

A GENNA-WAE PROPERTIES (PTY) LTD v
MEDIO-TRONICS (NATAL) (PTY) LTD

APPELLATE DIVISION

CORBETT CJ, HEFER JA, NESTADT JA, EKSTEEN JA and NIENABER JA

B 1995 March 13, 30

Case No 435/93

C *Landlord and tenant—Lease—Termination of—Whether lessee entitled to terminate lease on change in person of lessor—Impact of 'huur gaat voor koop'—Alienation of leased property consisting of land or buildings pursuant to sale not bringing lease to end—New owner substituted ex lege for original lessor—New owner acquiring by operation of law all rights of original lessor under lease—New owner obliged to recognise lessee and permit him to continue to occupy premises—Lessee in turn bound by lease and, provided new owner recognises his rights, does not have any right to resile from contract—Lessee not entitled to terminate lease on purchase of premises by new owner from original lessor.*

D In terms of South African law the alienation of leased property consisting of land or buildings in pursuance of a contract of sale does not bring the lease to an end. The purchaser (new owner) is substituted *ex lege* for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease, provided that he (the lessee) continues to pay the rent and otherwise to observe his obligations under the lease. The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract. This is the impact of *huur gaat voor koop* in modern South African law. (At 939A–C/D.)

E The decision in the Durban and Coast Local Division in *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 (1) SA 106 reversed.

F Appeal from a decision in the Durban and Coast Local Division (Squires J), reported at 1994 (1) SA 106. The facts appear from the judgment of Corbett CJ.

G *M J D Wallis SC* for the appellant: The only question pursued in the appeal is whether the Court *a quo* was correct in the finding that the respondent was entitled to elect to terminate the lease when the premises were sold by the lessor to the appellant. The appellant does not pursue the appeal on the grounds that, if the respondent was vested with such a right of election, it exercised it in favour of continuing the lease. The judgment in the Court *a quo* has subsequently been dissented from in the matter of *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320, a judgment of Heher J, sitting in the Witwatersrand Local Division. The question is whether this judgment or that of the Court *a quo* is correct. The development of the rule *huur gaat voor koop* was reviewed by this Court in *Mignuel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) at 1047I–1051H. See also *Graham v Local and Overseas Investments (Pty) Ltd* 1942 AD 95 at 110–11; *De Wet* 1944 *THRHR* at 74 *et seq*, 166 *et seq* and J 226 *et seq*.

LWA 401-U
In the judgment in *Mignuel Properties (supra)* this Court concluded that A
'(it) can . . . be regarded as generally accepted that the effect of the rule is that the purchaser steps into the shoes of the lessor'. (At 1049F–G and 1051H.) This conclusion was in accordance with similar views previously expressed by this Court in *De Jager v Sisana* 1930 AD 71 at 82 (a minority judgment by Wessels JA); *De Wet v Union Government* 1934 AD 59 at 63 B (the majority judgment of Stratford ACJ); *Kessoopersadh en 'n Ander v Essop en 'n Ander* 1970 (1) SA 265 (A) at 283F–G (the majority judgment of Rabie AJA). It also accords with decisions in the Provincial Divisions, such as *Scrooby v Gordon & Co* 1904 TS 937 at 945; *Boshoff v Theron* 1940 TPD 299 at 302–5; and *Nicholas v Wigglesworth* 1937 NPD 376 at 380–1; C and the views of academic writers, both those cited in the judgment in *Mignuel (supra)*, namely *Nellisen* at 1049H–I; *Bodenstein* at 1050A–B; and *Van Loggerenberg* at 1051D–E; and others. See also *Wille Landlord and Tenant in South Africa* 4th ed at 124; *Cooper Landlord and Tenant* 2nd ed at 288 and 290. Whilst none of the abovementioned cases dealt with the precise point in issue in this case, it is significant that the statements that D the purchaser 'steps into the shoes of the landlord' or that 'the sale does not break the lease' are not qualified by reference to the contingency that the tenant may on that ground bring the lease to an end even though the purchaser is willing for the lease to continue. The source of the contention E that the lessee is vested with a right, on the sale and transfer of the property to a new owner, to elect to terminate the tenancy rather than continue with the new owner substituted for the old under the lease is a passage in *Voet* 19.2.17 (*Gane's* translation vol 3 at 424–5). In that passage, after pointing out that under the Roman law a sale put an end to the lease, *Voet* goes on to say:

F 'But there has long since been a departure from this law by the people of Brabant, Flanders, Overijssel and Holland, and even by the people of Utrecht in terms of the enactments cited below; though it is still approved by the Frisians and by some other peoples. It has been decided . . . that purchase gives place to lease (*dat Huer voor Koop gaat*) unless something different has been expressly arranged G between lessor and lessee. This is so whether the sale takes place privately or publicly or by the order of a magistrate on petition of creditors with employment of the formalities of the auction-spear. Thus also the lessee enjoys a right of retention if he prefers to continue with the hiring, rather than to take judicial proceedings for damages after being untimeously put out.'

H See also *De Wet (supra)* at 193). The view expressed by *Voet*, if it is given the interpretation that the lessee has in the event of a sale an election to H terminate the lease, appears to differ from that of other Roman-Dutch writers such as *Grotius*, *Schorer*, *Groenewegen* and *Van Leeuwen*, as was noted in *Kessoopersadh en 'n Ander v Essop en 'n Ander (supra)* at 283F–284B). *Voet* in the passage in question is merely dealing with the alternatives open to the tenant of a property which has been sold when I faced with a demand by the purchaser that he vacate the property. In those circumstances the tenant has 'a right of retention if he prefers to continue with the hiring' by virtue of the rule *huur gaat voor koop* or the right to I leave the premises and to claim damages from the original landlord, that is, the seller. *Wunsh* (1990) 107 *SALJ* 384 at 386. If that interpretation of *Voet* is correct, then his views do not constitute a departure from those of J

A the other Roman-Dutch writers who do not mention any such exception. It would be surprising in relation to a topic which 'has not been dealt with in any great depth by the writers' (*Mignuel Properties (supra)* at 1048E)) to find that one writer alone, particularly one of the eminence of *Voet*, was the only one to mention such a significant qualification to the operation of the rule *huur gaat voor koop*.
 B indeed recognise such a right vested in the lessee, his view should not be preferred to those of the other Roman-Dutch authorities. In support of that contention, (a) for the reasons set out in *Boshoff v Theron (supra)* at 303-4), such an approach involves no inequity and imposes no undue burden on the lessee in the absence of any *delectus personae* insofar as the
 C lessor is concerned; (b) it is reasonable that the purchaser of property should be able to have some measure of certainty in advance of his purchase in regard to not only the scope of his potential commitments to tenants, but their commitments to him; (c) where, by virtue of the operation of the rule, the lessee's entitlement to receive the full benefit of the lease is secured, there is no sensible reason why the lessee should be
 D given the right unilaterally to withdraw from the lease; (d) such an election would merely provide a charter for tenants, if they so chose, to escape from obligations seriously undertaken and could also provide a means for them, in suitable market conditions, to hold the new owner to ransom by threatening to leave the premises if he does not renegotiate the leases on
 E terms more favourable to them. In the converse situation the tenant would be protected by the rule from such conduct; (e) such an election would be potentially disruptive of commercial activity in that at present properties are bought and sold on the basis that the purchaser knows in advance what the position will be in regard to occupation of the premises by tenants.
 F *Wunsh (supra)* at 387). Alternatively to the foregoing, and if it is held that the matter is *res nova* on which the Roman-Dutch authorities are effectively silent—possibly because the present situation did not occur to them and therefore they did not deal with it—this is not a bar to holding that no such election is vested in the lessee. As was pointed out in the judgment in *Mignuel Properties (supra)* at 1049C-F), the rule *huur gaat voor*
 G *koop* is one *sui generis* which has evolved in the light of considerations of practicality and fairness and which in particular circumstances establishes relationships between a lessor, a lessee and a purchaser of immovable property. It is open to this Court in those circumstances in the further development of the rule to hold, for the reasons set out above, that the
 H corollary to the protection conferred upon the tenant by the rule is that the purchaser acquires the rights of the landlord under the lease. This approach also avoids the practical problem, illustrated by the facts of the present case, that, if the lessee is vested with such a right of election, there will always be a period of uncertainty, after an immovable property, all or part of which is subject to a lease, is sold and transferred, as to the basis
 I of the relationship between the lessee (or lessees) and the new owner. Whilst it is clear that, assuming there to be an election vested in the tenant, the effect of the tenant electing to remain in occupation is that from the date of transfer of the property to the new owner the lease binds the new owner as landlord, there will always be a period after transfer
 J when the position is unclear because the tenant has not yet made his

election. Further problems will arise in determining within what period A such election must be made and the potential for disputes to arise is greatly enhanced. In all the circumstances, the judgment of the Court *a quo* was incorrect and the true position in our law is that on the sale of immovable property, which is subject to a lease, the effect of the rule *huur gaat voor* B *koop* is that from the date of transfer of the property to the purchaser both the purchaser and the lessee or lessees are bound in terms of the existing lease on the basis that the purchaser is substituted for the original landlord.

J P de Bruin SC as amicus curiae for the respondent: The question for decision in this appeal is whether our law recognises a right vesting in a lessee to unilaterally terminate the lease in the event of the lessor having C transferred ownership in the leased property to a third party and on that ground alone. The Court *a quo* held that our law does recognise such a right. Heher J, sitting in the Witwatersrand Local Division, came to a contrary conclusion. See *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 (W). Research did not reveal any further D argument that can be advanced in support of the reasons given by the learned Judge in the Court *a quo*. These can be briefly stated as follows: In *Voet* 19.2.17 such a right to elect is to be inferred from the use of the words 'thus also the lessee enjoys a right of retention if he prefers to continue with the hiring, rather than to take judicial proceedings for damages after being untimeously put out'. The aforesaid rule as enunciated by *Voet* E seems to have come down to and been recognised in South Africa in decisions of our various Courts. See *Botha's Executor v Du Plooy and Dreyer* (1897) 14 SC 414 at 421 in connection with the rule. The learned Judge further referred to the judgment in *Transvaal Mortgage Co Ltd v Aronson* 1904 TS 864 at 866 and *Antje Komen v De Heer* 1908 NLR 237 at F 242. The learned Judge also found authority for the proposition that the rule has been recognised in our Courts in the judgments of this Court in *Kessoopersadh en 'n Ander v Essop en 'n Ander* 1970 (1) SA 265 (A) at 284A and *Mignuel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A) at 1050J. The learned Judge comes to the conclusion that, 'while a tenant may G continue with a lease if the leased property is sold during the subsistence of the lease, he is not bound to do so. Only in respect of the protection afforded to the *colonus* was the civil law rule altered. He could remain on in the lease if he wished and avail himself of his *ius retentionis* to do so. But that left unaffected the right of the tenant to decide whether to remain in occupation or not, and being a personal obligation one can see good reason H for providing such an election'. For this proposition the learned Judge clearly relied on the judgment of Wessels JA in *De Jager v Sisana* 1930 AD 71 at 82, where the learned Judge said the following:

'This principle, 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 no other respect did the Roman-Dutch law alter the civil law in regard to the legal relationship of persons on the land who had made personal contracts with the seller.*'

(Emphasis added.) On reviewing the aforesaid it seems clear that the Judge in the Court *a quo* came to the conclusion that the lessee is bound J

A only if he elects to be bound and, if he does so elect, the purchaser is bound as if he were the lessor. The authorities referred to in the judgment certainly lend support to such a conclusion. In the *Mignoel* case this Court found that the effect of the rule *huur gaat voor koop* is that the purchaser *ex lege* steps into the shoes of the lessor and, without a new contract being entered into, the purchaser is substituted for the seller as lessor without the necessity for a cession of rights or an assignment of obligations. The only question is whether this substitution happens without the co-operation of the lessee and, perhaps, against his will. This Court expressly decided this issue in *Mignoel* as appears from the passage at 1050J-1051. This passage, as stated above, recognises the existence of a right of election which accords with the principle that one debtor may not be substituted for another without the consent of the creditor. Undoubtedly, once the lessee elects to continue with the lease, he should be bound by all the terms and conditions of the original lease, again without a new lease being entered into.

D Despite the foregoing submissions, I, as *amicus curiae*, have to concede that my research has revealed no reason in principle or in logic as to why, where the purchaser is bound as lessor, the lessee should have a right to resile from the contract merely because ownership has passed from one lessor to another—a right which he did not have before. That the recognition of such a right of election has certain practical consequences can hardly be disputed. However, if a right of election is recognised nothing is really uncertain. Upon transfer of ownership of the property the purchaser by operation of law acquires all the rights and obligations of the lessor who falls out of the picture. The lessee is obliged to exercise his election within a reasonable time. In the interim period the lessee's rights and obligations are corollaries to those of the purchaser. That should continue to be the position if the lessee elects not to terminate the lease. Although the existence of such a right has perhaps not found its way into practice too often, this Court should perhaps be cautious not to hold that such a long-standing rule has no place in our law.

Wallis SC in reply.

Cur adv vult.

Postea (March 30).

H **Corbett CJ:** This appeal raises an interesting and important point in regard to the principles of our law succinctly denoted by the maxim '*huur gaat voor koop*'.

I The essential facts are that on 23 August 1991 the respondent entered into a written agreement of lease with a certain close corporation in terms whereof respondent hired a unit in a building in Durban for a period of three years, commencing on 1 September 1991, at a specified rental, which escalated from year to year. At the time the lease was entered into the close corporation was the owner of the property, the subject-matter of the lease. On 30 July 1992 ownership of the property passed to the appellant in pursuance of an agreement of purchase and sale concluded between appellant and the close corporation. The respondent was notified of the change of ownership, probably during September 1992. Thereafter the

respondent informed the appellant that it (respondent) did not wish to continue with the lease and also gave notice of its intention to vacate the premises. In doing so, the respondent purported to exercise a right of election whether or not to continue with the lease in consequence of the change in the ownership of the property and the identity of the lessor. The appellant took the view that there was no such right of election.

B Thereafter the appellant instituted proceedings (in the Durban and Coast Local Division) on notice of motion, the main relief claimed being a declaration to the effect that the lease entered into between the close corporation and the respondent on 23 August 1991 was of full force and effect and was binding upon the respondent as lessee and the appellant as lessor. There was also a claim for the payment of certain rental due under the lease, but this is no longer of any relevance.

D The application was heard by Squires J, who, with reference to the main claim, held (i) that, upon the sale of the leased property, in terms of the principle of *huur gaat voor koop*, the lessee (respondent) had an election whether to continue with the lease or not; (ii) that the respondent had exercised this right by notifying the appellant that it wished to terminate the lease; and (iii) that accordingly the declaration sought should be refused. The judgment of the Court *a quo* has been reported (see *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1994 (1) SA 106 (D)).

E With the leave of Squires J the matter now comes on appeal to this Court. It appears that after leave to appeal was granted respondent was placed under liquidation. Subsequently, and after the appeal had been noted, the liquidator filed a notice stating that the respondent did not intend to oppose the appeal and abided the decision of this Court. Inasmuch as the appeal raised a common-law principle of great importance, Mr J P de Bruin SC was asked to appear as *amicus curiae* on behalf of the respondent. We would like to express our appreciation to him for his assistance in the matter.

G The principles relating to *huur gaat voor koop*, their origin and development, have been discussed in a number of judgments of this Court (see in particular *De Jager v Sisana* 1930 AD 71; *De Wet v Union Government* 1934 AD 59; *Graham v Local and Overseas Investments (Pty) Ltd* 1942 AD 95; *Kessoopersadh en 'n Ander v Essop en 'n Ander* 1970 (1) SA 265 (A); and *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A)). The position may be summed up as follows:

H Under Roman law a lease of property (*locatio conductio rei*) conferred only *jura in personam*. More particularly the lessee (*conductor*) held no real right (*jus in re*) in the leased property: he merely enjoyed contractual *jura in personam* against the lessor (*locator*) by virtue of the agreement of lease. Consequently if during the currency of the lease the lessor alienated the leased property in terms of, say, a contract of sale, the purchaser (and new owner) was not bound to recognise the lessee's rights of occupation under the lease, unless he had undertaken to do so. The main authority referred to in this regard is the *Codex* of Justinian 4.65.9, which reads:

'Emptori quidem fundi necesse non est stare colonum, cui prior dominus locavit, nisi ea lege emit. Verum si probetur aliquo pacto consensisse, ut in eadem conductione maneat, quamvis sine scripto, bonae fidei iudicio ei quod placuit parere cogitur.'

A ('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. If, however, it is proved by any agreement that he did consent that the tenant should remain until the expiration of his lease, even though this may not have been reduced to writing, he will be compelled by an action of good faith to comply with the contract which he made.')

B (As translated by *Scott*.) Reference may also be made to *Digest* 19.2.25.1. The same situation arose if the lessor alienated the leased property in some other way, for example by gift or usufruct or by legacy (see *Digest* 7.1.59.1; *Digest* 19.2.32; and *Digest* 30.120.2; *Buckland A Textbook of Roman Law* 3rd ed at 502 note 5). According to *Buckland* (*op cit* at 502), such alienation to a third person upon whom the lease was not binding did not bring the lease to an end. It merely meant that the lessor, by conferring a *ius in rem* on such third person, made it impossible for himself to fulfil it. For this he would be liable to the lessee in damages if the latter were evicted from the property by the new owner. The other side of the rule was that the lessee was not bound contractually to the new owner. (This appears from *Digest* 19.2.32.)

The inequity of the tenant's position in these circumstances under Roman law led to a desire to find a principle which would give him security of tenure; and in certain parts of the Netherlands, including Holland, a rule derived from local custom and legislation became established which gave a measure of security to the tenant in the event of the alienation of the leased property. The rule was expressed in the maxim *huur gaat voor koop*—hire takes precedence over sale. The rule applied to leases of land and houses and in general, in a case where the leased property had been alienated, it conferred upon the lessee the right to continue to occupy the property, and precluded the new owner from ejecting him, for the remainder of the lease, provided that he (the lessee) continued to pay the rent due under the lease. In this way the lessee in occupation of the leased property became vested with a real right. The rule of *huur gaat voor koop* has been adopted by our Courts and is part of our law. The rule is limited to leases of land and buildings (*Graham v Local and Overseas Investments (Pty) Ltd* (*supra*)).

There has been much debate, mainly in academic circles, as to the nature of the relationship created by the doctrine of *huur gaat voor koop* between the new owner and the lessee. It is now the established view of this Court that the new owner is in law (*ex lege*) substituted for, and takes the place of, the original lessor; and that the latter falls out of the picture. On being so substituted the new owner acquires all the rights of the original lessor under the lease (see particularly the case of *Mignuel Properties* (*supra* at 1049C–1051J)). This is contrary to the view expressed by Professor J C de Wet in his three-part article entitled 'Huur gaan voor koop' and published in (1944) *THRHR* at 74, 166 and 226. A summary of the views of Professor De Wet on this topic is to be found in the *Mignuel Properties* judgment *supra* at 1048D–1049B.

But what of the position of the lessee when the leased property has been alienated? And what of the respondent's contention that in such circumstances the lessee has a right of election whether or not to continue with the lease?

In his aforementioned article Professor *De Wet* stated the following (at A 193):

'Vervolgens onderzoek ons welke verhoudings deur die vervreemding tussen huurder, koper en verkoper geskep word. Dit word algemeen aanvaar dat die koper die huurder nie van die grond mag verdryf nie. *Voet* beweer verder dat die huurder, indien hy wil, uit die ooreenkoms mag terugtree en die verhuurder-verkoper vir skadevergoeding mag aanspreek. Die reël "*huur gaat voor koop*" werk dus nie ten gunste van die verkoper in die sin dat hy hom daarop kan beroep teen 'n huurder wat verkies om die goed by vervreemding te verlaat, en die verhuurder weens kontrakbreuk aan te spreek nie. Verkies die huurder egter om aan te bly, dan ontstaan die probleem of die koper nou sonder meer verhuurder word en die verkoper heeltemal uit die gedrang verdwyn.'

Apart from the general reference to *Voet*, Professor *De Wet* does not quote any authority for the propositions in this passage, but from other remarks of his (at 186 and 234) it would seem that he had *Voet* 19.2.17 in mind when stating that the lessee might, if he wished, resile from the agreement of lease ('uit die ooreenkoms mag terugtree').

In discussing Professor *De Wet's* article in the *Mignuel Properties* case *D supra*, Friedman AJA stated (at 1048F–G):

'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.'

Later in his judgment (at 1050J–1051B) Friedman AJA concluded:

'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.'

In the Court *a quo* this latter passage, in particular, was regarded by Squires J as indicating an acceptance by this Court of the notion that in the event of the leased property being sold the lessee has 'a right of election . . . to decide' whether to remain on as tenant or not (see the judgment *a quo* at 110H–I). I would add that Squires J conceded (quite correctly) that the *Mignuel Properties* case did not decide the point. This so-called right of election was not an issue in the case. What the Court was called upon to decide was whether in the event of the sale of the leased property (and it would seem the transfer thereof—see judgment at 1047B) the purchaser (new owner) so stepped into the shoes of the original lessor that he was entitled to enforce a suretyship agreement in terms whereof the surety bound himself to the lessor as surety and co-principal debtor for all amounts owing by the lessee in respect of the lease. Insofar, therefore, as Friedman AJA may have indicated an acceptance of this so-called right of election his remarks must be regarded as *obiter*.

Not long after the judgment of the Court *a quo* had been delivered the question of the lessee's 'right of election' again arose for decision. In this

A case, *One Nought Three Craighall Park (Pty) Ltd v Jayber (Pty) Ltd* 1994 (4) SA 320 (W), Heher J refused to follow the decision of the Court *a quo*, and concluded that there was no such right of election and that a lessee of property transferred from his lessor to a new owner is bound to recognise and observe the terms of the lease after transfer (at 327C-D).

B The *fons et origo* of the right of election theory is undoubtedly Professor *De Wet's* article. In his judgment Squires J does refer to certain *dicta* in our case-law and I shall deal with them later. I now proceed to consider Professor *De Wet's* theory.

C As I have indicated, it seems likely that Professor *De Wet* had *Voet* 19.2.17 in mind when stating (at 193 of his article) that the lessee might if he so wished resile from the agreement of lease. In his judgment in the *Craighall Park* case *supra* Heher J referred to an incisive and instructive article by Mr Basil Wunsh entitled 'May Lessee Quit Premises on Sale of Them?' and published in (1990) 107 *SALJ* 384. In this article (at 385) Mr Wunsh infers that Professor *De Wet* was relying upon *Voet* 19.2.23. I agree, D however, with Heher J that it is likely that Professor *De Wet* relied not on *Voet* 19.2.23, but on *Voet* 19.2.17. In the relevant portion of 19.2.23 *Voet* is clearly writing of the Roman law rules which obtained in all areas in which the *huur gaat voor koop* principles had not been introduced. This is E evident from the statement in the second sentence of this section to the effect that the purchaser and other particular successors of the lessor are not bound to abide by the lease ('... *emtor aliique successores particulares locacione stare haud tenentur* ...').

F The relevant passage in *Voet* 19.2.17 commences with a similar statement to the effect that neither purchasers nor others who have obtained ownership by particular title are bound by a lease made by the original owner from whom they derived their title, unless this has been provided for in an agreement attached to the sale. *Voet* then goes on to state that this rule, though still approved by the Frisians and certain other peoples, has long since ('*jam dudum*') been departed from by the people of G Brabant, Flanders, Overijssel and Holland and even by the people of Utrecht in accordance with an enactment of 14 April 1659; for the rule is that purchase yields to hire ('*dat Huer voor Koop gaat*'), unless it has expressly been agreed otherwise between the lessor and the lessee. Then comes the vital passage:

H '*... sive privata venditio interveniat, sive publica, aut ex decreto magistratus adhibitis hastae solemnibus ad creditorum petitionem; sic ut et jus retentionis conductori competat, si remanere in conductione malit, quam post expulsionem intempestivam ad id quod interest iudicio experiri, si modo bonâ fide, non in fraudem creditorum (pendente forte subhastationis iudicio, aut lite jam motâ), locatio facta sit*'.

Of the four translations available (ie those of *Gane*, *Beinart and Ormonde*, *Solomon* and *Berwick* I shall quote from the first two only.

I *Gane* renders the above-quoted passage as follows:

J 'This is so whether the sale takes place privately or publicly or by the order of a magistrate on petition of creditors with employment of the formalities of the auction-spear. Thus also the lessee enjoys a right of retention if he prefers to continue with the hiring, rather than to take judicial proceedings for damages after being untimeously put out. The proviso must be added that the lease has been

made in good faith and not in fraud of creditors (as when perhaps a proceeding for a sale under the spear is pending, or a suit has already been set in motion).'

And the *Beinart and Ormonde* translation reads:

B '... (W)hether it be a private sale or a public one, or a formal judicial sale following on a decree of a magistrate at the petition of creditors; the result is that the lessee has a right of retention, if he wishes to remain in possession rather than bring an action for damages after he had been ejected with prejudice to himself, provided that the lease had been made in good faith and not in fraud of creditors (for instance, where process for judicial sale was pending, or the suit had already been brought).'

C It seems to me to be reasonably clear that the portion of this passage from 19.2.17, which speaks of the lessee enjoying a right of retention if he D prefers to continue with the hiring (or to remain in possession) rather than taking judicial proceedings for damages, contemplates an ejection, or attempted ejection, of the lessee by the new owner contrary to the term of the lease. The very words '*post expulsionem intempestivam*' (which have been variously translated above) indicate this. In the context a better D translation of *intempestivus* might be 'untimely'; and I would suggest that what *Voet* was referring to was an ejection (or attempt thereto) before the term of the lease had expired. Thus the election which is here referred to is, and is confined to, one relating to the remedies open to the lessee if, E contrary to the lease and contrary to the rule of *huur gaat voor koop*, the new owner seeks to eject him. (This, incidentally, was the view of Mr *Wunsh* in regard to the meaning of this passage and his view was adopted by Heher J in the *Craighall Park* case *supra*.) *Voet* is not referring to the case where the new owner abides by the lease and there is no attempt to unlawfully eject. In such a case there would be no need for the exercise of F a right of retention by the lessee; nor would there be any basis for claiming damages. In fact, the reference to suing for damages demonstrates, to my mind, that *Voet* was not dealing with the case where the new owner G recognised the lessee's rights and allowed him to remain in possession. In those circumstances it is difficult to see what damages the lessee could possibly have suffered. Moreover, the *huur gaat voor koop* rule was conceived, we are told, in the interests of equity and sound reason (see G Schorer's *Notes* to the *Inleiding* of Grotius 3.19.16 note 59, *Maasdorp's* translation). It is difficult to imagine what considerations of equity and sound reason would create a legal rule which prescribed that, where a new owner of leased premises was prepared to accept the lessee and recognise H the lease in all its terms, the lessee should nevertheless not only have the right to resile from the lease, but, having elected to do so, should be entitled to claim damages as well. All this leads me to the view that *Voet's* remarks were directed solely at the situation where the new owner did not recognise the lease and sought to eject the lessee.

I That this is the correct interpretation of the cited passage from *Voet* 19.2.17 is confirmed, in my opinion, by a number of factors. In the first place, none of the writers on Roman-Dutch law of the 17th, 18th and 19th centuries (ie those who wrote both before and after the publication of *Voet's Commentaries*) which I have consulted makes mention of this so-called right of election. Admittedly many of these writers deal J somewhat cursorily with the topic of *huur gaat voor koop*, but if it were the

A law that upon the leased property being alienated the lessee had such a right of election, irrespective of whether the new owner wished to abide by the lease or not, then I would have expected at least some of them to have alluded to it.

In the second place, there are indications in the writings of at least two jurists that, where the rule of *huur gaat voor koop* applied, both the new owner and the lessee were bound by the terms of the lease. The first of these is Groenewegen, in his treatise *De Legibus Abrogatis*. Before considering the relevant passage in this work, which consists generally of a pithy commentary on the *Corpus Juris Civilis*, pointing out where the Roman law still applies and where it does not apply, I must emphasise what I have already indicated, viz that the rule of *huur gaat voor koop* embraced not only the case of the person who acquired ownership of the leased property by purchase, but also usufructuaries, legatees, donees and like successors to the original lessor by particular title (see *Voet* 19.2.17 *in fin*; Van Leeuwen *Het Roomsche Hollandsch Recht* IV.21.7; Kersteman *Hollandsch Rechtsgeleert Woorden-Boek* at 183 *vo* 'Huur'). I have already referred to *Codex* 4.65.9, which enunciates the general rule of Roman law that a purchaser of land is not obliged to recognise a lease subsisting over the land unless he purchased the property on this condition. Commenting on this, Groenewegen *ad Cod* 4.65.9 states that, according to the customs of Holland and most of the Low Countries ('*Belgii*'), this rule has been abrogated in accordance with the common maxim *huur gaat voor koop*.

In *Digest* 19.2.25.1 Gaius is quoted to the effect that, when a man has let to someone the enjoyment of a farm or dwelling, if he (the lessor) thereafter for some reason should sell the farm or building he ought to ensure by agreement with the buyer that the tenant farmer is permitted to enjoy and the urban tenant to dwell; otherwise the tenant, if forbidden (to enjoy or dwell), may sue him on the contract of hire. Groenewegen's comment on this passage is (I quote from *Beinart's* translation):

'Nowadays, as I state *ad C* 4.65.9, the purchaser is obliged to accept the tenant, even though no specific arrangement to that effect had been made between the buyer and seller.'

This, obviously, is a reference to the rule of *huur gaat voor koop*.

The next, and crucial, passage from the *Digest* is 19.2.32. This poses the case of a man who had let a farm for several years ('*in plures annos*'), the tenant to keep it in cultivation, and who thereafter died, leaving the farm to a legatee. According to *Cassius*, the tenant cannot be compelled to keep up the cultivation as the heir has no interest in his doing so. Should the tenant wish to do so and be hindered by the legatee, the tenant has an action against the heir and this loss falls on the heir. Commenting on this, Groenewegen states (I quote again from *Beinart's* translation):

'1. Nowadays a singular successor is obliged to accept the tenant, 2. and the tenant is bound to the singular successor.'

1. A singular successor to leased property was not bound to the tenant, as also conversely a tenant was not bound to such successor.

2. But equally as a singular successor is under our customs obliged to accept the tenant, as I say *ad C* 4.65.9, so must it be stated that conversely nowadays the tenant can be compelled to continue the cultivation of the land, even though the person who had let the land for a period of several years had died.'

As I read this comment, it constitutes a clear indication by Groenewegen that, in terms of the *huur gaat voor koop* rule, a singular (or particular) successor is obliged to accept the tenant of the property to which he succeeded, and conversely that the tenant is bound by the terms of the lease to the singular successor. The reference to *ad C* 4.65.9 shows that Groenewegen is referring to the *huur gaat voor koop* rule. In para 2 specific reference is made to the obligation of the tenant farmer to continue cultivating the land, but this is because that is the factual instance posed in *Digest* 19.2.32. The heading indicates that this is part of a wider obligation on the lessee to observe the lease.

Professor *De Wet* conceded in his article (at 234) that Groenewegen's comments on *Digest* 19.2.32 were in conflict with the relevant passage in *Voet* 19.2.17, as interpreted by him. He appears to have regarded this as casting doubt on the reliability of Groenewegen. This apparent conflict was referred to by Rabie AJA in the *Kessoopersadh* case *supra* at 283H-284A. Having referred to Groenewegen *ad Dig* 19.2.32, the learned Judge stated:

'Die bewering dat die huurder verplig kan word om die grond te bewerk, is strydig met *Voet* 19.2.17, wat sê dat die huurder die reg het om die grond te verlaat. Moontlik word bedoel dat hy verplig kan word om die grond te bewerk indien hy sou besluit om dit nie te verlaat nie.'

With respect, it seems to me that this apparent conflict only arises if *Voet* 19.2.17 is interpreted as giving the lessee a right of election even where the new owner is willing to recognise and implement the lease. On the interpretation which I have adopted there is no conflict.

The other jurist who appears to support the view that in terms of the *huur gaat voor koop* rule both the new owner and the lessee were obliged to observe the lease is Anthonius Matthaeus II. In his *De Auctionibus* 1.7.20 Matthaeus observes that there is no uniformity because in some places the Roman law is followed and one has the rule that sale breaks the lease ('*koop breeckt huire*'). In other places the converse rule operates: ie '*Huylr gaet voor koop*'. The writer then lists a number of areas in which this is so, namely Holland, Overysse, Brabant, Vlaandere, Henegouwe and Ruremond. (I have given the Dutch names as they appear from a Dutch translation of the work.) The commentary continues by pointing out that therefore wherever the Roman law is in operation the lessee must vacate the property at the behest of the buyer; but where there has been a departure from Roman law the purchaser is not entitled to expel the lessee before the termination of the lease. In confirmation of this Matthaeus then quotes a 'landrecht' of Ruremond providing as follows:

'Al is't dat een huys vercocht, oft andersints weg gegeven is, soo moet nochtans den huerlinck, des niet teghenstaende, syn huylr gebruycken, soo langh die duert, al waer't oock sake, dat het huys oft erve by executie vercocht waere, overmits dat huylr, naer deses Quartiers recht voor koop gaet.'

('Even where a house is sold or otherwise alienated the lessee must despite the sale continue to exercise his rights under the lease for the duration of the lease; and it is also the case where the house or ground is sold in execution: inasmuch as, in terms of the Quartiers law, hire goes before sale.')

A (My translation.) It may be that here the emphasis is more on the rights of the lessee *vis-à-vis* the purchaser than his obligations, but had the position been that the lessee had an option to resile from the lease, mention would surely have been made of this.

B In the case of *Scrooby v Gordon & Co* 1904 TS 937, a case concerned with the question as to whether a claim by a lessee for compensation for improvements lay against the original lessor or a purchaser who was the owner of the property at the time when the lease terminated, Mason J stated at 945:

C 'Now when the owner of land which has been leased sells it to someone else the purchaser takes the land subject to the lease, so that he is bound to the tenant and the tenant is bound to him in the relation of lessor and lessee (Van Leeuwen *Censura Forensis* 1.4.22.15; *Voet* 19:2.19; *Groen ad Dig* 19.3.32).'

D The reference to *Censura Forensis* should, I think, read 1.4.22.19 and the *Groenewegen* reference should be 19.2.32 (see *Boshoff v Theron* 1940 TPD 299 at 303). This statement of the law by Mason J was apparently accepted as being correct until queried in the *Kessoopersadh* and *Mignoel Properties* cases and departed from in the Court *a quo*.

E In his judgment in this case Squires J placed some reliance upon the rule of the common law, as applied in our case law, that the new owner of leased property was only obliged to recognise the lease so long as the lessee was willing to pay the rent, which he said at least implied that the lessee had a choice in the matter (see at 109E-H). In the event of the lessee 'choosing' not to pay the rent he would commit a breach of the lease and be liable therefor to the new owner, and possibly also in damages. This is a far cry from the 'right of election' claimed by the respondent in the Court below in this case.

F The learned Judge *a quo* also made reference (at 109H-I) to a *dictum* by Broome J in *Antje Komen v Hendrick de Heer and Others* (1908) 29 NLR 237 at 242. The *dictum* should be read in its context, which is as follows:

G 'Under the Roman law a legatee or usufructuary as singular successor could himself give or hire the things of which he had the usufruct (*Dig.* 7.1.12; *Voet* 19.2.4), and a usufructuary had the power of prohibiting a tenant the use of a thing bequeathed to the former, and could expel the tenant "after the example of sale", even before the expiry of the term of the lease given by the deceased. The modern rule, 'Hire goes before purchase', however, operated in favour of the tenant, and secured him in his tenancy if he preferred to remain (*Voet* 19.2.18).'

H The context is the right of a singular successor under Roman law to deny a tenant use of the leased property. The last sentence of the passage quoted is at least susceptible of the meaning that, under the modern rule of *huur gaat voor koop*, a tenant faced with a challenge to his right to occupy the property could be secured in his tenancy if he chose to remain instead of claiming damages.

I Finally, I would point out that I have not been able to find any suggestion of the so-called right of election in the works of more modern writers such as Fockema Andreae's *Notes* to the *Inleiding* of *Grotius*. (see 3rd ed by *Van Apeldoorn* at 291-3); *Bodenstein's Huur van Huizen en Landen volgens Het Hedendaagsch Romeinsch-Hollandsch Recht* at 132 *et seq*; *Nelissen's Huur en Vervreemding* at 155 *et seq*; *Wessels History of the Roman-Dutch Law* at 622-3; *Van Loggerenberg Skuldoornamen* en

Kontraksoornamen at 292 *et seq*; and indeed De Wet and Van Wyk's *A Kontraktereg en Handelsreg* 5th ed at 374 *et seq*.

B Accordingly, I hold that in terms of our law the alienation of leased property consisting of land or buildings in pursuance of a contract of sale does not bring the lease to an end. The purchaser (new owner) is substituted *ex lege* for the original lessor and the latter falls out of the picture. On being so substituted, the new owner acquires by operation of law all the rights of the original lessor under the lease. At the same time the new owner is obliged to recognise the lessee and to permit him to continue to occupy the leased premises in terms of the lease, provided that he (the lessee) continues to pay the rent and otherwise to observe his obligations under the lease. The lessee, in turn, is also bound by the lease and, provided that the new owner recognises his rights, does not have any option, or right of election, to resile from the contract. This is the impact of *huur gaat voor koop* in our modern law.

D Some of the practical and theoretical problems which would arise were the law to be otherwise, ie were the lessee to have an option, or right of election, to resile from the lease on the alienation of the leased property by the original lessor, have been alluded to by Heher J in the *Craighall Park* case *supra*. Happily, on the conclusion as to the legal position that I have reached, these problems disappear.

E The appeal must accordingly succeed. In view of the respondent's liquidation appellant's counsel asked merely for an amended declaration in terms of prayer 1 of the notice of motion. No order in respect of costs was sought.

It is ordered as follows:

- (1) The appeal is allowed.
- (2) The order of the Court *a quo* is set aside and there is substituted:

F 'It is declared that the agreement of lease which was signed on behalf of the respondent as lessee at Durban on 23 August 1991 and on behalf of 677 Umgeni Road CC as lessor on 26 August 1991 and which related to the respondent's occupation of unit No 1, 677 Umgeni Road, Durban (copy of which lease was annexed to the affidavit of John Hillel Moshal, as annexure 'B' thereto), was of full force and effect and was binding upon the respondent as lessee and the applicant as lessor upon transfer to the applicant of the immovable property of which the premises leased formed a part.'

H Hefer JA, Nestadt JA, Eksteen JA and Nienaber JA concurred.

Appellant's Attorneys: *J H Nicholson, Stiller & Geshen*, Durban; *Honey & Partners*, Bloemfontein. Respondent's Attorneys: *Israel & Sackstein*, Bloemfontein.