THE RIGHTS AND REMEDIES OF THE HOLDER OF A RIGHT OF FIRST REFUSAL OR PREFERENTIAL RIGHT TO CONTRACT

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INTRODUCTION

Preference contracts, also called first refusal contracts, are contracts in which one party promises to prefer the other party when concluding a specific type of contract. Such a right to be preferred may also be created by will, where a testator provides that a beneficiary may not sell the inherited object without giving another a chance to buy it first,1 or it may be created by legislation.2

In spite of the wide use of preference agreements, the residual rules on the basic rights, duties and remedies of parties thereto are surrounded by controversy in South African law.3

CONFLICT IN THE CASE LAW

Four conflicting views

The controversy surrounding the residual rules was brought to the fore by the leading Appellate Division decisions of Owsianick v African Consolidated

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1 Van Wyk v Posemann 1915 CPD 672; Fick v Fourie 1934 EDL 152; Engelbrecht v Mandell’s Trustee 1934 CPD 111; Ex parte Zunckel 1937 NPD 295; Bodasing v Christie NO 1961 (3) SA 553 (A).
The approach of the majority per Botha JA in Owsianick has been interpreted, in subsequent cases and by academic writers, to mean that an order for specific performance, that is, an order compelling the grantor of a right of first refusal to make an offer to the holder, cannot be obtained. The majority also held that there is no legally recognized procedure whereby the holder, in the event of a sale in conflict with his rights, can demand to step into the buyer's place, simply because there never is an enforceable obligation upon the grantor to make an offer. The holder's only remedy is to interdict the grantor from selling and/or from transferring the property to a third party. Even in the case of a mala fide third party having taken transfer, the holder cannot oblige the grantor to make an offer, but can only have the transfer set aside. Thus neither through his own declaration nor through a court order can the holder of a right of pre-emption compel a sale to himself. Only if the grantor voluntarily makes an offer can this take place. The right of first refusal merely confers on the holder 'a weapon which may or may not . . . persuade the grantor to offer to sell to him'. Put differently, the majority view in Owsianick means that the grantor has only a negative obligation, an obligatio non contrahendo cum tertii. This obligation is subject to a resolutive condition, namely that the holder rejects an offer by the grantor. Hence the grantor cannot be forced to make an offer to the holder, but by making one he would be released from the obligatio non contrahendo cum tertii.

In a minority judgment in Owsianick, however, Ogilvie Thompson JA held that the holder of a right of pre-emption is entitled to an order compelling the grantor to make such an offer to sell.

In contrast to the majority in Owsianick, the Appellate Division in Oryx held that the holder of a right of pre-emption may demand that he be allowed to step into the buyer's place upon a sale in conflict with his rights, a remedy that has come to be known as the Oryx mechanism, an indication that it was considered to be a novelty in our law.

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4 1967 (3) SA 310 (A).
5 1982 (3) SA 893 (A). For details, see Naudé op cit note 3 chs 1 and 2.
7 At 323E.
8 In the words of advocate O’Donovan arguendo, Bellairs v Hodnett 1978 (1) SA 1109 (A) at 1113.
9 That is, an obligation not to contract with third parties.
10 This point is belaboured here as Botha JA’s explanation that the making of an offer is intended merely as a means whereby the property concerned may freely be sold, has been described as ‘so obscure, with respect, that it is not clear what the learned judge intended to convey . . .’(W E Cooper The South African Law of Landlord and Tenant 2 ed (1994) 144).
Prior to the decisions in Owsianick and Oryx De Vos J in Hartsrivier Boerderye (Edms) Bpk v Van Niekerk12 offered a fourth view, which amounts to a minor variation on Botha JA’s construction in Owsianick.13 According to Hartsrivier Boerderye, the essence of a right of first refusal is that the grantor obliges himself not to contract with another without first giving the holder a reasonable opportunity to make an offer to contract.14 This places a positive duty on the grantor, requiring her to give notice of an intention to sell.15 If the holder thereafter does make an offer, the grantor can reject it. She then forfeits her right to sell to a third party.16 The holder thus has a right to make an offer, not a right to buy.17

It must be emphasized that the different constructions followed in these decisions were not justified by reference to the particular wording of the preference contracts or the surrounding facts. Instead, the decisions reveal an insistence on one uniform construction, based on precedent and historical authority, rather than on the particular interests and likely intentions of the parties involved.18

A breakdown of the system of precedents and questionable reliance on other authority

Despite this insistence on precedent, the four judgments mentioned above, and a number of others concerning preference contracts, rely on what are in fact incorrect interpretations of previous decisions and disregard contrary decisions.19

The climax of Ogilvie Thompson JA’s argument in Owsianick, for example, was a reliance on Le Roux v Odendaal,20 but his view that specific performance of the right of pre-emption had been granted in that case is clearly incorrect. The plaintiff in Le Roux’s case had, in fact, accepted a voluntary offer by the grantor and obtained specific performance of the resulting contract of sale.21 Ogilvie Thompson JA thus took out of context the statement in Le Roux that ‘in each case the holder is entitled, by a due exercise of his right, to become a purchaser’.22 It is submitted that the ‘due exercise of the right’ referred to the scenario in which the grantor had voluntarily made an offer to the holder

12 1964 (3) SA 702 (T).
13 I use the word ‘construction’ to refer to a view or explanation of the rules relating to a specific type of contract, which include the reserve rules or natura, but also the criteria for classifying a transaction under that type.
14 At 705H.
15 At 706B.
16 At 707C.
17 Ibid.
18 In Hartsrivier supra note 12 at 706A De Vos AJ stated that: ‘Die verskyningsvorms kan wissel.’ However, his pronouncements on the right of first refusal show that he regarded it as a uniform concept, especially in the light of the general wording of the clause, which simply provided that if the grantor should decide to sell, the holder will have the first right of refusal to purchase. He probably intended to allow only for express deviations in the rights and duties of the parties.
19 For details, see Naudé op cit note 3 ch 2.
20 1954 (4) SA 432 (N), applied at 320D–G.
21 At 320G.
22 At 442F.
who had thereafter exercised his right by accepting it. It cannot be concluded from this statement that the court was of the view that the holder would, in the absence of such a voluntary offer, automatically be entitled to make himself a purchaser (whether by court order or unilateral declaration).

In *Oryx* the court, in turn, wrongly relied on this minority judgment of Ogilvie Thompson JA in *Owsonianick* in support of the *Oryx* mechanism.\(^{23}\)

The reliance on the Vorkaufsrecht of German law in the *Oryx* case\(^ {24} \) is also problematic. The Vorkaufsrecht differs radically from the right considered in the *Oryx* case in that it does not prohibit a contract with a third party. Instead, the Vorkaufsrecht allows the grantor to contract first with a third party, and this must occur before the holder has to decide whether to exercise his right.\(^ {25} \) By contrast, the wording of the clause in *Oryx* could be and was interpreted as prohibiting a sale to a third party unless a prior offer was made to the holder.\(^ {26} \) Such wording, which is the norm for preference contracts in South Africa, leads to the application of a different construct in German law, namely the Vorhand, rather than the Vorkaufsrecht.\(^ {27} \) German law recognizes a number of different types of Vorhand contracts. Which type is applicable depends on the different contexts in which preference contracts may be used, the relative bargaining power of the parties, the purpose of the holder and the wording chosen for the preference clause. Each of these constructions has a commercial justification. According to Henrich, the writer of the most comprehensive exposition of Vorhand contracts, the default Vorhand construction amounts to an obligatio non contrahendo cum tertii that corresponds with the *Hartsrivier* construction.\(^ {28} \) It is, therefore, also similar to Botha JA’s construction in *Owsonianick*.\(^ {29} \)

Furthermore, the majority judgments in both *Owsonianick* and *Oryx* relied on the same historical sources to arrive at totally conflicting views regarding the remedies of the holder in Roman-Dutch law. Indeed, the precise construction of preference contracts in Roman and Roman-Dutch law is not certain.\(^ {30} \) It is possible that Roman-Dutch contractual preference agreements only gave rise to a claim for damages or the setting aside of the transfer to the

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\(^ {23} \) More specifically, insofar as it is suggested (at 904A–B) that Ogilvie Thompson JA had been of the opinion that the holder obtains a claim over the merx as soon as the condition was fulfilled. See also Reinecke & Otto op cit note 3 at 201n17.

\(^ {24} \) At 907H.

\(^ {25} \) Dieter Henrich *Vertrag, Optionvertrag, Vorrechtsvertrag* (1965) 300 at 302; Naudé op cit note 3 ch 4.

\(^ {26} \) At 904D. See also the formulation of the clause at 900E–F.

\(^ {27} \) See the sources cited in note 25.

\(^ {28} \) Recognized in *Hartsrivier Boredeyr (Edms)* Bpk v Van Niekerk supra note 12.

\(^ {29} \) Supra note 4. See Henrich op cit note 25 at 304–7. In this, Henrich is supported by a decision of the German Supreme Court of 1956 (BGH 22, 347). Admittedly a number of writers who do not consider the Vorhand in depth have opted for a default construction rather like that of Ogilvie Thompson JA in *Owsonianick*.

\(^ {30} \) Naudé op cit note 3 ch 3; Tjakie Naudé ‘Rights of first refusal or preferential rights to contract: a historical perspective on a controversial legal figure’ (2004) 15 Stellenbosch LR 66 at 72–86; Floyd op cit note 3 at 256 and 262–3.
third party.\textsuperscript{31} On the other hand, they could possibly have operated like the ex lege right of retraction or naastingsrecht. This allowed the holder to compel performance to himself on the same terms agreed with a third party where the holder was not given a prior chance to contract.\textsuperscript{32} It is also possible that both these constructions were received into early South African law.\textsuperscript{33} The absence of a clearly defined, unified default regime for preference contracts in Roman-Dutch law may explain the plurality of constructions in South African law.

Van Heerden JA in \textit{Oryx} also appears to have placed much weight on his mistaken reading of D 18 1 75 as granting to the original seller who retained a right of pre-emption upon selling his property the actio empti — the action of a buyer — on breach.\textsuperscript{34} The court implied that the holder of a right of pre-emption would thereby be entitled to enforce the grantor’s duty to deliver, just as a buyer could against his seller. The text, however, grants the seller the actio venditi — the action of a seller — simply because that was the only action available to the seller upon breach of the pre-emption agreement. A pre-emption agreement was regarded as a mere pactum adiectum or ancillary pact to the contract of sale and not as an enforceable contract in its own right.\textsuperscript{35} The name of the action has no bearing on the relief that could be obtained in this instance. In any event, the Roman rule that all judgments had to sound in money may have prevented a buyer from claiming specific performance of the seller’s duty to deliver even in Justinian’s time.\textsuperscript{36}

Aside from these difficulties relating to the authority relied upon in the case law, the position is, after the \textit{Oryx} case, not crystal clear. The judges in \textit{Crundall Brothers (Pty) Ltd v Lazarus NO}\textsuperscript{37} confessed that they had ‘some difficulty in understanding the effect of the order made in the \textit{Bakeries} case — a difficulty apparently shared by the two Judges of Appeal who dissented in that case, and by Professor Kerr . . .’.\textsuperscript{38} The cogency of the reasons for the

\begin{itemize}
\item \textsuperscript{31} For details, see Naudé op cit note 3 ch 3 and Naudé loc cit note 30. A number of writers refer to the holder ‘retracting the sale’ (Van Leeuwen \textit{Censura Forensis} 20.4) or of the holder ‘attaching the contract of sale and retracting the same’ (Van Zutphen \textit{Practycke} v ‘voorcoop’ para 4) but do not mention setting aside only the transfer. This seems to imply that the sale itself could be rescinded. Furthermore, the remedy of recission of the third-party contract is also encountered in early South African cases, such as \textit{Transvaal Silver Mines v Jacobs}, \textit{Le Grange & Fox} (1891) 4 SAR 116, where the court granted cancellation of the contract of lease concluded in contravention of the right of first refusal. See also \textit{Malan v Schalkwyk & Odendaal} (1852) 1 Searle 225. Setting aside the sale implies that the transfer could be set aside and it may be the case that the writers and cases referring to the rescission of the sale intended to mean that the transfer is set aside.

\item \textsuperscript{32} Ibid.

\item \textsuperscript{33} Ibid.

\item \textsuperscript{34} At 905E–G.

\item \textsuperscript{35} Roman law knew a numerus clausus of enforceable contracts which did not include preference contracts. However, ancillary pacts (pacta adiecta) could be sued upon if they were entered into simultaneously with an enforceable contract, such as a sales contract. If a contract of sale created a right of pre-emption for the seller, he could therefore only sue for breach of this ancillary pact with the seller’s action or actio venditi, as there was no separate action available to enforce a pre-emption agreement. The standardized formula of the actio venditi ordered the judge to take good faith into account when reaching his verdict, and good faith demanded that ancillary pacts be honoured (D 2 14 7 5; Reinhard Zimmermann \textit{The Law of Obligations: Roman Foundations of the Civilian Tradition} (1990) 510).

\item \textsuperscript{36} Zimmermann op cit note 35 at 772 and authorities cited there.

\item \textsuperscript{37} 1992 (2) SA 423 (ZS).

\item \textsuperscript{38} At 429D.
\end{itemize}
decision in *Oryx* has also been questioned.39 The court’s failure to spell out the basis of the *Oryx* mechanism leaves the impression that a fiction is at work with all the dangers flowing from it.40 One commentator has even declared that the precise nature, effect and basis of the so-called *Oryx* mechanism cannot be ascertained with certainty.41

The court in *Oryx* also left open important questions regarding the operation of preference contracts, inter alia, whether or not only a contract of sale would trigger the *Oryx* mechanism, or whether an offer to sell to a third party would have the same effect, and whether the *Oryx* mechanism was available where the preference contract did not conform with the formalities prescribed for the eventual substantive contract.42 The *Oryx* mechanism, as formulated by the court, appears inappropriate in some situations; for example where the terms agreed with the third party differ from those to which the holder is entitled in terms of the preference contract.43 These shortcomings place a question mark over the court’s rejection of the alternative constructions advocated in *Owsianick*.

The cases following upon the *Oryx* case have not satisfactorily resolved these controversial issues. In *Hirschowitz v Moolman*44 the Appellate Division assumed for the purposes of the case, without deciding the question, that the *Oryx* mechanism is also triggered by the grant of an option, and that an order for specific performance in the form of an order to make an offer is still available as an alternative remedy to the *Oryx* mechanism.45 The court here did, however, decide one question left open in the *Oryx* case, namely that a contract of pre-emption in respect of land must comply with the formalities legislation before the holder may claim specific performance against the grantor.46

The confusion has been exacerbated by statements in other cases that conflict with the *Oryx* case. The court in *Rogers v Phillips*47 held that a right of pre-emption merely gives the holder a personal right to an offer by the owner and that the holder cannot become a purchaser unless an offer is actually made.48 In *Dithaba Platinum v Erconovaal*49 the court, without actually referring to the mechanism used, surprisingly held that the *Oryx* case

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39 Eiselen op cit note 3 at 99.
41 Du Plessis op cit note 11 at 337; Cf Lubbe & Murray op cit note 11 at 93–4.
42 At 908F–G.
43 Reimecke & Otto op cit note 3 at 24; cf Lubbe op cit note 11 at 141 and op cit note 6 at 130; Floyd op cit note 3 at 266.
44 1985 (3) SA 729 (A).
45 At 763F–G and 764G–H respectively. This assumption may have been made as the application was launched before the decision in *Oryx*. See Lubbe op cit note 43 at 139.
46 At 767G–H.
47 1985 3 SA 183 (E) at 187D.
48 At 188C–D.
49 1985 4 SA 615 (T).
confirmed that specific performance can be granted to enforce a pre-emptive right and that a court has a discretion to refuse this remedy.\textsuperscript{50}

The exact construction of preference contracts thus remains uncertain. Furthermore, neither \textit{Owsianick} nor \textit{Oryx} nor later decisions comprehensively considered the policy considerations at stake. Indeed, the two just-mentioned decisions rest on the presupposition that there is one ‘correct’ default construction prescribed by precedent and historical authority.\textsuperscript{51} But, as neither of these provide a clear answer, a detailed policy analysis is necessary in order to arrive at a fair set of residual terms for these contracts.\textsuperscript{52}

\textbf{IS THE VIEW OF THE MAJORITY IN OWSIANICK AND THE COURT IN HARTSRIVIER WORTHY OF FURTHER CONSIDERATION?}

It is true that a number of academic commentators writing after \textit{Oryx} have dismissed Botha JA’s view in \textit{Owsianick} as ‘erroneous’ and ‘a misleading simplification’\textsuperscript{53} on the grounds of commercial efficacy,\textsuperscript{54} principle,\textsuperscript{55} practical utility,\textsuperscript{56} reasonableness\textsuperscript{57} and logic.\textsuperscript{58} However, their criticisms rest on very vague grounds and they do not explain their objections. The fact that some writers concede that parties may expressly structure their preference contracts as set out in \textit{Hartsrivier Boerderye} also detracts from their criticism.\textsuperscript{59}

The view of the majority in \textit{Owsianick} and of the court in \textit{Hartsrivier} is, in fact, not meaningless from a practical or commercial perspective and, therefore, deserves attention. The balance of bargaining power in a particular case could very well result in the grantor agreeing only to be subject to an interdict or damages claim in case of breach (or the setting aside of a transfer to a mala fide third party) as opposed to an order compelling an offer or specific performance of the substantive contract.\textsuperscript{60} The holder might also be satisfied with such an arrangement. Furthermore, if the holder discovers in time that the grantor has concluded a sale with another and intends to transfer, or has transferred to a mala fide third party, an interdict (and an order setting aside the

\textsuperscript{50} At 627D–E.

\textsuperscript{51} By default construction I mean the body of rules that should apply in the absence of clear regulation by the parties.

\textsuperscript{52} Residual rules aim for the fairest solution of disputes not provided for by the parties themselves (see, inter alia, Alfred McAlpine & Sons (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 532G–H; Tucker’s Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) at 651–2; A Becker & Co (Pty) Ltd v Becker 1981 (3) SA 406 (A) at 420G–H; Tjakie Naudé ‘The function and determinants of the residual rules of contract law’ (2003) 120 SALJ 820; Naudé op cit note 3 para 6.2). An effort should also be made to fit this set of residual terms into the conceptual structure of South African contract law by providing a coherent juridical explanation for them. See Naudé op cit note 3 para 7.2.2.3 for such an attempt.

\textsuperscript{53} Cooper op cit note 10 at 143.

\textsuperscript{54} Cooper op cit note 10 at 144; CF Du Plessis op cit note 3 at 14.

\textsuperscript{55} Cooper op cit note 10 at 144.

\textsuperscript{56} Reinecke & Otto op cit note 3 at 20.

\textsuperscript{57} Eiselen op cit note 3 at 97.

\textsuperscript{58} Reinecke & Otto op cit note 3 at 21n26; Flack op cit note 3 at 833.

\textsuperscript{59} Eiselen op cit note 3 at 97; Lubbe & Murray op cit note 11 at 92; Van der Merwe et al op cit note 3 at 62–3; Floyd op cit note 3 at 261; Lubbe op cit note 11 at 144–5.

\textsuperscript{60} Or a third party who did not know about a right of pre-emption contained in company statutes (\textit{Smuts v Booyens; Markplaas (Edms) Bpk v Booyens} 2001 (4) SA 15 (SCA)).
transfer) will adequately restore the status quo, a solution that makes practical sense.

The negative construction does not make of the holder's right something other than a 'right of first refusal' or a 'right of pre-emption'. Although not enjoying a conditional right to purchase, the holder still has a preferential right; he must be preferred above any potential purchaser by the grantor. A 'preference' implies a negative — the non-selection of others — but does not necessarily indicate when and how a selection must take place. The construction is, therefore, not 'illogical'. Neither does the fact that 'refusal imports an offer' necessarily imply that the grantor must have an enforceable duty to make an offer.61 As was stated by Botha J in his minority judgment in Soteriou v Retco Poyntons,62 'a right of first refusal' could also refer to the first chance to refuse any voluntary offer which the grantor may, but is not obliged to, make.63

The construction of a right of pre-emption would not give rise to theoretical problems if the view of Botha JA or that of De Vos J in Hartsrivier64 were accepted as the only correct one.65 Their approach also accords with the policy consideration that restraints on alienation must, in the interests of commerce, be narrowly construed.66 This negative construction has also been championed in Germany and Scotland as the default construction of pre-emption rights, entailing an obligation not to contract with a third party first (the so-called Vorhand contracts of German law).67

61 As was held in Manchester Ship Canal Company v Manchester Race Course Company [1901] 2 Ch 37 (CA). This statement was relied on by the majority in Soteriou v Retco Poyntons 1985 (2) SA 922 (A) 932G. The court in Cohen v Behr 1946 CPD 942 was also influenced by this reasoning as appears from 946–8. See also Flack op cit note 3 at 834 and Du Plessis op cit note 3 at 17, who accept this statement as a truism.
62 Supra note 61.
63 See the minority judgment of Botha JA at 936B–C, approved of by Radesich op cit note 40 at 408–10. Du Plessis op cit note 3 at 17 therefore incorrectly states that no objection had been made against the conclusion reached by the majority in Soteriou that 'refusal imports an offer' from which an obligation to make an offer was inferred. In the Manchester case, the holder was in any event merely granted an interdict to protect his right. Furthermore, the holder's right in that case was not a true right of first refusal, but a right to be made a fair and reasonable offer on a stated event irrespective of whether the grantor wished to sell or not (see further Naudé op cit note 3 at 125). Cf also Siviglia's comment on the term 'right of first refusal': 'Some agreements merely state that one party will have a ''right of first refusal'', but standing alone, that term has little, if any, meaning. Certainly, in this spare form, it is an invitation to dispute. If an agreement must contain a right of first refusal, the mechanics of the right should be clearly stated.' (Peter Siviglia 'Helpful practice hints: Rights of first refusal' (1994) 66 New York State Bar Journal 56.)
64 Supra note 12.
65 Reinecke & Otto op cit note 3 at 20.
66 As confirmed at 321E of Botha JA’s judgment in Owsianick, relying on Voet 18.3.9–18.3.10 and Robinson v Randfontein Estate Gold Mining Co Ltd 1921 AD 168 at 188. See also Edwards (Waaikraal) Gold Mining Co Ltd v Mampuru NO & Bakwena Mines Ltd 1927 TPID 288; Ah Ling v Community Development Board 1972 (4) SA 35 (E) at 37G–38A.
67 BGH 22, 347 (decision of the Bundesgerichtshof of 1956); Henrich op cit note 25 at 305ff. For details see Naudé op cit note 3 at 112ff. In Roebuck v Edmunds 1992 SLT 1055 the court refused to order that the holder may buy at the price agreed with a third party where the grantor acknowledged that the transfer to the third party should be set aside. In effect, only the status quo ante was restored. It argued that pre-emption clauses should be strictly construed and that the clause does not go beyond a duty not to convey the property to another without a prior offer to the holder. The court saw no legal basis for a positive obligation to convey the property to the holder in the case of breach. On the other hand, Matheson v Tynney (OH) 1989 SLT 533 at 537 contains this obiter statement: 'A clause of pre-emption does not prohibit alienation [so as to contravene a statute of 1746] but simply gives the superior or the disponor an option to purchase if the vassal or disposee decides to sell.'
Accordingly, a multiplicity of types of preference contracts with different rules on the basic rights and remedies of the holder present themselves as alternative possible approaches.

PROPOSAL ON THE BASIC RIGHTS AND DUTIES OF THE PARTIES

The best way to deal with the multiplicity of possible interpretations of preference arrangements is to prevent disputes by means of clear drafting. Unfortunately, this is not often done. In fact, preference agreements frequently merely state that a first option, right of pre-emption or right of first refusal is granted. Such a contract can be understood in different ways. Even those contracts that grant an enforceable conditional right to contract often fail to define clearly the condition or trigger event. It is often stated widely enough to include any manifestation of a desire to conclude the main contract, as opposed to a clearer indication that the grantor is about to contract with a specific third party.

In choosing a default type for these unclear cases, two main types of preference contracts should be recognized where the parties intend an obligatio non contrahendo cum tertii: first, ‘preference contracts’ that stipulate a price for the main contract, or a mechanism for ascertaining the price, and, secondly, those that are silent in this regard.

Conditional options to contract at a predetermined price

Where the preference contract predetermines the main price, either by fixing a price or by establishing a mechanism for its determination, the preference contract is essentially an option conditional upon any manifestation of a desire to contract by the grantor.68

Stipulation of a price clearly indicates that the grantor has no interest in sounding out the market, for example by negotiating with third parties. It must, therefore, be the parties’ intention that, as soon as the grantor manifests an intention to contract, the holder will have a right to contract with her on the terms determined in the preference contract. The commencement of negotiations with third parties is, therefore, sufficient to trigger the right.

68 That is, provided any other material terms are also determined or determinable. The conditional option explanation has been supported by Reinecke & Otto op cit note 3 at 24ff and Lubbe op cit note 43 at 137–8 in respect of all preference contracts. The view that all preference contracts may be regarded as conditional options was implicitly rejected by the Supreme Court of Appeal in *Hirschowitz v Modman* supra note 6 at 765F–G and *Soteriou v Retco Poyntons (Pty) Ltd* supra note 61 at 932E, but these decisions did not specifically reject this juridical explanation in respect of the narrower category of preference contracts which does predetermine the price, not including reference to a price which the holder is prepared to accept from a third party. The fact that the grantor is not immediately obliged to keep an offer open does not detract from this construct’s status as a conditional option. Any condition added to an option means that the grantor is not bound to keep an offer open at that point, but only once the condition is fulfilled. Whether the grantor should be able to withdraw the offer once the condition is fulfilled, thereby curing the breach, is a question that is beyond the scope of this article. On that issue, see Naudé op cit note 3 at 319–22. If the grantor is allowed to do so before the holder exercises the right, this type of preference contract is not a conditional option, but rather a conditional offer.
This condition, ‘any manifestation of a desire to contract’, is not an objectionable potestative condition. Liability depends on the actions of the grantor that manifest a desire or intention to contract and not on the mere ipse dixit of the grantor.69

Preference contracts that simply provide for an offer at ‘a price which the grantor is prepared to accept from third parties’ do not fall into this category of contracts, since the grantor then has an interest in negotiating with third parties, and indeed should remain free to do so. This implies that the manifestation of a desire to contract should not trigger the holder’s right.

Reference to a ‘usual price’ or a ‘reasonable price’ is also sufficient to bring the preference contract under the present type,70 as are provisions that the holder will have a right to buy — at a price to be agreed, or, failing agreement, to be ascertained by a third party.

In view of this overlap of options and preference contracts, it is not particularly surprising that the distinction between options and rights of pre-emption is not, as Christie points out, always apparent to those who make contracts.71 The present type of ‘preference contract’ gives the holder a right to contract at a specified or determinable price despite a better offer by a third party. The primary obligation of the grantor is, therefore, not merely to prefer the holder above third parties, all things being equal, as is the case in other types of preference contract. Furthermore, if a ‘preferential right to contract’ at a determinable price is a ‘preference contract’, any option is also a preference contract, as an option holder also has a right to contract at a specified price, such that she has the right of ‘first refusal’ to contract at that price. The only difference is the condition suspending the right to contract.72

Perhaps academic writers favouring retention of the distinction between options and rights of pre-emption73 would criticize typifying certain rights of pre-emption as options. There is, however, no inherent virtue in retaining a dogmatic distinction for its own sake.

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69 For detailed consideration of this issue, see Naudé op cit note 3 para 5.2.2.2.
70 Where no price, not even a price ‘which the grantor is willing to accept’, is referred to but a usual price exists, it will be a matter of interpretation whether the parties intend a right to contract at the usual price. Uncertainty as to their intention should lead to a narrow interpretation, that is, in favour of a bare preference contract and not a conditional option to contract at the usual price. Certainly, the courts’ apparent readiness to depart from the established rule that a sale for a reasonable price is invalid due to uncertainty (cf Genac Properties (Jhb) (Pty) Ltd v NBC Administrators CC 1992 (1) SA 566 (A)) should not lead to implying a reasonable price in pre-emption contracts which do not refer to a price. For argument on these matters see Naudé op cit note 3 para 7.2.2.1.1.
72 See also Reinecke & Otto op cit note 3 at 33; cf Van der Merwe et al op cit note 3 at 81–2. It is therefore not surprising that the court in the English case of Pritchard v Briggs [1980] Ch 338 (CA) suggested that a pre-emption agreement that specified the terms of the main contract is a conditional option contract.
73 Cf Janisch op cit note 3 at 434 and Van der Merwe et al op cit note 3 at 68.
Ordinary preference contracts

The second default type referred to above should provide for all other cases where there is an obligatio non contrahendo cum tertii. This is the type of preference contract most widely used in South Africa, thus the label of ‘ordinary preference contracts’. Here the parties indicate that the holder should have the first chance to contract with the grantor, but do not specify a price or mechanism for determining a price, aside, perhaps, from making reference to the price that the grantor would be prepared to accept from third parties.

Such contracts only oblige the grantor to ‘prefer’ the holder above interested third parties if the holder matches the terms offered by them. The type previously mentioned actually gives the holder a right to contract at a specified price despite a better offer by a third party.

The two most important issues that a default type for ordinary preference contracts must settle are:

1. What manifestation of a desire to contract should trigger the holder’s right?
2. What exactly is the holder entitled to upon occurrence of the trigger event and what remedies should be available on breach? Most importantly, may the holder ultimately enforce performance of the main contract?

After an examination of the relevant policy considerations, proposals on these issues will be made before exploring whether the proposed solution has found recognition in South Africa.74

Should any conduct short of a third-party contract breach or trigger the holder’s right?

The default rule should be that nothing short of a valid offer to, or contract with, a third party should amount to breach by the grantor. An obligatio non contrahendo cum tertii implies that the grantor’s first offer should be made to the holder, and not to a third party. No lesser manifestation of a desire to contract should trigger any enforceable right to an offer or other remedy for the holder (apart from a prohibitory interdict). This should be the case even where the preference contract provides that ‘upon the grantor desiring to contract, he shall offer to contract with the holder’. Only if the parties make it clear that the holder shall be entitled to enforce the preference contract on the occurrence of a lesser manifestation of a desire to sell, should the default rule be excluded.

The policy reasons in favour of this default position are that the grantor should be left as free as possible to negotiate with third parties in order to

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74 A full consideration of the other default rules of normal preference contracts, such as exercise of the holder’s right and termination thereof, and of a possible juridical explanation of the proposed body of rules, are beyond the scope of this article. For these aspects, see Naudé op cit note 3 ch 7.
sound out the market and ultimately to obtain the best possible price. This promotes maximization of wealth and economic efficiency, to the benefit of society as a whole.\textsuperscript{75} As noted by the court in \textit{Ah Ling v Community Development Board},\textsuperscript{76} any lesser trigger than the conclusion of a contract (or a valid offer) would cause the grantor to ‘always be acting at his peril in land deals’, compelling him ‘to move with clandestine caution’ and to ‘constantly . . . be on his guard against statements or conduct on his part which could possibly provide evidential material pointing to a desire to dispose of his property’.\textsuperscript{77} The grantor would, as a result, not even be able to conduct open and free negotiations with the holder.\textsuperscript{78}

Typically, grantors are likely to agree to such a limited burden on their contractual freedom; all the more so since preferential rights are often granted gratuitously on the assumption that they do not make any real difference to the grantor’s position.\textsuperscript{79} In sectors where the use of preference agreements is common, such as the publishing industry, third parties would not be willing to negotiate at all if serious negotiations would trigger a right to contract to the obvious detriment of the holder.\textsuperscript{80}

Furthermore, defining the trigger event as some earlier manifestation of a desire to contract creates uncertainty. Efforts to narrow the trigger event to ‘initiating the execution of the decision to alienate’,\textsuperscript{81} or ‘the display of a willingness, here and now, to contract with a specific person’,\textsuperscript{82} or ‘entering into serious negotiations with third parties’, are insufficient to dispel this uncertainty in cases where the grantor has not actually contracted or offered to contract with a third party. There would also be uncertainty regarding the contract price. A right to contract, conditional upon a mere manifestation of a desire to contract, would be meaningless unless the law were to lay down a standard for the contract price. Prior to an offer or a contract, the grantor has not yet indicated clearly what terms he is prepared to accept from third parties. At such an early stage, the criterion therefore cannot be ‘the terms which the grantor is prepared to accept from third parties’.\textsuperscript{83} Ultimately, vague and

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\textsuperscript{75} Respecting the policy goal of maximization of wealth is justified in the present context. No oppression or exploitation of the holder is involved and there are no other policy considerations at stake that would justify disregarding this policy goal, such as the needs of the environment or the landless poor.

\textsuperscript{76} 1972 (4) SA 35 (E).

\textsuperscript{77} At 40A–D.

\textsuperscript{78} Ibid.

\textsuperscript{79} Cf J M Van Dunnen \textit{Verbintenissenrecht Deel 1: Contractenrecht} 2 ed (1993) 21. In fact, the right of first refusal can be costly for the grantor because it may reduce the amount that can be obtained from the sale of the property. The existence of a preemptive right may deter potential buyers from making offers because it reduces their expected return from the costs they incur in negotiating and making an offer (Jonathan F Mitchell ‘Can a right of first refusal be assigned?’ (2001) 68 \textit{University of Chicago LR} 985; Terry I Cross ‘The ties that bind: Preemptive rights and restraints on alienation that commonly burden oil and gas properties’ (1999) 5 \textit{Texas Houstoun LR} 193 at 195).

\textsuperscript{80} Ibid. Therefore there is a good argument for a limited default construction to prevent a total disinterestedness from third parties.

\textsuperscript{81} In the words of Karl Larenz ‘Die rechtliche Bedeutung von Optionsvereinbarungen’ 1955 Der Betrieb 209 at 210. (my translation). See also Hans Carl Nipperdey ‘Über Vorhand, Vorkaufsrechte und Einlösungsrecht’ 1930 Zeitschrift für Handelsrecht 300 at 301.

\textsuperscript{82} Henrich op cit note 25 at 340 in connection with the Angebotsvorhand.

\textsuperscript{83} As was held in \textit{Soteriou v Retco Poyntons} supra note 61 at 932H; 933F.
disputable criteria such as fairness and reasonableness or ‘a good faith offer’ will of necessity have to be employed. In such circumstances, however, the grantor has not agreed to be limited to a fair or market price. She has only agreed not to contract with a third party at a price that the holder might be willing to pay. Clearly, some third party may be prepared to pay a higher price than the fair or market price. The grantor should, therefore, be allowed freely to sound out the market in order to ascertain the highest price at which she could contract and to refrain from contracting at all if it turns out that the market price is not high enough.

For these reasons, the approach in Souteriou v Retco Poynons (Pty) Ltd should not be followed. The majority there held that ‘refusal’ imports an offer, and that, while the clause was silent as to the method of determining the rental to be stated in the offer, the grantor was not free to fix any rental it pleased; it had to act bona fide. The rental and conditions had to be those upon which the lessor would offer the premises to other would-be lessees in the event of the holder not being willing to exercise his right. In the absence of an actual contract with, or offer to, a third party, these standards are too vague. The terms which the grantor would offer to others can only be established with any certainty once he has indeed made or accepted such an offer. Moreover, if a lesser manifestation of a desire to contract would trigger a right to buy ‘on the terms which the grantor would offer to others’, this would unfairly limit the grantor to a reasonable price. The grantor has a bona fide interest in obtaining as high a price as possible, as opposed to merely a reasonable price, as long as the holder is ultimately preferred above third parties.

This approach is consistent with the accepted general principle that preference contracts, as restraints on alienation, should be strictly construed. A rule that a preference contract only terminates once the grantor actually contracts with, and performs to, a third party on terms that the holder had an opportunity to match, sufficiently protects the holder against a mala fide attempt to shake off the holder by an outrageously high offer. Presumably, the main argument for recognizing a lesser manifestation of the desire to contract as a trigger event would be the protection this affords against losing the benefit of the main contract to a bona fide third party who has commenced negotiations with the grantor. However, society’s, and the grantor’s, interest in the minimum possible limitation on his capacity to deal freely with his property is not overridden by a need to protect the holder in this regard. Prior to actual breach of the obligatio non contrahendo cum tertii, the holder’s interests could be protected by a prohibitory interdict, which

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84 See also Floyd op cit note 3 at 260.
85 Cf Hans-Theodor Soergel & W Siebert (eds) Bürgerliches Gesetzbuch vol 3: Schuldrecht II 12 ed edited by Hans-Joachim Mertens (1991) preliminary comments to § 504 (marginal note 4) where the legitimate interest of the owner in obtaining as high a price as possible is recognized.
86 At 932H, 933F.
87 Supra note 66.
88 For more on this proposed rule see Naudé op cit note 3 paras 7.2.2.2.3, 5.1.1.II and 5.2.2.1.III.
could be served on interested third parties and, where relevant, the Registrar of Deeds.

The default rule should thus be that nothing short of a valid contract or offer should constitute breach of a preference contract or otherwise trigger a right to contract.89

Should the holder be entitled to performance of the main contract on breach?
There are compelling policy reasons both in favour of and against allowing the holder ultimately to enforce performance of the main contract upon breach of the preference contract.

The policy considerations against allowing such a ‘positive’ remedy centre on the now familiar argument that restraints on alienation should be construed as narrowly as possible. As set out above, it is logically possible to view preference contracts as negative contracts only, which do not create a right to contract, but only an obligatio non contrahendo cum tertii, which terminates upon rejection of an opportunity to match a third-party offer.90 Such contracts afford a real preference for the holder and cannot be said to be economically useless. If the grantor’s obligation is regarded as a negative one only, coherence and consistency arguably require that an order of specific performance thereof should consist only of a prohibitory interdict, coupled with an order setting aside any performance to a third party with prior knowledge of the holder’s right.91 If the holder wanted a stronger right, he should have bargained for a conditional right to contract.

Furthermore, a prohibitory interdict or order setting aside performance to a mala fide third party restores the status quo ante, which the holder has been content with since conclusion of the preference contract.

An argument that these remedies are ineffective because of the likelihood of another cynical breach by the grantor, this time transferring real rights in the object to a bona fide third party, can be met by three counter-arguments. First, the holder could adequately protect himself against that possibility in most cases, so that the ‘negative’ remedies would effectively protect the holder’s right to be preferred. In the case of land, the holder can register the right of pre-emption to prevent transfer to a bona fide third party.92 In the case of company shares, no alienation contrary to the right of pre-emption in the registered statutes would be effective, not even to a bona fide third party.93 In the case of publishing contracts, a third-party publisher would probably be found to have known of the holder’s preferential right, as preference agreements are widely used in that industry. A third-party publisher would

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89 The question whether the grantor may cure the breach by cancellation of the third-party contract or withdrawal of the offer to the third party is beyond the scope of this article. On this issue, see Naudé op cit note 3 para 7.2.2.11 at 319–22.
90 See ‘Four conflicting views’ supra.
91 The latter is of course available on the basis of the doctrine of notice. See Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd supra note 5.
92 Ex parte Zunckel 1937 NPD 295.
93 Smuts v Booyens; Markplaas (Edms) Bpk v ’n Ander en ’n Booyens supra note 60 at 24 para 17.
rarely be willing to contract with a published author without confirming with the previous publisher that it holds no preferential right. In other cases, the holder could stipulate a penalty to dissuade the grantor from breaching the contract. In a number of economic contexts, holders are sophisticated parties with sufficient bargaining power to be expected to protect themselves in this manner. Secondly, grantors would, in any event, very rarely contract with a third party in breach of the preferential right, without making the third party contract subject to the non-exercise of the preferential right.

In most other cases where the grantor breaches the preference contract cynically, transfer to a bona fide third party would already have taken place by the time the holder learns of the breach. Here only damages could, in any event, be claimed. In other words, the holder may lose the object through cynical breach and transfer to a bona fide third party regardless of how the preference contract is construed and which remedies are available.

Where the grantor has sold but not yet transferred to a bona fide third party, the reason for the holder’s interest in obtaining the object being preferred above the innocent third party’s right under the contract of sale could be questioned. There are valid policy arguments in favour of protecting the innocent third party above the holder. The holder could, for example, often have taken steps to inform third parties of his right, such as by registration of this right in the Deeds Office.

Nevertheless, with some exceptions, South African courts, including the Supreme Court of Appeal, have held that conflicting claims to the same asset, based on personal rights, should be resolved by application of the maxim qui prior est tempore, potior est iure, provided there are no personal circumstances which affect the balance of equities. This means that the holder is entitled to an interdict prohibiting performance of the conflicting contract between the grantor and third party, even in terms of the negative or bare preference construction. In other words, South African law allows the third party’s right to be trumped by the holder’s right.

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94 Franchisors, for example, often provide for rights of pre-emption in their favour in franchise contracts.
95 This was an argument relied upon by the Austrian Supreme Court (Obersten Gerichtshof) as to why only damages could be granted upon breach of a preference contract in its decision of 3 October 1972 reported in 1974 Juristische Blätter 204 at 206.
96 See, for example, Botes v Botes 1964 (1) 623 (O); Barnhoorn v Duvenhage 1964 (2) SA 486 (A); Knauze v L’Oen Wyk 1986 (1) SA 158 (A); Waldo Sand BK v Jintrec, Hanbly Parker Trust 2002 (2) SA 776 (SCA); NJ van der Merwe ‘Nemo plus iuris...’ (1964) 27 THRHR 300 at 302–3. However, there have been decisions where no preference was given to an earlier personal right, such as Gardner v Executor of Jones (1899) 16 SC 206, Kohling v McKenzie (1902) 18 SC 287, Hofgaard v Registrar of Mining Rights 1908 TS 650, Ex parte De Wet (1910) 20 CTR 305 and Ex parte Kingo 1936 (2) PH A 56 (C).
97 Floyd op cit note 3 at 264. However, Floyd wrongly relies on Smith v Momberg 1895 SC 295 for his general statement that the holder may prevent delivery to the third party by interdict. On the facts, the third party was aware of the holder’s prior right so that the doctrine of notice applied.
98 Some writers base this result on the view that the doctrine of notice operates against a third-party purchaser who may have been unaware of the prior right at conclusion of his contract, but became aware thereof before transfer. Cf Cooper op cit note 10 at 286–7 and authorities there cited and De Wet & Van Wyk Kostendrag en Handelsreg vol 1 ed (1992) 377–8 in the context of ‘huur gaat voor koop’. There is authority to the contrary (such as the minority in the appeal from Konoppenath v Essop 1968 (4) SA 610 (D) 614, reported in 1970 (1) SA 265 (A) at 274; the majority left the question undecided); Total SA v Xypteras 1970 (1) SA 592 (T) 598 and George Wille Landlord and Tenant in South Africa 5 ed (1956) 99, but the authority on which the cases are based have been questioned (Cooper op cit note 10 at 286).
It could, therefore, be argued that protection of the bona fide third party is irrelevant in the choice between the negative or bare preference construction, and the construction which entitles the holder to specific performance of the main contract upon breach. Neither construction protects the third party's interest in obtaining performance of the contract with the grantor.

The application of the maxim prior est tempore, potior est iure in this context has been criticized. It has been criticized not only because of lack of authority for its application to personal rights, but also because there is no theoretical foundation for its use in this context, nor any persuasive argument based on fairness which favours the prior right holder. It appears that supporters of the application of the maxim in this context wrongly assume that the grantor's capacity to contract, or indeed her ownership, is limited, even against bona fide third parties, by a contract creating only personal rights. As the creation of merely personal rights is not accompanied by publicity, so that the holder of the later right could not have known of the earlier one, there is no clear equity in according priority assigning to the chronological order of the claims. Accordingly, it has been persuasively argued that it is a better approach rather to insist on application of the normal principles of specific performance (which also apply to the claim for a prohibitory interdict, as it constitutes specific performance of an obligatio non faciendi).

What are the policy reasons for not limiting the remedies for breach of a preference contract to damages and restoration of the status quo ante?

Even where the holder is not primarily interested in obtaining the object, but is rather interested in the power to ward off unwanted third parties, the grantor should know that the holder has an interest in concluding the main contract on breach. The preference contract should fulfill this warding-off function by allowing the holder the choice to contract with the grantor, rather than allowing a third party to do so.

Allowing the holder a right to conclusion and performance of the main contract upon breach enables the court to arrive at a concretely fair outcome on the facts of each case. This would not be the case if the holder were invariably limited to a damages claim or a prohibitory interdict upon conclusion of a contract with a bona fide third party. The court's discretion to award or refuse specific performance means that fairness towards the third party and

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100 Lubbe op cit note 11 at 146–7; Mulligan ‘Double sales and frustrated options’ (1948) 65 SALJ 564 at 577.
101 Van der Merwe op cit note 96 at 302–3 and 305–6. This is criticized by Lubbe op cit note 11 at 147.
102 Lubbe op cit note 11 at 147. Cf the Oryx case where the court confirmed that publicity of a proprietary interest in an asset as a pre-condition for its operation against third parties (910H, 913E–F), and based the doctrine of notice on the satisfaction of this principle.
103 Lubbe op cit note 11 at 147. This is also the view of the minority (per Botha AJA) in Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd supra note 5. Cf Crundall Brothers (Pvt) Ltd v Lazarus NO 1991 (3) SA 812 (Z) 428H; Lubbe ‘Law of purchase and sale’ 1992 Annual Survey 100 at 106.
the holder is the primary consideration in deciding between their competing claims. For example, if there were evidence that the third party is a trader who wishes to sell the object whereas the holder has a sentimental (for example, familial) interest in obtaining the object, damages to the third party and specific performance to the holder would be the fairest outcome. If the court cannot enforce performance of the main contract in favour of the holder in such a situation, justice is arguably not done. The court should consider the following circumstances in exercising its discretion: Which of the parties has a personal interest in obtaining the object that cannot be compensated by damages? What could the holder have done to protect her own interests and to warn the third party of the preferential right? Why did the holder not do this? In the case of land, was the holder in occupation, for instance, under a lease? What enquiries did the third party make in such a case? Should the chronological order of the competing claims also be a factor if no other applies? This has been said to be fair as the holder of the preferential right to contract dealt with a bona fide seller, whereas the third party buyer ‘had the misfortune to deal with a mala fide seller’.  

In England the court will not compel a defendant specifically to perform an agreement when the result would be to compel him to commit a breach of a prior agreement with another person. Although this cannot be equated with the maxim of prior est tempore, potior est iure, it is based on the same principle. A similar explanation is given by Cooper as to why knowledge by a purchaser of a prior personal right before transfer is sufficient for the operation of the doctrine of notice. He states that

105 [t]he correct view is that by taking transfer the second purchaser assists the seller to commit a breach of the first contract, whereby the second purchaser commits a delict, namely inducement of breach of contract’.  

An alternative approach would be to give priority to the party who first initiated proceedings for specific performance. Perhaps this fall-back position could be justified on the basis that the other party’s delay indicates that specific performance is not as important to him. Both this approach and the insistence on prior est tempore, potior est iure as the fall-back position are, in fact, equally mechanical. In any event, the point of departure should remain the application of the normal principles of specific performance. This creates sufficient leeway to reach a fair solution in each specific case.

In response, it can be argued that the availability of a prohibitory interdict is sufficient to achieve a fair result between the holder, the third party and the grantor, whilst also serving the public interest in leaving the grantor as free as possible to deal with her property to her best advantage. Where the holder has a personal, for example familial, interest in the object, it would still be fair towards all parties to prohibit transfer to the third party, who would be

106 Willmott v Barber [1880] 15 ChD 96.  
107 At 287.  
108 Ibid.
awarded damages in compensation. As far as the holder is concerned, the prohibitory interdict restores the status quo ante. It could only be regarded as unfair as between the holder and grantor if one were to argue that the grantor should be punished more harshly for breaching the contract, which is not generally regarded as a valid aim of contract law rules.

It could, however, be argued that a prohibitory interdict or order setting aside a transfer to a mala fide third party does not, in fact, adequately protect the holder’s interests by restoring the status quo ante. It must be remembered that the grantor’s breach would, in most cases, be deliberate. A grantor who has deliberately breached a non facere duty can be expected to flout this duty again in the future. There is therefore a very great risk that the grantor may try to contract with another bona fide third party and pass transfer before the holder is able to prevent that by interdict. In this sense, a prohibitory interdict and setting aside of a mala fide transfer are ineffective remedies to protect the status quo ante and, therefore, the holder’s interests.

Granting a stronger remedy to the holder should also not be seen as ‘punishment’, but as discouraging breach as being conduct detrimental to the interest of society, a policy consideration which courts in South Africa have taken into account in the formulation of default contract rules.109

In response to the argument that the holder often can take steps to make effective the remedies aimed at restoring the status quo ante, it should be noted that there is not much a holder can do to protect his right against bona fide third parties in the case of movables. A preferential right to conclude a transaction other than a sale can generally also not be safeguarded by registration. To expect of the holder to stipulate a penalty is often unrealistic due to ignorance of this possibility or inequality of bargaining power. Proponents of the strictly bare-preference construction may respond that, if the grantor has the greatest bargaining power, this is a further reason to construe the preference agreement in a manner to which the grantor would most likely agree, namely so as to restrict as little as possible the grantor’s freedom to deal with her property as she pleases. As such an interpretation does not give rise to exploitation of the holder, there is no good reason for departing from the likely consent of the grantor.

Proponents of the purely negative preference contract acknowledge, however, that the holder may claim damages to place him in the position that he would have been in had the grantor performed in terms of the main contract.110 This approach acknowledges the need to protect the holder’s interest in obtaining performance of the main contract. If there is not, in fact, a duty on the grantor to conclude or perform the main contract with the holder at some point, this manner of calculating damages is difficult to explain. It is,


110 See for example Henrich op cit note 25 at 367–8.
therefore, logical to allow, subject to the courts’ discretion to refuse specific performance, an order that the grantor perform the main contract. Proponents of the bare-preference construction could reply that the award of damages is not inconsistent with the absence of an enforceable duty to contract with the holder. The claim for damages aims to place the holder in the position he would have been in had the contract not been breached. The grantor could have fulfilled the preference contract in one of two ways. First, by not contracting with anybody and, secondly, by contracting with the holder. As the first situation is unlikely, because the breach clearly shows the grantor’s wish to contract with somebody, it is more logical to compensate the holder on the basis of the second scenario. In other words, the holder claiming damages can usually prove, on a balance of probabilities, that if the grantor had complied with the contract, he would have contracted with the holder.

To the arguments in favour of a remedy aimed at performance of the main contract could be added the fact that Henrich’s main authority for construing the ‘normal Vorhand’ as enforceable by negative remedies only is a decision of the Bundesgerichtshof in respect of a publishing contract.\textsuperscript{111} There are special reasons for limiting a publisher to such negative remedies that do not apply in other contexts. First, it would normally be too late to grant the holder a remedy which ultimately entails specific performance of the eventual publishing contract, as a transfer of the intellectual property rights often takes place simultaneously with the conclusion of the publishing contract with that third party.\textsuperscript{112} As these rights are analogous to real rights, the bona fide third party is in a stronger position than the holder. Secondly, forcing the author into a publishing contract with the holder would jeopardise the very close working relationship that such contracts require, which could explain the courts’ wariness to grant such an order, instead of only negative remedies or damages. Thirdly, the courts could be swayed by the vulnerable bargaining position of an author, as grantor, as against the publishing company to construe the preferential right as narrowly as possible. This is often not a relevant consideration in other contexts.

Accordingly, there are compelling policy reasons both in favour of and against allowing enforcement of performance of the main contract upon the grantor contracting with a third party.

In my view, all of the interests and policy considerations at stake are most fairly balanced by a default rule that the holder is allowed to enforce performance of the main contract upon breach, subject to the court’s usual discretion, as long as the breach concerns nothing less than a valid offer to, or contract with, a third party. The grantor’s interest in the minimum possible curtailment of his freedom to deal with his property, and in obtaining the best

\textsuperscript{111} BGH 22, 347.

\textsuperscript{112} See Walter Bappert & Theodor Maunz \textit{Verlagsrecht} (1952) § 1 (marginal note 45) with reference to BGH 1962 NJW 1197 and RGZ 108, 58.
possible price for it, is sufficiently protected by this definition of breach, as well as by a default rule that the grantor may cure that breach until the exercise of the preferential right by the holder. This default rule provides sufficient scope for the grantor to sound out the market freely, which is the fundamental policy justification of a limited interpretation of the holder’s rights. However, once the grantor has deliberately breached the preference contract, he has gone beyond sounding out the market, and the justification for a limited interpretation falls away. In such a situation, it is unfair to restrict the holder to a claim for damages or a prohibitory interdict. Damages would not sufficiently compensate the holder where she has a non-pecuniary interest in the conclusion of the main contract.\footnote{An example would be a sentimental interest in obtaining a family heirloom hitherto held by the grantor on condition that family members have the first chance to buy it from him.} A prohibitory interdict would also often be ineffective against a grantor who has willfully breached the preference contract and who may be antagonized by the preceding litigation. The innocent third party’s interest in obtaining performance of her contract could be balanced against the holder’s interest, taking account of the equities in each specific case and the equitable discretion of the court to refuse specific performance. This equitable discretion is also sufficient to protect grantors, such as authors, who have a strong interest in not being forced into a contract with the holder against their will due to the close working relationship which such a contract requires.

Even if the policy considerations relevant to the remedies for breach are, in fact, rather on a par, this does not provide sufficient justification for deviating from the present position of our law on this issue.\footnote{Cf Jan L Neels ‘Regsekerheid en die korrigerende werking van redelikheid en billikheid (deel 2)’ 1999 TSAR 256 at 269.} Ever since the \textit{Oryx} case, South African courts have accepted that the holder may ultimately enforce performance of the main contract upon breach of a preference contract.\footnote{See Naudé op cit note 3 para 1.1.}

South African law is not totally clear, however, on what circumstances would trigger such a remedy. First, the \textit{Oryx} case did not finally decide what would trigger the \textit{Oryx} mechanism, leaving open the possibility that, in addition to a contract with a third party, a grant of an option would do so.\footnote{At 908F–G.} Secondly, the Supreme Court of Appeal as well as other courts and commentators have left open the possibility that an order for specific performance of the duty to make an offer is still available.\footnote{Hirschowitz v Modman supra note 6 at 764G–H. However, this assumption may have been made in \textit{Hirschowitz v Modman} because the application was launched before the decision in \textit{Oryx}. See Lubbe op cit note 43 at 139. See also \textit{Rogers v Philips} 1985 (3) SA 183 (E) 187D which held that a right of pre-emption merely gives the holder a personal right to an offer by the owner. Commentators who still see a need for a remedy of specific performance in the traditional sense include A J Kerr \textit{The South African Law of Sale and Lease} 2 ed (1996) 410; Cooper op cit note 10 at 144–6 and Reinecke & Otto op cit note 3. Cf also A D J van Rensburg & S H Treiman \textit{The Practitioner’s Guide to the Alienation of Land Act} 2 ed (1984) 70–1; Lubbe op cit note 6 at 128 and 130; Floyd op cit note 3 at 267; Lotz ‘Purchase and sale’ in Reinhard Zimmermann & Daniel Visser (eds) \textit{Southern Cross: Civil Law and Common Law in South Africa} (1996) 386. Eiselen op cit note 3 at 99 rejects the \textit{Oryx} mechanism and advocates a remedy of specific performance in the traditional sense only.} As previously
noted, many of these commentators and courts do not specifically limit the trigger event for such a remedy to the conclusion of a contract with, or an offer to, a third party. Some specifically argue that a lesser manifestation of a desire to sell should be sufficient.

There is, however, authority for a default construction in terms of which the holder is allowed to enforce the main contract only upon breach in the form of an offer to, or contract with, a third party.

The *Oryx* case itself envisages an *obligatio non contrahendo cum tertii*, whereas the holder may unilaterally create the main contract and pray for its performance on conclusion by the grantor of a contract with a third party, and perhaps on the granting of an option. This clearly implies that a lesser manifestation of a desire is insufficient.

The majority in *Owsianick* did not unambiguously exclude the possibility of a positive remedy upon the grantor actually contracting with a third party. In his discussion of the ius commune texts on naastingsrechte Botha JA emphasized that none of these texts grants the holder the right to obtain the object before conclusion of a contract with a third party. This suggests that Botha JA does not totally exclude the possibility of a positive remedy upon a sale in breach of the preference contract. On the facts, the court did not need to consider the effect of an actual option contract or sale to a third party with immediate effect, because the grantor gave the third party an option which would only take effect after termination of the lease. The majority of the court did not find this indication of a desire to sell to be a breach of the obligation not to sell to third parties during the lease period.

Interestingly, Van Rensburg & Treisman argue, in effect, that the *Hartsrivier* construction (which does not force the grantor to contract on a mere manifestation of a desire to contract) should be combined with the *Oryx* mechanism. They mention both in their discussion of the present legal position without branding them as alternative approaches. They also state that the *Oryx* mechanism should be available only upon conclusion of a contract with a third party.
Such a default regime furthermore reminds one of the combined voorcoop and nacoop procedures of ex lege naastingsrecht in some areas in Roman-Dutch times. Under the voorcoop procedure, the owner could announce his intention to sell in a public place before the sale to a third party. This could be equated with a public invitation to make an offer. A family member, as holder of a naastingsrecht, could then declare his willingness to buy. This was the voorcoop procedure. However, if the owner failed to follow this procedure, and sold directly to a third party, a holder of a naastingsrecht could still exercise the right in terms of the nacoop procedure, thereby stepping into the contract concluded with the third party. This suggests a construction that the owner was actually supposed first to offer the opportunity to contract to relatives before contracting with a third party (an obligatio non contrahendo cum tertii or negative obligation). If the owner did not fulfil this duty, the holder of the naastingsrecht could, only upon the owner contracting with a third party, obtain performance of the main contract on the same terms.

CONCLUSION

The best way to deal with the multiplicity of possible constructions encountered in the case law is to prevent disputes by means of clear drafting. Drafters should clearly describe the remedies available to the holder and the point at which these may be exercised.

The breakdown of the system of precedents relating to preference contracts, which occurred time and again as wrong interpretations of previous decisions were relied upon and contrary decisions disregarded, as well as the uncertainty surrounding preference contracts in Roman-Dutch law, requires a proper policy analysis of these contracts in order to arrive at a fair set of residual rules for them.

Two basic questions should be answered in this regard. First, whether any manifestation of a desire to conclude the main contract should amount to a trigger event or breach of the preference contract, or whether only an offer to or contract with a third party should suffice. In this respect, two default types of preference contract should be recognized. Where the preference contract predetermines the eventual contract price, any manifestation of a desire to conclude the main contract should entitle the holder to bring the main contract into existence, since the grantor has no interest in sounding out the market once the decision to contract is taken. Such a preference contract amounts to a conditional option. Where the preference contract does not predetermine the price, or simply refers to the price which the grantor would accept from a third party, the default rule should be that nothing short of a...
valid offer to, or contract with, a third party would trigger the holder’s right or amount to breach by the grantor. The grantor should be left as free as possible to sound out the market and obtain the best possible price for his property without fear of his conduct breaching or triggering the holder’s right.

The second basic question to be answered applies to this second, ordinary class of preference contracts, namely whether the holder may ultimately enforce performance of the main contract on breach, or whether the holder should instead be limited to damages and remedies aimed at preserving or restoring the status quo ante. The opposing policy considerations in favour of each of these approaches can be most fairly balanced by a rule that the holder would be entitled ultimately to enforce performance, but only upon the grantor having breached the contract in the form of contracting with a third party or making an offer to a third party. The legal nature of the holder’s remedy will be considered in a separate publication.

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**LEGAL CULTURES AND TRADITIONS**

‘In thinking about the laws of the world, in their diversity, we appear driven by an epistemological urge to think of different laws as representative of larger, explanatory categories of being. It is not clear why this is so but it is a widespread phenomenon. The laws of the world are thus seen or grouped (the list is probably not exhaustive) as systems, cultures, traditions, styles, mentalities, families, circles or spheres (Rechtskreise) or civilizations. The effort has been in large measure taxonomic, a means of satisfying the “rage for order” yet there have been varying emphases on the importance of taxonomy. The efforts have been efforts of construction and not deconstruction. Law is presumed and sought to be explained or justified in terms of the larger ontological notions. If we think of law as a social good, there is nothing here which is alarming. The laws of the world should emerge strengthened from this demonstration of interrelationships and larger forms of intellectual justification. It appears in any event inescapable.’