

Case no 219/88
/MC

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between

MIGNOEL PROPERTIES (PTY) LTD Appellant

- and -

DAVID RODERICK KNEEBONE Respondent

CORAM: JOUBERT, BOTHA, NESTADT, STEYN JJA
et FRIEDMAN AJA.

HEARD: 8 September 1989.

DELIVERED: 22 September 1989

J U D G M E N T

FRIEDMAN AJA.

FRIEDMAN AJA:

On 14 October 1982 a written agreement of lease was concluded between Himelsein Properties (Pty) Ltd (the lessor) and Computalarm Transvaal (Pty) Ltd (the lessee) in terms of which the lessor leased certain premises to the lessee for a period of three years with an option to renew for a further two years. The lease was subject to a condition precedent that certain named persons (who did not include the respondent) were to bind themselves to the lessor as sureties and co-principal debtors for the lessee in terms of a deed of suretyship approved by the lessor. This condition was stated to be

for the benefit of the lessor who could, in its discretion, waive compliance therewith, which the lessor in fact did. Subsequently, however, on 8 February 1983 respondent in writing bound himself to the lessor as surety and co-principal debtor for the due payment by the lessee "of all such sums of money which may now or at any time be or become owing by or claimable from the debtor(s) (i.e. the lessee) to the creditor (i.e. the lessor) from any cause whatsoever, in respect of" the lease. On the same date one Gorton entered into an identical suretyship undertaking.

On 6 December 1983 the lessor sold the immovable property of which the leased premises formed a part, to appellant. The lessee failed to pay rental in an amount of R21 504-00 in

respect of the period from August 1984 to March 1985 and appellant sued Gorton and respondent (as first and second defendants respectively) in the Magistrate's Court, Johannesburg, for payment of the outstanding rental.

Respondent filed a Special Plea and at the same time pleaded over on the merits. In the Special Plea he alleged that as there had been no cession to appellant of the lessor's rights in and to the lease between it and the lessee, alternatively that no such cession had been alleged in the particulars of claim, appellant was not entitled to claim payment of the outstanding rental from respondent. By agreement the matter was argued before the magistrate on the basis of the facts alleged in the Special Plea

only.

The magistrate, relying on the decision in Pizani and Another v First Consolidated Holdings (Pty) Ltd 1979(1) SA 69(A), held that appellant had, by operation of law, "stepped into the shoes" of the lessor and that upon transfer the relationship of lessor and lessee continued between appellant and the lessee without the necessity of a formal cession of rights. He also held that appellant's right to claim compliance with the lease against the lessee, extended to a surety for the lessee and that it was therefore unnecessary for the lessor to have ceded its rights under the suretyship to appellant. He accordingly dismissed the Special Plea with costs.

Respondent's appeal to the Witwatersrand Local Division against the dismissal of his Special Plea was upheld. Appellant applied for leave to appeal against the judgment of the Witwatersrand Local Division, but that was refused. He was, however, on petition to the Chief Justice, granted leave to appeal to this Court.

In Pizani's case the Appellants, who had bound themselves as sureties for the due payment of any moneys which were or may become owing by the lessee to the lessor arising out of certain leases of equipment, were sued for payment of arrear rental. The plaintiff (respondent) alleged that the lessor had ceded to it his right, title and interest in and to the agreements of

lease as well as all rights of ownership in and to the leased equipment. The plaintiff alleged, further, that the deeds of suretyship had also, on an unspecified date, been ceded to it by the lessor. It was argued, on behalf of appellants, that unless the cessions of the deeds of suretyship were effected simultaneously with the cession of the rights under the leases, the sureties were relieved of their obligations under the deeds of suretyship. Dismissing this argument, the Court held (at 78) that in the absence of any contrary indications in the cession or in the deed of suretyship, the cessionary of rights acquires the cedent's rights against both the principal debtor and the surety and he may sue the surety without the necessity of a separate

cession in respect of the rights against the surety.

Pizani's case is distinguishable from the facts of the present case: in Pizani's case there was an express cession by the lessor of his rights under the lease whereas in casu there was no such cession. It was argued on behalf of the appellant, however, that the effect of the maxim "huur gaat voor koop" was that the appellant, as purchaser, took the place of the lessor and that a tacit cession of the lessor's rights occurred which, on the basis of Pizani's case, entitled the appellant, as cessionary, to sue respondent on the suretyship. Respondent's counsel on the other hand contended that the rights and obligations created by virtue of the "huur gaat voor koop"

rule, could not be equated with and did not embody a cession of rights or an assignment of obligations and that there was accordingly no room for the application of the principles enunciated in Pizani's case.

It is necessary to consider the scope and effect of the maxim "huur gaat voor koop". It had no place in Roman Law. In Roman Law a lessee had no jus in re in the leased property. He merely had a jus in personam against the lessor. A purchaser of the leased property was not bound to recognise the lease unless it was a condition of the sale that he should. As stated in Code 4.65.9: "Emptori quidem fundi necesse non est stare colonum cui prior dominus locavit nisi ea lege emit". (It is not necessary for the purchaser

of land to permit the tenant to whom the former owner leased it to remain until his lease has expired, unless he bought the property under this condition.- Scott's translation.) In the absence of such a condition the purchaser could evict the lessee, leaving the latter with merely a claim for damages against his lessor. See Buckland: A Text-book of Roman Law, 3rd ed, p 502.

The origin of the rule "huur gaat voor koop" can be ascribed to a desire in certain Western European areas, including the Province of Holland, to alleviate the position of a lessee under the Roman Law. Out of Germanic and Dutch customs and local legislation, there grew a measure of protection for a lessee which came to be expressed by the maxim "huur gaat voor koop",

which is a concise statement of the effect of such customs and legislation on leases of land and houses. See Graham v Local and Overseas Investments (Pty) Ltd 1942 AD 95 at 110-111; Kessoopersadh en n Ander v Essop en n Ander 1970(1) SA 265 (A) at 274.

The history of the development of the maxim has been dealt with in a three-part series of articles by Professor J C de Wet, entitled "Huur gaat voor koop", which appeared in 1944 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 74 et seq, 166 et seq and 226 et seq. Professor de Wet has dealt exhaustively with all the Roman-Dutch writers on the subject and it is unnecessary to repeat all those references. Suffice it to say that the maxim has not been dealt with in any

great depth by the writers. Thus Professor de Wet states, op cit 190:

"Alhoewel die gelding van die reël 'huur gaat voor koop' vir die provinsie Holland deurgaans aanvaar word, is dit besonder moeilik om uit wat ons skrywers meedeel af te lei wat presies die vereistes was vir die toepassing van die reël, en wat die presiese werking of gevolge van die reël was."

Professor de Wet analyses the authorities and concludes that the effect of the operation of the maxim is that a lessee acquires a real right in respect of the leased property. He then proceeds to deal with the relationship created between lessee, purchaser and seller and points out that it is generally accepted that a purchaser may not

evict a lessee and that, according to Voet, the lessee may vacate the property and sue the lessor/seller for damages. However, if the lessee elects to remain in the property, the question arises as to whether the purchaser becomes the lessor and the seller disappears from the scene. On this question Professor de Wet, having pointed to the difference of approach between Voet and Schorer, suggests (op cit 193) that one could conclude, from the vague pronouncements of the authorities,

"dat die koper die verkoper vervang as skuldeiser ten aansien van die regte wat vir die verhuurder uit die ooreenkoms voortvloei, en natuurlik onderhewig aan alle verweermiddels wat die huurder mag hê, soos bv. dat hy die huurpenninge

reeds betaal het".

Professor de Wet's view, however, is that a purchaser is obliged to tolerate the lessee, not because he is bound by the contract, but because of the real right enjoyed by the tenant. (Op cit, 250).

This theme is further developed in De Wet and Yeats: Die Suid-Afrikaanse Kontraktereg en Handelsreg, 4th ed, at 334-5, where the authors state that the maxim "huur gaat voor koop" does not create contractual rights or obligations between the purchaser and the lessee, which can only be achieved by cession and assignment. They express strong criticism of the decisions of our courts to the effect that the purchaser of leased

property becomes entitled, on receiving transfer, to claim the rental from the lessee and that the seller is relieved of his obligations under the lease. In this regard De Wet and Yeats state (op cit 334) :

"Hierdie houding is onverdedigbaar, eenvoudig omdat dit 'n flagrante afwyking is van basiese en goeie beginsels van die verbintenisreg."

The view adopted by Professor de Wet in his article in THRHR and of the authors of Die Suid-Afrikaanse Kontraktereg en Handelsreg, appears, however, to overlook the sui generis nature of the "huur gaat voor koop" rule. As RABIE AJA (as he then was) pointed out in Kessoopersadh's case, supra at 283 B-C:

"Dat sessie of delegasie gewoonweg nodig is om regte of verpligtinge, na gelang van die geval, te laat oorgaan, is natuurlik so, maar ek betwyfel die korrektheid van die benadering om die koper se reg op die huurgeld en sy gebondenheid aan die bepalinge van die huurkontrak, soos dit deur die Howe erken word, te ontken op grond daarvan dat dit nie in die lig van die gewone beginsels van die kontraktereg te verklaar is nie."

RABIE AJA, went on to state, at 283 C-D:

"Na dit my voorkom, moet die huurder se reg op die huurgeld en sy gebondenheid aan die bepalinge van die huurkontrak in die geskiedenis van die reël huur gaat voor koop gesoek word. Soos hierbo aangedui is, was dit 'n nuwe reël wat weens praktiese en billikheidsoorwegings

tot stand gekom het, en dit sou derhalwe ook nie vreemd wees as daar in sulke omstandighede verhoudinge tussen huurder, verhuurder en koper ontstaan en ontwikkel het wat nie volgens bekende reëls van die kontraktereg te verklaar is nie."

Although the Roman-Dutch law sources in regard to the legal relationships created by the "huur gaat voor koop" rule are sketchy, it can, in my view, be regarded as generally accepted that the effect of the rule is that the purchaser steps into the shoes of the lessor. Nelissen in his thesis entitled "Huur en Vervreemding", (1880) states the position thus at 206:

"Wat de verhoudingen betreft door vervreemding van een verhuurd goed

geboren, hebben we gezien hoe in alle streken waar het koop breekt geen huur gold, de nieuwe eigenaar in de plaats werd gesteld van den oorspronkelijken verhuurder, hoe tusschen kooper en huurder de huurovereenkomst werd voortgezet, zoodat al dadelijk na de vervreemding aan den kooper de huurpenningen moesten worden betaald, terwijl van den anderen kant deze ook de pligten des verhuurders had na te komen."

And at 262 Nelissen states:

"Toen we den regel in ons Oud-Hollandsch regt onderzochten, hebben we gevonden, hoe in alle streken waar het 'koop breekt geen huur' gold, de beteekenis van den regel deze was, dat de nieuwe eigenaar de plaats innam van den oorspronkelijken verhuurder, aan den nieuwen eigenaar de huurpenningen

moesten worden uitbetaald."

Bodenstein in his thesis: Huur van Huizen en Landen Volgens het Hedendaagsch Romeinsch-Hollandsch Recht (1907) states at 133:

"Dat de kooper geheel treedt in de schoenen van den verhuurder, dus ook alle contractueele verplichtingen uit het huurcontract op zich moet nemen, wordt nergens met zooveel woorden door de oude schrijvers gezegd."

Bodenstein goes on, however, to set out the position as follows at 133-134 :

"Wanneer wij bedenken, dat de verhuurder zijne verplichtingen tegenover den huurder alleen naar eisch kan vervullen, als hij de beschikking heeft over het gehuurde goed, zouden des huurders

rechten gebrekkig beschermd zijn, wanneer wij aannamen, dat de huurder zich tot nakoming van de contractueele verplichtingen te wenden had tot den ouden verhuurder, omdat deze veelal er niet toe in staat zal zijn. Het is ook moeilijk aan te nemen, dat men den verhuurder nog als contractueel gebonden beschouwde, nadat men hem het recht op de huurpenningen ontnomen had. Hier wordt dus den huurder een nieuwe crediteur in plaats van den vroegeren toegevoegd, zonder dat hij zelf hierin heeft toegestemd en volgt een opvolger onder bijzonderen titel ook op in de persoonlijke verplichtingen van zijnen voorganger, beide zeer ongewone verschijnselen."

This approach has also been followed in this Court. Thus in De Jager v Sisana 1930 AD 71, WESSELS JA stated at 82:

"This principle [i.e. the Roman Law principle that a sale breaks a lease], however, was modified by the Roman Dutch law, and that system adopted the rule that the sale does not break the lease but that the purchaser becomes the landlord of the tenant under the same conditions as his lease with the seller."

In De Wet v Union Government 1934 AD 59, BEYERS JA in a dissenting judgment, expressed the view in an obiter dictum, that by taking transfer of the leased property, the purchaser acquired a tacit cession of the seller's rights under the lease. However, in delivering the judgment of the Court, STRATFORD ACJ, with whom DE VILLIERS JA and GARDINER AJA concurred, stated at 63:

"This being a contract of lease, the purchaser is bound on it by the doctrine of huur gaat voor koop, and bound also by all its material terms."

Finally, in Kessoopersadh's case at 283

F-G, RABIE AJA stated:

"Ek verwys ten slotte na menings van enkele van ons ou skrywers wat m.i. getuig van h opvatting dat die koper in die plek van die verhuurder tree en dat hy gebonde is aan die bepalings van die huurkontrak oor die grond wat hy koop."

He then referred, in support of this conclusion, to a number of Roman-Dutch writers including Voet, Grotius, Groenewegen and Van Leeuwen. In a minority judgment in Kessoopersadh's case, OGILVIE

THOMPSON JA (as he then was), after referring to De Jager's case and De Wet's case, said the following at 289G-290A :

"There is also a line of decisions in the Provincial Divisions pointing in the same direction. Of these the most striking is perhaps Boshoff v Theron, 1940 TPD 299, wherein GREENBERG, JP, and SCHREINER, J, decided that, once the purchaser of land which is subject to a lease receives transfer, the landlord-vendor is divested both of his rights and his obligations qua landlord. While the practical convenience of accepting the situation as indicated in the above-mentioned decisions is apparent, they have been the subject of considerable weighty criticism in a series of articles by Professor J C de Wet in vol 8 (1944) Tydskrif, more especially at pp 239 et seq, and in De Wet & Yeats,

Kontraktereg, 3rd ed, p 280. Without pausing to examine that criticism, it is to be observed that the above-mentioned decisions were all dealing with the situation whereunder the purchaser had, as a result of the protection conferred upon a tenant by the maxim 'huur gaat voor koop', admittedly become bound by the lease."

From the foregoing it follows, in my view, that once the lessee elects to remain in the leased premises after a sale, the seller ex lege falls out of the picture and his place as lessor is taken by the purchaser. No new contract comes into existence; all that happens is that the purchaser is substituted for the seller as lessor without the necessity for a cession of rights or an assignment of obligations. On being so

substituted for the seller, the purchaser acquires all the rights which the seller had in terms of the lease, except, of course, collateral rights unconnected with the lease.

Professor van Loggerenberg, in my view, sets out the position correctly in his doctoral thesis entitled "Skuldoorname en Kontraksoorname" (Leiden 1981), when he states, in regard to the relationship between the lessee and the new owner of the leased property, at 292-3 :

"Met betrekking tot die verhouding tussen die huurder en die nuwe eienaar van die huursaak het ons houe hul op die standpunt gestel dat die huur gaat voor koop-reël meebring dat laasgenoemde in die plek van die oorspronklike verhuurder te staan kom. Daar is by geleentheid verklaar dat 'the new owner

steps into the shoes of the old owner as landlord' en dat die koper 'becomes the landlord of the tenant under the same conditions as his lease with the seller'. Dit veroorsaak dat die oorspronklike verhuurder sy regte ingevolge die huurkontrak verloor en ook van sy verpligtinge bevry word, terwyl die nuwe eienaar van die saak dienoooreenkomstig opvolg in die regte en verpligtinge van sy voorganger en gevolglik daarna self as verhuurder optree.

Die resultaat van die toepassing van die huur gaat voor koop-reël by vervreemding van die huursaak is die vervanging van een van die oorspronklike partye tot die huurkontrak (die verhuurder) deur 'n nuwe party, welke vervanging outomaties van regsweë volg nadat eiendomsreg in die saak formeel aan die verkryger oorgedra is, dit wil sê sonder die medewerking van die oorblywende party tot die kontrak (die

huurder)."

After pointing out that there have been attempts to explain this substitution by reference to the rights which flow from a transfer of ownership or by reference to a tacit cession, Professor van Loggerenberg states at 294 that neither of these explanations is acceptable, since

"Die koopkontrak tussen die verhuurder en die koper en die daaropvolgende oordrag van die eiendomsreg stel bloot die causa vir die partyvervanging daar."

Later on the same page he expresses his conclusion as follows :

"Dit word ter oorweging gegee dat die enigste aanvaarbare verklaring vir hierdie regsverskynsel geleë is in die

konstruksie daarvan as kontraksoorname wat van regsweë intree (òf 'n kombinasie van ex lege sessie en skuldoorname). Die feit dat die koper die oorspronklike verhuurder as kontraksparty vervang en met al sy regte en verpligtinge bekleed word, terwyl daar geen vernuwing van die kontrak plaasvind nie, dui onteenseglik daarop."

This approach accords fully with the principle which emerges from the authorities referred to above, namely that the effect of the "huur gaat voor koop" rule is that the purchaser is substituted as lessor in the place of the seller. It is a logical and natural result of such a substitution that the purchaser also acquires the rights which the seller had against a surety for the lessee's obligations under the

lease. The respondent bound himself to the lessor in terms of his deed of suretyship, for the due payment by the lessee "of all such sums of money which may become owing from any cause whatsoever, in respect of (the) lease". As the appellant was substituted as lessor, he acquired the lessor's right to sue respondent as surety, in the same way as the lessor could have done. This was not a collateral right unconnected with the lease; it was a right which the lessor had, qua lessor, in respect of the tenant's obligations under the lease.

In the Court a quo, GOLDSTEIN J with whom STRYDOM J concurred, held that the "huur gaat voor koop" rule was sui generis, that there was no room for extending its operation by analogy with

other legal principles or rules and that as the rule was silent in regard to the liability of a surety for the lessee, it could not result in the surety's becoming liable to the purchaser of the leased property. The Court a quo went on to hold that as there had been no cession in the present case, Pizani's case did not apply.

This approach overlooks the basic feature of the "huur gaat voor koop" rule, namely that its effect is to substitute the purchaser as lessor. Once this is recognised, the necessity for a formal cession does not arise: the purchaser, as a matter of law, is substituted as lessor in place of the seller and as a natural and logical concomitant of that position, the

purchaser acquires all the rights which the lessor enjoyed, qua lessor, in terms of the lease. Those rights include the right to claim moneys owing in terms of the lease from the lessee's surety in the event of the lessee failing to pay.

For these reasons the appeal must succeed. In regard to costs the Court a quo, in upholding the appeal, ordered that "the limitation in Rule 69(1) regarding counsel's fees shall not apply". The reference to Rule 69(1) is obviously an error. That rule provides that only such fees as are consequent upon the employment of one advocate shall be allowed as between party and party unless the court orders otherwise. As only one counsel appeared on either side in the Court a quo, the court could not have intended to refer

to Rule 69(1). What the Court a quo obviously had in mind was Rule 69(3). That Rule limits counsel's fees in the case of an appeal from the magistrate's court, to the maximum prescribed by the tariff contained in the Rule, unless the court otherwise orders. Having regard to the complexity of the matter, an order that Rule 69(3) should not apply, was certainly warranted and would have been the correct order for the Court a quo to have made.

It is ordered as follows :

The appeal is upheld with costs. The order of the Court a quo is set aside and there is substituted for it, the following order :

"The appeal is dismissed with costs. The limitation in Rule 69(3) regarding counsel's fees shall not apply."

G. FRIEDMAN AJA.

JOUBERT	JA)	
BOTHA	JA)	
NESTADT	JA)	Concur.
STEYN	JA)	