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Real Estate Law ALERT

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Pre-emptive rights and property transactions

A pre-emptive right in a lease agreement creates an obligation on the registered owner to offer the property to the lessee first, should the owner decide to sell it. The *Deon Nel v Petrus Jacobus de Beer and Another (406/21) [2022] ZASCA 145 (26 October 2022)* case heard facts which took into account this legal principle.



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Pre-emptive rights and property transactions

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Synopsis

The holder of a pre-emptive right instituted legal action against the grantor (registered owner/lessor) on the basis that he breached the lease agreement by entering into a sale agreement with a third party without first offering it for sale to the holder of the right. The grantor's defence was that he had only sold two of the five farms to a third party and in consequence of such, the pre-emptive right was not triggered. The High Court ordered that the pre-emptive right does not constitute such, due to the omission of the value of the property. The decision of the High Court was set aside and the Supreme Court of Appeal (SCA) ordered the grantor to sign an agreement with the holder on the same terms as the agreement entered into with the third party. This case

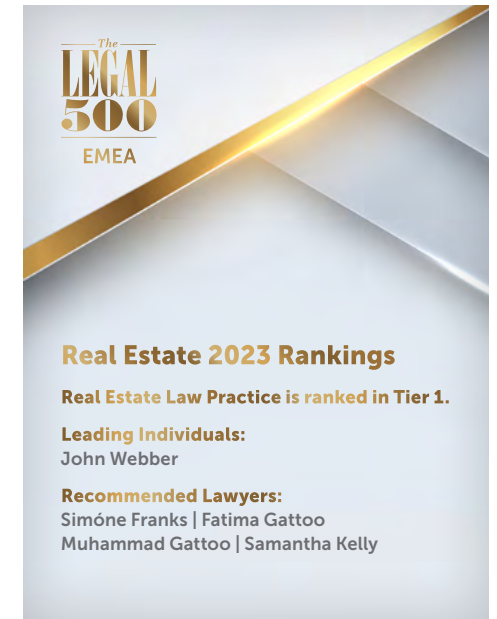
presents a myriad of pertinent principles relating to the operation and consequence of a pre-emptive right, including:

- The court's discretion in making decisions and the multitude of factors that influence this decision-making process.
- The importance of an accurate and concise agreement.
- Specific performance as a remedy available to holders of pre-emptive rights.
- Validity and operation of a pre-emptive clause where the price is not disclosed.

We will now discuss each principle in relation to the case.

The court's discretion

This case is indicative of the fact that courts are not hesitant in setting aside a High Court's decision when exercising their discretion where the circumstances are reasonable



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and appropriate. It is decided on a case-by-case basis having due regard to principles of fairness and justice in the circumstance. The *Deon Nel* case reiterated the importance of giving a contextual interpretation to documents when interpreting agreements by giving cognizance to such principles. There are a plethora of factors that courts take into consideration when exercising their discretion. Ascertaining the subjective intention of the parties by analysing the objective factors is key in their decision-making. The more accurate an agreement is, the less room it leaves for courts to have to “fill in the gap” to ascertain the intention of the parties.

The importance of an accurate and concise agreement

Purchasers must be aware that when making provision for a pre-emptive clause in a lease agreement where more than one property is involved, it must be clearly stated in the lease agreement whether the pre-emptive right is intended to operate in isolation or for all the properties collectively.

If the owner does not intend to grant this pre-emptive right to the lessee over all the properties, it must be clear in the agreement. This case seems consistent with previously decided cases and reiterates the notion that where pre-emptive rights are granted in respect of land or separate parcels of land and the grantor sells a portion of the land or one of the parcels, the right of pre-emption would be triggered unless a contrary intention is indicated in the agreement between the parties. Therefore, ensuring that a well-drafted agreement being in place limits room for contentious issues arising later.

Validity and operation of a pre-emptive clause where the price is not disclosed

This case further demonstrates the importance of concisely drafted agreements. Although it was found that the omission of the land price in the agreements does not render the pre-emptive right incomplete as the price of a property is determinable, it is nevertheless a contentious issue that required the court’s assistance in interpreting the matter.

Specific performance as a remedy

The granting of a pre-emptive right to a grantee/lessee is a decision that should not be taken lightly as the consequences are often far-reaching. A pre-emptive right creates an obligation on the registered owner to offer the property to the lessee first, should the owner decide to sell it.

The courts do not shy away from providing equitable relief to holders of pre-emptive rights when the situation necessitates it. As can be seen in *Deon Nel*, the legal remedies available to holders of pre-emptive rights are impactful. Not only can the owner be interdicted from selling the property to a third party, but the holder also has the right to claim specific performance (he has the right to step into the shoes of the third party and purchase that property on all the same terms and conditions as that entered into between the registered owner/grantor and the third party). Although at the discretion

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of the court, in most instances and where suitable and appropriate, the court will order specific performance as appropriate relief when dealing with the grantees pre-emptive right in an attempt to protect the rights of lessees/usufructuaries. Therefore, a lessor/registered owner should consult an attorney to fully acquaint themselves with the legal ramifications of granting a pre-emptive right to the lessee.

From the above, it is clear that it is essential for individuals to carefully consider the legal implications of pre-emptive rights when entering

into property transactions. It is always best to contact your attorney and seek legal advice when concluding lease agreements. If you are an agent, and you are selling a property that is subject to a lease, make sure you check the lease carefully before marketing the property. You need to look for pitfalls like rights of pre-emption to protect both your seller and any prospective buyers from the consequences of overlooking a clause like this.

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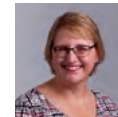
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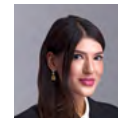
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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