is admitted"

38 That is the most that is said on the papers about Mr Badenhorst's signature on the OTP. But it is entirely unclear what is being denied about Mr Badenhorst's signature in this sentence. Is it denied that the signature is the signature *of Mr Badenhorst*? In other words, are we to think that someone other than Mr Badenhorst signed the OTP? Or are we to think that there is something deficient in the signature itself? Or is the complaint that there is actually no signature at all appearing on the document? None of this is explained.

39 More than this, the obscure complaint about Mr Badenhorst's signature appears for the first time *in the replying affidavit*. As a result, we do not know what Mr Badenhorst's response to the challenge to his signature is. We do not know, for example, whether he would have explained, had he had the opportunity to do so, that he first typed his name into the document on the line that said "purchaser" and then applied his signature in the next line that said "witness".

40 We do not know any of this because a challenge to the validity of the Badenhorst OTP, on the basis that it was not signed by Mr Badenhorst, never formed part of Pegasus's case for specific performance. And how could it? Pegasus brought an application to enforce its own purported agreement of sale with Mr Murphy. It chose to do nothing about the Badenhorst OTP because its case was predicated on the fact that it had exercised the right of first refusal and therefore stood first in line for the property.

41 But as I have held above, it has only itself to blame for not having exercised its pre-emptive right in a manner that the law recognises. It cannot rely on one obscure line in the *ad seriatim* section of its replying affidavit now to try to invalidate the Badenhorst OTP. I have no application before me for that relief and Mr Badenhorst cannot be faulted for not addressing a bald and vague claim, in a replying affidavit, that there was something deficient in his signature on the Badenhorst OTP.

42 The only application before me is one for specific performance of the agreement of sale that was allegedly entered into between Pegasus and Mr Murphy. But for all the reasons set out above, that application must fail.

Eviction

43 The parties were agreed that if I dismissed the Pegasus specific performance application then Pegasus was currently in unlawful occupation of the property. The only issue between the parties then became when it would be just and equitable to have the Pegasus tenants vacate the property.

44 The differences between the parties amounted to a three month period. Mr Badenhorst seeks to have propriety vacated by end October 2025 and Pegasus asks to remain until the end of January 2026.

45 I have a judicial discretion to exercise in determining the just and equitable terms of an eviction of Pegasus from the property.⁶ Importantly, there is no issue of homelessness arising from this eviction. The Pegasus occupiers are persons of means, who have been paying in excess of R40,000 per month under their lease for the property.

⁶ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) para 18

- 46 Mr Badenhorst has been waiting to take occupation of his property since 4 December 2024. He has plans for renovations to the property and has been prevented from commencing them while the Pegasus tenants have refused to vacate pending the outcome of these proceedings.
- 47 Pegasus raised three main grounds for delaying the eviction until the end January 2026:
- 47.1 Mr Joubert was undergoing surgery and would be incapacitated until the end of November 2025.
 - 47.2 His daughter was undergoing university studies and it would be disruptive for her to have to leave the house before the year end.
 - 47.3 They would need time to find alternative accommodation.
- 48 I am mindful of Mr Joubert's health needs so I shall not order an eviction date before the end of November. But I deem it just and equitable to make end November 2025 the date for the Pegasus tenants to vacate for two main reasons:
- 48.1 The papers make it clear that Mr Joubert's former wife, and the mother of his daughter, lives on the adjacent property. In the light of this fact, I do not believe it will be too disruptive for Mr Joubert's daughter to take up occupation with her mother, next door, for any university exams she may still be writing into December 2025.
 - 48.2 I have endeavoured to hand down this judgment as soon as possible since the hearing on Monday, 8 September 2025 so that I provide the Pegasus tenants with the maximum amount of time possible to find alternative accommodation before the end of November 2025.

Conclusion and order

- 49 I have concluded that the specific performance application should be dismissed. It was a hotly fought application pursuing commercial interests with senior counsel on both sides. I see no reason why costs should not follow the result and that the costs should include two counsel on scale C.
- 50 In so far as the eviction application is concerned, costs should also follow the result because these are commercial dealings and the respondents in the eviction application are not vulnerable parties. However, I do not regard the eviction matter as warranting costs on scale C, I shall therefore order costs of two counsel on scale B.
- 51 I therefore make the following orders:
- a) The application for specific performance is dismissed with costs, including the costs of two counsel on scale C.
 - b) The eviction application is granted with costs of two counsel, on scale B, to be paid by the first to third respondents.
 - c) The first to third respondents in the eviction application are directed to vacate the property at 1[...] K[...] Way, Kenrock Country Estate, Hout Bay by 30 November 2025, failing which, the Sheriff is authorised to evict them on Monday, 1 December 2025.

K HOFMEYR
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

Pegasus Treasury's counsel:

Mr P Hodes SC with Ms Z Titus

Attorneys:

Diale Mogashoa Attorneys

Badenhorst and Murphy counsel:

Mr F Sievers SC with Ms L Liebenberg

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