

Seller holds all the aces

Clearing up confusion about purchase offers contained in lease

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SOME tenants and owners are genuinely confused about the requirement of “the offer to purchase” and its incorporation into an agreement to lease.

There are tenants who believe they were “cheated” by their landlords / landladies, who ignored their rights by selling or offered to sell the leased property to a third party.

Some tenants aver that they were given the option to purchase the leased property at the time they entered into a lease agreement.

There are those who assume that their long period of occupancy entitles them to ownership, or at least, to the right to purchase the leased property, at the exclusion of others.

There are a few instances when tenants refused to vacate the dwelling or property on termination of a lease by becoming “imaginative” about an offer to purchase.

Landlord and tenant can mutually agree that the tenant be given the (i) option to purchase the dwelling to be leased or (ii) a preferential right to do so.

This becomes binding once it is written into the lease contract, and upon parties having concluded such an agreement.

The option to purchase is an offer by the landlord / seller and must therefore have the essential elements of a contract of sale that includes the purchase price and the agreement of the (leased) dwelling or property.

Accordingly, a landlord/ lady who gave the tenant a written option to purchase the leased dwelling cannot sell it to a third party unless it was offered to the tenant and the latter declined or was unable to pay the purchase price.

In the absence of the written lease contract containing the period within which the tenant is required to exercise the option, this has to be done before the lease comes to an end. Once the tenant exercises the option by accepting to purchase, the landlord / seller cannot refuse or change it; the option to purchase is irrevocable.

If the parties concluded a lease contract that contained a preferential right or a right to pre-emption this means that the tenant has the right of first refusal if a condition in the lease contract is fulfilled.

The condition is usually that when the landlord / lady decides to sell, it must be offered to the tenant first.

This preferential right given to the tenant does not mean the landlord must sell the leased property but that when he / she decides to sell or proposes to do so, the tenant has the right of first refusal.

This right may be for a period stipulated in the lease contract or a period that is reasonable.

It would appear that the price need not be specified because the landlord may or may not decide to sell the leased property. In other words, the preferential right is not an offer to sell at the conclusion of a lease contract but a right granted to the tenant that becomes operative if the landlord decides to sell.

Can a tenant lodge a complaint with the Rental Housing Tribunal (RHT) of an unfair practice regarding a dispute that the landlord / lady has refused or failed to offer the dwelling for sale to the tenant as stipulated in the lease contract? *No!*

A clause reads, “The tenant has the first option to purchase the dwelling during the lease period when the owner decides to sell.” Or “The tenant has the first right of refusal on the dwelling for the purchase price R120, 000.00 for a period of 12 calendar months from the start of this lease.” Or The tenant’s employment is linked to a lease which in turns allows him the option to purchase provided he fulfil the terms of his employment and the lease (*Mittermeier v Skema Engineering (Pty) Ltd* 1984 (1) SA 121 (A)).

This aspect of the lease applies to a purchase and sale of the dwelling and the dispute with the landlord-owner does not relate to the use

and enjoyment, rental and other terms and conditions of the lease contract.

The RHT does not have authority to resolve such a dispute. The lease can include a clause that states that the tenant would work for the landlord for a monthly salary.

The failure to pay salary does not affect the lease agreement nor can the tenant set off against the rental the salary owed to him or her.

It is for the tenant or landlord / lady to seek legal advice when there is dispute relating to the option to purchase or a preferential (pre-emptory) right.

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