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REAL ESTATE ALERT

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REAL ESTATE

Traversing uncharted territory: Does the conclusion of a 'package deal' trigger pre-emptive rights?

Given its rich history, one might reasonably assume that there was nothing novel left to be said about pre-emptive rights.

The genealogy of pre-emptive rights can be traced back as far as the Digest of Justinian – where *D* 18 1 75 and *D* 19 1 21 5, albeit scantly, dealt with the sale of land subject to the condition that the buyer would not sell to anyone other than the seller. Since then, the nature, content and scope of pre-emptive rights have undergone considerable development – ranging from the early Roman Law *pactum protimeseos* to the Germanic Law *näherrecht* – and so, too, have the remedies afforded to the grantee upon breach thereof by the grantor.

Given this rich history, one might reasonably assume that there was nothing novel left to be said about pre-emptive rights. Quite the contrary – in the recent case of *Plattekloof RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd and Another* (7836/2020) [2021] ZAWCHC the court traversed uncharted territory, when it was called to determine whether the conclusion of a so-called 'package deal', with a third-party purchaser, triggered pre-emptive rights in respect of land leased by the grantee – an issue for which there was, at the time, no binding authority.

Genesis of the dispute

Dahlia Investments Holdings (Pty) Ltd (Dahlia), the owner of certain farmland consisting of eight separate portions, leased two portions thereof to Plattekloof RMS Boerdery (Pty) Ltd (Applicant). Clause 10 of the lease agreement granted the Applicant a right of pre-emption in respect of the two portions of the farmland so leased (pre-emption property). The relevant provisions of clause 10 read as follows –

> *"10.1 Provided that the Lessee has complied with all of its obligations under this agreement, the lessee shall have the right of first refusal to purchase the Premises on terms and conditions the same as nor (sic) no less favourable than those offered by a bona fide third party to the Lessor and the Lessor shall deliver written notice to the Lessee specifying the terms and conditions of such offer, and the Lessee shall have 14 (fourteen) days thereafter in which to accept or reject the offer by written notice, failing which the Lessor shall be entitled... to dispose of the property..."*

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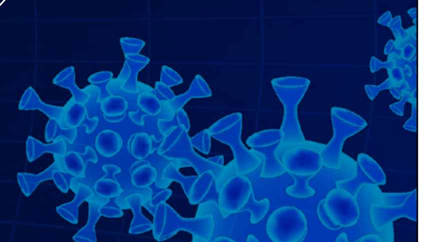

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For the subsistence of the lease period, the Applicant was aware that Dahlia had intended to sell the farmland in its entirety, as it had itself been an active participant in several 'half-baked' sales, as it were, which had previously fallen through.

On 7 April 2020, Dahlia entered into a deed of sale (Sale Agreement), pursuant to which it sold all eight portions of the farm (including the pre-emption property) to Swellendam Plase (Pty) Ltd (Swellendam) for a purchase consideration of R17,000,000.

It is worth noting that the Sale Agreement did not specify what price had been allocated to the respective portions of the land, which, in turn, made ascribing a specific value to the corresponding portions all the more onerous. Moreover, the respective portions of the farmland were by no means homogenous, as the portions leased by the Applicant contained a proportionately greater share of arable land compared to its counterparts. This notwithstanding, had the entirety of the farm been indiscriminately valued on a per hectare basis, in accordance with the purchase consideration paid by Swellendam, the combined value of the pre-emption property would have amounted to approximately R6,600,000.

For the subsistence of the lease period, the Applicant was aware that Dahlia had intended to sell the farmland in its entirety, as it had itself been an active participant in several 'half-baked' sales, as it were, which had previously fallen through. Nonetheless, upon becoming aware of the sale, the Applicant sought to enforce its pre-emptive rights.

It laboured under the erroneous assumption that Dahlia would accept R4,000,000 for the pre-emption property and that Swellendam would be content with the remaining six portions for an amount of R13,000,000. These figures were, in part, predicated on previous discussions between the relevant parties during the respective 'half-baked' sales that subsequently fell through.

When it became apparent that the Applicant's assumption was in fact false, it sought to vindicate its pre-emptive rights by approaching the court. The Applicant moved for an order directing Dahlia to comply with its contractual obligations, by proffering a written notice offering the pre-emption property for a purchase consideration of R4,000,000, on identical terms and conditions to that of the Sale Agreement.

The reasoning of the High Court

The court intimated that the central issue for determination was the position of the Applicant in terms of clause 10 of the lease, when the 'premises' in respect of which it enjoyed a right of pre-emption, became the subject of a contract of sale which formed part of a larger 'package deal'. A factual matrix of this nature had no precedent in our law because the Sale Agreement did not only pertain to the pre-emption property, but rather, was a globular transaction for the entire farm, of which the pre-emption property was just a component part.

The court considered the case of *Sher v Allan* 1929 OPD 137 (*Sher v Allan*) where the lessee, too, had been, granted the "*first option to purchase the leased property*" in the event that the lessor desired to sell it during the currency of the lease. In that instance the leased property was but a portion of a much larger registered erf.

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In the court's estimation, the clause in *Sher v Allan* imposed a positive obligation on the lessor whereas the clause in the present instance did not have the same import.

Notwithstanding the lessee's pre-emptive right, the lessor in that instance sold the entirety of the erf to a third-party without regard for the lessee's pre-emptive right. The court, in that instance, held that the lessor was not at liberty to –

> "*derogate from his own concession, or defeat its operation by his own act. If he wished to sell the whole, he could do so – provided, as to half of what he was willing to sell, he had to respect his undertaking to the [lessee]; and his conduct would have to be regulated accordingly.*"

In considering the import of the dicta from *Sher v Allan*, the court noted that it lent support to the notion that Dahlia may have incurred liability for damages, had it disposed of the leased property to Swellendam without first offering it to the Applicant. Moreover, and perhaps by implication, the judgment also lent support to the conclusion that, the Applicant could interdict the transfer of the pre-emption property to Swellendam, if it could illustrate that the Sale Agreement so concluded failed to cater for its pre-emptive rights.

The court did, however, note that *Sher v Allan* did not provide support for the relief sought by the Applicant, that being, the sale of the pre-emption property at a price gleaned from the circumstances that surrounded the conclusion of the sale. More importantly, the court noted that the terms of the pre-emptive right in *Sher v Allan* differed materially to those of clause 10 in the present instance.

In this regard the court remarked that –

> "*In Sher v Allan the clause required the lessor to offer the pre-emption property to the lessee should he desire to sell it during the continuance of the lease. It was for the lessor, and not a third party offeror to determine the terms upon which he wished to sell his property.*"

In the court's estimation, the clause in *Sher v Allan* imposed a positive obligation on the lessor whereas the clause in the present instance did not have the same import. The court intimated that the content of the grantor's obligations under the contrasted pre-emptive clauses, had a direct bearing on the types of remedies available to the grantee upon breach thereof by the grantor.

Given the novelty of the relief sought, and the paucity of authority on the issue at hand, the Applicant sought support from the approach endorsed by Professor Naude.

In her seminal article titled "*Which transactions trigger a right of first refusal or preferential right to contract*" Professor Naude acknowledges the dearth of authority in our law on the matter at hand. She does, however, note that in the United States – whose jurisprudence on the topic is, in her estimation, informative – four conflicting approaches exist, the fourth of which the Applicant relied on. In terms of this approach upon the conclusion of the package deal by the

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It remains to be seen whether the approach espoused by the court in this instance will be followed in future 'package deal' cases.

grantor with the third party, the grantee may purchase the pre-emption property alone. Given the attendant difficulty of determining the price payable for the pre-emption property, Professor Naude posits that the court ought to fix the price at a reasonable amount.

The court was unpersuaded by this line of reasoning, as it felt that this would, in effect, result in the court making a contract for the parties for the sale of the pre-emption property, at a reasonable price when the right of pre-emption itself, did not vest the holder thereof with a right to buy it at a reasonable price. That said, having considered the contentions put forward by both parties, the court held that the pre-emptive rights contained in clause 10 of the lease were, in fact, triggered by the Sale Agreement. Moreover, upon the triggering thereof, Dahlia became obliged to give the Applicant written notice specifying the terms and conditions of the Sale Agreement, to which the Applicant would then elect whether or not it intended to acquire the pre-emption property.

The court did not, however, agree that the Applicant became entitled to purchase the pre-emption property for R4,000,000. Applying the *Plascon-Evans* rule, the court proceeded on the basis that at the conclusion of the Sale Agreement, the pre-emption property was worth more than R5,000,000. Therefore, according to the court the relief sought by the Applicant – namely, that the pre-emption property be sold for R4,000,000 – could not be granted. Accordingly, the court dismissed the application.

Conclusion

It remains to be seen whether the approach espoused by the court in this instance will be followed in future 'package deal' cases. Nevertheless, until then, the court must be applauded for giving primacy to the terms of the clause in which the pre-emptive right was sourced, as it is the wording employed therein that determines the obligation assumed by the grantor, and by corollary, the remedies available to the grantee. It is thus clear that there is still, in fact, more to be said about pre-emptive rights and, perhaps, more uncharted territory to traverse in future.

Fatima Gattoo, Shanita Goven and Khoro Makhesha

It's on the house - revisiting the accession principle

Accession is the process whereby a movable thing is combined with another thing (either movable or immovable) through a natural or, more commonly, an artificial process.

Movable property, described in a manner that renders it readily recognisable, may be pledged by a mortgagor in a special notarial bond in terms of section 1(1) of the Security by Means of Movable Property Act 57 of 1993. Having seen an increase in the registration of complex notarial bonds recently, it has become important to revisit when a movable thing will become immovable for purposes of registering special notarial bonds.

Accession

Accession is the process whereby a movable thing (the accessory thing) is combined with another thing (either movable or immovable) through a natural or, more commonly, an artificial process. The accessory thing loses its independence and becomes a component of another object (the principal thing). The owner of the principal thing will thus become the owner of the accessory thing.

This article specifically focuses on the principal of *inaedificatio*, which refers to the process whereby the accessory thing is attached to land through an artificial process and becomes part of the land. The application of the principle of accession renders all accessory things attached to land 'immovable'. In terms of the common law, the owner of land is also the owner of all items permanently attached to it.

MacDonald v Radin and The Potchefstroom Diaries and Industries Co 1915 AD 454 (Potchefstroom Diaries) sets out the criteria that must be considered when investigating whether an accessory thing has become immovable.

The factors are –

(i) the nature and purpose of the attachment. This requires the accessory thing to be capable of permanent attachment to the principal thing;

(ii) the manner and degree of attachment. The accessory thing must be permanently attached to the principal thing. If the accessory thing loses its own identity and becomes an integral part of the principal thing or if the attachment is so secure that separation would involve substantial injury either to the accessory thing or the principal thing, the accessory thing would be regarded as immovable; and

(iii) the subjective intention of the annexor.

In *Potchefstroom Dairies*, the court applied the three criteria in a way that is now known as the traditional approach. The court firstly considered, with reference to the nature and purpose of the attachment and the manner and degree of attachment, whether attachment of the movable asset to the immovable asset occurred. The court further found that if the first two criteria produce an inconclusive result, the stated subjective intention of the owner of the movable asset will be decisive.

In this case, *Potchefstroom Dairies* sold an erf, on which a diary plant was situated to Jacobson in terms of an instalment sale agreement. The erf would have been transferred to Jacobson once the final instalment was paid. Jacobson also purchased a refrigeration plant from Macdonald in terms of a hire purchase agreement and replaced the existing plant on the property with this new refrigeration plant. Jacobson was unable to settle its debt with Potchefstroom Diaries or Macdonald and the court had to determine whether the new refrigeration plant had acceded to the land, owned by Potchefstroom Diaries. The new refrigeration plant was installed in the building in a concrete foundation and attached to the walls with nuts and bolts. Nevertheless, the machinery could be removed without causing injury to the premises and the old plant, now

It's on the house - revisiting the accession principle*...continued*

A word of caution, considering the case law, a fixture clearly intended to be permanent will not necessarily be deemed movable simply due to the operation of the provisions of an agreement stating otherwise.

in storage, could be re-installed at a reasonable cost. After considering the first two requirements, the court found that it was not clear that accession had taken place. Thus, the court held that the third criterion- the subjective intention of Macdonald- should be decisive.

The court explained at 467 that "*the importance of the first two factors is self-evident from the very nature of the enquiry. But the importance of intention is for practical purposes greater still; for in many instances it is the determining element. Yet it is sometimes settled by the mere nature of the annexation. The article may be actually incorporated in the realty or the attachment may be so secure that separation would involve substantial injury either to the immovable or its accessory. In such cases the intention as to permanency would be beyond dispute*".

The court found with reference to the terms of the hire-purchase agreement that Macdonald clearly did not intend for Jacobson to become the owner of the machinery until he had paid for the machinery in full and that accession had not taken place.

Over the years there have been many decisions emanating from our courts, some of which adopted the traditional approach, as set out in Potchefstroom Diaries, while others held that the subjective intention was the most important factor even if, based on the objective criteria, accession had taken place. One such a case is *Melcorp SA (Proprietary Limited) v Joint Municipal Pension Fund* (TVL) [1980] 1 All SA 498 (W), where the court found that a lift installation formed an integral part of a building wherein it was installed. The court, at 507 explained that if it only had to consider the first two criteria "*it would be a proper and necessary inference that the person who installed the lifts intended them to form a permanent part of the structure and consequently that they acceded to it*". However, the court did not stop its enquiry there and proceeded to consider the subjective intention of the owner of the lift, as stated in an agreement, after which it found that the lift had not acceded to the building.

What are the implications of these decisions for the registration of special notarial bonds? When receiving an instruction to register a special notarial bond, the first point of enquiry should always be whether the movable assets are in fact movable. This may not be a straightforward enquiry and it may be necessary to involve technical experts to assess whether an asset can be moved without causing substantial harm to the land and the movable asset. The stated intention of the owner of the movable asset, as set out in an instalment sale agreement or long-term lease agreement must also be considered.

A word of caution, considering the case law, a fixture clearly intended to be permanent will not necessarily be deemed movable simply due to the operation of the provisions of an agreement stating otherwise. Then again, a court may find that the subjective intention of the owner of the movable is of overriding importance. Each case must be considered with reference to its case-specific circumstances.

The identification of movable and immovable assets plays a pertinent role in the registration of special notarial bonds. When drafting a special notarial bond, time and care must be taken to understand when an accessory thing has formed part of a principal thing.

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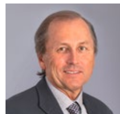

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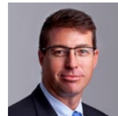

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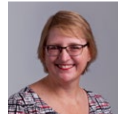

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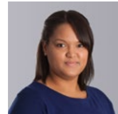

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