Pub 58/85

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

HIMIE NORMAN HIRSCHOWITZ ..... appellant

and

PIETER BENJAMIN MOOLMAN ..... first respondent

STEPHANUS JACOBUS DANIEL MOOLMAN ..second respondent

DORSTFONTEIN COAL MINES LIMITED ..... third respondent

CORAM: Corbett, Miller, Cillié, Van Heerden JJA, et Smalberger AJA.

DATE HEARD: 5 March 1985

DATE OF JUDGMENT: 24 May 1985

J U D G M E N T

CORBETT JA :

The appellant, Mr H N Hirschowitz, made application on notice of motion to the Witwatersrand

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Local Division ("WLD") claiming an order for the enforcement of a right of pre-emption held by him in respect of a farm known as "Welstand No 55" and situated in the district of Bethal, Transvaal ("the farm"). The application failed, as did an appeal to the Transvaal Provincial Division ("TPD"). The judgment on appeal has been reported (see Hirschowitz v Moolman and Others 1983 (4) SA 1 (T).). Leave having been granted by the TPD, appellant now appeals to this Court against the dismissal of his application. The essential facts of the matter are as follows.

In 1955 first respondent, Mr P B Moolman, and his brother, the late Mr T D du P Moolman, became the registered owners of the farm in equal, undivided shares. On 11 July 1977 there was registered a notarial prospecting contract, granted by the brothers Moolman in favour of Sun Prospecting and Mining Company (Pty) Ltd ("Sun Prospecting"), entitling

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the latter to prospect for coal on the farm and giving the latter the option to purchase the coal rights pertaining to the farm. On 7 December 1977 Sun Prospecting ceded its rights, obligations and interest under and in the prospecting contract to Zenith Enterprises (Pty) Ltd, which later changed its name to Dorstfontein Coal Mines (Pty) Ltd ("Dorstfontein") and which figured as fourth respondent in the Courts a quo and third respondent in this Court. On 19 December 1977 the cessionary exercised the option to purchase the coal rights in respect of the farm. Later these rights were formally ceded to Dorstfontein.

Some time between 19 December 1977 and 3 March 1978 - the precise date does not appear from the papers - T D du P Moolman died, leaving a surviving spouse, Mrs C M Moolman, to whom he had been married in community of property, and a son, Mr S J D Moolman, the second respondent. Mrs Moolman was cited as third respondent in the Court a quo,

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but the appeal to this Court is not pursued against her.

The late T D du P Moolman and Mrs Moolman had in 1959 executed a mutual will nominating the survivor as the sole and universal heir or heiress of their whole joint estate, subject to the following condition, inter alia :-

> "Indien ek THEODORUS DANIEL DU PLESSIS MOOLMAN die Testateur eerste te sterwe kom en indien ek CHRISTINA MAGDALENA MOOLMAN (gebore Botes) die Testatrise hertrou wil en bepaal ons dat ons onverdeelde een-helfte in die plaas 'Welstand' nr. 34, distrik Bethal (geregistreer in die naam van die Testateur) aan ons seun STEPHANUS JACOBUS DANIEL MOOLMAN sal vererf en in sy naam getransporteer moet word."

On 15 May 1978 a written lease of the farm was granted to appellant by first respondent and Mrs C M Moolman for a period of five years, reckoned from 1 September 1978. The lease contains the following clause (which, it is common cause, created a right of pre-emption):

/ "8. Ingeval....

"8. Ingeval die huurders die eiendom wens te verkoop gedurende die huurtermyn, sal hulle aan die huurder die eerste reg en opsie gee om dit te koop vir 'n tydperk van 1 (een) maand vanaf datum van skriftelike kennisgewing aan die huurder van hulle voornemens om te verkoop. Indien die huurder nie binne genoemde maand die eiendom van hulle koop nie sal die eerste reg om te koop outomaties verval".

Mrs Moolman signed this lease presumably in the anticipation that she, as heiress under the will, would in due course become a registered co-owner of the farm, together with her brother-in-law, the first respondent. In fact this never came to pass. For on 26 June 1978 she and her son entered into a redistribution agreement ("herverdelingsooreenkoms"). This agreement records in its preamble that Mrs Moolman accepted the benefits of the joint will on 23 May 1978 and it provides basically (a) that the one-half share in the farm, together with all mineral rights (other than rights to coal), be awarded to

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second respondent; and (b) that the entire net residue of the joint estate (including the proceeds of the sale of the coal rights) be awarded to Mrs Moolman. Subsequently Mrs Moolman remarried and is now Mrs Duvenhage. On 11 May 1979 and in pursuance of the redistribution agreement an undivided half-share in the farm was transferred to second respondent.

On 28 February 1980 first and second respondents, as owners of the farm, entered into an underhand prospecting contract with third respondent (Dorstfontein) in terms whereof the latter was given the sole and exclusive right to prospect for all minerals, excluding coal, on the farm. (I shall refer to this contract as "the prospecting contract".) Clause 4(a) of the prospecting contract provides as follows:

> "Te enige tyd gedurende die Prospekteertydperk sal die Prospekteerder die enigste en uitsluitlike reg en opsie hê om die gesegde Plaas tesame met alle regte tot enige minerale uitgesonder steenkool, van die Eienaar te koop teen 'n koopprys bereken teen 'n koers van R755,00 (sewehonderd vyf-en-vyftig rand) per hektaar oor die hele omvang van die gesegde Plaas, betaal-
>
> / baar.....)

> baar in kontant teen registrasie van oordrag daarvan in die naam van die Prospekteerder, as sekuriteit vir welke betaling die Prospekteerder die gebruiklike bankwaarborg sal verskaf op aanvraag sodra die dokumente wat nodig is om sodanige registrasie te bewerkstellig gereed is om by die Aktekantoor ingedien te word."

It is appellant's case that the grant in the prospecting contract of the option contained in clause 4(a) "triggered off" the right of pre-emption contained in clause 8 of the lease, quoted above. On 8 August 1980 appellant's attorneys addressed a letter to first respondent and Mrs Moolman referring to clause 8 of the lease and stating that their client had been informed of the grant of an option over the farm. The letter concludes —

> "Indien u wel begerig is om die eiendom te verkoop, word u versoek om die voorwaardes te stel sodat ons kliënt sy opsie kan oorweeg ingevolge bogemelde klousule van die huurkontrak."

An exchange of correspondence ensued, culminating in the

attorneys acting for first and second respondents on 2 December 1980 giving written notice, in terms of clause 8 of the lease, that their clients were considering selling the farm at a price of R270 643,86 and that appellant, therefore, had the prior right ("eerste reg") to purchase the farm at the offered price within a period of one month as from the receipt of the notice. According to appellant, discussions then took place between the attorneys acting for the parties and a deed of sale was drafted. This was signed by appellant on 10 December 1980, ie within the period of one month. Immediately thereafter Dorstfontein intervened; first and second respondents gave a written undertaking to Dorstfontein not to sell the farm; and they notified appellant that the notice of 2 December 1980 had not been authorized by them and was of no force or effect. Appellant's attorneys responded by demanding from first and second respondents a formal written offer in terms of clause 8

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of the lease, to sell the farm to appellant for the price stated in the prospecting contract, namely R755,00 per hectare. In reply thereto, they were asked to hold the matter in abeyance until 30 June 1981. This they refused to do. In May 1981 appellant instituted proceedings.

In his notice of motion (as amended) appellant claimed orders —

1 A. declaring that first and second respondents are obliged to offer the farm to appellant (applicant) for sale on the same terms and conditions, mutatis mutandis, as those set out in clause 4(a) of the prospecting contract;

1 B. directing the respondents to deliver the offer to appellant within 30 days of the date of the court's order in compliance with their obligations set forth in paragraph 1 A, which offer shall comply with the provisions of the Formalities in respect of Contracts of Sale

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of Land Act 71 of 1969;

1 C. alternatively, declaring that first and second respondents are obliged to accept an offer in the terms mentioned in 1 A;

2. authorising the Sheriff of the Transvaal or any of his lawful deputies to sign, execute and deliver such offer to the appellant for and on behalf of the first and second respondents, if the respondents fail to do so;

3. directing first and second respondents to pay the costs of the application jointly and severally, the one paying the other to be absolved.

When the application came before the WLD the presiding Judge, GOLDSTONE J, referred at some length to the various judgments in the case of Owsianick v African Consolidated Theatres (Pty) Ltd 1967 (3) SA 310 (A) and

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> "The majority judges thus decided that the usual right of pre-emption, such as the provision they were considering, does not, when it comes into operation, give rise to a binding contract of sale: i.e. the holder of the right, when he exercises it, may not demand either transfer of the land or a sale to himself. If that is the proper construction of the pre-emptive right conferred by clause 7 of the lease in the Owsianick case, then I can find nothing in the provisions of Clause 8 of the lease now before me which would justify a broader construction. Certainly, there are no words which would entitle me to hold that the provision confers upon the applicant a right to demand to become the purchaser of the subject matter of the pre-emptive right i.e. the farm.
>
> As the majority of the Court held in the Owsianick case, such a pre-emptive right gives rise only to a claim for an interdict in a suitable case or for damages in the event of a breach thereof. No such claims are made in this case. On this ground the application cannot succeed."

The learned Judge then went on to consider a further argument by counsel for the respondents that, in any event, even if a right of pre-emption did entitle the grantee thereof to claim transfer of the land or to demand to be-

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come the purchaser thereof, then such right had to comply with the provisions of sec. 1(1) of the Formalities in respect of Contracts of Sale of Land Act 71 of 1969 ("the Formalities Act"). He concluded that sec. 1(1) of the Formalities Act was an "insuperable obstacle" in the way of the Court granting the relief sought against the second respondent in that the latter had signed no written document obliging him to sell the farm to the appellant or to offer to sell it to him. Moreover, the claims against first and second respondents could only be made jointly, not jointly and severally. The application was accordingly dismissed with costs.

On appeal to the Full Bench of the TPD it was held (per COETZEE J, ESSELEN J and PHILIPS AJ concurring) that (a) since the delivery of judgment in the WLD the Appellate Division had held that "its previous decision in Owsianick's case was wrong and that there (was) no reason why an order for specific performance should

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not be granted on the strength of a pre-emptive right such as that in issue. See Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA 893 (A)"; and (b) the Formalities Act was not a stumbling block in casu, (judgment, pp 4H to 5 E). This Court thus overruled the grounds upon which the decision in the WLD had been reached. Nevertheless, the Court came to the conclusion that the application had been rightly dismissed since there was no ground in law upon which second respondent could be held to be bound by clause 8 of the lease (judgment pp 6 F to 11 D). It rejected a submission which was argued "but faintly", to the effect that appellant could succeed against first respondent in respect only of his undivided share in the property (judgment p 11 E).

In this Court the two main issues which were argued were (i) whether the Formalities Act was an insuperable obstacle to appellant's claim, and (ii) whether second respondent was bound by the lease and, more particularly,

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by clause 8 thereof. It was submitted by appellant's counsel that the Formalities Act had no application to the present case and that second respondent became bound by clause 8 of the lease on one or more of the following grounds, viz. -

(1) that second respondent elected to be bound by all the terms of the lease, including clause 8;

(2) that second respondent was aware of the right of pre-emption (at the latest) by the time he received transfer of his undivided half-share of the farm, i.e. 11 May 1979, and that he was therefore bound by the doctrine of notice;

(3) that second respondent, as a gratuitous successor in title, was bound by the obligations in personam incurred by his predecessor in title (Mrs Moolman) in respect of the farm;

/ (4) that .....

(4) that second respondent was bound by the grant of the pre-emptive right by reason of the doctrine of huur gaat voor koop.

All these contentions were contested by respondent's counsel. During the course of argument appellant's counsel intimated that he was not pursuing the contention based on the doctrine of notice.

I proceed to deal with the argument based on the Formalities Act. Here it is necessary to consider and analyse the provisions of sec. 1(1) of the Act, the common law relating to rights of pre-emption and the relief sought by appellant in the present case. It is to be noted that the Formalities Act was repealed by the Alienation of Land Act 68 of 1981 ("the new Act"). The relevant portions of the new Act and the repeal came into operation on 19 October 1982 (see Proc. 148 of 1982, G.G. 8344 of 20 August 1982). The relevant facts in this case occurred, and

judgment in the WLD was given, prior to the new Act coming into operation. In this Court counsel made no reference to the new Act and appeared to be agreed that the Formalities Act was the relevant legislation. This would seem to be correct. In any event, sec. 2(1) of the new Act seems to have the same impact on sales of land as did sec. 1(1) of the Formalities Act. I shall, therefore, proceed on the basis that the Formalities Act is the legislation to be considered and I shall speak of it as though still operative.

Sec. 1(1) of the Formalities Act provides –

> " (1) No contract of sale of land or any interest in land (other than a lease, mynpacht or mining claim or stand) shall be of any force or effect if concluded after the commencement of this Act unless it is reduced to writing and signed by the parties thereto or by their agents acting on their written authority."

This subsection replaced subsec. 1(1) of the General Law Amendment Act 68 of 1957, which was in virtually identical

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terms, save that it included a "cession in respect of land". Subsec. 1(1) of Act 68 of 1957 repealed and replaced provisions in Transvaal and the Orange Free State (sec. 30 Proc. 8 of 1902 (T) and sec. 49 of Ord. 12 of 1906 (OFS)) similarly requiring contracts for the sale of fixed property to be in writing and signed by the parties thereto or by their agents duly authorized in writing. The object of the subsection and its predecessors was to avoid, as far as practicable, uncertainty and disputes (possibly leading to litigation) regarding the contents of contracts for the sale of land (recognising that such contracts were, as a rule, transactions of considerable value and importance) and to counter possible malpractices, including perjury and fraud in connection therewith (see Estate Du Toit v Coronation Syndicate, Ltd and Others 1929 AD 219, at 224; Neethling v Klopper en Andere 1967 (4) SA 459 (A), at 464 E - F; Ferreira and Another v SAPDC (Trading) Ltd 1983 (1) SA 235 (A), at 246 B - D). What the subsection requires is that (at least) all the material terms of the contract

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be reduced to writing and signed by the parties. This does not mean that the terms of the contract and the signatures of the parties must necessarily be embodied in one document. Thus, a written and signed offer by one party in one document and a written and signed acceptance thereof by the other in another document would constitute compliance with the subsection, provided that these documents fully recorded the contract (see Johnston v Leal 1980 (3) SA 927 (A), at 937 G-H; Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd 1982 (1) SA 7 (A), at 18 C-E and the authorities there cited).

The juridical nature of a right of pre-emption (or "voorkoopsreg" or "voorkeur van koop") was fully considered by this Court in Owsianick's case (supra) and in the ASA Bakeries case (supra). It is important to determine what precisely was decided in these cases.

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In the former case the essential facts (somewhat simplified) were as follows. The appellant owned certain cinema premises in Johannesburg. A clause (clause 7) in a written lease of the premises, in respect of which the respondent had become the lessee by assignment, provided that if during the currency of the lease the lessor (appellant) desired to sell the leased premises she should, before concluding any sale, offer the premises for sale to the lessee at the same price and upon the same terms and conditions as she was prepared to sell the premises to any bona fide purchaser; and that the lessee should be entitled to accept the offer within a period of seven days. During the currency of the lease the appellant concluded with one P a written contract of lease of the cinema property, the lease to commence after the termination of respondent's lease. The lease to P contained a clause giving the lessee the option to purchase the property

leased at a price of R30.000. Respondent instituted action against appellant claiming an order directing appellant, within a time to be fixed by the court, to offer in writing to sell the leased premises to respondent at the same price and upon the same conditions as she was prepared to sell the property to P and directing further that respondent be entitled to accept the offer within a period of seven days. In its declaration respondent alleged that by concluding the lease with P (and thereby conferring the option on P) appellant had formed and manifested a desire to sell the leased premises (within the meaning of clause 7), but had refused to offer the premises to respondent. Appellant filed a plea in which she admitted the conclusion and contents of the two leases, but (and here I summarize the effect of the plea) denied that the conclusion of the lease with and the grant of the option to, P brought into operation the pre-emptive right contained in clause 7 of the lease to respondent. Res-

pondent took exception to the plea on the ground that it disclosed no defence. The issue raised was whether or not on the facts which were common cause on the pleadings the right of pre-emption provided for in clause 7 had come into operation. The matter was heard at first instance in the Transvaal Provincial Division and the exception was upheld, i.e. it was found that the right of pre-emption had come into operation.

On appeal to this Court, counsel for the appellant, in addition to arguing that the right had not come into operation, raised a new point, viz. that in any event respondent had no enforceable rights prior to appellant actually concluding a contract of sale with P and that then respondent's rights were confined to a claim for damages, should appellant so sell, or for an interdict restraining transfer pursuant to any such sale. The Court reached divergent conclusions on these issues. OGILVIE THOMPSON JA held

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that the grant of the option to P had brought into operation the right of pre-emption contained in clause 7 and in coming to this conclusion he rejected the argument (advanced by appellant's counsel) that clause 7 applied only to a sale concluded or proposed to be concluded during the currency of the lease to respondent. He held that by granting the option to P appellant had demonstrated during the currency of the lease to respondent a "desire to sell" the premises, within the meaning of clause 7. The learned Judge of Appeal further held that (p. 320 G) -

> "Subject..... to the discretion of the Court to decline, in any particular case, to order specific performance, I am of the opinion that the holder of a right of pre-emption is, once the contingency giving rise to that right has supervened, entitled by due exercise of his right to become a purchaser."

(It would seem from the context and the authorities cited that the learned Judge of Appeal was referring to the

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specific performance of the contract of sale resulting from the exercise by the holder of his right of pre-emption.) Applying this principle to the facts, he concluded that appellant was "obliged to offer respondent the premises for sale" upon the terms stipulated in the option. Appellant's plea accordingly disclosed no defence and the exception had been correctly upheld by the Court below.' OGILVIE THOMPSON JA was thus of the opinion that the appeal should be dismissed. WILLIAMSON JA concurred in the judgment of OGILVIE THOMPSON JA on the issue as to whether on the facts alleged the respondent's right of pre-emption had come into operation and agreed that the appeal should be dismissed. He was of the opinion, however, that on the pleadings the only issue which arose, and had to be decided on appeal, was whether the right of pre-emption had come into operation. As to the remedies available to the holder of a right of pre-emption, when his right

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comes into operation, and the new argument raised by appellant's counsel, WILLIAMSON JA was of the opinion that it was unnecessary and undesirable to decide this issue. He nevertheless expressed the "prima facie view" that the conclusion of OGILVIE THOMPSON JA on this issue was correct. BOTHA JA, in whose judgment POTGIETER JA concurred, held that the grant of the option to P did not bring the right of pre-emption contained in clause 7 of the lease into operation and was accordingly of the view that the appeal should succeed and the order of the Court a quo be altered to one dismissing the exception with costs. In his judgment he considered the nature and legal effect of a right of pre-emption. In the course of doing so he expressed, or appeared to express, the following views:

(i) that a right of pre-emption does not normally impose any enforceable positive obligation upon the grantor of the right, but merely restrains him from selling to a

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third party, save under the conditions prescribed in the agreement creating that right (see pp 321 F and 323 G - H); (ii) that upon a sale of the property subject to a right of pre-emption in disregard of the rights of the grantee of the right of pre-emption, the latter may claim damages from the grantor, but that there is no procedure known to our law whereby the grantee may in that event demand to be allowed to step into the buyer's place and compel a sale of the property to himself (see pp 321 G to 323 E, in which the contrary views expressed by Van Zutphen, Nederlandtsche Practÿcke, s.v. "Voorcoop", were considered and rejected, principally on the ground that Van Zutphen had wrongly imported, in relation to a conventional "voorkoopsreg", the legal position applicable under the Dutch law of "naesting" or the legal "jus retractus"); and (iii) that the grantee of a right of pre-emption may in our law, in appropriate circumstances, by interdict restrain a sale about to be concluded with a third party in breach of his rights (see p. 322 H). It would follow from the views

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expressed by BOTHA JA that, a fortiori, the grantee of a right of pre-emption would have no right to positively enforce his rights where there had not been a sale to a third party, but merely the granting to him of an option to purchase. The fifth member of the Court, WESSELS JA, agreed that the appeal should be allowed on the ground that upon a proper construction of clause 7 the lessor (appellant) could only be in breach thereof when a sale to a third party was actually concluded during the currency of the lease to respondent. He added (at p 328 F) -

> "A threatened breach may entitle the lessee to an interdict, but that circumstance could not give rise to an action for specific performance. The Court lacks power to issue a command in wider terms than that incorporated in clause 7."

That this statement was merely an interpretation of the effect of clause 7 itself and was not intended as a general exposition of the law relating to the remedies available

to the grantee of a right of pre-emption, was made clear in the last paragraph of the judgment, which reads (see p 328 G - H) :-

> "I regard it as unnecessary for the purposes of my conclusion to deal with the remedies which are available to the holder of a right of pre-emption or to consider whether a clause primarily designed to create a right of pre-emption could be so formulated as to impose on the grantor of the right a concurrent positive obligation to offer the subject matter in question for sale to the grantee in certain spci-fied circumstances."

It is to be noted that, contrary to what has on occasion been said in comments on this case, there was no majority decision on the legal issues raised in re-gard to the remedies available to the holder of a right of pre-emption; there was a majority decision only on the question as to whether the pre-emptive right had come into operation and this decision determined the result of the appeal.

The facts in the ASA Bakeries case (supra) were complex, but essentially the case related to a right of pre-emption in respect of shares in and claims against a certain private company. The holder of the right of pre-emption (a company) alleged that a sale in conflict with its rights had taken place and brought an application, making claims which in the main were directed to a positive enforcement of its right of pre-emption. At first instance the application was refused, on grounds which are not relevant. On appeal, this Court (by a majority decision) made an order granting the appellant certain relief. In the course of his judgment (which was the majority judgment) VAN HEERDEN AJA, having considered the judgments in the Owsianick case and the views of a number of writers on Roman-Dutch and German common law, summarized the position as follows (see p 907 E - G):-

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"Die voorgaande uiteensetting van die menings van skrywers oor die Romeins-Hollandse en Duitse gemene reg kan nou soos volg saamgevat word:

(a) Behalwe dat die houer van 'n voorkoopsreg 'n bloot persoonlike reg het, word geen tersaaklike onderskeid tussen enersyds, sy reg en, andersyds, 'n naastingsreg wat ex lege voortspruit en 'n jus retractus getrek nie.

(b) Indien 'n verkoper in stryd met 'n voorkoopsreg 'n koopkontrak met 'n derde aangaan, kan die koper deur 'n eensydige wilsverklaring in die plek van die derde tree. 'n Koopkontrak word dan geag aangegaan te gewees het tussen die verkoper en die houer van die voorkoopsreg.

(c) Indien lewering reeds geskied het, kan die reghebbende nie met sy persoonlike reg die koopgoed in die hande van die derde opvolg nie tensy laasgenoemde bewus was van die bestaan van die voorkoopsreg".

(The first of these propositions has relevance to the grounds advanced by BOTHA JA in the Owsianick case for rejecting the authority of Van Zutphen. With reference to proposition (b) it is clear that the word "koper" has reference to the holder of the right of pre-emption, or "voorkoopsreg".) After referring to similar principles

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in modern German and American law, VAN HEERDEN AJA concluded that there was no reason why South African law should not give effect to the common law view of the nature of the right of pre-emption, as set forth in (a) to (c) above. In this respect he disagreed with the conclusions of BOTHA JA (in the Owsianick case) as to the remedies available to the holder of a right of pre-emption. VAN HEERDEN AJA added, for sake of clarity, that it was not necessary for the purposes of the case under appeal to express any opinion in regard to the following questions (see p 908 E - G):

> "(i) Of die houer van 'n voorkoopsreg 'n koopkontrak tussen hom en die verkoper tot stand kan bring slegs nadat 'n koopkontrak met 'n derde aangegaan is en nie ook, bv, indien die verkoper 'n aanbod aan die derde gemaak het nie. Moontlik kan die presiese bewoording van die voorkoopsreg in hierdie verband van belang wees.

/ (ii) Of.....

(ii) Of die reghebbende in die plek van die derde kan tree indien die betrokke koopkontrak aan bepaalde vormvereistes, soos bv in geval van verkoop van onroerende goed, moet voldoen.

(iii) Of die tydstip waarop die al of nie kennis van die derde aangaande die voorkoopsreg van belang is, verband hou met die sluiting van die koop-kontrak of met die lewering van die koopgoed."

In further explanation of his views, VAN HEERDEN AJA emphasized that, although the holder (grantee) of the right of pre-emption is said to step into the shoes of the third party ("in die plek van die derde tree"), he does not take the place of the third party in relation to that contract. The true position is that upon the grantee exercising his rights after the conclusion of a contract of sale with a third party, a new independent contract - and not a substitutionary one - comes into existence between the grantor and the grantee and this does not

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affect the validity of the contract between the grantor and the third party (p 919 C - E). The learned Judge found it unneccessary to decide whether the court can order a grantor who has acted contrary to the provisions of a right of pre-emption to make an offer to the holder of the right, but expressed grave doubt ("sterk twyfel") as to whether the court had the power to do so.

BOTHA AJA, who delivered the minority judgment agreed with the conclusion of VAN HEERDEN AJA that in principle the holder of the right of pre-emption *in casu* could claim the positive enforcement of his right; he, however, found it unnecessary to consider the interpretation of the authorities discussed by VAN HEERDEN AJA or the jurisprudential interpretation of what occurs when the right is breached and the holder wishes to enforce his right; but, for the sake of argument, he accepted the exposition of VAN HEERDEN AJA in this connection.

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The impact of the majority judgment in the ASA Bakeries case upon the divergent standpoints adopted in the Owsianick case may, I think, be summed up as follows:-

(1) The views of BOTHA JA (in the Owsianick case) that a right of pre-emption does not impose on the grantor any enforceable positive obligation, but that the grantee may only claim damages in the event of a sale in disregard of his rights or, in appropriate circumstances, an interdict to restrain such a proposed sale, were rejected; as also were his views on Van Zutphen and the latter's reliability as an authority on the subject.

(2) The view of OGILVIE THOMPSON JA 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 en-

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forcement of his rights was endorsed, but in a number of respects (listed in (3), (4) and (5) below) the majority judgment in the ASA Bakeries case did not go as far as OGILVIE THOMPSON JA (and apparently WILLIAMSON JA) were prepared to go.

(3) It was held by OGILVIE THOMPSON JA that once the contingency bringing his right of pre-emption into operation had supervened, the holder could under the common law claim implementation of his contract with the grantor before actual breach by the latter (see Owsianick case, p 319 H - 320 A). In the judgment of VAN HEERDEN AJA this point was left open (ASA Bakeries case, p 908 F, point (i)).

(4) It was held by OGILVIE THOMPSON JA that when the right of pre-emption comes into operation, the grantor is

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subject to an enforceable obligation to offer the property for sale to the grantee upon the terms offered to the third party (Owsianick case p 320 G - H). As I have indicated, VAN HEERDEN AJA had grave doubts as to whether in such circumstances the court had the power to order the grantor to offer the property to the grantee (ASA Bakeries case, p 919 H).

(5) The property concerned in the Owsianick case was immovable property. The question of the effect of the Formalities Act was not raised. In ASA Bakeries the property concerned was movable and VAN HEERDEN AJA expressly left open (p 908 G, point (ii)) the question as to whether the grantee of the right of pre-emption could step into the shoes of the third party where the contract had to comply with requirements as to form, as in the case of the sale of immovable property.

/ I return.....

I return now to the facts of the present case. In discussing the argument based on the Formalities Act I shall proceed on the premise that second respondent became bound by clause 8 of the lease, which conferred the pre-emptive right upon the appellant, on one or other of the legal grounds advanced by the appellant. Were it otherwise, cadit quaestio.

It is to be noted that in this case the grantors of the right of pre-emption (first and second respondents) have not sold the farm to a third party in disregard of appellant's rights as the holder of the right of pre-emption: they have merely granted to the third party an option to purchase the farm. Now, the grant by an owner of property of an option to purchase the property amounts in law to an offer to the grantee of the option to sell the property to him and an agreement to keep that offer open for a certain period. The grantee acquires the right to accept the offer

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at any time during the stipulated period and, if he does so, a contract of purchase and sale immediately comes about. (See generally Venter v Birchholtz 1972 (1) SA 276 (A), at 283-4). In the Owsianick case the grant of an option, even though it could not be exercised by the option-holder until after the termination of the right of pre-emption, was held by OGILVIE THOMPSON JA and WILLIAMSON JA to bring into operation the right of pre-emption there provided for and to entitle the grantee to claim the positive enforcement thereof. The right in that case was contingent on the grantor desiring to sell the property (cf. "die eiendom wens te verkoop" in clause 8 of the lease in casu). The reasoning of OGILVIE THOMPSON and WILLIAMSON JJA would apply a fortiori in the present case where the option could be exercised during the currency of the right of pre-emption.

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The correctness of this approach was left open in the ASA Bakeries case (see point (i) on p 908 F, quoted above).

I shall assume for the purposes of this case that the grant of the option to Dorstfontein brought into operation appellant's right of pre-emption, in that it established that first and second respondents wished to sell the property, and that at common law this entitled appellant by a unilateral declaration of intent ("eensydige wilsverklaring") to step into the shoes of Dorstfontein, with the result that an independent contract of purchase and sale would by operation of law then be deemed to have been concluded between appellant and respondents at the option price (see Sher v Allan 1929 OPD 137; Hattingh v Van Rensburg 1964 (1) SA 578 (T) at p 582 E). I shall furthermore accept that, although this was not appellant's case, the signing of the draft

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deed of sale on 10 December amounted to a written declaration of intent on the part of appellant, capable at common law of bringing about an independent contract of purchase and sale. The question is whether such a contract could be said to conform to the requirements of the Formalities Act. There are certain difficulties. It is true that the appellant's declaration of intent was written and signed by him. Even if this be regarded as the acceptance of an offer, which by operation of law was deemed to be made to appellant when the option was granted to Dorstfontein, it is arguable that what the Formalities Act requires (where the contract consists of a separate offer and acceptance) is an offer and acceptance in the ordinary contractual sense, i.e. a written and signed offer in fact (and not merely notionally) made by one party and a written and signed acceptance by the person to whom it was directed. It is also true that first and second respondents signed the written lease containing the option to Dorstfontein, but the offer contained in this

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option was in fact made to Dorstfontein and not to the appellant. It is not necessary, however, to decide this question for there is, in my opinion, a more fundamental difficulty confronting the appellant, viz. the fact that the contract granting the right of pre-emption was not signed by one of the persons against whom appellant seeks to enforce the right of pre-emption.

Before elaborating upon this difficulty I would just point out that in a case where the grantor of the right of pre-emption respects the rights of the grantee and, as is usually provided, gives him written notice of his desire to sell and of the terms thereof and the grantee exercises his right to purchase in writing, there would normally be no difficulty in spelling out a contract in writing, which would satisfy the Formalities Act. Such a notice was given in the present case by the attorneys acting for first and second respondents, but their authority to do so (which also had to be in writing) was denied on affidavit and it was not

suggested that the Court can go behind this denial.

As I have mentioned, appellant did not advance the case that the signing of the draft deed of sale on 10 December amounted to a declaration of intent, with the possible consequences discussed above. And here I must again point out that the application came before the WLD prior to the decision in the ASA Bakeries case. Appellant's case is, and always has been, that he is entitled to claim specific performance of his right of pre-emption; that consequently first and second respondents may be ordered to offer the farm to appellants upon the terms contained in the option to Dorstfontein, such offer to comply with the requirements of the Formalities Act; and that the right of pre-emption itself was not hit by the Formalities Act. (See the claims in the notice of motion, quoted above - claim 1 C does not seem to have been pressed.)

/ As.....

As appears from my analysis of the ASA Bakeries case, the majority judgment expressed grave doubt as to whether the court has the power to order a seller who has acted contrary to a right of pre-emption to make an offer to the holder of the right. I do not think that this expression of opinion was confined, or intended to be confined, to the case where the seller concluded a contract of sale with a third party, as distinct from granting him an option to purchase. Nevertheless, I shall assume in appellant's favour that at common law a right of pre-emption may be specifically enforced in the manner claimed by appellant in this case.

In concluding that the Formalities Act was "not a stumbling block" in this case, the Court a quo relied on the case of Van der Hoven v Cutting, 1903 TS 299 (see judgment p 5 D). But the problem here under consideration did not arise for decision in Van der Hoven's

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case. A simplified version of the facts in that case may be stated as follows. Cutting granted to S a written lease of certain stands in a township. The lease contained a clause giving the lessee the refusal of the properties for £30 000, provided that he exercised this right within 14 days after written notice from the lessor that he wished to sell. S ceded all his rights under the lease to P. His right to do so was not disputed. It was not clear whether this cession was in writing, but INNES CJ, at any rate, took it for granted that it was. The cession stipulated that the right of pre-emption be exercised by the cessionary, P, within 10 days after notice from S. Cutting gave notice to S calling upon him to decide whether to exercise his right of pre-emption. S notified P. P exercised the right of pre-emption within the 14 days allowed by the original lease, but not within the 10 days provided for by the cession. In an

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action between Cutting, as plaintiff, and Van der Hoven, as defendant, the details of which are irrelevant, the issue arose as to whether the right of pre-emption had been validly exercised. Cutting alleged in his replication that the 10 days provided for in the cession had been verbally extended to the full term of 14 days provided for in the lease. Van der Hoven applied to have this allegation expunged from the replication on the ground that such a verbal extension was in conflict with sec. 30 of Proc. 8 of 1902 (Tvl) and, therefore, invalid. The court of first instance refused the application (see 1903 TH 110) and an appeal against this decision was dismissed by the Supreme Court. It was held that at common law a cession of a right could be verbally effected; that the cession of the right of pre-emption, i.e. the agreement between S and P, which was "presumably for good consideration" was neither a sale of land nor a sale of a limited interest in land, within the meaning of sec. 30, read together with sec. 2, of the Proclamation; and that the right of

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pre-emption had been validly exercised.

As I read it, the case of Van der Hoven v Cutting is not authority for the proposition that a right of pre-emption in respect of land need not be in writing. In fact, in that case the right of pre-emption in question was in writing, and was given effect to in writing and, in the opinion of INNES CJ, a written and valid contract of sale came into existence (see p 306). Nor is the case authority for the proposition that the holder of a verbal right of pre-emption in respect of land may, when the right comes into operation, seek to enforce it by obtaining from the court an order compelling the grantor to make to him a written offer complying with the Formalities Act.

It may be accepted, as conceded by counsel for respondents, that where A grants to B a right of pre-emption in respect of A's land, A does not thereby enter

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into a contract for the sale of that land or even offer to sell that land to B. Respondent's counsel submitted, however, (a) that the grant of such a right is a contract whereby A undertakes and is obliged to sell the land to B if (i) the contingency bringing the right of pre-emption into operation has supervened and (ii) B has exercised the right of pre-emption in writing; (b) that the grant amounts to a promise by A to sell the land to B upon the happening of certain events, i.e. a pactum de contrahendo; and (c) that a pactum de contrahendo must itself comply with any formalities which are requisite to the validity of the proposed second contract. This submission seems to me to be sound.

A pactum de contrahendo is simply an agreement to make a contract in the future (see Montrose Diamond Mining Co v Dyer 1912 TPD 1, at p 5; Lugtenborg v Nichols

/ 1936 TPD.....

1936 TPD 76, at p 79; Wessels, Law of Contract, 2nd ed., par. 217; De Wet and Yeats, Kontraktereg en Handelsreg, 4th ed., p 29; 5 LAWSA par. 117). It was a class of contract "very well known in the Civil Law" (see McIlrath v Pretoria Municipality 1912 TPD 1027, at p 1037 - per WESSELS J, BRISTOWE J concurring). Often the pactum provides that the conclusion of the second (future) contract is to depend upon some contingency. In McIlraths's case, for example, the plaintiff contracted with the municipality to execute for a term of years such cartage work as the municipality might from time to time require at certain specified cartage rates. The contract was construed as placing no legal duty upon the municipality to employ the plaintiff; but once it decided to call upon plaintiff to do certain work, it was obliged to pay him for the work at the stipulated rates. Similarly, the portion of an option constituting the agreement to keep the offer open

is often referred to as a species of pactum de contrahendo (see Anglo Carpets (Pty) Ltd v Snyman 1978 (3) SA 582 (T), at p 585 H; De Wet and Yeats, op. cit., pp 29-30; 5 LAWSA, par. 117 and 118; Kerr, Law of Contract, 3rd ed., p 47). Here the conclusion of the "second" contract is dependent upon the contingency of the option-holder deciding to accept the offer contained in the option. In my view the grant of a right of pre-emption also constitutes a kind of pactum de contrahendo, the conclusion of the "second" contract being dependent on the contingencies mentioned above.

In general a pactum de contrahendo is required to comply with the requisites for validity, including requirements as to form, applicable to the second or main contract to which the parties have bound themselves: Montrose Diamond Mining Co v Dyer 1912 TPD 1, at p 5.

/ In.....

In this case the plaintiff alleged in its declaration that defendant had purchased a certain leasehold at a public auction and, tendering the grant of a notarial lease (notarial execution was required by sec. 29 of Proc. 8 of 1902), plaintiff claimed that defendant be ordered to execute the lease before a notary. Defendant's exception to the declaration on the ground that it disclosed no cause of action was upheld. DE VILLIERS JP, having referred to the terms of sec. 29 of the Proclamation, stated (at p 5):

> "Where the parties, therefore, have agreed upon all the terms of such a lease, and have embodied them in a written document duly signed, but have not executed the lease before a notary public, the Proclamation lays down that the lease shall have no force or effect in law. In such a case the one party cannot sue the other party to execute the lease before a notary public. As there is no lease before the execution, there is no obligation, and consequently no vinculum juris between

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p 787 C - D.) Goudsmit, Pandecten-Systeem, par. 27(a), referred to by DE VILLIERS JP, supports the proposition for which it is cited. Par. 27(a) contains the following statement with reference to pacta de contrahendo:

> "De vereischten tot geldigheid, als ook de vormen bij de overeenkomstbelofte in acht te nemen, zijn dezelfde als voor de overeenkomst, tot het aangaan waarvan men zich verbonden heeft, ..."

Windscheid, Lehrbuch des Pandektenrechts, vol 2, §§ 310, writing of the pactum de contrahendo, referred to by him as a "vorvertrag", also states that the requisites for the validity of the main agreement ("hauptvertrage"), and in particular those relating to prescribed form, apply also to the "vorvertrag".

In Souter v Norris, 1933 AD 41, the appellant, as plaintiff, had instituted action in the WLD alleging certain cessions of a share in a patent owned by respondent (defendant) and claiming an order directing respondent to execute all the documents necessary to register

/ appellant

appellant as part-owner of the patent or alternatively authorising the Registrar of Patents to effect such registration. On a special case submitted, this Court held that since the cessions (or assignments) had not been registered they were, in terms of sec 45 of the Patents Act, 9 of 1916, of no force or effect against the respondent. In argument appellant's counsel raised the point that an executory contract to assign was not hit by sec 45 and could be specifically enforced. Only one of the members of the Court (BEYERS JA) appears to have dealt with this argument and he did so extremely briefly. Having referred to the Montrose case, he stated that this was the answer to counsel's argument concerning pacta de contrahendo (see p 50).

In the case of an option, the option itself contains the offer which, when the option is exercised by acceptance, forms the basis of the ensuing contract.

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It follows that in the case of an option to purchase land the option must be in writing and signed by the grantor of the option (see Venter v Birchholtz, supra, at p 284 C - D).

It seems to me that in order that the holder of a right of pre-emption over land should be entitled, on his right maturing and on the grantor failing to recognise or honour his right, to claim specific performance against the grantor (assuming that he has such a right), the right of pre-emption itself should comply with the Formalities Act. Were this not so, the anomalous situation would arise that on the strength of a verbal contract the grantee of the right of pre-emption could, on the happening of the relevant contingencies, become the purchaser of land. This would be contrary to the intention and objects of the Formalities Act.

In the present case the contract containing the right of pre-emption was not signed by second respondent.

/ Consequently.....

Consequently I am of the view that GOLDSTONE J was correct in holding that the Formalities Act was an insuperable obstacle in the path of appellant's application. Indeed I did not understand appellant's counsel to contend that, if the Formilities Act were applicable, there had been compliance therewith. This conclusion renders unnecessary a consideration of the further question as to whether second appellant ever became legally bound by the right of pre-emption.

The appeal is dismissed with costs, including the costs of two counsel.

M M CORBETT

MILLER, JA)
CILLIé JA)
VAN HEERDEN JA) CONCUR.
SMALBERGER AJA)