CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 113/16 and 291/16

In the matter between:

NTSWAKI JOYCE MOKONE Applicant

and

TASSOS PROPERTIES CC First Respondent

BLUE CANYON PROPERTIES 125 CC Second Respondent

Neutral citation:	*Mokone v Tassos Properties CC and Another* [2017] ZACC 25
Coram:	Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J
Judgments:	Madlanga J (majority): [1] to [75] Froneman J (concurring): [76] to [88]
Heard on:	9 March 2017
Decided on:	24 July 2017

ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. Leave to appeal is granted in both applications.
2. Both appeals are upheld.
3. In both appeals, the orders of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) are set aside.
4. It is declared that the extension of the lease between Ms Ntswaki Joyce Mokone and Tassos Properties CC on 3 May 2006 resulted in the extension of the right of pre-emption in favour of Ms Mokone.
5. The action for the prosecution of the right of pre-emption referred to in paragraph 4 is remitted to the High Court for the determination of issues which, in accordance with the pleadings, remain outstanding.
6. The final determination of the appeal in respect of the proceedings brought by Blue Canyon Properties 125 CC in the Boksburg Magistrate's Court for the eviction of Ms Mokone is held in abeyance pending finalisation of the action referred to in paragraph 5.

JUDGMENT

MADLANGA J (Nkabinde ADCJ, Jafta J, Khampepe J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] These are two applications for leave to appeal against judgments of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court). The applications raise the following issues:

(a) whether, when parties renew a lease without saying more (*simpliciter*), only terms that are "incident to the relation of lessor and tenant" are renewed;

(b) whether a right of pre-emption granted orally or in writing without signature is invalid; and

(c) the circumstances under which a court may stay proceedings pending finalisation of other proceedings.

Background

[2] On 1 March 2004 Ms Mokone, the applicant in both applications, entered into a written lease agreement with the first respondent in the first application, Tassos Properties CC (Tassos). In terms of the agreement, Tassos leased premises to Ms Mokone at 119 Commissioner Street, Boksburg (leased premises) at a monthly rental of R4 500. The lease was for an initial period of one year ending on 28 February 2005, renewable for a further period of a year at a rental to be agreed upon. Since the conclusion of the lease to date, Ms Mokone has been conducting a business under the name "Nick's Bottle Store" on the leased premises.

[3] Clause 6 of the lease agreement reads:

> "The [tenant] shall have the [right of first refusal] to purchase the leased premises when the [lessor wishes] to sell the leased premises. The purchase price shall be negotiated when the [lessor wishes] to sell the leased premises."

[4] For the period 1 March 2005 to 3 May 2006 Ms Mokone and Tassos concluded an oral agreement on the same terms and conditions as the written lease. On 3 May 2006 they agreed to an extension of the lease until 31 May 2014. This they did by means of a manuscript endorsement on the face of the first page of the original written lease signed by only a representative of Tassos. The endorsement reads: "Extend till 31/5/2014 monthly rent R5 500".[1]

[1] Nothing turns on the fact that this sounds like an instruction that there be an extension. All concerned accepted that this was an extension of the lease.

[5] On 15 July 2009 Tassos entered into a deed of sale with Blue Canyon Properties 125 CC (Blue Canyon) in terms of which it sold the leased premises to Blue Canyon. Blue Canyon is the second respondent in the first application and the only respondent in the second application. Transfer to Blue Canyon took place on 1 March 2010.

[6] In 2010, after becoming aware of the sale, Ms Mokone brought an application in the High Court seeking: a declarator that Tassos was in breach of the right of pre-emption; cancellation of the sale and reversal of transfer of the leased premises; and an order compelling Tassos to comply with clause 6 of the written lease (the clause containing the right of pre-emption).[2] She later withdrew this application.

[7] On 27 January 2012 Ms Mokone notified Tassos in writing that she was exercising her right of pre-emption. She tendered payment of R55 886.60. The following documents reflected this amount as the price at which Tassos sold the leased premises to Blue Canyon: the power of attorney to pass transfer; a South African Revenue Service document reflecting the purchase price on which transfer duty was payable; and the deed of transfer.[3] Tassos rebuffed Ms Mokone, arguing that the right of pre-emption was no longer part of the lease. On 3 April 2012 Ms Mokone initiated action against Tassos and Blue Canyon in the High Court to set aside the sale and transfer of the leased premises and compel a sale of the property to her. In the alternative, she asked for damages. Her contention was that the manuscript endorsement that extended the lease to 31 May 2014 had also extended clause 6 containing the right of pre-emption. She sought to upset the transfer to Blue Canyon on the basis that Blue Canyon was aware of her right of pre-emption before it took transfer.

[2] On the face of it, this appears to gainsay an allegation by the respondents that Ms Mokone did not pursue her right of pre-emption for some two years after becoming aware of the sale to Blue Canyon. But, for present purposes, nothing turns on this.90

[3] The respondents suggest that the actual purchase price was R950 000. Happily, in these two matters we do not have to untangle the mystery as to what the true purchase price was.

[8] The High Court separated issues in terms of rule 33(4) of the Uniform Rules of Court. All that the High Court had to determine was whether the right of pre-emption had been extended. And it had to do this on the basis of stated facts, which were that—

(a) "the initial period of the written lease commenced on 1 March 2004 and terminated on 28 February 2005";

(b) "from 1 March 2005 there existed an oral lease between [Ms Mokone] and [Tassos] on, essentially, the same terms and conditions as contained in the written lease"; and

(c) "on 3 May 2006 the initial written lease was extended until 31 May 2014 at a monthly rental of R5 500.00 as per the manuscript on the first page of [the initial written lease agreement]".

[9] The High Court held against Ms Mokone. It concluded:

> "[T]he word 'extended' is appropriate to the continuance of the period of the lease, and not the continuance of the right of pre-emption, especially if one has regard to the fact that the right of pre-emption is collateral [and not an incident] to the relation of [lessor] and tenant and terms that are collateral to and independent of such relationship are not renewed when a lease is renewed *simpliciter*, unless the parties make it clear that they intended this."[4]

[10] In short, the High Court held that the manuscript endorsement did not result in the right of pre-emption being incorporated in the extended new lease. It made a declarator to that effect. Because there were other issues raised by the pleadings that were still outstanding, the High Court postponed the matter indefinitely.

[11] The High Court and, later, the Supreme Court of Appeal refused leave to appeal. This is what has given rise to the first application before us.

[4] *Mokone v Tassos Properties CC* [2015] ZAGPJHC 322 at para 15.

[12] Whilst the action was pending before the High Court, the latest period of the lease came to an end. Despite this, Ms Mokone continued to occupy the leased premises. Blue Canyon, which had stepped into the shoes of Tassos as lessor after it had taken transfer, continued to accept rent. There was thus a tacit month-to-month lease between Ms Mokone and Blue Canyon from 1 June 2014. On 10 December 2014 Blue Canyon gave Ms Mokone written notice to vacate the leased premises by 31 January 2015. Ms Mokone refused to vacate. On 17 February 2015 Blue Canyon sought her eviction from the Boksburg Magistrate's Court on the basis that: it was the owner of the leased premises; the lease had come to an end through effluxion of time; and Ms Mokone had been given due notice to vacate the premises.

[13] Ms Mokone resisted the application on the grounds that: Blue Canyon's alleged ownership was under challenge in proceedings that were pending before the High Court; as a consequence, Blue Canyon had no right to terminate Ms Mokone's occupation; since issues relevant to the eviction proceedings were pending before the High Court, the eviction proceedings were premature and had to be held in abeyance pending the determination of the action pending before the High Court. The Magistrate's Court dismissed the eviction proceedings. But Blue Canyon subsequently succeeded on appeal before the High Court.

[14] The Supreme Court of Appeal refused special leave to appeal. The second application before us is a sequel to this.

Issues

[15] This matter raises the following issues:

(a) whether leave to appeal in both applications should be granted;

(b) whether the right of pre-emption contained in the written lease agreement was renewed when the lease was extended on 3 May 2005;

(c) whether the endorsement on the face of the lease agreement extending the lease had to comply with the formalities contained in section 2(1) of the Alienation of Land Act;[5] and

(d) whether, despite the fact that the lease has ended through effluxion of time and Ms Mokone has been given due notice to vacate the leased premises, there is a basis on which she can – in the meantime – resist eviction.

Leave to appeal

[16] Each application engages our jurisdiction in terms of section 167(3)(b)(ii) of the Constitution.[6] The first application concerns the question whether the right of pre-emption was renewed with the last extension of the lease. Leases with terms similar to clause 6 of the lease at issue here are commonplace. Unsurprisingly, therefore, the question of the effect of an extension or renewal of a lease on clauses of this nature arises not infrequently. That much is plain from the reported cases on the subject.

[17] I thus conclude that, although in this litigation this question affects only the parties, "its impacts and consequences are substantial, broad-based, transcending the litigation interests of the parties, and bearing upon the public interest".[7] "[I]ssues do not have to be of importance to all citizens or the whole nation in order to be of

[5] 68 of 1981.

[6] This section provides:

"The Constitutional Court—

. . .

(b) may decide—

(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court".

[7] *SAJ v AOG & 2 Others* Supreme Court of Kenya Petition No. 1 of 2013; [2013] eKLR at para 31 (available online at http://kenyalaw.org/caselaw/cases/view/84298/), which was quoted with approval in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 25. See also *Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone* Supreme Court of Kenya Application No. 4 of 2012; [2013] eKLR at para 58 (available online at http://kenyalaw.org/caselaw/cases/view/88828).

'general public importance'".[8] It is enough if the issues are "of importance to a sufficiently large section of the public".[9] The question at issue in the first application meets the test.

[18] The second application raises two questions. The first is whether a *pactum de contrahendo* (loosely, a contract whose aim is to conclude another contract)[10] that could lead to a sale of land – like the right of pre-emption – must comply with the formalities contained in section 2(1) of the Alienation of Land Act. The second is whether, outside of certain circumscribed circumstances,[11] a court may stay proceedings pending finalisation of other proceedings. For reasons similar to those I have discussed in relation to the first application, these issues too are of general public importance.

[19] The issues raised by both applications are arguable[12] and of some import and, as will appear shortly, they bear prospects of success. They ought to be considered by this Court.[13] Leave to appeal must be granted.

Renewal of right of pre-emption upon extension

[20] Our courts have proceeded from an assumption that English law on this subject forms the basis of our common law.[14] What does the English law say? It tells us that a term that is collateral, and not an incident, to the relation of lessor and tenant, continues during the period of extension of a lease only if it is clear that this is what

[8] *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] ECWA Civ 749; [2009] 1 All ER 978 (*Wiltshire Primary Care Trust*) at para 16, quoting with approval Holman J in *The Queen on the Application of Val Compton v Wiltshire Primary Care Trust* [2008] EWHC 880 (Admin) at paras 32 and 36. *Wiltshire Primary Care Trust* was quoted with approval in *Paulsen* above n 7 at para 26.

[9] Id at para 16.

[10] My rough translation should not be understood to suggest that it is obligatory that the other contract to which the pact relates be concluded. Take an option, for example, the envisaged sale may or may never take place.

[11] Compare *Clipsal Australia (Pty) Ltd v Gap Distributors (Pty) Ltd* [2009] ZASCA 49; 2010 (2) SA 289 (SCA) (*Clipsal*) at para 17.

[12] Compare *Paulsen* above n 7 at paras 21-3.

[13] Compare *Paulsen* above n 7 at paras 17-8.

[14] See *Levy v Banket Holdings (Private) Ltd* 1956 (3) SA 558 (FC) at 563B-C.

the parties to the lease intended. The English authorities I refer to deal with options. Like an option, a right of pre-emption is considered to be collateral to, and independent of, the relation of lessor and lessee.[15]

[21] The principle is put thus in Halsbury's:

> "[A]n option is collateral to, independent of, and therefore not incident to, the relation of [lessor] and tenant. It is not, therefore, one of the terms which will be incorporated in the terms of a yearly tenancy created by the tenant holding over after the expiration of the original lease . . . . If the parties agree that a lease is to be extended, unless it is clearly shown that it was their intention that the option to purchase should continue throughout the extended period, it will not be deemed to be one of the terms of the extended tenancy."[16] (Footnotes omitted.)

[22] Here is how *Levy* captures the English position:

> "The principle of the English law seems to be clear. When a lease is renewed *simpliciter* all the terms are renewed that are incident to the relation of [lessor] and tenant. Terms that are collateral to and independent of such relationship are not renewed unless the parties make it clear that they intended this."[17]

[23] This approach has been followed in South Africa and Zimbabwe.[18] I must say it appears to coincide with the Roman-Dutch law position. Pothier says:

> "Where by the same deed a property has been sold, and has been let by the purchaser to the seller for a certain period, and after the expiry of that period a tacit relocation has taken place, a distinction must be made between those clauses of the deed which pertain to the contract of sale and those which pertain to the contract of lease. It is only the latter that are deemed to be repeated in the tacit relocation and not those which pertain to the contract of sale rather than to the lease . . . . [I]f you have let me

[15] See *Doll House Refreshments (Pty) Ltd v O'Shea* 1957 (1) SA 345 (*Doll House*) at 351E.

[16] Lord Mackay *Halsbury's Laws of England* (LexisNexis, London 2012) 2 at 169-70.

[17] *Levy* above n 14 at 562F-G.

[18] See *Webb v Hipkins* 1944 AD 95 at 104; *Doll House* above n 15 at 351E; and *Levy* above n 14 at 564E-F.

> a property and it is stated in the lease that, if the property pleases me, you undertake to sell it to me whenever called upon by me to do so during the period of the lease, you will be discharged from this obligation at the termination of the lease, if I have not called upon you to sell me the property, and though there has been this tacit relocation your promise is not deemed to have been repeated in it. For though contained in the same deed as the lease, it is not deemed to be part of the terms of the lease, unless it appears from the circumstances that it was actually such and that the lessee had accepted the lease only upon this condition."[19]

[24] More than being interpretative, the rule applied by English courts (and followed by ours) sounds more like a categorical substantive rule. Take, for example, the words of Lord Atkinson in *Batchelor*:

> "It is quite true that when there is a collateral agreement, it is not necessarily transferred by a transfer of the lease, but it is perfectly competent to the contracting parties if they are so inclined to use language which will carry in a collateral agreement just as well as any stipulation springing from the relation of landlord and tenant."[20]

[25] The *Levy*[21] rendition of the English rule also makes this plain.[22] Likewise, Pothier tells us about it not being "*deemed*" that an option is "part of the terms of [an extended] lease, unless it appears from the circumstances that it was actually such".[23] This is definitely a categorical substantive rule.

[26] On first principles, the issue at hand concerns the interpretation of the words in terms of which an extension was effected. We should be wary of generalisations or positions assumed *a priori*. A fundamental problem I have with the present approach is that it proceeds from what seems to be the understanding of not just lawyers, but

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[19] Pothier *Treatise on the Contract of Letting and Hiring* (translated by GA Mulligan) (Butterworth & Co, Durban 1953) at 138.

[20] *Batchelor v Murphy* [1926] AC 63 (HL) at 68.

[21] *Levy* above n 14.

[22] That rendition is quoted above at [22].

[23] Quoted more extensively at [23].

lawyers in the know insofar as this subject is concerned. As an illustration, what happened in *Sherwood*[24] is instructive. In that matter the trial Judge took the view that, as lay people who had extended the lease without the assistance of lawyers, the lessor and lessee must have intended to extend the contents of the entire document that contained the terms of the lease. Not according to Pollock MR who sat on appeal. He said:

> "I protest against the doctrine that the meaning of words ought to be construed according as they are used by laymen or by lawyers. I think that we have to take the words as they stand and construe them, and that we ought not to speculate upon what was the probable intention of the parties. Their intention is to be found in the meaning of the words which they have used, properly construed."[25]

[27] The Master of the Rolls then proceeded to "construe" the words that had been used in that matter. They were "we agree that this lease be extended". And the construction led him to this:

> "[A]re those words apt to cover the option as well as the extension of the demise? I think they do not cover the option. There is a clear distinction between the two things. The first is the demise of the premises by the [lessor] to the tenant, and although it is to be found in an agreement, or in a lease signed and executed by the parties, still the option is a separate and independent contract whereby a chance is given to the tenant . . . to purchase the freehold of the premises which are demised to him . . . ."[26]

[28] That may be the understanding of lawyers. Is it likely to be the understanding of ordinary lay people? Would lay people not likely regard the contents of a document setting out the terms of their lease and a related *pactum de contrahendo* of whatever nature as their "lease"? I think it is more likely that they would. Indeed, they would most likely regard the document itself as their lease. Put differently, it is

[24] *Sherwood v Tucker* [1924] 2 Ch 440.

[25] Id at 443.

[26] Id at 444.

more likely that to them their lease would be the lease proper and the *pactum de contrahendo*. That should mean, when ordinary lay people use the words "we agree that this lease be extended", they may well be intending to extend all the terms of the written agreement, *pactum de contrahendo* and all. This I say because I cannot conceive of ordinary lay people being able to draw a distinction between terms that are "collateral to, and independent of, the lessor and lessee relation" and to then extend or renew their lease in accordance with that distinction.

[29] Interpreting a contract concerns establishing the meaning of its wording.[27] According to Wallis JA, the proper approach to interpretation "is from the outset to read the words used in the context of the document as a whole and in the light of all relevant circumstances".[28] Ordinary lay people are capable of understanding ordinary words. And they are likely to use them in accordance with that understanding. Surely, the use of language by non-lawyers who know nothing about the distinction drawn in *Sherwood* and, of course, other cases must be part of the "relevant circumstances". It escapes me why a lawyer's understanding – especially on ordinary words (*not legalese*) – should effectively become an imposed meaning to non-lawyers.

[30] Crucially, it does happen that lay people make extensions of this nature without involving lawyers. The present extension is an example; and so is the extension in *Sherwood*.

[31] In *Levy* Tredgold CJ sought to justify the English approach on the basis that it is "essentially reasonable". Here is how he articulated this:

> "[T]he approach of the English law seems to me to be essentially reasonable. If there is in existence an agreement containing a lease and matters that are not incident to the relationship of landlord and tenant, and if agreement is reached simply 'to renew the lease' then surely any reasonable person would understand that the lease and nothing

[27] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18.

[28] Id at para 24.

> more was to be renewed, and would feel it incumbent upon him, if he wished to extend any other portion of the agreement to stipulate expressly that this should happen."[29]

[32] I disagree. This too suffers from the very problem of imposing the understanding of lawyers on non-lawyers. Rather than speak of "any reasonable person", the Court should have spoken of "any reasonable lawyer". It seems more reasonable that, when non-lawyers write the word "extended" across the face of a written agreement containing the terms of a lease, generally they mean to extend not only the lease, but everything contained in the document. And that includes even a *pactum de contrahendo*. Of course, because this is about interpretation, it may be apparent from the nature of certain terms in the document that they were not meant to be extended. That is the answer to the examples given in *Levy* to demonstrate the perceived reasonableness of the English approach. Here are those examples:

> "Supposing a farmer leased his farm and, in the same agreement sold a hundred head of cattle at a fixed price and agreed to manage the farm at a fixed salary for the period of the lease, and supposing there was an extension of the lease, no reasonable person would claim that he had been sold another hundred head of cattle and any reasonable tenant, if he wanted the [lessor] to continue as manager, would see that express provision was made to that effect."[30]

[33] If the only accompanying agreement were the management of the farm, I would incline towards an interpretation that says that too was extended. As for the sale, it would indeed be unreasonable of a lessee to think that the extension meant a sale of another hundred head of cattle. Because of that, the result should be that this term was always meant to be a once-off event. That is a result yielded by an interpretative process, not by a position adopted *a priori*.

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[29] *Levy* above n 14 at 564F.

[30] Id.

[34] Another example that may well be held not to have been meant to endure beyond the initial period of the lease would be an option to purchase the leased premises at a specified price.[31] That is so because the market value of premises may increase between the time of conclusion of the lease agreement and of its renewal. Beyond the initial period, it might be prejudicial to seek to hold the owner to the specified price, regardless of the length of time that has elapsed and the increase in the market value of the property. But, as I say, these are results that we get to through a process of interpretation, not through predetermined legal rules. Ultimately, the question must be: what does an interpretative exercise yield?

[35] The problem with the present common law rule, which, as I say, proceeds from an *a priori* position, is that it favours lessors. I cannot conceive of a convincing reason why that should be the case. It is less about interpretation and more about laying down a categorical substantive legal rule.

[36] In sum, where, in extending their lease, parties – without stipulating anything more – say their lease is extended, generally I read that to mean all the terms of the lease, including terms that are "collateral, and not incident, to"[32] a lease are being extended. Certain terms may be of such a nature that it is plain that it could never have been within the contemplation of the parties to extend them either at all or in this manner. All this is about *meaning*. And, since this concerns interpretation, that is what it should be about: the ascertainment of the meaning of the words used in extending the lease. Where there is no readily ascertainable meaning, the ordinary rules of interpretation to ascertain the meaning must apply. That must happen without adopting any *a priori* position. If a term or terms are not meant to be extended, that must be made plain.

[31] I need not pronounce definitively on this.

[32] *Halsbury's* above n 16.

[37] On the approach that I prefer, the party against whom the term in issue may be operating oppressively can always stipulate expressly or tacitly – at the time of renewal – that that term will not be extended.

[38] This approach is not without some support. In a dissent in the then Appellate Division Van den Heever JA said that "[i]n the absence of express stipulation to the contrary in the renewal of a lease, its collateral parts are also deemed to have been renewed".[33] In *Levy* this pronouncement is criticised on the basis that it is not supported by the authority relied upon.[34] Further support is to be found outside of our shores. The American case of *Tubbs* concerned the question whether a right of first refusal to purchase the leased property endured alongside a tacit relocation. Holding that it did, the Court said:

> "The long-standing general rule which has very recently been reaffirmed by the Court of Appeals is that a holdover tenancy impliedly continues 'on the same terms and subject to *the same covenants* as those contained in the original instrument' . . . . The logic behind the rule is that since the parties have continued in the relationship of [lessor] and tenant it is implied that they intended no change in the conditions of that relationship. Of course, the parties are free to prove 'a changed condition of affairs which would naturally or of necessity operate to modify the relations existing between the parties'."[35]

[39] The endorsement at issue here reads "Extend till 31/5/2014 monthly rental R5 500". Does this change anything? I think not. All it does is to indicate the duration of the extended lease and the increased rental. But for that detail, I do not see this to be any different from the example that says "the lease is extended" without more, on the basis of which I have been making my point.

[40] The common law is well-established. And it is dead against the route that I seek to follow. Is it open to me to follow that route? Section 39(2) of the Constitution

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[33] *Shenker Bros v Bester* 1952 (3) SA 655 (AD) at 677B–C.

[34] *Levy* above n 14 at 564B.

[35] *Tubbs v Hendrickson* 88 Misc 2d 917 (NY Misc 1976) at 919.

provides that "when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". It only becomes necessary to develop the common law in this manner "where the common law as it stands is deficient in promoting the section 39(2) objectives".[36] But there are instances where the common law may suffer from a deficiency that is not at odds with the Bill of Rights. If this deficiency be of a nature that necessitates the development of the common law, that cannot be done in terms of section 39(2).

[41] The Supreme Court of Appeal and High Court have "always had an inherent jurisdiction to develop the common law to meet the needs of a changing society".[37] If section 39(2) were to be read to have removed the power of courts to develop the common law where its shortcomings do not implicate the Constitution, that would be a retrograde step and absurd. That would mean, even if it were clamant that the common law be developed on a non-constitutional basis, courts would not be able to do anything. That, despite the fact that for centuries – in the era before the advent of our constitutional democracy – courts have always been able to develop the common law. In fact, section 173 of the Constitution stipulates that the Constitutional Court, the Supreme Court of Appeal and the High Court have the inherent power to develop the common law, taking into account the interests of justice. This language is wide enough to admit of the development of common law outside the ambit of section 39(2).

[42] So, the answer to the question whether it is open at all to the Court to develop the common law in the circumstances in issue here is yes.

[43] There is a matter of detail that I must deal with. That is the fact that the intervening extension before the one now in issue resulted in an oral lease agreement. Does this in any way detract from the view that I take on the effect of the manuscript

[36] *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 39.

[37] *Amod v Multilateral Motor Vehicle Accident Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 22.

endorsement extending the period of the lease? I think not. The person representing the lessor consciously took the document embodying the original written lease agreement and made the endorsement on it. If this was not of some significance, the endorsement could well have been made even on a blank piece of paper. That it was made on the document embodying the original lease can only mean it is the lease contained in the document that they were extending. And, based on what I have said before, that was an extension of all the terms, including the right of pre-emption.

Compliance with the Alienation of Land Act

[44] Earlier I stated that the manuscript endorsement extending the lease was signed only by the representative of Tassos. Blue Canyon argued that Ms Mokone's prosecution of the right of pre-emption would ultimately be stillborn and that, therefore, there was no point in upsetting the High Court's appeal decision in the eviction proceedings. The basis for this argument was that, because it was not signed by Ms Mokone, the endorsement was invalid for lack of compliance with the provisions of section 2(1) of the Alienation of Land Act. Blue Canyon placed reliance on *Moolman*.[38] Section 2(1) provides:

> "No alienation of land after the commencement of this section shall . . . be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on written authority."

[45] *Moolman* concerned section 1(1) of the Formalities in Respect of Contracts of Sale of Land Act[39] (Formalities Act), the predecessor to the Alienation of Land Act. That section read:

> "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."

[38] *Hirschowitz v Moolman* [1985] ZASCA 38; [1985] 3 SA 739 (A) (*Moolman*).

[39] 71 of 1969.

I deal with what *Moolman* held later.

[46] In terms of section 2(1) of the Alienation of Land Act, the formality on signature relates to "alienation of land". The Alienation of Land Act defines "alienate" thus—

> "'alienate', in relation to land, means sell, exchange or donate, irrespective of whether such sale, exchange or donation is subject to a suspensive or resolutive condition, and 'alienation' has a corresponding meaning".

[47] In the case of a right of pre-emption, an alienation – as defined – takes place only when that right is exercised and a sale comes into being. Merely affording someone that right is not an alienation because that is simply not a sale, exchange or donation. In sum, I do not see why section 2(1) of the Alienation of Land Act should apply to a right of pre-emption.

[48] To the extent that it relates to a "contract of sale", section 1(1) of the Formalities Act is comparable. It applies to a sale of (a) land or (b) any interest in land.[40] Although the Formalities Act does not define "sale", I see no basis on which it can be gainsaid that – absent any mishaps – a sale results in the alienation of land or interest in land. To this extent, its meaning is similar to that of "alienate" in the Alienation of Land Act.

[49] By parity of reasoning then, when section 1(1) of the Formalities Act was still in operation, it should not have applied to a right of pre-emption. In *Rogers*[41] this is the exact approach Kannemeyer J adopted on this debate. In that case it was not clear on the facts whether a right of pre-emption, if it had been granted at all,[42] had been granted before or after the Alienation of Land Act had come into operation. The

[40] Of course, with the exceptions specified in the section.

[41] *Rogers v Phillips* 1985 (3) SA 183 (E).

[42] The respondent was disputing that he had granted it.

applicant was claiming that the right had been granted orally. The respondent was denying this. The parties asked the Court to deal with the question whether writing was a prerequisite for the validity of a right of pre-emption. And they asked that it be dealt with as a preliminary issue. The Court proceeded to deal with the question regardless of which Act was applicable. This is how it concluded:

> "[N]either in terms of section 1(1) of [the Formalities Act] nor in terms of section 2(1) of [the Alienation of Land Act] does a right of pre-emption in respect of land have to be in writing in order to be valid."[43]

[50] This is how the Court got there:

> "[A] right of pre-emption gives the pre-emptor no right to claim transfer of land; it merely gives him a right to enter into an agreement of sale with the grantor should the latter wish to sell. When such an agreement is completed then, and not before, will he have a right to claim transfer of land, so that it is the agreement which must be in writing."[44]

So, according to *Rogers* there is no need for compliance with the formalities at the time a right of pre-emption is granted.

[51] Not according to Corbett JA. His view to the contrary is expressed in *Moolman*.[45] According to him section 1(1) of the Formalities Act and section 2(1) of the Alienation of Land Act require signature by all parties to a right of pre-emption.[46] He makes this point:

[43] *Rogers* above n 41 at 188D-E.

[44] Id at 188C-D.

[45] *Moolman* above n 38.

[46] Id at 757E-F, 766D, and 767F-H.

> "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. . ."[47]

[52] Crucially, that view is held despite an apparent and, indeed, unavoidable acceptance that a right of pre-emption itself is neither a sale nor an alienation. On what basis then must the formalities stipulated by the two Acts, which apply to sales or alienations, find application to non-sales or non-alienations? *Moolman* explains thus:

> "[I]n 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 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 the land. This would be contrary to the intention and objects of the Formalities Act."[48]

[53] Is it perhaps open to me to adopt the stance that, because *Moolman* concerned section 1(1) of the Formalities Act, what it held about section 2(1) of the Alienation of Land Act was *obiter*? It is not. In fact, it would be disingenuous to do so. This is because of the comparable nature of the two sections. That being the case, the reasoning in *Moolman* must, indeed, apply to both sections.

[54] Now, let us have a close look at that reasoning. The fundament of the reasoning is that inexorably the holder of the right of pre-emption can become a purchaser in terms of the right only through means that fall foul of the formalities. It is this that gives rise to the anomaly to which the Court is referring. I do not see why – upon the occurrence of the contingencies that trigger an entitlement to exercise

[47] Id at 766D.

[48] Id at 767F-H.

the right – the holder cannot exercise it in a manner that complies with the requisite formalities. The holder may simply make a signed written offer to purchase. If the grantor accepts the offer in writing under signature, a sale that meets the formalities will come into being. If she or he does not, the holder of the right may seek a declarator by a court that she or he is entitled to the exercise of the right and a mandamus requiring the grantor to accept the offer in writing. If the relief is warranted,[49] it must be granted. That is nothing more than holding the grantor to the parties' agreement.

[55] It may happen that the sale by the grantor to a third party may be in terms that do not correspond with those in which the right of pre-emption was granted. The question arises as to whether the written offer by the grantee must be in the terms on which the grantor sold to the third party or in those on which the right was granted. That question was not argued before us. I think it prudent not to decide it.

[56] In the event that the conduct of the grantor of the right of pre-emption has culminated in the sale of land to a third party, it seems necessary to understand the import of the so-called *Oryx*[50] mechanism. This was expressed thus:

> "In the event that a seller concludes a contract of sale with a third party in breach of a right of pre-emption, the [holder of the right of pre-emption] may, through a unilateral declaration of intent, step into the position of the third party. A contract of sale is then deemed to have been between the seller and the holder of the right of pre-emption."[51]

[49] See what I say shortly about this.

[50] *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd* [1982] ZASCA 1; 1982 (3) SA 893 (A) (*Oryx*).

[51] Id at 907E-F. This is my translation of the original Afrikaans text. Here is the original Afrikaans text:

> "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."

[57] I see no reason in principle why the notion of the holder of the right "stepping into the position of the third party"[52] cannot be achieved in a manner that does not bypass the requisite formalities. That may be achieved either consensually or through coercion by court. 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 on ordering or not ordering specific performance, the grantor of the right is liable to coercion.

[58] I am addressing myself only to situations where coercion will be warranted. I consciously eschew the debate whether, in this context, there is room for the exercise of discretion by courts whether to grant specific performance. I avoid that debate because the pertinent question raised before us is whether the right of pre-emption is invalid for lack of signature by Ms Mokone on the extension. Whether specific performance will be an appropriate remedy at all, and under what circumstances, is best left for decision by the High Court as part of the issues left pending before that Court. That question is, indeed, part of those issues. What I am addressing concerns only the existence or otherwise of the impediment or anomaly that helped inform the decision in *Moolman*.

[59] Court-coerced compliance by the grantor will be doing nothing more than to require her or him to honour what she or he had bargained for. It will not be an imposition. Ultimately, the holder of the right of pre-emption may be able to purchase on the exact terms on which the third party purchased and thus "step into the position of the third party".[53]

[60] To hold otherwise leads us to the difficulty that, indeed, a sale of land may come about without the formalities having been complied with. It does not have to be that way. Effectively, *Moolman*'s view of the effect of the *Oryx* mechanism is the means by which the Court itself in *Moolman* places hurdles in the path and then

[52] *Oryx* above n 50.

[53] Id.

claims that those hurdles cannot be cleared. Why place hurdles in the path of travel in the first place? Unsurprisingly, Lubbe opines that *Oryx* presupposes an offer complying with the requisite formalities.[54]

[61] We must not give on a silver platter and on formalistic, technical grounds an easy way out to a grantor of a right of pre-emption who wants to resile from a bargain concluded with her or his eyes wide open. This is not making light of what the Alienation of Land Act seeks to achieve. It is about averting abuse and injustice. After all, our interpretation needs to be restrictive on the reach of the formalities required by the Act.[55] Of course, where an alienation of land must fail for non-compliance with the formalities, so be it. The Act exists for a reason.[56]

[62] Addressing the passage[57] in which *Moolman* points out the anomaly referred to above, Lubbe writes:

> "This passage is . . . not free from difficulty. It must, it seems, be read as referring to the contract granting the right of pre-emption, for a right of pre-emption as such is not something that can be governed by the formalities legislation. An action for the specific performance of a grant of pre-emption seeks an order on the grantor to make a valid offer to the grantee. In the present context this means an offer complying with the prescribed formalities, which if accepted by the grantee, in accordance with the statutory requirements, will result in a perfectly valid contract. It is difficult to see

[54] Lubbe "Law of Purchase and Sale" (1985) Annual Survey South Africa 133 at 140-1. See also Lubbe and Murray *Farlam and Hathaway Contract: Cases Materials and Commentary* 3 ed (Juta & Co Ltd, Cape Town 1988) at 93.

[55] See Van Rensburg "Formaliteitsvoorskrifte, Voorkoopregte en Opsies" (1986) 49 *THRHR* 208 at 214.

[56] See *Moolman* above n 38 at 757I-758A, where the following appears:

> "The object of the subsection [of the Formalities Act] 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."

[57] Quoted in [52] above.

> how such a procedure can undermine the legislative object with regard to alienations of land."[58]

[63] Contrary to what *Moolman* suggests, I reach two related conclusions. First, regardless of the stage to which a sale to a third party by the grantor of a right of pre-emption may have progressed, generally the right is capable of enforcement in a manner that complies with the formalities.[59] Second, the exercise of the right does not ineluctably lead to the anomaly referred to in *Moolman.* In sum, I disagree with the conclusion in that case.

A basis to resist eviction until completion of the litigation

[64] In *Kent* Innes CJ said:

> "[The appellant] also asked us to stay the proceedings on equitable grounds, urging that we had an equitable jurisdiction under the Insolvency Law. The Court has again and again had occasion to point out that it does not administer a system of equity, as distinct from a system of law. Using the word 'equity' in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of the Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all."[60]

[65] In similar vein, and placing reliance on *Kent*, the Court in *Jorgensen* held that "[t]he Courts do not however act on abstract ideas of justice and equity. They must

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[58] Lubbe above n 54 at 140-1. See also Van Der Merwe et al *Contract: General Principles* 4 ed (Juta & Co Ltd, Cape Town 2012) at 70 who have this to say:

> "In principle, formalities prescribed for the substantive contract ought not to apply to option agreements relating to such a contract . . . . It has been stated, however, that, as a general rule, *pacta de contrahendo* have to conform to formalities prescribed for the substantive contract envisaged by the parties and that therefore option contracts to purchase land must conform to the applicable statutory formalities [citing *Moolman*]. This view may be in keeping with a construction of preliminary agreements known to continental systems of law, but quite apart from whether its application may be warranted in respect of other types of *pactum de contrahendo*, it is doubtful whether there is any need to apply the construction to option contracts in South African law."

[59] I say generally because issues that may come into the equation are, for example, whether transfer that has already taken place should be undone or whether the right holder is entitled to specific performance at all.

[60] *Kent v Transvaalsche Bank* 1907 TS 765 at 774.

act on principle".[61] In *Clipsal* the Supreme Court of Appeal quoted both *Kent* and *Jorgensen* with approval.[62]

[66] This seems to stand in the way of Ms Mokone getting the relief she is seeking. Must it? Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[67] Put simply, this says the mentioned Courts may regulate their own process taking into account the interests of justice. I will say nothing about equity but, based on this, I do not see why proceedings may not be stayed on grounds dictated by the interests of justice. Whatever the import of what was said by courts previously may be, the Constitution lays down its own test; and it has everything to do with the interests of justice.

[68] In this context, the idea of interests of justice is quite wide. I will not attempt to delineate what it encompasses. Suffice it to say, what justice requires will depend on the circumstances of each case.

[69] Coming to the matter before us, at first instance, it came before the Boksburg Magistrate's Court. That Court does not have the section 173 power. But, rightly or wrongly, that Court did hold the eviction proceedings in abeyance. It took the view that, until the High Court had determined the validity and enforceability of the right of pre-emption, it could not conclude that Ms Mokone was liable to be evicted. The matter went on appeal to the High Court. The High Court does have the section 173 power. It was well within that Court's power to regulate its process by holding the determination of the appeal in abeyance pending the final determination of

[61] *Fisheries Development Corporation of SA Ltd v Jorgensen*; *Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1979 (3) SA 1331 (W) (*Jorgensen*) at 1340B-D

[62] *Clipsal* above n 11 at para 18.

the litigation that is pending before the High Court. This it could do if it was in the interests of justice so to do. It did not. Before us Ms Mokone persisted in her quest for a stay. May we grant her this wish?

[70] In the litigation pending before the High Court, Ms Mokone has pleaded that the purchaser, Blue Canyon, knew of the existence of the right of pre-emption before it took transfer of the leased premises. If that is indeed so, the purchaser's ownership obtained upon transfer to it may well be assailable.[63] It seems unjust to require Ms Mokone to be uprooted and her business brought to a halt or destroyed in circumstances where the purchaser might not have been an innocent player when it purchased or took transfer of the leased premises. The interests of justice dictate that the eviction proceedings be held in abeyance pending finalisation of the action in which Ms Mokone is seeking to enforce the right of pre-emption.

[71] It is not as though Ms Mokone is entitled to remain on the leased premises free of charge. She has to continue paying rent and Blue Canyon is entitled to enforce its rights in this regard. In the eviction application, Blue Canyon alleges that Ms Mokone has not paid rent for a number of months and that arrear rental now amounts to tens of thousands of rand. But, as will be noted from my characterisation of the cause of action, the eviction proceedings are not seeking to enforce payment of arrear rental, nor is the eviction grounded on failure to pay rent.

[72] Blue Canyon argued that the power to hold proceedings in abeyance involves the exercise of a discretion and that there is no basis for suggesting that here the discretion was not exercised judicially. A major flaw in this argument is that the High Court upheld the appeal in the eviction proceedings on the merits. It concluded that, as a matter of law, there was no way Ms Mokone could assail the purchaser's title. There was no question of an exercise of discretion whether to stay the proceedings or not. So, nothing stands in our way to upset the High Court's decision.

[63] See *Oryx* above n 50 at 907F.

Remittal

[73] When the High Court ordered a separation of issues in the action in which Ms Mokone is pursuing her right of pre-emption, it was plainly envisaged that a number of issues would remain pending. So, holding for Ms Mokone is not dispositive of the action. The matter has to be remitted to the High Court for the final determination of the outstanding issues.

Costs

[74] Ms Mokone's counsel indicated that, because they represent her *pro bono*, they do not ask for costs. No costs order will be made.

Order

[75] The following order is made:

1. Leave to appeal is granted in both applications.
2. Both appeals are upheld.
3. In both appeals, the orders of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court) are set aside.
4. It is declared that the extension of the lease between Ms Ntswaki Joyce Mokone and Tassos Properties CC on 3 May 2006 resulted in the extension of the right of pre-emption in favour of Ms Mokone.
5. The action for the prosecution of the right of pre-emption referred to in paragraph 4 is remitted to the High Court for the determination of issues which, in accordance with the pleadings, remain outstanding.
6. The final determination of the appeal in respect of the proceedings brought by Blue Canyon Properties 125 CC in the Boksburg Magistrate's Court for the eviction of Ms Mokone is held in abeyance pending finalisation of the action referred to in paragraph 5.

FRONEMAN J

[76] I have had the privilege of reading the judgment of my brother Madlanga J (main judgment). It is an important judgment because it tackles and develops our existing law on three different fronts. On two of those I agree, with a comment here and there to clarify its justification from my perspective. On the third I am sympathetic, but in the end I think this is not the case to go as boldly as he does.

[77] Let me start with the first two.

[78] I agree that the question whether the extension of an agreement that contains provisions relating to a lease and other rights, like a right of pre-emption, also extends those other provisions, should, as a start, be interpreted without baggage. To start by calling it a lease agreement gives it baggage. The baggage comes with the name, or characterisation. Once one calls it a lease then surely, all other provisions superfluous to the necessaries of a lease are collateral to the lease, not incidents of it? Yes, put that way it does, but that begs the question one wants to determine, namely what kind of agreement is it? A lease? Primarily a lease? Or a hybrid, something that contains features of not only a lease, but also other kinds of agreements? So, yes, let us start without lawyerly blinkers and determine the meaning of the agreement as those who concluded it would have understood the ordinary meaning of words.

[79] The pre-constitutional case law in relation to whether courts have an equitable discretion to stay proceedings in one matter until determination of a material legal point in another was at pains to separate law from equity in denying this wide equitable competence to our courts.[64] If there is a broad theme of the Constitution, it is to unshackle our law from this painful historical dichotomy and tension between law and fairness. The Constitution demands that they run together, hand in hand. Ordinary folk assume that is the purpose of law – that it should be infused with

[64] *Clipsal* above n 11 at para 17.

fairness and justice. Lawyers should no longer be embarrassed to admit that there is nothing wrong with that view.

[80] The main judgment does not seek to locate the development of our law in relation to these two issues in our new constitutional ethos, but in the common law's inherent competence to do so. I would prefer to bring the two together. Unarticulated in the common law's development were underlying notions of fairness and justice. The Constitution unashamedly tells us that we should no longer hesitate to bring the law in accord with constitutional notions of fairness and justice. Looking at agreements without baggage in favour of lessors brings equality in bargaining and good faith in the enforcement of agreements to the fore. So does the suspension of proceedings seeking to enforce rights that are subject to determination in another court. Those kinds of notions were not foreign to our common law.

[81] That, unfortunately, brings me to the third development to our existing law in the main judgment: bringing down *Moolman*.[65] I am not convinced that it is necessary to be so bold in deciding this case. Let me explain.

[82] On my reading of *Moolman* it deals only with "stepping into" rights of pre-emption, or what the main judgment calls an *Oryx* mechanism.[66] *Moolman* accepted, on the authority of *Oryx*, that the nature of a right of pre-emption allows the grantee to step into the shoes of the third party "purchaser" unilaterally and a new independent contract then comes into being between them.[67] The right of pre-emption, as a species of a *pactum de contrahendo*, is, in effect, a conditional sale of land and conditional sales of land must also comply with the statutory formality of being in writing.[68] The implication of this is that if there is no written offer to step into, the unilateral stepping in, even if in writing, cannot transform the resultant sale

[65] *Moolman* above n 38.

[66] *Oryx* above n 50.

[67] *Moolman* above n 38 at 761B-C and H-I.

[68] Id at 765G-767H.

into a written sale. It is this that underlies the statement that "[w]ere 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."[69]

[83] It may be that this "conception of the preparatory pact as an inchoate, conditionally suspended version of the substantive contract"[70] is in conflict with the earlier Appellate Division case of *Birchholtz*.[71] It may also be that both the characterisation of the nature of this kind of right of pre-emption, as entitling the grantee to step into the shoes of the third party "purchaser" unilaterally with the result that a new independent contract then comes into being between the grantee and the grantor, as well as the requirement that it must be in writing, are suspect and need to be re-examined. But before getting there it must be clear that the pre-emption clause here is of the "stepping into" or *Oryx* variety. If it is not, dumping *Moolman* is not yet called for.

[84] A right of pre-emption may take many different forms. In *Bellairs*, the Court distinguished the right of pre-emption, in that case a grant binding the grantor to offer at "the price which he is willing to accept for such shares",[72] from other forms:

> "[T]he right of pre-emption in clause 21 differs radically from the usual kind in which the pre-emptive price is either specified . . . or in which, because of its wording or effect, it is the same price as the owner is prepared to accept from the third person . . . or in which the price is otherwise objectively determinable".[73]

It seems to me that the "stepping into" nature of a right to pre-emption upon which *Oryx* and *Moolman* rest may be restricted to those rights where because of its wording

[69] Id at 767H.

[70] Lubbe above n 54.

[71] *Venter v Birchholtz* 1972 (1) SA 276 (A).

[72] *Bellairs v Hodnett* 1978 (1) SA 1109 (A) at 1139A-B.

[73] Id at 1139 D-F.

or effect, it is the same price as the owner is prepared to accept from the third person.[74] In other cases, the rationale for *constructing* its nature as one of unilaterally stepping in to create an independent contract of sale, and hence liable to being in writing, appears inapposite.

[85] The right of pre-emption granted in this case is not a "stepping into on the same terms" right. It reads:

> "The [t]enant shall have the [right of first refusal] to purchase the leased premises when the [lessor wishes] to sell the leased premises. *The purchase price shall be negotiated when the [lessor wishes] to sell the leased premises*." (Emphasis added.)

[86] This is much closer to the terms of the right of refusal clause in *Soteriou,* which provided for the extension of a lease "upon such terms and conditions and at such rental as may be mutually agreed upon".[75] With reference to the principle enunciated in *Oryx* that a purchaser can step into the shoes of the third party by a unilateral declaration of intent, Nicholas JA stated:

> "There would seem to be no reason in principle why the same should not apply where a lessee of premises has a right of first refusal of a new lease. *But the lease concluded with the third party must be such that the grantee of the right can step into the third party's shoes. It is not clear that he could do so in the present case*."[76] (Emphasis added.)

[87] Before one can enter the realms of whether *Moolman* was wrongly decided, one must first determine whether the pre-emption clause here is of the "stepping into" kind of pre-emption clause that *Moolman* speaks to. To me it seems not to be of that kind, which makes it unnecessary to leave *Moolman* on the ash-heap.

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[74] *Soteriou v Retco Poyntons (Pty) Ltd* [1985] ZASCA 15; 1985 (2) SA 922 (A) at 933.

[75] Id at 933.

[76] Id.

[88] I thus agree that the matter should be remitted to the High Court for determination of the other issues. These issues include whether the clause leaving the purchase price to further negotiation is valid[77] and, if so, whether specific performance in the form sought by the applicant, or at all, is tenable. I also agree with the rest of the order issued in the main judgment.

[77] Compare *Hattingh v Van Rensburg* 1964 (1) SA 578 (T) and *Soteriou* above n 74 at 931.

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