

# REAL ESTATE ALERT

## IN THIS ISSUE

### PRE-EMPTIVE RIGHTS GRANTED VERBALLY ARE VALID AND ENFORCEABLE

In *Mokone v Tassos Properties CC and Another* [2017] 25 CC, the Constitutional Court ruled that pre-emptive rights need not comply with the formalities set out in the Alienation of Land Act, 1981 (ALA). The implication of this decision is that such rights may be enforced against a property owner even if they were granted verbally. The court's ruling overturns *Hirschowitz v Moolman*, where the Appellate Division held that pre-emptive rights have to be reduced to writing and signed by the parties to the agreement, as required by s2(1) of ALA, to be valid and enforceable. The Constitutional Court, albeit in a footnote, also indicated that similar considerations apply in regard to option contracts.

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*The Constitutional Court also overturned the established common law principle that collateral terms, such as an option or a right of pre-emption in a lease agreement, are not extended automatically when the lease is extended ...*



In *Mokone v Tassos Properties CC and Another* [2017] 25 CC, the Constitutional Court ruled that pre-emptive rights need not comply with the formalities set out in the Alienation of Land Act, 1981 (ALA). The implication of this decision is that such rights may be enforced against a property owner even if they were granted verbally. The court's ruling overturns *Hirschowitz v Moolman*, where the Appellate Division held that pre-emptive rights have to be reduced to writing and signed by the parties to the agreement, as required by s2(1) of ALA, to be valid and enforceable. The Constitutional Court, albeit in a footnote, also indicated that similar considerations apply in regard to option contracts.

The Constitutional Court also overturned the established common law principle that collateral terms, such as an option or a right of pre-emption in a lease agreement, are not extended automatically when the lease is extended, unless the parties expressly or tacitly agree otherwise.

In this case, the lessee, Ms Mokone, entered into a written one-year lease agreement with the lessor, Tassos Properties (Tassos) in 2004 for a year. The lease agreement incorporated a right of pre-emption, giving Ms Mokone the right to purchase the leased property in the event that Tassos wished to sell. The parties renewed the lease by oral agreement for a further year, and later agreed to a further extension, which was endorsed on the first page of the lease: "extend till 31/5/2014, monthly rent R5500". Tassos signed the endorsement but Ms Mokone did not.

Tassos subsequently entered into an agreement of sale with Blue Canyon Properties 125 CC (Blue Canyon) in 2009 and the property was transferred on 1 March 2010. After becoming aware of the sale, Ms Mokone notified Tassos in writing that she wished to exercise her right of pre-emption and tendered

payment of an amount equivalent to Blue Canyon's purchase price. Ms Mokone then launched an application in the High Court contending that her right of first refusal was extended together with the lease and that Blue Canyon's purchase was defective. In the meantime, Blue Canyon entered into a month-to-month lease with Ms Mokone for a period of six months after which it terminated the lease in writing, requesting Ms Mokone to vacate the property by 31 January 2015.

The High Court applied the common law as it stood at the time and found that Ms Mokone did not have a valid right of pre-emption to enforce. Ms Mokone approached the Constitutional Court for relief.

In the Constitutional Court, Tassos argued that the pre-emptive right was not extended with the lease and that in any event the right did not comply with the prescribed statutory formalities. The Constitutional Court held that it has the inherent power to develop the common law if necessary and that from now on collateral agreements, such as options or rights of pre-emption, are automatically extended when a principle agreement, such as a lease, is renewed. With regard

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*CDH cautions its clients to be careful when making verbal representations with regard to pre-emptive rights and options relating to immovable property as this may be construed as the granting of a pre-emptive right or option.*



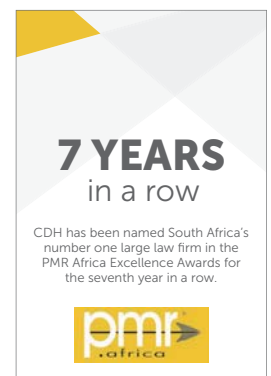
to the formalities prescribed by ALA, the court held that the fact that Ms Mokone did not sign the endorsement on the first page of the lease did not affect the validity of the pre-emptive right. The court reasoned that the statutory formalities do not apply to a pre-emptive right as this does not constitute an "alienation" of property – a sale only comes into being once the right is exercised.

Unfortunately, the Constitutional Court declined to decide whether Ms Mokone could enforce a claim for specific performance and procure transfer of the property from Blue Canyon or whether she would only be entitled to damages. This matter was referred back to the High Court for determination. Having regard to the common law prior to the decision of the Constitutional Court, it seems unfair to Tassos or Blue Canyon to enforce either, as this would amount to the application of retrospective changes to the law. We wait with interest as to how the High Court will deal with this. In the meantime,

the Constitutional Court ordered a stay in the eviction proceedings launched by Blue Canyon and held that Ms Mokone could remain on the premises, despite the termination of the lease, until the High Court has resolved the outstanding issues.

In light of this judgment, CDH cautions its clients to be careful when making verbal representations with regard to pre-emptive rights and options relating to immovable property as this may be construed as the granting of a pre-emptive right or option. It is imperative to reduce such agreement and any variation or amendment thereof to writing to avoid being bound by verbal representations made in passing. Moreover, a principal agreement, such as a lease agreement, must clearly state when a collateral agreement, such as an option or right of pre-emption, expires or that such collateral agreements are not extended unless the parties have expressly agreed to this in writing.

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