

# Corporate & Commercial ALERT

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INCORPORATING  
KIETI LAW LLP, KENYA

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The case of *Plattekloof RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd* (667/2021) [2022] ZASCA 182 is a recent appeal heard by the Supreme Court of Appeal (SCA) involving a pre-emptive right over immovable property, which was granted by Dahlia Investment Holdings Proprietary Limited (DIH) (the respondent) to Plattekloof RMS Boerdery Proprietary Limited (Plattekloof) (the appellant). This article focuses on rights of pre-emption and how, pursuant to the contradictory findings of the High Court and the SCA, these clauses in agreements can be redrafted to provide maximum protection to the holder of the pre-emptive right.



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## Reconsidering pre-emptive rights clauses in the context of "package deals"

The case of *Plattekloof RMS Boerdery (Pty) Ltd v Dahlia Investment Holdings (Pty) Ltd (667/2021) [2022] ZASCA 182* is a recent appeal heard by the Supreme Court of Appeal (SCA) involving a pre-emptive right over immovable property, which was granted by Dahlia Investment Holdings Proprietary Limited (DIH) (the respondent) to Plattekloof RMS Boerdery Proprietary Limited (Plattekloof) (the appellant). This article focuses on rights of pre-emption and how, pursuant to the contradictory findings of the High Court and the SCA, these clauses in agreements can be redrafted to provide maximum protection to the holder of the pre-emptive right.

As a brief summary of the facts, DIH was the owner of a farm in the Western Cape that consisted of eight separate portions. In 2018, DIH and Plattekloof entered into a lease agreement whereby Plattekloof leased two of the eight portions of the farm from DIH. The lease provided that Plattekloof had the right of first refusal to purchase the two portions of the farm that it leased on terms no less favourable than those offered by a third-party purchaser to DIH.

In April 2020, DIH entered into an agreement to sell its entire farm to a third party for R17 million, but did not specify the price per portion of the farm. Upon learning of the purported sale, Plattekloof attempted to enforce its rights to claim specific performance under the pre-emptive rights clause, but failed to resolve the dispute with DIH. As a result, Plattekloof approached the Western Cape High Court for an order that DIH be compelled to comply with the pre-emptive rights clause by delivering a written notice offering to sell the

two portions to it for R4 million (Plattekloof's extrapolation of the portion of the package purchase price which should be allocated to its leased portions), on the same terms and conditions as the sale concluded with the third-party purchaser. The High Court, however, dismissed Plattekloof's application with costs, a decision which was then appealed to the SCA.

### The SCA's findings

Both courts determined that the "package deal" offer had triggered Plattekloof's pre-emptive right. Where the courts differed was on the issue of the remedy. The High Court was of the view that because the third-party purchaser wanted to buy the entire farm, that Plattekloof only had the pre-emptive right to purchase the entire "package deal" for R17 million, as this was in line with the plain meaning of the pre-emptive rights clause. The SCA disagreed and held that Plattekloof had no more than the right of first refusal to purchase the two portions of the



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farm leased by it. Hence, it held that DIH was contractually obliged to determine, in good faith, what portion of the third-party offer price pertained to the two portions and to offer this to Plattekleof. The SCA ordered DIH to extend an offer to Plattekleof for Plattekleof to acquire the two leased portions from DIH (without directing what the price should be).

Although the SCA has given some guidance as to how a package deal may be interpreted in the context of a pre-emptive right, a contracting party should still be cautious as different wording and different facts might not support the principle. In order to prevent any confusion in the interpretation of pre-emptive rights clauses, it is recommended that these clauses be worded to ensure that the offer is made for the specific pre-emptive asset regardless of whether the third-party offer triggering the pre-emptive might be

for a package of more than just that asset. Essentially, the aim should be to place an obligation on the grantor of the pre-emptive right to make a *bona fide* offer to the holder of the right for exactly what the right encapsulates. A mechanism (such as an independent valuation) might then be considered to ensure that the value of the specific pre-emptive asset must be determined by reference to the value provided for or implied by the third-party offer. Drafting pre-emptive rights provisions in this way will assist in clearing any doubts on the steps that must be taken when the pre-emptive asset forms part of a package deal, thereby providing greater protection to the holder of a pre-emptive right and giving the grantor of the pre-emptive right a clear path to follow should they wish to dispose of the relevant asset, whether individually or as part of a package deal.

[David Pinnock and Nicola Stipinovich](#)



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The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.

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