ONLY THE LEASE ('HUUR') 'GAAT VOOR KOOP', NOTHING MORE

The maxim 'huur gaat voor koop' is generally familiar to all property law practitioners , and probably equally well-known amongst landlords and tenants alike. The exact content of the protection afforded by this rule of our law can, however, still leave a tenant (or other party relying on the maxim) on his back foot because the exact content of this rule is not always correctly understood. Translated loosely, it means that a lease trumps a later sale.

For example, assuming that landlord A sold his property to X whilst it was leased to B, it is clear that the maxim will protect the rights of B so that the lease remains in place after the sale of the property to X. However, if the lease contained, for example, an option to purchase the property or a clause regulating the payment of commission to the leasing agent used by the landlord (being A at the time), would such provisions also be covered by this maxim so that it forms part of the substituted agreement that comes into existence between the tenant and the purchaser?

Background

The essence of the maxim is that the tenant is protected against the rights of third parties that vested later in time than the rights of the tenant. It is particularly relevant in the context of an agreement for the sale of land that is leased at the time of the sale, where the purchaser wishes to move into the property before the termination date of the lease.

How the maxim applies

It is often said that in terms of this maxim, the purchaser 'steps into the shoes' of the landlord. What in fact happens, notes our Supreme Court of Appeal, is the following:

> *"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 recognize 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 recognizes his rights, does not have any option, or right of election, to resile from the contract."* [1]

Our courts have held that the protection offered by the maxim is of a *sui generis* nature, in other words, it is unique in that there is no cession of rights between the parties. The purchaser automatically, *ex lege*, steps into the shoes of the seller and a relationship is established between the seller and the tenant.

[1] Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd

What is protected by the maxim?

The protection afforded relates to the essential elements of the lease relationship between the parties: the tenant is liable to pay rent to the purchaser (landlord) and the purchaser, in turn, must allow the tenant to remain in undisturbed, quiet occupation of the premises for the duration of the lease period. The protection includes the natural consequences of the lease agreement such as the right to claim moneys owing in terms of the lease from the tenant (or from the tenant's surety in the event of the tenant's failure to pay[2]).

Extent of the protection

There are limitations to the protection afforded. All the rights and obligations in terms of the various provisions of the existing lease agreement are not, without more, protected under the maxim *huur gaat voor koop*. The limitation is expressed as follows: " [A] purchaser is bound on it [the lease] by the doctrine of *huur gaat voor koop*, and bound also by all its material terms." (*Our emphasis*) This means that the maxim only transfers rights that are the usual incidences of the direct relationship between the landlord and the tenant, but goes no further, as the discussion in the following paragraphs shows.

Option to purchase included in original lease agreement

In *Spearhead Property Holdings v E & D Motors (2010)* the court held that that an option to purchase the leased premises, is not an integral part of the landlord-tenant relationship in respect of which the *huur gaat voor koop* rule operates. Thus the court disallowed a claim by a tenant against the (new) property owner to exercise an option to purchase the leased property that was contained in the original lease agreement (entered into with the erstwhile owner of the leased property). The court noted that a tenant who seeks to exercise an option to purchase will usually have to do so against the grantor of the option.

However, in line with the doctrine of notice, were the purchaser made aware of the existence of the option at the time of contracting, the doctrine of notice may allow the tenant to claim transfer of the property from the purchaser.

Enrichment claims

The *huur gaat voor koop* maxim does not grant a tenant the same rights against the purchaser in respect of improvements to the leased property as he would have had against the erstwhile landlord (seller of the property)[3]. This is because the purchaser is not the party that was enriched. Were it possible for the tenant to prove that the purchaser had paid less for the property because the latter contemplated an enrichment action by the tenant, a possible claim for enrichment may exist.[4]

[2] Mignoel Properties (Pty) Ltd v Kneebone
[3] Smith, *Eviction and rental Claims: A Practical Guide*, p11-3
[4] Supra

Execution sales and prior real rights

If leased property is subject to a prior real right, such as a mortgage bond registered before the lease was concluded, then such right may trump the *huur gaat voor koop* rule. This is because the property must in such circumstances first be put up for auction in the execution process, subject to the lease; but if the highest bid is not enough to cover the outstanding debt owed to the bank (or other mortgagee), the bank may insist that the property be auctioned free from the lease. The election is at the discretion of the bank.

This is also the procedure in the case of the sale by a liquidator in an insolvent estate. The election to sell the property free from the lease remains with the bank (mortgagee, as holder of the real right). In other words, if the mortgaged property realises proceeds that are enough to discharge the debtor's debt in full, a liquidator has no option but to sell the property subject to the existing lease agreement. However if the proceeds realised in the sale are not sufficient to discharge the debt in full, it is the mortgagee's discretion whether to uphold the existing lease when selling or to insist that the sale excluding the lease agreement be concluded. Neither the liquidator nor other creditors have the right to exercise this election or force the mortgagee to exercise its election either way. [5]

Sureties

Sureties remain bound to the new purchaser in terms of a suretyship executed should the tenant fail to make payment as provided for in the lease. This is as a consequence of the fact that the seller is substituted by the purchaser under the *huur gaat voor koop* maxim, and the purchaser (new landlord) acquires all the rights that the seller had against sureties – cession of such rights is not required.

Leasing agent's commission, as provided for in the lease agreement

Lease agreements that are entered into with the assistance of a letting agent, often include a clause that makes commission payable on a monthly basis as part of the rental amount, or as a once-off payment on conclusion and/or renewal of the lease.

In light of the above discussion and the courts' application of the maxim, it has been argued that such a payment will generally not be seen to be 'material' to the landlord-tenant relationship, but are ancillary rights, not protected by the maxim. In such instances it would be advisable for a seller, agent (in terms of the lease) and new purchaser to arrange their obligations separately to avoid unnecessary uncertainty and litigation.

Conclusion

It is trite law that the rights of a tenant are protected on alienation of the leased property by virtue of the *huur gaat voor koop* rule. This rule stipulates that where a property sold

[5] *Moneyline 340 (Proprietary) Limited v Stilfontein Een-Stop Vultstasie CC t/a Engen Quick Stop and Another*

was subject to a lease, the purchaser is automatically substituted as lessor under the lease agreement in the place of the seller, and no cession of rights is required. In this way the purchaser acquires all the rights that the seller had in terms of the lease, except for collateral rights unconnected with the lease. It is accordingly important, when seeking to rely on this maxim, to establish whether the right relied on is material to the lessee's right of occupation for purposes of protection under the *huur gaat voor koop* rule. If not, reliance on the *huur gaat voor koop* rule may prove misplaced.

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