IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No. 2011/22837

DELTE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE: **SIGNATURE:**

In the matter between:

LONCON DEVELOPMENTS (PTY) LTD Applicant

And

EKURHULENI METROPOLITAN MUNICIPALITY Respondent

JUDGMENT

VAN DER LINDE, AJ:

1 The applicant applies for an order directing the respondent to sign the draft sale of property agreement annexed as “X” to the notice of motion within seven days, and to sign all documents necessary to give effect to the transfer of the properties referred to in the said annexure “X” from the respondent to the applicant. In the event of the respondent failing to sign the draft agreement, or failing to sign the

transfer documents, the applicant asks that the sheriff for the district of Boksburg be authorised to do so on the respondent's behalf.

2 The background to the application is as follows. The applicant used to be the owner of the three properties that are referred to in paragraph 1 of the draft agreement of sale. It disposed of the properties to the respondent's legal predecessor, the City Council of Vosloorus, in terms of an agreement which provided as follows:

> "10. The Council (the predecessor to the respondent) shall …
>
> 10.1 …
>
> 10.6 not be entitled to sell the property to any other party or to use the property for any other purpose other than for educational purposes. Should the purchaser desire to sell the property then the seller shall have a right of first refusal and the Council shall not be entitled to sell the property to a third party on terms more favourable than those offered to the seller."

3 After an opposed application, Lamont J in this Division under Case No. 2010/39419 made an order in the following terms:

> " The Court grants an order:
>
> 1. Declaring that the first respondent, as the successor to the rights and obligations of the Vosloorus Council, is bound by clause 10.6 in the Deed of Sale known as Lots 1……., 1……. and 1……., Vosloosrus Ext. 1……., which Deed of Sale is attached to the founding affidavit, marked 'FA10'.
>
> 2. Directing the first respondent that, in the event of it intending to alienate the property in any manner, to offer it

to the applicant on the same terms and not less favourable than such third party may offer to the first respondent, contemplated by clause 10.6 of 'FA10'.

3. Directing the second respondent (the Registrar of Deeds) to register clause 10.6 against the Title Deeds of each of the aforesaid properties.

4. Interdicting and restraining the first respondent from alienating the aforesaid erven to any third party without having offered them to the applicant in terms of clause 10.6 of the agreement, 'FA10'.

5. Ordering the first respondent to pay the costs of this application."

4 This order was made by default of appearance and the respondent consequently applied to rescind the judgment. The matter came before Makhanya, J who, in a reasoned judgment, dismissed the application on 2 December 2011. A subsequent application for leave to appeal was dismissed. It is unclear whether a further similar application to the Supreme Court of Appeal was also dismissed, or whether it was filed out of time without appropriate condonation.

5 This application was then launched on 17 June 2011 after the applicant had called on the respondent to sign the draft agreement which is now annexure "X" to the notice of motion. That the respondent had intended to sell the properties to a third party, transpired at a meeting which took place on the 28th of June 2010 at the respondent's Boksburg offices, at which the applicant was

represented by its attorney Mr Creswick and Mr Harrop, and the respondent was represented by Mrs Dowd.

6 During that meeting Mrs Dowd conveyed to the applicant that the respondent had sold the properties to the Department of Public Works for R315 000.

7 In a letter of 16 July 2010, the applicant's attorney recorded that the respondent intended selling the properties to the Department of Education (not the Department of Public Works), and asked for an undertaking that the respondent would not transfer any of the properties into the name of either the Gauteng Provincial Government (Department of Education) or any other entity.

8 Subsequently the applicant's attorney asked the respondent to provide a copy of the agreement of sale of the properties to the Department of Public Works but the respondent did not do so.

9 On 1 October 2010 the respondent wrote to the applicant's attorney advising that it would put on hold the envisaged transfer of the properties while it was investigating the matter, but in the end the respondent declined to sign the draft agreement.

10 In its answering affidavit the respondent said that it intended to and indeed did dispose of the properties to the Department of Education. It said that it had no duty to provide the undertaking sought by the

applicant and it pointed out that it was at that stage still applying for leave to appeal against the refusal to grant the rescission of the judgment of Lamont, J. The respondent did not deal with the applicant's assertion that at the meeting held with Mrs Dowd on 28 June 2010 the respondent conveyed to the applicant that the property had been sold for R315 000.

11 In the applicant's replying affidavit the applicant alleges that in fact the respondent had never launched an application for leave to appeal to the Supreme Court of Appeal.

12 At the hearing of the matter before me the respondent handed up, without objection from the applicant, a supplementary affidavit in which the deponent said on 27 August 2015, the following:

> "9. Bearing in mind that it may lose them to the detriment of these purposes (sic), the respondent now changed its mind and cancelled all such arrangements it had entered with the Gauteng Department of Education. For these purposes, such agreement has now been cancelled and the respondent is no longer intent on alienating the properties but rather will keep and administer them itself.
>
> 10. For this reasons (sic), the respondent will be bound by only paragraphs 1, 3, 4 and 5 of this Court's order of 26 October 2010 since it has now cancelled its arrangement with Gauteng Department of Education in that it is no longer alienating or intent on alienating any of the properties because they are required for educational purposes.
>
> 11. Accordingly, the respondent cannot now be forced to sell the properties to the applicant if it is no longer intent on alienating to any other person."

13 Against this background, the competing contentions were the following. For the applicant Mr Shepstone argued that the applicant's right of pre-emption was perfected when the respondent formed the desire to sell the property to the Department of Education, and the applicant thereupon exercised its right. The applicant did this in writing when it sent FA4 to the respondent attaching the draft agreement, signed by the applicant on 19 May 2011. The respondent does not dispute receiving this communication.

14 It is to be noted that the proposed purchase price is R320 000, which is more than the R315 000 which Mrs Dowd said was the price at which the properties had been disposed of.

15 The applicant argued that no subsequent changing by the respondent of its mind as to whether or not to dispose of the properties affected the applicant's exercise of its right of pre-emption. The applicant relied specifically on Hirschowitz v Moolman, 1985 (3) SA 739 (A), particularly at p.765 F-H. It also referred to Van Deventer v Ivory Sun, 2015 (3) SA 532 (SCA) for the proposition that the debt owed by the respondent to the applicant arose once the applicant had made the written offer to the respondent (paragraph 23 of the judgment).

16 For the respondent, Mr Ngutshana argued first, that having regard to the respondent's changing of its mind and cancellation of the

arrangements it had entered into with the Department of Education, clause 10.6, the basis of the applicant's right of pre-emption, no longer afforded the applicant the entitlement for which it contends.

17 Second, he argued that on a proper interpretation of clause 10.6 the intention was that the respondent would hold the properties exclusively for educational purposes. The right of pre-emption, according to the argument, would accordingly not have been triggered by the intended disposal of the properties to the Department of Education, because self-evidently the Department of Education would use the properties for educational purposes, and therefore the use of the properties would still be within the ambit of the clause.

18 In reply Mr Shepstone argued that on a proper construction of clause 10.6 it contained two relevant parts. The first was that there was a prohibition on the Council not to sell the properties to any other party. Second, there was a prohibition on the Council not to use the properties for any other purpose other than for educational purposes. If the Council despite the first prohibition desired to sell the properties, then the applicant would have the right of first refusal and the respondent would not be entitled to sell the properties to a third party on terms more favourable than those offered to the applicant.

19 Although Mr Ngutshana did suggest from the Bar that the price of R320 000 for the properties was grossly undervalued, but declined to press the point after an objection by Mr Shepstone that this issue had not been raised on the papers, there was no suggestion that the terms contained in the draft sale agreement annexed as "X" to the notice of motion were less favourable to the respondent than the terms that would have applied had the disposal of the properties by the respondent to the Department of Education gone ahead.

20 The discussion of the issues that arise in this application must commence with a consideration of the nature of the right which the applicant has in terms of clause 10.6. In its terms, it is a *"right of first refusal"*. Hirschowitz, referred to by Mr Shepstone was concerned with a right of pre-emption, not, in terms, with a *"right of first refusal"*. RH Christie & GB Bradfield, Christie's The Law of Contract in South Africa, 6th Edition, say (at p.58) that in the context of sale a *"first refusal"* is usually called a *"right of pre-emption"*. In substance, such a right is regarded as a personal right and may be enforced in the same say as an agreement between parties whereby one of them is prohibited from selling property without having obtained the consent of the second of them; see Cussons v Kroon, 2001 (4) SA 833 (SCA). In Super Rent (Pty) Ltd v Bax Global (Pty) Ltd, 2006 (3) SA 422 (W) Cachalia, J (as he then was) equated a clause which entitled a

contractual party to *"match"* any other acceptable offer which the other party might receive, with a right of pre-emption.

21 Accordingly, the principles set out in Hirschowitz relied upon by Mr Shepstone may validly be applied in the present matter. At p.765 F-H of Hirschowitz, Corbett, JA (as he then was) accepted as correct the submission that the grantor of a right of pre-emption is obliged to sell the property to the grantee if two things will have occurred: first, the contingency bringing the right of pre-emption into operation must have supervened; and second, the grantee must have exercised the right of pre-emption in writing.

22 In much the same vein is the discussion in the third edition of The Law of Sale and Lease by AJ Kerr, at p.462:

> "A preferent conditional right to purchase is referred to as a right of pre-emption. It gives the grantee – in the context under discussion, the lessee – a right to purchase if the condition in question is satisfied. Normally the condition is that if the lessor decides or desires or proposes to sell, he shall offer the property to the lessee first. The grant of a right of pre-emption does not compel the grantor to sell; it only compels him to give the grantee the preference in case he sells at all. And consequently it too prevents him from selling to third persons during the existence of the right."

23 In the present matter the contingency which brings the right of first refusal into operation is stated in clause 10.6 to be the respondent's *"desire to sell the property"*. Has that contingency supervened in the present matter?

24 One must accept that it has supervened, for two reasons. First, it is not disputed by the respondent that certainly at some stage it intended to dispose of the properties to the Department of Education. And second, the mere fact that the respondent explicitly states that it has changed its mind and *"is no longer intent on alienating the properties",* supposes that before its mind was that it was intent on alienating the properties.

25 The second requirement, namely that the grantee will have exercised the right of pre-emption in writing, is not in dispute in this matter.

26 What is in dispute is whether or not in law the contingency is capable of being retracted by unilateral action on the part of the grantor. On general principle it seems to me that the occurrence of the contingency that brings into operation the right of pre-emption, being the desire to sell the property, may for present purposes be compared with the obligation on the part of the grantor of the right, to offer the property to the grantee. Although generally an offer to contract is a communication voluntarily made by the offeror to the offeree, in the case of a right of pre-emption the grantor of the right is obliged and may be compelled to make an offer to the grantee. The question is whether such an offer, whether made voluntarily or under compulsion, may be withdrawn.

27 Since generally an offer may be withdrawn before it is accepted, in my view in this matter too the offer which the respondent was compelled to make by virtue of clause 10.6, could be withdrawn before it was accepted by the grantee, the applicant. One is not concerned here with whether the offer should have been kept open for a reasonable time, or whether in the case of an offer made under compulsion is should be deemed to remain open for a reasonable time.

28 That issue does not arise in the present matter, because here the change of heart only came about substantially after the grantee of the right, being the applicant, had in fact accepted the offer deemed to have been made under compulsion upon the respondent forming the *"desire"* or intent to dispose of the property.

29 In the circumstances it follows that in my view the argument raised in paragraphs 9, 10 and 11 of the respondent's supplementary affidavit dated 27 August 2015 does not hold water.

30 That leaves for determination the question relating to the interpretation of clause 10.6. Here the respondent's argument, described above, was that properly construed there was no prohibition in clause 10.6 against the respondent disposing of the property to a third party, provided that it would be for educational purposes.

31 The respondent's submission entails that the component parts of clause 10.6 are the following. First, the Council shall not be entitled to sell the property to any other party. Second, the Council shall not be entitled to use the property for any other purpose other than for educational purposes. And third, the Council shall not be entitled to sell the property to any other party other than for educational purposes.

32 As I have indicated above, the applicant's argument is that this part of clause 10.6 contains only two component parts. The first is that the Council shall not be entitled to sell the property to any other party. And the second is that the Council shall not be entitled to use the property for any other purpose other than for educational purposes. The right of first refusal is then attached to the case where the Council nonetheless desires to sell the property *"to any other party"*.

33 There are to my mind two reasons why the interpretation advanced on behalf of the respondent is not correct. The first is that the first sentence of clause 10.6, read with the introductory party, contains two infinitives: *"to sell the property"*, and *"to use the property"*. Those two infinitives define the structure of the sentence by composing it of two parts. The first part is the prohibition *"to sell the property to any other party"*, and the second part is the prohibition *"to use the property for any other purpose other than for educational purposes"*.

34 In other words, there is no scope in the first sentence of clause 10.6 to conflate the sale prohibition with the use prohibition, thereby qualifying the former by the contents of the latter.

35 The second reason is that the right of first refusal arises should the purchaser simply *"desire to sell the property"*; it is not stated to arise should the purchaser *"desire to sell the property other than for educational purposes".* The envisaged desire is not qualified in this way.

36 It follows therefore that to my mind the applicant is entitled to the relief it seeks, and I make the following order:

1. The respondent is directed to sign the draft Sale of Property Agreement annexed as "X" to the notice of motion within seven days of the service of the order on it.

2. The respondent is directed to sign or cause to be signed all documents necessary to give effect to the transfer of the properties referred to in annexure "X" ("the properties") into the name of the applicant or the applicant's nominee, within seven days of being furnished with such documents and a guarantee as provided for at paragraph 2.2 of annexure "X", and being requested to sign same; and generally to take all steps necessary to give effect to the transfer of the properties

into the name of the applicant or its nominee, particularly the issuing and furnishing of clearance certificates in respect of the properties.

3. In the event of the respondent failing, refusing and/or neglecting to sign or cause to be signed the aforesaid annexure “X” to the notice of motion, as provided in paragraph 1 above, and/or failing to sign the transfer documents referred to in paragraph 2 above, the deputy sheriff for the district of Boksburg is hereby authorised to sign or cause to be signed annexure “A” to the notice of motion and/or the transfer documents referred to above on behalf of the respondent.

4. The respondent is directed to pay the costs of the application.

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WHG VAN DER LINDE
ACTING JUDGE OF THE HIGH COURT

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Date argued:	Monday, 31 August 2015
Judgment delivered:	Friday, 11 September 2015