

Options v Rights of first refusal

If you market, buy or sell immovable property on a regular basis you will at some stage be faced with Rights of First Refusal and Options. Although they might be similar in nature, they have core differences. Failure to understand these differences is simply not an option.

In both cases you will have a *grantor* and a *grantee*. The *grantor* is the person who grants someone else the option or right of first refusal in respect of a property. The person who receives the right, being the holder of the option or right of first refusal, is of course the *grantee*.

An option exists when the grantor offers the grantee the option to buy a property. As soon as the option is exercised, a valid and enforceable sale agreement is born. The offer will remain open for acceptance for as long as the option remains valid. In other words, for as long as there is an option, the grantee can force the grantor to sell the property by exercising the option.

However, since the option will become a valid sale agreement when exercised, it is crucial that the option must contain all the essentialia of a sale agreement, as provided for in the *Alienation of Land Act, 68 of 1981*. Should the option not contain all the essentialia, it won't be capable of becoming a valid sale agreement when executed, and consequently, the option itself will be unenforceable.

A right of first refusal, on the other hand, differs from an option in that it does not have to contain all the essentialia of a sale agreement. Where a right of first refusal is given, the grantor is prohibited from selling the property to a third party without first giving the grantee the opportunity to purchase the property on terms that are no less favourable than the terms on which the property will be sold to the third person.

Put simply, the grantor is saying "Mr Grantee, if I ever receive an offer on my property, I will first give you the opportunity to match that offer."

As a final remark, it should be noted that the grantee cannot force the grantor to sell the property, as in the case of an option. The grantee simply has a right to match an offer whenever the grantor receives one, and if the grantor decides to sell.

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