Case No 435/93

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

GENNA-WAE PROPERTIES (PROPRIETARY) LIMITED
.....Appellant

and

MEDIO TRONICS (NATAL) (PROPRIETARY) LIMITED
.....Respondent

CORAM: CORBETT CJ, HEFER, NESTADT, EKSTEEN et
NIENABER JJA.

DATE OF HEARING: 13 March 1995

DATE OF JUDGMENT: 30 March 1995

JUDGMENT

CORBETT CJ/....

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".

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 3 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.

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.

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 gaaf 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)).

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.

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:

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 recognize 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 Code of Justinian 4.65.9, which reads:

> colonum,cui prior dominus locavit,nisi ea lege ut in eadem conductione maneat, quamvis sine scripto,bonea fidei iudicio ei quod placuit parere cogitur."
>
> ("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." -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, e g

by gift of usufruct or by legacy (see Digest 7.1.59.1, Digest 19.2.32 and Digest 30.120.2; Buckland, A Text-book of Roman Law, 3 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 jus 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 Mignoel Properties, supra, at 1049C - 1051 J). This is contrary to the view expressed by Prof 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 Prof De Wet on this topic is to be found in the Mignoel 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 Prof De Wet stated the following (at 193):

> "Vervolgens ondersoek 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 reel "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 Prof 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 Prof De Wet's article in the Mignoel Properties case, 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 aforegoing 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 Mignoel 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. In so far, 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 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 recognize and observe the terms of the lease after transfer (at 327C - D).

The fons et origo of the right of election theory is undoubtedly Prof 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 Prof De Wet's theory.

As I have indicated, it seems likely that Prof De Wet had Voet 19.2.17 in mind when stating (at p 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 Prof De Wet was relying upon Voet 19.2.23. I agree, however, with Heher J that it is likely that Prof 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 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 locatione stare haud tenentur....).

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 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 Huur voor Koop gaat"), unless it has expressly been agreed otherwise between the lessor and the lessee. Then comes the vital passage:

> ". . . sive privata venditio interveniat, sive publica, retentionis conductori competat, si remanere in si modo bonda fide, non in fruadem creditorum

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

Gane renders the above-quoted passage as follows:

> "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 sale under the spear is pending, or a suit has already been set in motion)".

And the Beinart and Ormonde translation reads:

> "... whether 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)."

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 prefers to continue with the hiring (or to remain in possession) rather than taking judicial proceedings for damages, contemplates an ejectment, or attempted ejectment, 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 translation of imtempestivus might be "untimely"; and I would suggest that what Voet was referring to was an ejectment (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, 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 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 recognized 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 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 recognize 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 recognize the lease and sought to eject the lessee.

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 (i e 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 somewhat cursorily with the topic of huur gaat voor koop, but if it were the 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 emphasize 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 to usufructuaries, legatees, donees and like successors to the original lessor by particular title (see Voet 19.2.17 in fin; Van Leeuwen. Het Roomsch Hollandsch Recht IV.21.7; Kersteman. Hollandsch Rechtsgeleert Woorden-Boek s.v. Huur, p 183). I have

already referred to Code 4.65.9, which enunciates the general rule of Roman law that a purchaser of land is not obliged to recognize a lease subsisting over die 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 Digast 19.2.25.1 Gains 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 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 par 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.

Prof 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 recognize 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 huyre"). In other places the converse rule operates: i e "Huur gaet voor koop". The writer then lists a number of areas in which this is so, namely Holland, Overyssel, 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 wegh gegeven is, soo meet nochtans den huerlinck, des niet teghenstaende, syn huyr gebruycken, soo langh die duert, al waer't oock sake, dat het huys oft erve by executie vercocht waere, overmits dat huyre, 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. - my translation.)

It may be that here the emphasis is more on the rights of the lessee vis-a-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.

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:

> "Now when the owner of land which has been leased sells it to some one 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). "

The reference to Centura 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.

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 recognize 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.

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

> "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 me term of the lease given by the deceased. The modem 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)."

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.

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 Inleidings of Grotius (see 3 ed by Van Apeldoom pp 291-3); Bodenstein's Huur van Huizen en landen volgens Het Hedendaagsch Romeinsch-Hollandsch Recht, 132 et seq; Nelissen's Huur en Vervreemding, 155 et seq; Wessel's History of the Roman-Dutch Law, at 622-3; Van Loggerenberg, Skuldoorname en Kontraksoorname at 292 et seq; and indeed De Wet and Van Wyk's Kontraktereg en Handelsreg 5 ed, 374

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 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. This is the impact of huur gaat voor koop in our modern law.

Some of the practical and theoretical problems which would arise were the law to be otherwise, i e 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.

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:

3. The appeal is allowed.

4. The order of the Court a quo is set aside and there is substituted:

> "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."

M M CORBETT

HEFER JA) NESTADT JA)
CONCUR EKSTEEN JA)
NIENABER JA)