

SOUTH AFRICA / JUDGMENT

Instand Trade 110 CC v Lewis and Others (AR 247/13) [2013] ZAKZPHC 58 (25 October 2013)

[2013] ZAKZPHC 58

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen, Vahed, Nkosi

CASE / FILE NUMBER

AR 247/13

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR 247/13

In the matter between:

INSTAND TRADE 110 CCAppellant

and

EILEEN LEWISFirst Respondent

EMIL ALEXANDER LEWISSecond Respondent

WESTPORT PROPERTIES (PTY) LIMITEDThird Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

- [1] This is an appeal against a judgment by Ploos van Amstel J discharging a rule nisi issued by Radebe J, with costs.

BACKGROUND:

- [2] The First Respondent is the registered owner of the immovable property situated at Lot 1953, Pinetown, situate at 54 Glenugie Road, Pinetown. The Second Respondent is her husband.
- [3] On 28 June 1999 the Second Respondent, describing himself as 'the Landlord', entered into a written 'AGREEMENT OF LEASE' ('the lease') with George Michael Mouzouris ('Mr Mouzouris') in respect of the property.

This lease commenced on 1 August 1999 and continued until 30 July 2004, and contained the following option to renew in clause 4 of the agreement:

'4.1 The tenant, being in compliance with all his obligations hereunder, shall have the option to renew this lease for a period of four (4) years and eleven (11) months upon the same terms and conditions as are contained in this lease excepting this clause and clause 5 as to the amount of rental provided however that the option shall be exercised by notice in writing delivered to the landlord before February 1 2004.'

- [4] Material to the present application is clause 18:

'18. RIGHT OF FIRST REFUSAL

18.1 While the tenant occupies the premises in terms of this lease (including the option period referred to in 4 but only if the option is exercised) the tenant shall have a right of first refusal to purchase the property;

18.2 The terms and conditions applicable to such right of first refusal are as follows –

18.2.1 The Landlord shall give notice in writing to the tenant of the terms and conditions upon which he is prepared to sell the property or of any offer to purchase the property as the case may be;

18.2.2 Within three (3) days after receipt by the tenant of such notice, the tenant shall give notice in writing to the Landlord of his intention to exercise the right of first refusal;

18.2.3 If the tenant does not give notice of his intention to exercise the right of first refusal within the aforesaid period of three (3) days, the said right of first refusal shall lapse'.

- [5] On 28 February 2001, during the initial period of the lease, the Second Respondent, the tenant Mr Mouzouris and the Appellant

concluded a written 'DEED OF ASSIGNMENT OF LEASE: FOUR WAYS KWIKSPAR' ('the assignment'). The effective date of this agreement was 2 April 2001. The operative part of the agreement provided:

‘5.1 With the effect from the EFFECTIVE DATE, Mouzouris cedes, assigns and makes over to the ASSIGNEE all of Mouzouris’s rights and obligations as tenant under the LEASE AGREEMENT and the ASSIGNEE accepts such assignment;

5.2 The Landlord hereby consents to the assignment as provided for in 5.1’.

[6] The ‘LEASE AGREEMENT’ was defined in the assignment to mean the above ‘written lease agreement which was concluded between MOUZOURIS and the LANDLORD on 28 June 1999 in respect of which MOUZOURIS leases the PREMISES, a copy of which lease agreement is attached hereto marked “A”. The ‘ASSIGNEE’ was defined to mean the Appellant.

[7] Pursuant to the lease and assignment, the Appellant has occupied the property and is still in occupation.

[8] No notice in writing to renew the lease for a further period of 4 years and 11 months was given before 1 February 2004, or at all. The original lease, as assigned, accordingly expired by effluxion of time on 30 July 2004.

[9] On 12 August 2004, after the lease had expired, the Appellant and the Second Respondent concluded an ‘ADDENDUM TO LEASE’

(‘the addendum’). This document is not a model of clarity. It provides:

‘The attached document titled, “PROPOSAL FOR ADDENDUM TO LEASE” is to form an addendum to the lease between Emil Alexander Lewis and George Michael Mouzouris with regards to the premises at 54 Glenugie Road, Pinetown.

As detailed in this addendum the ADDENDUM TO LEASE is to be accompanied by the assignment of the lease and as such Mr David Buckingham² has effected this ADDENDUM to LEASE.

PROPOSAL FOR ADDENDUM TO LEASE

The following to capture the renewed lease pertaining to the property (54 Glenugie Road, Pinetown) as described in the AGREEMENT OF LEASE between EMIL ALEXANDER LEWIS and GEORGE MICHAEL MOUZOURIS and act as an addendum thereto.

ASSIGNMENT OF LEASE to be signed by all three parties;

PERIOD OF LEASE to commence on 1 August 2004 and terminate on 31 July 2009;

RENTAL

2.1 To be R27 728,59 inclusive of VAT per month for the period of 1 August 2004 to 31 July 2005;

Escalation to be 7% as of 1 August 2004 per annum.

OPTION TO RENEW

An option to renew the lease for a further five (5) years upon the same terms and conditions contained within the amended lease. With the proviso for the rental and escalation to be adjusted to market related figures.

OPTION TO PURCHASE THE PREMISES

It is the intention of the TENANT Mr David Buckingham to secure an option to purchase the building at an agreed price should the LANDLORD choose to dispose of such. The price or an acceptable formula for defining a price to be agreed by both parties and written into the addendum.

(Below the above typing on the addendum, inserted in manuscript, appear the words 'at a market related price').

MAINTENANCE ISSUES:

.....'

[10] Although this addendum was not signed in any special designated place indicated for the tenant, Mr Buckley did sign the addendum, at a place where provision was made for witnesses to sign.³ Nothing was made of this fact in argument.

[11] The legal position thus is that the original lease, as assigned, came to an end at midnight on 30 July 2004. The Appellant remained in occupation for 31 July 2004, seemingly without there being any formal lease arrangement in place. From 12 August 2004, retrospective to 1 August 2004 the Appellant's occupation has been governed by the terms of the addendum.

[12] Before 31 July 2009, and more specifically during the period from January to March 2009, written notice was given by the Appellant

of its intention to renew the lease for a further five (5) year period to expire on 31 July 2014. This notice, ex facie the papers, was conveyed in letters addressed by the Appellant's attorneys to the First and/Second Respondents attorneys, GDLK on 20 January 2009 and 25 March 2009. It appears from this correspondence that the First and Second Respondents might have disputed the right of the Appellant to extend the lease after the end of July 2009. But be that as it may, the factual reality is that the Appellant remained in occupation throughout and is still in occupation. On the probabilities this is because the lease was renewed for a further period pursuant to the terms of the addendum. Facts pointing to that probability include the allegation in the founding affidavit that the First Respondent accepted payment of the rental arising from the Appellant's continued occupation of the property without protest, which allegation, properly construed, appears to relate to rentals paid after 31 July

2009. This allegation has not been disputed on the papers. Further, in a letter dated 13 December 2010 referring to some incident which occurred at the Appellant's business premises involving their son, the Second Respondent wrote:

‘regarding the sale of your business you need my permission. Please take note of the building is definitely not going to be sold ever. July 2014 cannot come soon enough’.⁴

[13] On 1 June 2012 the Third Respondent and the First Respondent concluded a written agreement of sale in terms whereof the property

was sold by the First Respondent for a purchase price of R8 million. This agreement inter alia provides:

‘16. SPECIAL CONDITIONS

Subject to the purchasers being afforded a 28 day due diligence study;

...

Subject to purchasers giving confirmation of the sellers receiving full rental from existing tenant up until the date of transfer.’

[14] It is the discovery of the existence of this sale which prompted the application in the court a quo. In that application, the Appellant relying on what it maintains is an enforceable right of first refusal, sought the following relief:

‘1.

That a rule nisi do hereby issue calling upon the Respondents to show cause on September 2012 why the following orders should not be granted:

That the Applicant be and is hereby directed to institute an action against the First Respondent, within 21 days of the grant of this order, claiming the relief set out in paragraph 43 of the founding affidavit;⁵

That First Respondent be and is hereby interdicted by effecting transfer of the immovable property described as Lot 1953, Pinetown, to the Third Respondent;

That the relief in paragraphs 1(b) hereof shall operate pending the outcome of the action to be instituted in terms of paragraph 1 (a) hereof;

That the First Respondent and any other Respondent opposing this application pay the Applicant’s costs of suit.

2.

That the relief set out in paragraph (1)(b) above operate as interim relief with immediate effect pending the outcome of this application’.

[15] On 7 September 2012 Radebe J granted the rule nisi returnable on 28 September 2012 with the interim relief as prayed.

[16] In a letter dated 27 September 2012 from Dickenson and Theunissen Incorporated, the attorneys for the First and Second Respondents, addressed to the Appellant's attorneys it was indicated that the First and Second Respondents

'...consent to the order as set out in paragraph (1) (a) (b) of the Notice of Motion dated 4 September 2012 ... (and)... we confirm further that we agree that the question of costs would be reserved for the trial court'.

[17] The Third Respondent opposed the application. It did not dispute any of the factual allegations in the founding affidavit but instead filed a notice in terms of rule 6(5)(d)(iii) raising certain legal defences. In essence these were that insofar as the Appellant relied on the 'option to renew' and a 'right of first refusal' in the lease, the right of first refusal constituted an unenforceable pactum de contrahendo (alternatively was void for vagueness); that insofar as it may be considered that the right of first refusal was enforceable at law, that it was only capable of being exercised during the option period (that is the period after the expiry of the initial lease period on the 30 July

2004) if written notice was delivered to the Landlord before 1 February 2004, and that this was not done; that it had lapsed by effluxion of time on 30 July 2004 and is no longer of force and effect at law. The notice continued that insofar as the Appellant relies on the addendum and the 'option to purchase the premises' contained in clause 5 thereof, this provision equally constituted an unenforceable pactum de contrahendo (alternatively was void for vagueness); alternatively insofar as it may be found that the option to purchase the premises was enforceable, any option to purchase the premises lapsed on the 31st July 2009. Accordingly, the contention was that the Appellant had not established that it had any right (prima facie or otherwise) warranting the grant of the interim interdictory relief pending the outcome of an action to be instituted.

[18] The matter was argued as an opposed application before Ploos van Amstel J. After the matter had been argued he addressed an email to the counsel acting for the Appellant and Third Respondent stating:

'When this matter was argued nothing was said about the fact that the First Respondent against whom the interdict is sought, is ex facie the lease agreement not a party to it. What exercises my mind is the following:

The Second Respondent does not purport to act on behalf of the First Respondent in the lease agreement. The fact that he does not own the property does not preclude him from being landlord.

There is no admissible evidence that the Second Respondent represented the First Respondent as an undisclosed principle. Even if he did, was a written authority not required to make the right of first refusal binding on her?

If the First Respondent was not a party to the agreement which contains the right of first refusal, on what basis can she be interdicted from selling the property, of which she is apparently the sole owner?

The parties are invited to address these issues by way of written argument to be delivered by the first Friday in February 2013’.

[19] Pursuant to this invitation a supplementary affidavit was filed by the Appellant’s attorney Ms Anderson. The contents of her affidavit were in turn confirmed by confirmatory affidavits by Mr David Buckingham and a Mr James Crawford.⁶In these affidavits it was contended that the Second Respondent at all material times acted for and on behalf of the First Respondent as undisclosed principal.

THE JUDGMENT OF THE COURT A QUO:

[20] In his judgment the learned Judge inter alia commented:

‘[9] Whether or not the second respondent acted as agent for the first respondent when the lease agreement was concluded is a question of fact. If he did not, and acted in his personal capacity, the further issues in the case become academic. ...

[10] A landlord does not have to be the owner of the property which he lets, just as a seller does not have to own what he sells. The mere fact that the first respondent owned the property does not warrant an inference that the second respondent acted on her behalf ... It is also not unlikely that the second respondent contracted in his personal capacity because he dealt with the property as if it was his, although legally it was not.

[11] There is no direct evidence before me that the second respondent acted on behalf of the first respondent as undisclosed principal when the lease was concluded. In the founding affidavit Mr Buckingham makes a number of assertions in this regard. In para 11 he says “In concluding that lease agreement the Second Respondent represented the First Respondent and acted as a Landlord”. In para 12 he says “All my dealings in respect of the property were with the Second Respondent. It was clear to me that the First Respondent left all negotiations about the property to her husband”. There are similar assertions regarding the assignment of the lease and the addendum which renewed the lease. On Mr Buckingham’s own evidence he did not know at the time that the second respondent was not the owner of the property. He had no reason to think that he was acting on behalf of his wife. The assertions in the founding affidavit is not evidence of the fact that the Second Respondent was acting as his wife’s agent.

[12] ...

[13] I do not consider that the Applicant has made out a case for an interdict pendent lite against the First Respondent. There is no basis on the evidence before me for a finding that she is bound by the right of first refusal on the lease agreement, not even prima facie though open to some doubt’.

[21] In the light of the conclusion to which he came, he did not deal with any of the legal issues raised in the rule 6(5)(d)(iii) notice.

DISCUSSION:

[22] In the Court a quo, the Appellant was simply seeking an interim interdict pending the action. It is trite that to succeed with such an application, the Appellant had to demonstrate:

- (a) A clear right, or, if not clear, is prima facie established, though open to some doubt;
- (b) A well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) The absence of any other satisfactory remedy;
- (d) That the balance of convenience favoured the granting of such an interim interdict.⁷

[23] The factual allegations advanced by the Appellant, particularly those relating to the deponent's belief as to who the Second Respondent represented in concluding the assignment and the addendum, the existence of the imminent threat of transfer of the property to the Third Respondent and the allegations in support of the contention that the balance of convenience favoured the Appellant, all stood entirely un-contradicted. The deponent's unchallenged factual evidence was that in all his dealings with the Second Respondent, he thought it clear that the 'First Respondent left all negotiations about the property to her husband', that when the written assignment of the lease was concluded the 'Second Respondent again acted as the First Respondent's agent'. Allegations that there were negotiations during June to July 2004 in regard to inter alia 'the extension by the First Respondent of a right of first refusal in respect of the property', and that the addendum was considered by the 'Second Respondent on behalf of the First Respondent', stand un-contradicted. Similarly, the allegations in the supplementary affidavits⁸ that at all material times to the conclusion of the assignment and addendum neither Mr Buckingham nor Mr Crawford were aware that the First Respondent indeed owned the property until much later after the conclusion thereof, and that the position is in fact that, in acting as he did, the Second Respondent at all material times acted as an agent for the First Respondent as undisclosed principal, remain un-contradicted.

[24] It is correct that ex facie the agreements, the Second Respondent did not purport to act on behalf of the First Respondent. It is also correct, as the learned Judge concluded, that whether or not the Second Respondent acted as agent for the First Respondent is a question of fact. The Appellant's witnesses under oath alleged that the First Respondent was the undisclosed principal of the Second Respondent.

[25] Those allegations were not disputed by the Third Respondent, nor for that matter, were they disputed by the First and Second

Respondents in the application. It was simply not raised as an issue by the Third Respondent.⁹ Before us it was conceded by the Third Respondent that the issues properly raised for determination before the court a quo were those identified in the rule 6(5)(d)(iii) notice and those only.

[26] However, as much as the question of what authority a purported agent might have to represent another is a factual issue, the

conclusion whether such authorisation as might be proved in a particular factual scenario amounts to the authority required to

validly conclude a particular legal act, is a conclusion of law.

[27] Where there is no factual basis advanced in a founding affidavit that an agent acted for and on behalf of an undisclosed principal, on which an Applicant can base the relief it claims, or the factual basis contended for is so absurd as to be highly improbable, it would no doubt be correct that relief can and should be refused by the Court even if this particular issue was not specifically challenged by any of the other parties to the litigation. This is probably what the learned judge had in mind. But I am respectfully of the view that he erred in not concluding that at least a *prima facie* case, even if open to some doubt, had been made out on oath that the Second Respondent had indeed acted on behalf of the First Respondent as undisclosed principal.

[28] My reasons for that conclusion include *inter alia* the following:

The question of agency was, on the allegations by the deponents to the affidavits on oath, a matter of undisputed fact. The effect of the judgment in the court a quo is that these statements under oath had to yield in toto to inferences arising from general legal principles, notably, the principle that in our law a lessor may validly conclude a lease in respect of a property he does not own. That is a trite principle of law. But it cannot per se negate the weight of sworn evidence by a witness who states that the Second Respondent acted on behalf of the First Respondent as undisclosed principal, unless perhaps the surrounding circumstances are such as to make that belief on the part of the witness so absurd and ridiculous that it can be rejected summarily. The present case was not such an instance. One must appreciate that a litigant in the position of the Appellant would hardly ever have direct evidence of the relationship between an agent and his/her undisclosed principal, because if such relationship was disclosed, the situation would probably not be one of an undisclosed principal. The First, Second and Third Respondents did not dispute factually that the First Respondent was an undisclosed principal. In the context of adjudicating this application, their failure to do so was telling.

In *Hasselbacher Papier Import and Export (Body Corporate) and another v M V Stavroula*¹⁰ it was held *inter alia* that even when an applicant's case was based on hearsay evidence, a respondent's failure to deny any of the facts alleged, made it hardly likely that the hearsay evidence was untrue. A respondent's failure to reply to allegations, although not itself proving the applicant's case, had to be taken with the evidence provided by the applicant together with considerations as

to whether or not the relevant information was readily available to the applicants or respondent in deciding whether an evidentiary onus has been discharged.

In *Wightman t/a J W Construction v Headfour (Pty) Ltd and another*¹¹ Heher JA said that:

‘[a] real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the facts said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer or (countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say “generally” because the factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be born in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes

fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust

view of the matter’.

Here there was not even a bare denial of the undisclosed principal relationship from the respondents.

But the court a quo was also not simply confronted with the Appellant’s ipse dixit as to the undisclosed principal relationship between the First and the Second Respondents. The appellant’s sworn evidence also included allegations that the First Respondent had accepted the payment of rental in respect of the property without protest. That positive factual allegation stands un-contradicted. Although the specific rentals received were not identified, in the chronology in which the statement appears in the founding affidavit, the statement appears, at least prima facie, to relate to rentals received pursuant to the conclusion of the addendum. The significance of this positive allegation lies in the First Respondent receiving rentals in respect of her property. The rhetorical question irresistibly arising, is on what basis the First Respondent would accept these rentals, unless she knew it was in terms of the lease assigned and renewed in terms of

the addendum? If it is on any other basis then she has not disclosed it. This also, prima facie at least, points to an undisclosed principal relationship existing between the First and Second Respondents.

Further, in the sale agreement between the First Respondent and the Third Respondent, clause 16.3 expressly provided that both parties were aware that rental was being received in respect of the property. The clause also confirmed that the tenant, which could only be the Appellant, would continue paying rental to the First Respondent as 'sellers' until the date of transfer. This clearly, and certainly prima facie points to knowledge on the part of the First Respondent of a rental arrangement giving rise to the payment of rent to her, which on the uncontested evidence, before the court, could only have been pursuant to the lease, assignment and addendum.

The inference to be drawn from the First Respondent receiving the rentals and acknowledging that they would be continued to be

received until transfer, is more probable and consistent with her acknowledging her rights and obligations in terms of the lease, the assignment and/or addendum, than the Second Respondent, calling himself the landlord in respect of a property he does not have to own, gives rise to any inference that he was not acting on behalf of the First Respondent as an undisclosed principal.

The inference the court a quo drew that the Second Respondent was acting in his personal capacity, could not contradict the evidence at a prima facie level that he had acted on behalf of the First Respondent as his undisclosed principal. In any event also, that inference was not the only inference or the most probable inference to be drawn from at least two, but possibly a greater range of possible inferences which could arise.

In the final analysis, the correct approach is to consider, with reference to all the evidence adduced, whether prima facie, even if maybe open to some doubt, the most probable inference to be drawn is whether the Second Respondent acted for the First

Respondent as his undisclosed principal, or not. In my view, the probabilities clearly favour the conclusion that the First Respondent not only knew of the lease¹² but indeed had made the benefits (the rental payable in terms thereof) and accordingly also the concomitant obligations therein

(such as any right of first refusal), her own.

Accordingly, even if the question of the First Respondent's representation was properly an issue to be considered by the court a quo, it, with respect, erred in concluding that at a prima facie level there was not proof that the Second Respondent acted on behalf of his wife as undisclosed principal.

[29] It is trite that the Appellant, on discovering that there was such an undisclosed principal in the background, was entitled to elect to hold the undisclosed principal instead of the Second Respondent as intermediary liable.¹³

WAS THERE A VALID RIGHT OF FIRST REFUSAL THAT COULD BE ENFORCED?

[30] Having dealt with the authority issue and whether the First Defendant is bound by terms of the lease agreement, assignment and addendum, the issues properly raised in the Third Respondent's rule 6(5)(d)(iii) notice now need to be considered. Particularly, the issues arising are whether the right of first refusal in clause 18 of the lease was revived after it lapsed when the lease lapsed by effluxion of time on 30 July 2004, and whether the right of first refusal contained therein is enforceable.

[31] This calls for an examination of the terms of the addendum.

[32] In paragraph 14.6 of its heads of argument, the Third Respondent argues that:

'At best for the Appellant a fresh lease agreement was, on or before the 12th August 2004, concluded between himself and the First Respondent on the same terms and conditions as those contained in the assigned Lease Agreement save for those Clauses pertaining to the period of the lease, the rental and escalation's payable, the "option to renew" and the "option to purchase the premises'.

[33] The Appellant's counsel has maintained that not much turns on whether one views the addendum as a separate 'fresh'

lease agreement incorporating by reference the terms of the original lease, or simply as an addendum to the original lease agreement.

These are two possible constructions to be placed on the addendum. A possible third construction that could be contended for is that the addendum was a separate agreement standing independent and entirely divorced from the lease agreement.

[34] Starting with the last possible construction first, in order to be a separate self-contained agreement, the terms of the addendum had to cover the essentialia for a lease namely the rental to be paid, the lease period and the identity of the property. These terms are all present in the addendum document. However, if the addendum was to be a separate self-standing agreement, then the references to it:

- (a) being an addendum to the original lease between the Second Respondent and Mouzouris which was assigned to the Appellant; and
- (b) acting '... as an addendum thereto'

would be superfluous, which would offend against the basic principle of interpretation that every word in the document is assigned a meaning. I therefore do not view the addendum as a separate self-contained agreement.

[35] At the time of the conclusion of the addendum, the lease agreement had elapsed by effluxion of time. What the addendum, ex facie its wording, patently sought to achieve was a renewal of the lease, which, possibly unbeknown to the parties, had at that point already come to an end, or alternatively a fresh lease with the rental period commencing from 1 August 2004. The addendum was drafted

very inelegantly. Giving business efficacy thereto however, the probabilities favour an interpretation that it sought to ensure the Appellant's continued occupation of the property on the basis of the agreement of lease originally concluded between the Second Respondent and Mouzouris and assigned to the Appellant, with the addendum acting as an addendum thereto, save that the period of the lease, the rental and the option to renew previously provided for in the lease, would now be different and relate to different periods.

[36] It seems to me that the Third Respondent is correct that the addendum was a fresh lease agreement concluded between the Appellant

and the First Respondent¹⁴ on the same terms and conditions as those contained in the assigned lease agreement, save for those pertaining to the period of the lease, the rental and escalations payable and the option to renew.

[37] In referring to the original lease agreement in the addendum, it seems clear that the intention of the parties was that the terms of the lease were to apply to the new periods for which the lease was to be in place in terms of the addendum. At a prima facie level I respectfully disagree with the submission that the clauses in the original lease relating to the right of first refusal were not revived on the same conditions which previously applied. These conditions included that when exercised, the tenant had to occupy the premises, whether it being during the initial period of the lease from 1 August 2004 to 31 July 2009 or then during 'the option period referred to in 4 but only if the option is exercised'. The Appellant, whilst in occupation of the premises seeks to exercise that right of first refusal during the further '5 years' renewal period referred to in paragraph 4 of the addendum. That it is entitled to do.

[38] Clause 5 of the addendum is a curious provision. It seems to me to be irrelevant to the present application. Its exact effect is uncertain. It might very well be an unenforceable pactum de contrahendo as it appears to express only an intention on the part of the tenant, wrongfully identified to be Mr Buckingham as opposed to the Appellant, 'to secure an option to purchase the building at an agreed price should the Landlord choose to dispose of such'. It cannot be a valid option to purchase the premises as it does not identify the purchase price. At best, it is probably unenforceable or otherwise void for vagueness. It was however argued that its existence, or the existence of an option to purchase, would be inconsistent with the continued existence also of a right of first refusal as contained in clause 18.

[39] The short answer to that question is that clause 5 does not contain a valid and enforceable option. But in any event, even

assuming clause 5 to somehow contain a valid option, there appears to be no reason why a valid option to purchase and a valid right of first refusal cannot co-exist in the same agreement. More specifically, if a valid option exists, it does not mean that there

can be no valid right of first refusal or right of pre-emption.

[40] In *Soteriou v RetcoPoyntons (Pty) Ltd*¹⁵ the distinction between a right of pre-emption and an option was clearly explained at 932 B-E as follows:

‘A right of first refusal is well known in our law. In the context of sale it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing, and consequently he is prevented from selling to a third person without giving the first refusal ...So, a right of pre-emption involves a negative contract not to sell the property to a third person without giving the grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies.

In the case of an option, the grantor has made an offer which the grantee can accept without more, upon which a contract of sale is complete. In the case of a right of pre-emption, there is no offer at the time of the grant, and the grantor is not obliged to make an offer unless and until he wishes to sell the property”.

[41] If that distinction is kept in mind, there is no reason why a lease agreement cannot contain an option exercisable at the election of the tenant to compel the sale of the leased property to the tenant at a predetermined price, and a right of pre-emption which would require the Landlord should it decide to sell the property, at any time and in circumstances where the option had not yet been exercised by the tenant, and possibly even at a price lower than the price stipulated in the option, to first offer it to the tenant on those same terms and conditions.

[42] At a prima facie level, clause 18 of the original lease agreement was included by reference in the addendum and is enforceable by the Appellant against the First Respondent as undisclosed principal at the election of the Appellant.

[43] The existence of such a right of first refusal would also not fall foul of any formalities legislation, as this right of first

refusal does not entail an interest in land for the purposes of the Alienation of Land Act 68 of 1981.¹⁶

COSTS:

- [44] What appears to me, and ought, with respect, have appeared to the court a quo, was that a prima facie case even if open to some doubt was established, justifying the grant of the relief claimed. With the rule nisi being confirmed it might, in the action foreshadowed in the relief and which has been instituted, nevertheless not be established on a balance of probability. Although the court a quo ought to have confirmed paragraphs (a), (b) and
- (c) of the rule nisi, the correct costs order would have been to reserve the costs of the application for determination by the trial court. The trial court will be in a much better position after hearing all the evidence, to determine whether the Appellant in fact had a right entitling it to claim transfer of the property pursuant to the exercise of the right of pre-emption.
- [45] The judgment by the court a quo discharging the rule nisi with costs falls to be set aside and to be substituted with an order confirming paragraphs 1(b) and (c) of the rule nisi, together with an order that the costs relating to the application including all costs of opposition be reserved for determination by the trial court.
- [46] The Appellant has been successful in this appeal and there is no reason why the costs of the appeal should not follow the result. Both the Appellant and the Third Respondent employed two counsel. The Third Respondent did not dispute the Appellant's claim for the costs of two counsel should costs be awarded in favour of the Appellant.

THE ORDER:

[47] The following order is granted:

1. The appeal succeeds with costs, such costs to include the costs consequent upon the employment of two counsel.
2. The order of the court a quo in terms whereof the rule nisi was discharged with costs including those occasioned by the employment of two counsel, is set aside and substituted with the following order:
 - (a) Paragraphs 1(b) and (c) of the rule nisi issued on 7 September 2012 are confirmed.
 - (b) The costs of the application are reserved for determination by the trial court.

VAHED J:

NKOSI J:

Date of hearing: 27/9/2013

Date of Judgment: 25/10/2013

APPELLANT'S COUNSEL: A M ANNANDALE SC with C NEL

APPELLANT'S ATTORNEYS: LISTER & CO.

c/o DAWSONS INC.

Ref: Mr Dawson/Rabia/

THIRD RESPONDENT'S COUNSEL: D A GORDON SC with M E STEWART

THIRD RESPONDENT'S ATTORNEYS: PIENAAR & PRETORIUS

1Pending the return date, an interim order interdicted the transfer of the immovable property described as Lot 1953, Pinetown from the First and Second Appellants to the Third Appellant.

2Mr Buckingham, the deponent to the Appellant's founding affidavit and a confirmatory affidavit, is the sole member of the Appellant.

3Although the addendum referred to Mr Buckingham having effected his signature to the addendum, it is clear that he had done so on behalf of the Appellant. Paragraph 44 of the founding affidavit in any event foreshadowed that rectification of the agreement would be claimed in the respects set out in the founding affidavit where incorrect designations were used. Nothing accordingly turns on the error either.

4This statement clearly recognises the Appellant's continued occupation until 31 July 2014, which would be consistent with a renewal of the lease pursuant to the addendum.

5We were advised during argument that the action has now been instituted in the Durban High Court under Case No 11688/2012. The relief claimed in paragraph 1(a) of the Notice of Motion has accordingly become academic.

6He is the author of the addendum.

7Webster v Mitchell 1948 (1) SA 1186 (W); L F Boshof Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 © at 267A-F; PrestThe Law and Practice of Interdicts page 51.

8These are confirmed by Mr Buckingham.

9It is a factual and not a legal issue. The Third Respondent only raised legal issues.

10 1987

(1) SA 75 (C).

11[2008] ZASCA 6; [2008 2 All SA 512 (SCA) at para 13.

12This knowledge on its own, might also not necessarily have been sufficient.

13O' Leary v Harbord(1887) 5 HCG 1; Chappell v Gohl 1928 CPD 47 and BP Wanda (original text updated by JC De Wet) 'Agency and Representation' in LAWSA2ed vol 1 (January 2003) atpara232.

14As undisclosed principal.

15 1985

(2) SA 922 (A).

16Rodgers v Phillips 1985 (3) SA 183 (E) at page 187 where it was held that: ‘One must consider the true nature of a right of pre-emption...It is a right which the grantee has that the grantor shall not sell a particular thing before the grantee has been afforded the election to buy at a price which is fixed or objectively determinable...’The grant of a right of pre-emption does not compel the grantor to sell; it only compels him to give to the grantee the preference in case he sells at all.” In my view this right cannot be said to be an interest in land’.

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