



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 406/21

In the matter between:

**DEON NEL**

**APPELLANT**

and

**PETRUS JACOBUS DE BEER**

**FIRST RESPONDENT**

**PIETER HENDRIK JACOBUS BURGER NO**

**SECOND RESPONDENT**

**Neutral citation:** *Deon Nel v Petrus Jacobus de Beer & Another* (406/21) [2022]  
ZASCA 145 (26 October 2022)

**Coram** Zondi, Molemela, Plasket and Mabindla-Boqwana JJA and Musi  
AJA

**Heard:** 14 September 2022

**Delivered:** 26 October 2022

**Summary:** Sale of land – right of pre-emption – right of pre-emption in lease agreement in respect of five separately registered farms – sale of two of those farms constitutes breach of contract – third party purchasing two of the farms with knowledge of right of pre-emption – remedy – specific performance, subject to court’s discretion, suitable remedy.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Van der Westhuizen J sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the high court is set aside and replaced with the following:  
  
'(i) The plaintiff is directed to submit a duly signed deed of sale to the defendants in respect of Portions 6 and 11 of the farm Swarts Rust, which deed of sale shall contain all the terms and conditions of the Fanie Trust agreement, save for clause 2(d), within 14 days from the date of this order;  
(ii) The defendants are ordered to sign the deed of sale submitted to them by the plaintiff within 14 days from date of receipt thereof;  
(iii) Should the defendants fail and/or refuse to sign the deed of sale aforesaid, the Sheriff of the Court (in which district the properties are situated) is authorised and ordered to sign the deed of sale on behalf of the defendants;  
(iv) The defendants are ordered to pay the costs of the action, including the costs of two counsel.'

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## JUDGMENT

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**Musi AJA (Zondi, Molemela, Plasket and Mabindla-Boqwana JJA concurring):**

### **Introduction**

[1] This appeal, which is with the leave of this Court, is against the judgment of the Gauteng Division of the High Court, Pretoria (the high court). The appeal concerns a dispute about the validity and enforceability of a right of pre-emption contained in a lease agreement. The high court found that there was no valid and enforceable pre-emption clause in the lease agreement and consequently dismissed the claim. Mrs de Beer (the erstwhile second respondent) passed on after the proceedings were instituted. The current second respondent is the executor of her estate. Although the lease agreement was entered into between the appellant (the plaintiff) and the respondents (the de Beers), the plaintiff's brother Mr Marius Nel played a pivotal role in the dispute.

### **Facts**

[2] On 20 November 2008, the plaintiff and the de Beers entered into a lease agreement in terms of which the plaintiff leased five farms from the de Beers for a period of three years (the capacity in which the plaintiff entered into the lease agreement is in dispute, and will be dealt with below). The five farms consisted of two portions of the farm Welgevonden (Portion 18 – a portion of Portion 1 – and Portion 20 – a portion of Portion 18), as well as three Portions of the farm Swarts Rust (Portions 2, 6 and 11). All the portions were separately registered. The parties agreed that the extent of the land was 600 hectares.

[3] The plaintiff initially desired to have an option to purchase the farms. However, the parties agreed to include a right of pre-emption in favour of the plaintiff. The right of pre-emption read as follows:

‘Die verhuurder verleen hiermee aan die huurder die eerste reg om die gemelde eiendomme voor die verstryking van hierdie huurkontrak te koop.’<sup>1</sup>

On 30 July 2009, whilst the lease agreement was extant, and unbeknown to the plaintiff, the de Beers concluded a sale agreement with the Fanie Trust (represented by Mr Marius Nel) in terms of which Portions 6 and 11 of the farm Swarts Rust (Portions 6 and 11) were sold for R3 137 103 (the Fanie Trust agreement). On the same day the Moladora Trust (represented by Mr Marius Nel) sold two farms (Portion 15 – a portion of Portion 5 of the farm Rietkuil and Portion 16 a portion of Portion 12 of the farm Doornfontein) to the de Beers for R2 100 000 (the Moladora Trust agreement).

[4] The Fanie Trust agreement stated that the properties shall not be registered before 1 November 2011, a day after the expiry of the lease agreement and consequently the right of pre-emption (clause 2(c)). The parties agreed, in clause 2(d) of both sale agreements, that the registration of the properties in the Fanie Trust agreement must be done simultaneously with the registration of the properties in the Moladora Trust agreement. They further acknowledged, in the Fanie Trust agreement, the existence of the lease agreement entered into between the de Beers and the plaintiff and recorded that the sale agreement was subject to that lease agreement.

[5] The de Beers did not offer the Swarts Rust farms to the plaintiff for him to exercise his right of pre-emption. Instead, on 22 September 2011 after the Swarts Rust farms were sold to the Fanie Trust the de Beers entered into another lease agreement in respect of the same five farms with the plaintiff for another three years. The second lease agreement also granted the plaintiff the right of pre-emption. The plaintiff subsequently found out about the Fanie Trust agreement when Mr Marius Nel told him about it. The plaintiff confronted Mr de Beer and told him that he wanted to exercise his right of pre-emption.

[6] On 28 November 2011, the plaintiff gave notice of his intention to exercise his right of pre-emption to the de Beers. He included a signed standard draft agreement

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<sup>1</sup> The lessors grant to the lessee the first right to purchase the said properties before this lease agreement expires. (My loose translation.)

for the de Beers' consideration. The de Beers did not sign the draft agreement. They also did not indicate that they were dissatisfied with any term or condition in the draft agreement or that they regarded the draft as a counter-offer. On 9 November 2012 the plaintiff's attorney transmitted letters to the de Beers' and Marius Nel's attorneys respectively, informing them that the plaintiff intended to purchase the farms sold to the Fanie Trust on the same terms and conditions set out in the Fanie Trust agreement.

[7] On 4 July 2014, the plaintiff launched an application wherein he *inter alia* sought an order declaring that he properly exercised his right of pre-emption over the farms sold to the Fanie Trust. He also requested that the de Beers be ordered to enter into a sale agreement with him on the same terms as the Fanie Trust agreement excluding paragraphs 2(c), 2(d) and 2(e).<sup>2</sup> Due to the factual disputes on the papers the matter was referred to trial.

### **The Trial**

[8] The plaintiff testified and called two witnesses, his wife, Mrs Mariette Nel, and Mr Nieuwoudt, the attorney who drafted the first lease agreement. Mr Marius Nel and Mrs Gagiano, the de Beers' daughter, testified on behalf of the respondents. Mr de Beer could not give coherent testimony, due to ill health.

[9] The plaintiff testified that he was informed by his mother that Mr de Beer asked her for his number. He called Mr de Beer and they arranged to meet at Mr de Beer's farm. They duly met and during that meeting they agreed that he could lease the farms. They agreed on the rental amount and Mr de Beers contacted Mr Nieuwoudt who drafted the lease agreement. Mr Marius Nel was not at the meeting and was not a party to the lease agreement. It was already planting season (which is between middle November and 15 December) and he was in a hurry to clear the land and commence planting.

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<sup>2</sup> Clause 2(e) was a recordal that the parties are aware of the Moladora Trust agreement and accept the contents of that agreement.

[10] He testified that the tractor that he used to rip the soil broke and the agents informed him that it would take approximately six weeks to repair it. He contacted Mr Marius Nel and asked him to rent him a tractor. He refused. In desperation he requested Mr Marius Nel to clear and cultivate the land. Mr de Beer consented to the arrangement and Mr Marius Nel paid for the lease of the land and cultivated it for the entire lease period. He confirmed that during November 2011 when he was cultivating the land, Mr Marius Nel informed him that he bought the farms. He consulted his attorney and it was as a result of the attorney's enquiries that they received the Fanie Trust and Moladora Trust sale agreements from Mr Marius Nel's attorney.

[11] Mrs Mariette Nel, confirmed that Mr Marius Nel was not at the meeting where the lease of the farms was discussed by her husband and the de Beers. Mr Nieuwoudt testified that Mr Marius Nel was not a party to the lease agreement.

[12] Mr Marius Nel testified that on 15 November 2008, Mr du Preez, the de Beers' son-in-law, informed him telephonically that Mr de Beer wanted to rent out his farms. He went to the de Beers' farm where he found the de Beers, Mr du Preez, the plaintiff and the plaintiff's wife. During the negotiations the plaintiff stated that he did not have enough implements to cultivate the farms. They agreed on the lease amount and that he would cultivate Portions 6 and 11 and the plaintiff would cultivate the rest. He paid the rental amount plus VAT for the properties. On 17 November 2008 he started cleaning and cultivating Portions 6 and 11. When he noticed that the plaintiff only delivered implements on the other farms without cultivating them, he decided to cultivate them. After the first season when he heard nothing from the plaintiff, he paid the de Beers and cultivated all the farms.

[13] He testified that during June 2009 he bought the farm Rietkuil from his mother. Mr du Preez informed him that Mr de Beer was interested in buying Rietkuil. Mr de Beer offered to sell Portions 6 and 11 of the Swarts Rust farm to the Fanie Trust. However, he only saw the first lease agreement in 2009 when the attorney who drafted the sale agreements requested it from Mr De Beer, and was disappointed to see that the plaintiff was the only lessee. As a result, the Fanie Trust and Moladora Trust agreements were entered into.

[14] Mrs Gagiano testified that she was not present at the meeting in her parental home. She confirmed that she filled in the other particulars on the cheque that Mr Marius Nel presented to the de Beers.

### High Court

[15] The high court found that the impugned clause did not contain a proper right of pre-emption since it did not provide for the price of the properties. It opined that the purported pre-emption clause was in effect an agreement to enter into an agreement about the purchase price and other terms and conditions of the sale. It also found that if the plaintiff wanted to step into the shoes of the Fanie Trust, no term of the agreement between the de Beers and the Fanie Trust may be added or deleted. It reasoned that the deletion of clause 2(d) from the Fanie Trust agreement would constitute a counter-offer. Furthermore, it found that the pre-emption clause was not triggered because the Fanie Trust agreement was in respect of certain specified farms and not the entire 600 hectares mentioned in the lease agreement.

### Issues

[16] The issues that fall to be determined are: (a) whether the Nel brothers were co-lessees; (b) whether the pre-emption clause was triggered when only two farms were sold; (c) whether the right was properly exercised; (d) whether the exclusion of clause 2(d) in the offer to step into the Fanie Trust's shoes constituted a counter-offer; and (e) the appropriate remedy.

[17] The principles regarding a right of pre-emption are well-established. In *Owsianick v African Consolidated Theatres*<sup>3</sup> it was stated as follows:

'A right of pre-emption is well known in our law . . . and it is to be distinguished from an option to purchase . . . The grantor of the right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right.'<sup>4</sup>

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<sup>3</sup> *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A).

<sup>4</sup> *Ibid* 316C-D.

**Was Mr Marius Nel a co-lessee?**

[18] Only the testimonies of the Nel brothers are relevant to determine whether Mr Marius Nel was a co-lessee. The high court did not deal with this issue. The de Beers contended that the plaintiff could not exercise the right of pre-emption unilaterally because Mr Marius Nel was a co-lessee and therefore had to exercise the right with the plaintiff. They argued that the plaintiff's name was inserted in the lease agreement as the nominee for himself and Mr Marius Nel. Mr Marius Nel testified that the agreement between him, the de Beers, and the plaintiff was that he would lease the two Swarts Rust farms and that the plaintiff would lease the rest. He did not sign any lease agreement. He initially testified that he assumed that the plaintiff was going to sign the contract on their behalf.

[19] During cross-examination, Mr Marius Nel testified that he assumed that he would sign a separate contract for the two Swarts Rust farms and that the plaintiff would do so with regard to the rest of the farms. He stated that he paid the full lease amount for all five farms because he assumed that the plaintiff would later repay him his (the plaintiff's) *pro rata* amount. However, he did not discuss any of this with the plaintiff. When he was not given a lease agreement in respect of the two farms, he did not enquire from the de Beers or the plaintiff about it. He testified that he did not confront the plaintiff or Mr de Beer when he found out that the plaintiff was the only lessee in terms of the contract. He also did not take any steps to try and rectify the anomaly. During the discussions preceding the signing of the sale agreement he, Mr de Beer and Mr du Preez discussed the lease agreement whereupon Mr de Beer informed him that the lease agreement is null and void because the plaintiff sub-let the property to him. He accepted this proposition without demur.

[20] In their plea, the de Beers stated that Mr Marius Nel and the plaintiff were co-lessees of all the farms, in terms of the first and second lease agreements. They later abandoned their stance with regard to the second lease agreement. The high court found that the de Beers were scoundrels because they entered into the second lease agreement with the plaintiff knowing that they concluded a sale agreement with the Fanie Trust, in respect of Portions 6 and 11. This finding was not challenged before us. Mr Marius Nel insisted that he was a co-lessee, however, he could not coherently explain why the Fanie Trust agreement was made subject to the lease agreement



entered into between the de Beers and the plaintiff. The high court did not make any credibility findings in respect of the Nel brother's testimonies.

[21] On the probabilities, I agree with the plaintiff that Mr Marius Nel's conduct was consistent with that of a sub-lessee. He did not ask for a separate lease contract; he paid the full lease amount whereas he stated that he leased only two farms and, when he was told by Mr de Beer that he was a sub-lessee, he did not object. Also, Mr Marius Nel signed the Fanie Trust agreement wherein he and the de Beers recognised the plaintiff's right of pre-emption in the lease agreement. This conduct is contrary to that of a person who claims to have been a co-lessee. Furthermore, Mr Marius Nel did not give the plaintiff an instruction to enter into the lease agreement as his nominee.<sup>5</sup> As such, the doctrine of the undisclosed principal is also not applicable firstly, because Mr Marius Nel did not testify that he was the plaintiff's principal and secondly, he did not give the plaintiff, as the purported intermediary, a mandate. There must be a relationship between the principal and the intermediary:

'It would appear though, that the required relationship exists only where the undisclosed principal has instructed the intermediary to conclude the contract either in the name of the principal or in his or her own name or in either as he or she chooses. If no such relationship exists, the situation is not an undisclosed-principal relationship and the alleged undisclosed principal can acquire no right and incur no obligations from the contract'<sup>6</sup>

I find that Mr Marius Nel was not a co-lessee. There was therefore no need for him to exercise the right of pre-emption jointly with the plaintiff.

### **Interpretation of Clause 19**

[22] This Court has set out the proper approach to interpreting a document in the oft-quoted decision in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.<sup>7</sup>

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the

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<sup>5</sup> In *Dadabhay v Dadabhay and Another* 1981 (3) SA 1039 (A) at 1047 Holmes AJA said 'The nominee shareholder takes his instructions from the beneficial shareholder.' See also *Smyth and Others v Investec Bank Ltd and Another* [2017] ZASCA 147; 2018 (1) SA 494 (SCA) paras 21-23.

<sup>6</sup> *The Law of South Africa*, Volume 1, Third Edition para 174.

<sup>7</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).

document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document . . . [t]he “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’<sup>8</sup>

[23] The approach to interpretation is a unitary exercise: the text, context and purpose must be considered simultaneously.<sup>9</sup> In determining the intention of the parties to an agreement the court must have regard to all the facts. Although the words used by the parties are important, it must, however, be remembered that ‘words without context mean nothing’.<sup>10</sup>

[24] The de Beers argued that the right of pre-emption was not triggered because in terms of clause 19 the farms were leased as a unit and the right could only be triggered if they were sold as a unit. The sale of the two farms, so the argument went, did not activate the right of pre-emption. The plaintiff argued that the wording of clause 19 is clear in that it refers to properties and not property, as the high court erroneously stated.

[25] It is correct that the high court referred to property instead of properties when it interpreted clause 19. The submission by the plaintiff that the high court should have found that the use of the word properties in clause 19 was indicative of an intention to disaggregate the farms is without merit. This is so because the parties clearly used the words ‘properties’ and ‘property’ interchangeably. In clause 1 it is stated that the ‘properties leased are described as follows’ later in the same clause it is stated that ‘both parties agreed on the size of the property’.

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<sup>8</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* para 18.

<sup>9</sup> *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (6) SA 1 (CC) para 65.

<sup>10</sup> *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 28.

[26] There is no evidence that the parties agreed that the farms had to be sold as a unit. It was common cause that the de Beers' other son-in-law, Mr Gagiano, occupied Portions 6 and 11. The relationship between the de Beer family and Mr Gagiano was strained and Mr de Beer wanted him to vacate those farms. Mrs Gagiano pertinently testified that one of the ways the de Beers considered to get rid of Mr Gagiano was to sell Portions 6 and 11. The de Beers therefore contemplated selling the Swarts Rust farms separately in order to get rid of Mr Gagiano. The plaintiff testified that Portions 6 and 11 could be sold separately as a viable unit because the land was arable with good soil. The de Beers eventually sold only Portions 6 and 11 to the Fanie Trust. When the plaintiff informed the de Beers that he wanted to exercise his right of pre-emption in respect of Portions 6 and 11, they did not inform him that he could not do so because their agreement was that he could only do so if all the properties were sold.

[27] I agree with the plaintiff that the contention that all the farms had to be sold simultaneously as a unit does not make business sense. The de Beers' contention would give them licence to undermine the plaintiff's right of pre-emption by selling the farms separately and on a piece-meal basis. The only sensible interpretation is that the right of pre-emption could be triggered by the sale of any or all the farms. There is, however, another reason why the de Beers' contention is untenable.

[28] In *McGregor v Jordaan*<sup>11</sup> the plaintiff (lessee) had a right of pre-emption over a farm. The defendant sold a portion of the farm to a third party who had knowledge of the plaintiff's prior right of pre-emption. Kotze J held that the object of the law is, *inter alia*, to discourage and prevent fraud and that the conduct of the second defendant (purchaser) amounted to fraud.<sup>12</sup> The court declared the sale agreement null and void and interdicted the seller from giving and the purchaser from accepting transfer of the half share of the farm.

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<sup>11</sup> *McGregor v Jordaan and Another* 1921 CPD 301.

<sup>12</sup> *Ibid* at 309.

[29] T Naude<sup>13</sup> states, with reference to *McGregor v Jordaan* and *Transvaal Silver Mines v Jacobs Le Grange and Fox*<sup>14</sup> that:

‘It is, however, clear that the sale of a portion of the pre-emption property is regarded as a breach of the right of pre-emption, and that the holder is entitled to an interdict prohibiting such a sale or an order cancelling the transfer of the pre-emption property to a third party with prior knowledge of the right of pre-emption’<sup>15</sup>

She summarises the legal position in other jurisdictions as follows:

‘A majority of courts in the USA have decided that the grantor’s willingness to sell a partial interest in the pre-emption property gives the holder the right to buy that partial interest by matching the third party’s offer. A Canadian court has also held that the sale of a portion of the pre-emption property (one of three parcels of land), triggers the right of pre-emption to buy that portion. . . The German BGB provisions on Vorkaufsrechte are silent on the effect of the sale of a partial interest in the pre-emption property. However, there is authority that the sale of a portion of the pre-emption property triggers the right of pre-emption to buy that portion.’<sup>16</sup>

[30] In *Pushka v Magnowski Estate*,<sup>17</sup> the Canadian case referred to by Naude, the right of pre-emption in a lease agreement referred to an offer for the ‘demised premises’ which consisted of three parcels of land. The defendant sold one parcel of land and contended that the right of pre-emption could only be triggered if all three parcels, and not merely a part thereof, were sold. The court said the following about the contention:

‘...it would follow that, although “the demised premises” retains the same meaning – all three parcels – the lessor, by offering and selling only one parcel to a third party would not only *not* trigger the lessee’s right to match the offer, but would terminate his right to match any later offer on either or both of the remaining parcels. Such a devious and tortured reading is not warranted when in their ordinary meaning the words are apt to include the parts in the whole.’<sup>18</sup>

[31] The absurdity illustrated in *Pushka v Magnowski Estate* would present itself in this matter if the de Beers’ contention were to be accepted. The plaintiff’s right of pre-

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<sup>13</sup> T Naudé, ‘Which transactions trigger a right of first refusal or preferential right to contract?’ (2006) 123 SALJ 461.

<sup>14</sup> *Transvaal Silver Mines v Jacobs Le Grange and Fox* 1891 4 SAR 116.

<sup>15</sup> Footnote 11 at 493.

<sup>16</sup> *Ibid* 494.

<sup>17</sup> *Pushka v Magnowski Estate* (1983), 23 Man. R. (2d) 189 (QB).

<sup>18</sup> *Ibid* at 194.

emption would be nugatory. In my view, where a right of pre-emption was 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.

### **Did the plaintiff exercise his right of pre-emption?**

[32] On 28 November 2011, the plaintiff's attorney wrote to the de Beers to inform them that the plaintiff insists on exercising his right of pre-emption and attached a deed of sale for the de Beers to append their signatures to. The de Beers, however, did not respond. On 9 January 2012 the plaintiff's attorney again wrote to the de Beers' attorney and informed him that the plaintiff insisted on specific performance of his right of pre-emption relating to Portions 6 and 11 and was prepared to buy them on the same conditions as those contained in the Fanie Trust agreement. Mr Marius Nel, on behalf of the Fanie Trust, entered into an agreement of sale with the de Beers in respect of Portions 6 and 11 whilst fully aware of the plaintiff's right of pre-emption. Accordingly, the plaintiff exercised his right of pre-emption properly.

### **Did plaintiff make a counter-offer?**

[33] The high court found that any attempt to delete any term contained in the proposed agreement would constitute a counter-offer. Additionally, it found that the plaintiff rejected the Fanie Trust offer and provided a counter-offer, ie the offer without clause 2(d) of the Fanie Trust agreement. No offer was ever made to the plaintiff. He could therefore not have made a counter-offer. On the contrary, the plaintiff offered to purchase Portions 6 and 11 on the same conditions contained in the Fanie Trust agreement.

[34] The finding with regard to the omission of clause 2(d) of the Fanie Trust agreement in the initial agreement that the plaintiff presented to the de Beers is a red herring. The de Beers pleaded that the Moladora Trust and Fanie Trust agreements were cancelled. The clause 2(d) issue was therefore moot. Clause 2(d) was in any event not a material clause; it was inserted for practical reasons to facilitate payment. The de Beers conceded that the Moladora Trust and Fanie Trust agreements did not constitute an exchange. The de Beers could therefore still continue with the Moladora Trust agreement without the Fanie Trust agreement.

### Was the price of Portions 6 and 11 determinable?

[35] The high court found that the price in the Fanie Trust agreement was for Portions 6 and 11 and not the entire 600 hectares. It opined that additional terms and conditions would have to be added to provide for the remaining farms. This reasoning was based on its unfortunate finding that the farms had to be sold as a unit for the right of pre-emption to be triggered. The finding of the high court is unsustainable. It is not in dispute that the price of Portions 6 and 11 was determinable based on the Fanie Trust agreement. A right of pre-emption is enforceable if the price and method of payment are determinable.<sup>19</sup>

### Remedy

[36] The de Beers argued that the only remedies at the plaintiff's disposal are a declaratory order or an interdict. This argument is misplaced. In *Associated South African Bakeries v Oryx*<sup>20</sup> this Court held that where a seller enters into a contract of sale with a third party, who had knowledge of the right of pre-emption, in breach of that right, the purchaser can by way of a unilateral declaration of intent step into the shoes of the third party.<sup>21</sup> The moment a right of pre-emption is exercised after a contract was concluded with a third party, an independent contract, and not a substitutionary one, comes into existence between the grantor and grantee and this does not affect the validity of the contract between the grantor and the third party.<sup>22</sup>

[37] In *Hirschowitz v Moolman*<sup>23</sup> this Court stated that:

'In principle the holder of a right of pre-emption is entitled (in addition to claiming an interdict or damages in appropriate circumstances) to seek the positive enforcement of his right.'<sup>24</sup>

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<sup>19</sup> *Van Aardt & Another v Weehuizen & Others* 2006 (4) SA 401 (N) para 16.

<sup>20</sup> *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) (*Oryx*).

<sup>21</sup> *Ibid* at 907E. In *Mokone v Tassos Properties CC* 2017 (5) SA 456 (CC) para 57 The Constitutional Court said: 'The idea of a "unilateral declaration of intent" is understandable in the circumstances. It is consonant with the notion that, subject to whatever the law may be held to be in ordering or not ordering specific performance, the grantor of the right is liable to coercion.'

<sup>22</sup> *Oryx* at 919C-E.

<sup>23</sup> *Hirschowitz v Moolman and Others* [1985] ZASCA 38; 1985 (3) SA 739 (A).

<sup>24</sup> *Ibid* at 776D.

It is now well-settled in our law that a right to specific performance exists subject to the Court's discretion to grant or refuse it.<sup>25</sup> There is no reason not to grant it in this matter. The appeal must succeed and the order of the high court should be set aside.

[38] The following order is made:

- 1 The appeal is upheld with costs, including the costs of two counsel.
- 2 The order of the high court is set aside and replaced with the following:

'(i) The plaintiff is directed to submit a duly signed deed of sale to the defendants in respect of Portions 6 and 11 of the farm Swarts Rust, which deed of sale shall contain all the terms and conditions of the Fanie Trust agreement, save for clause 2(d), within 14 days from the date of this order;  
(ii) The defendants are ordered to sign the deed of sale submitted to them by the plaintiff within 14 days from date of receipt thereof;  
(iii) Should the defendants fail and/or refuse to sign the deed of sale aforesaid, the Sheriff of the Court (in which district the properties are situated) is authorised and ordered to sign the deed of sale on behalf of the defendants  
(iv) The defendants are ordered to pay the costs of the action, including the costs of two counsel.'

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MUSI AJA  
ACTING JUDGE OF APPEAL

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<sup>25</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

## APPEARANCES

For Appellant: SG Maritz with him JF van der Merwe

Instructed by: JP Kruyshaar Attorneys, Pretoria

Honeys Attorneys, Bloemfontein

For First and Second

Respondents: R Grundlingh with him ASL van Wyk

Instructed by: Hengst Attorneys, Pretoria

Lovius Block Attorneys, Bloemfontein