WHAT IS THE DIFFERENCE BETWEEN AN "OPTION" AND A "PRE-EMPTIVE RIGHT"?

Lease Agreements of immovable property frequently contains the following term; 'In the event of the Lessor receiving, at any time during the period of this lease, a written offer of purchase of this property, the Lessee shall have the 'option' to purchase from the Lessor, at the same price and on the same conditions as the written offer received by the Lessor.'

At the heart of the distinction between an "option" and a "right of pre-emption" lies the obligation imposed on the owner in terms of an option to sell, whereas the grantor of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell, to offer the property to the holder of the right of pre-emption upon the terms as contained in the contract creating that right.

Courts of law have found that such a term obliges the owner to offer the property to the holder of the right **only** if he receives a written offer which he is desirous of accepting, that the language used is consistent with the creation of a right of pre-emption and not an option, despite the use of the word "option" in the clause.

The holder of a right of pre-emption is entitled to seek the positive enforcement of his rights and when the right of pre-emption comes into operation, the grantor is subject to an enforceable obligation to offer the property for sale to the grantee, upon the terms offered to the third party.