THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 214/2008

In the matter between:

SPEARHEAD PROPERTY HOLDINGS LTD Appellant

and

E & D MOTORS (PTY) LTD Respondent

Neutral citation: *Spearhead Property Holdings Ltd v E & D Motors (Pty)Ltd* (214/2008) [2009] ZASCA 70 (1 June 2009)

Coram: MPATI P, MTHIYANE, LEWIS, MAYA JJA and HURT AJA

Heard: 17 MARCH 2009

Delivered: 1 JUNE 2009

Summary: Lease – whether an option to purchase leased property is binding on a lessor's successor-in-title by virtue of the rule '*huur gaat voor koop*' – whether lease agreement ought to be rectified.

ORDER

On appeal from: Cape of Good Hope Provincial Division (Zondi J sitting as court of first instance).

1 The appeal is allowed with costs, such costs to include the costs of two counsel.

2 The order of the court below is set aside and the following order substituted therefor:

'The plaintiff's claim is dismissed with costs, such costs to include the costs of two counsel.'

JUDGMENT

MAYA JA (Dissenting)

[1] This appeal turns on the enforceability of an option to purchase business premises situate at Shop 1, Ottery Hypermarket Shopping Centre, Ottery, Cape Town (the premises) which was granted to the respondent as lessee by its erstwhile lessor, Quantum Leap Investments 230 (Pty) Ltd (Quantum) in terms of a lease agreement concluded on 19 February 2003.

[2] During October 2002, Mr M S Adams and his wife, Mrs N Adams, negotiated to hire premises from Quantum on behalf of a company named Expectra 534 (Pty) Ltd (Expectra). Mr Adams was Expectra's managing

director. Pursuant to the negotiations, Quantum and Expectra concluded an 'offer to lease' which was to remain binding until substituted by a standard lease agreement. To that end, Clause 10(b) of the Offer to Lease provided:

'On acceptance of this Offer the Lessor's standard Agreement of Lease will be prepared and signed by both parties in substitution of this Agreement within 30 days of date hereof. In the event that both or either of the parties refuse or fail to sign such standard Lease Agreement, then this Agreement shall continue to bind both parties.'

[3] By agreement initiated by Mrs Adams between Quantum and Expectra, the respondent, a Toyota car franchise with, incidentally, the same three directors as Expectra, substituted the latter as the tenant in the final lease agreement (the lease agreement). The respondent signed it on 19 November 2002 and commenced building alterations to the premises to suit its trading specifications. It took occupation of the premises in February 2003.

[4] Both the offer to lease and the lease agreement granted the respondent an option to purchase the premises. Clause 16.1 of the offer to lease provided:

'The landlord will provide the tenant with an option to purchase the property for R2 000 000.00 excluding VAT for a 24-month period from date of occupation, subject to approval from Pick `n Pay [the landlord's anchor tenant], approval from the City Council for sub-division and approval from Quantum Leap Investments 230 (Pty) Ltd for reciprocal access and parking agreement (See plan attached).'

These provisions were replicated in Clause 7 of the lease agreement, albeit without the conditions relating to VAT and the various forms of approval

from Pick `n Pay, the City Council and Quantum (I shall deal with the omission of the conditions later) and read:

'Area of Leased Premises:

7.1 This lease automatically entitles the tenant with the first option to purchase the said property as per annexure "E" [the site plan] within 2 years of date of signature hereof, the property totalling 3445sqm i.e. 1779sqm in addition to the leased premises.

7.2 The said property referred to in 7.1 above, shall constitute the entire area leased in terms hereof i.e. 847sqm plus an additional 529sqm for the extension and 290sqm for the undercover vehicle display, totalling 1666sqm.

7.3 It is further hereby expressly agreed that the tenant will be entitled to upon signature hereof also utilize the additional space referred to above (819sqm) which is situated at the front of the leased premises.'

[5] A few days after Quantum signed the lease agreement, on 25 February 2003, it sold the entire shopping centre to the appellant which took transfer on 15 June 2003. It is clear from the relevant deed of sale concluded by Quantum and the appellant that the latter had notice of the respondent's option at the time of purchase as clause 6.4.2, one of its warranty provisions, provides:

'The Seller [Quantum] warrants and undertakes to the Purchaser [the appellant] … no agreements have been entered into by the Seller whereby any restrictive conditions or servitudes or other real rights attach to the property or in terms of which any person, natural or corporate, is entitled to obtain any real rights to the property, *save for existing tenant, Ottery Toyota, [the respondent] who have limited rights to purchase their section subject to a subdivision of the land*.' (My emphasis.)

[6] Shortly after transfer, during June or July 2003 according to the pleadings, the respondent sought to exercise the option against the appellant by way of an undated letter. In correspondence that followed, the appellant pointed out that the respondent's option was subject to the conditions reflected in the offer to lease. This was denied by the respondent. The final letter from the appellant's attorneys, dated 28 October 2004, reads:

'Our client considers that it is bound by the option agreement but that due to an error common to the parties, the three conditions contained in the offer to rent were not carried forward into the ultimate lease agreement and that the lease agreement accordingly falls to be rectified.'

[7] The respondent had, in the meantime, obtained a written undertaking from Pick `n Pay that the latter did not object to the respondent's contemplated purchase of the premises. More correspondence flowed between the parties but the impasse remained. Consequently, the respondent instituted action proceedings against the appellant in the Cape High Court. The basis of its claim, which was pursued in this court, was that the appellant substituted Quantum and was bound by the option, which was an integral part of the lease agreement, as Quantum's rights and obligations concerning that agreement were assigned to it through the purchase and that the appellant had accepted and implemented such assignment. It was alternatively contended that the appellant had acknowledged the option's existence and exercise albeit in different terms. The assignment therefore arose from the rule '*huur gaat voor koop*' – hire takes precedence over sale – alternatively clause 6.4.2 of the deed of sale and the appellant's letters acknowledging the option.

[8] The appellant raised various defences, including that it had not become party to the option the purported exercise of which it contended was, in any event, invalid for failure to comply with the provisions of s 2(1) of the Alienation of Land Act 68 of 1981 (the Act).[1] It also counterclaimed for rectification of the lease agreement to incorporate the disputed conditions in the event that a finding was made in the respondent's favour.

[9] The matter was heard by Zondi J, who, on the strength of the respondent's submissions, ordered the appellant to procure the approval of the Cape Town City Council for the subdivision of the premises and effect transfer to the respondent, but dismissed its counterclaim for rectification. The learned judge then granted the respondent leave to appeal to this court only in respect of the validity of the option. Upon further application to this court, the appellant was granted leave to appeal against the dismissal of its counterclaim and a directive was issued for all the issues to be determined simultaneously.

[10] The issues on appeal[2] are (a) whether the option became binding upon the appellant as a result of its purchase of the premises by virtue of either the operation of the rule '*huur gaat voor koop'* or on any other legal basis; (b) whether the respondent's exercise of the option against the appellant gave rise to a valid agreement of sale which met the requirements of the Act

[1] Section 2(1) of the Act provides: 'No alienation of land after the commencement of this section shall, subject to the provisions of section 28, be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority.'

[2] Some of the issues argued in the court below and raised in the appellant's heads of argument in this court as grounds of appeal were correctly abandoned at the commencement of argument before us.

notwithstanding the absence of a new written deed of sale; and, if the answer to (a) and (b) is 'Yes', (c) whether the terms of the option ought to be rectified as claimed by the appellant in its counterclaim.

[11] In sum, the appellant's contentions before us were (a) that the operation of the rule '*huur gaat voor koop*' does not, as a matter of law, result in the transfer from the original lessor to the new owner of the rights and obligations contained in an option to purchase immoveable property reflected in a lease agreement upon the sale of the property; (b) that the said rights and obligations are not incidents of the lease which can be transferred to the new owner, and thus remain effective only between the lessee and the original grantor of the option; and (c) that the option must be signed by both the grantor and the grantee to amount to a written deed of alienation as envisaged by s 2(1) of the Act – one signed by both parties or their agents acting on their written authority – to be enforceable.

[12] In considering whether the '*huur gaat voor koop*' rule is relevant to the resolution of the issues it is necessary to examine briefly its source and the development of the principles which relate to it. In that regard, the following may be gleaned from various texts on our law and decisions of our courts.[3] In Roman law a lessee did not have a real right in the leased property, but merely enjoyed a personal right against the lessor on the lease

[3] *Scrooby v Gordon & Co* 1904 TS 937; *Boshoff v Theron* 1940 TPD 299; *Archibald v Strachan* 1944 NPD 40; J C De Wet '"Huur gaat voor koop" and the Proviso to Section 2 of the General Law Amendment Act, No 50 of 1956' (1970) 87 *SALJ* 137; J C De Wet (1944) 8 *THRHR* 74; W E Cooper '*Landlord And Tenant'* 2 ed p 274; A J Kerr '*The Law of Sale and Lease*' (1984) p 277; *De Jager v Sisana* 1930 AD 71; *De Wet v Union Government* 1934 AD 59; *Thipa v Subramany* 1954 (4) SA 126 (N); *Kessoopersadh en `n ander v Essop en 'n ander* 1970 (1) SA 265 (A); *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A); *Gennae-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A).

contract. If the lessor sold the property the buyer could generally evict the lessee as he had no duty to recognise the lessee's rights of occupation under the lease, unless he had undertaken to do so.

[13] As a result of the lessee's untenable situation and a need to cure the inequity, the rule evolved from local customs and legislation relating to the lease of land and housing in parts of the Netherlands and Holland as an equitable measure to give the lessee security of tenure where the leased property was alienated. It became part of Roman-Dutch law and, ultimately, South African law in that form.[4] The rule therefore has its origins in equitable principles and, apart from the fact that it applies to agreements of the letting and hiring of land and buildings, has never been clearly defined regarding its precise scope and consequence.

[14] This much is, however, settled in our law: successors in title to owners of leased property are bound to recognise the existence of the lease and an *ex lege* substitution of the purchaser for the lessor-seller takes place in the lease upon sale of such property. Thus, the rule relieves the seller of all rights and obligations flowing from the lease which are transferred to the buyer on transfer.[5] This view found expression in the *Mignoel Properties*[6] decision on which the respondent heavily relied. There, this court said:

'[O]nce 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

[4] *Graham v Local & Overseas Investments (Pty) Ltd* 1942 AD 95.
[5] See also 14 *LAWSA* 2 ed para 45.
[6] At 1050J-1051A.

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.'

This position has been endorsed in later decisions of this court: *Gennae-Wae Properties*[7] and *SA Breweries Ltd v Van Zyl*.[8]

[15] A question arises whether it can be accepted on the basis of these principles that in stepping into Quantum's shoes in terms of the lease agreement, the appellant also acquired the obligation relating to the respondent's option as its counsel urged upon us. An apparent difficulty which presents is that the case raises a novel issue as none of our courts, and certainly none of the authorities referred to above, have ever pertinently determined the extent of the effect of the '*huur gaat voor koop*' rule on a lease agreement containing an option to purchase leased immovable property. By and large, our courts have considered the relevance of the rule in the context of options to renew, rights of pre-emption and cession.

[16] There is, nevertheless, persuasive authority to the effect that an option to purchase may, in appropriate circumstances, be binding on a new owner. Authors W E Cooper[9] and A J Kerr[10] are of the view that the proper approach in determining the applicability of the '*huur gaat voor koop*' rule is to ask whether or not the option is an integral part of the agreement, such as where it was an inducement to contract or its presence had a bearing on the rent agreed upon, unless it is supplementary to the main agreement – the

[7] 1995 (2) SA 926 (A) at 937B.
[8] 2006 (1) SA 197 (SCA) para 7.
[9] *Landlord and Tenant* 2ed (1994) at 300-302.
[10] *The Law of Sale and Lease* 3ed (2004) at 42.

question whether the option is separate from the lease agreement largely depending on the interpretation of the contract as a whole.[11] The authors' reasoning is that if the option impacts on the determination of the rental to which the new owner is entitled, it must then follow that such new owner is bound by it as he becomes the lessee's debtor *in toto*,[12] unless the option forms a separate contract.

[17] In counter – and I shall deal incrementally with each leg of the argument outlined in para 11 as it developed – counsel for the appellant started with the submission that only the incidents of the direct relation of the lessee and lessor ie those arising in relation to occupation, and not those that may relate to dominium of the property, such as an option to purchase, are transferred in terms of the '*huur gaat voor koop*' rule. He relied for this contention on *Shalala & another v Gelb*[13] and *Hirschowitz v Moolman & others*.[14] The gist of the remarks of the provincial courts in these decisions, made in passing as the appellant properly acknowledges, is that an option to purchase is a collateral obligation undertaken by the original lessor and that the rule has no application as between competitors for dominium.

[18] With respect, I do not agree with this approach. It is similar to Prof De Wet's view,[15] which, as is pointed by Cooper,[16] is based on the premise

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[11] *Banket Holdings (Pty) Ltd v Levy* 1955 (4) SA 74 (SR) at 76; *Uys and another v Sam Friedman Ltd* 1935 AD 165 at 166.
[12] *Scrooby v Gordon & Co* (supra) at 945; *De Jager v Sisana* (supra) at 82; *De Wet v Union Government* (supra) at 63; *Kessoopersadh v Essop* (supra) at 282-3; *Creeser v Smit* 1948 (4) SA 302 (T); *Boshoff v Theron* (supra) at 305.
[13] 1950 (1) SA 851 (C) at 865.
[14] 1983 (4) SA 1 (T).
[15] (8) 1944 *THRHR* 74; De Wet & Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg* 4ed (1978).
[16] *Landlord and Tenant* 2ed (1994) at 302.

that a new owner does not become the lessee's debtor and is obliged only to suffer the lessee's rights of use, contrary to the decisions of our courts that a new owner is bound by all the material terms of the lease and upon transfer of ownership the lessor is divested of his obligations to the lessee. This view was roundly rejected by this court in *Mignoel Properties*.[17] There, Friedman AJA reiterated the view expressed in *Kessoopersahd*[18] that the rule, being a creature of practical considerations of fairness, is *sui generis* in nature and is not subject to a strict application of the law of contract, a factor which he said De Wet overlooked.

[19] But, despite my disagreement with Ogilvie Thompson J's view in the *Shalala v Gelb* decision[19] that options to purchase are not protected by the '*huur gaat voor koop*' rule, I nonetheless find his comments on the scope of the tenant's right to renew the lease instructive. The learned judge found that considerations of principle and convenience and our courts' interpretation of the rule dictated that the renewal period provided for in a lease, even one of which the purchaser was ignorant, falls to be included in the protection that the rule accorded to the tenant.

[20] The basis of this finding – which was limited to the right to renew a lease because it 'is an extension of the duration of a tenant's right of occupation… which the rule … is designed to protect' and 'forms a very

[17] At 1049B-F.
[18] 1970 (1) SA 265 (A) at 283B-C.
[19] 1950 (1) SA 851 (C).

material part of his interest in the land' – is expressed in the following remarks:[20]

'As regards the conditions of the existing lease, the purchaser is … admittedly bound – virtually in the position of the landlord *vis-à-vis* the tenant … Since the tenant must pay his rent to the purchaser, the original landlord's right to claim rent in consideration of the tenant's occupation is gone; and there is thus much to be said, both on grounds of convenience and of equity, for the view that the obligation to recognize a renewal of the lease should likewise pass from the original landlord to the purchaser. The alternative is to leave the tenant with an action for damages for breach of contract against his original landlord: but it was to avoid that very result that the Roman-Dutch Law departed from the Roman Law whereunder the tenant had only a personal right … and applied the doctrine of huur gaat voor koop to the tenant's right of occupation.'

[21] The learned judge further took the view that '[i]f the innocent purchaser is to be held bound by the existing lease because, had he enquired, he would have ascertained that there was a tenant in occupation of the premises under a lease, the same reason exists for holding him bound by a right of renewal of that lease which right, had he made a proper enquiry, would have been revealed to him.[21]

[22] I see no reason why these considerations should not apply to an option to purchase, which is a material component of and was a key motivating factor in the conclusion of the lease agreement. Our courts have made it clear that if an option to purchase is incorporated in a lease, principles similar to those on options to renew apply.[22] This view was expressed by this

[20] At 862.
[21] At 864.
[22] 14 LAWSA 2ed para 55.

court in *Mittermeier v Skema Engineering (Pty) Ltd*,[23] where Smuts AJA had to decide the longevity of an option to buy leased premises contained in an agreement of lease which did not state when it was to be exercised. He said:

'It appears to me that where one finds an option to buy leased premises conferred on a lessee in an agreement of lease, with no mention of the period within which it is to be exercised, the agreement *prima facie*, and in the absence of contrary indications, means that the option is to be exercised before the expiration of the lease. That is the way in which leases containing a right of renewal without a clear statement of the period within which the option to renew is to be exercised, have been interpreted in the past … There appears to be no reason why an option to buy the leased premises should be placed on a different footing.'

[23] Another example is *Banket Holdings v Levy*[24] in which Murray CJ relied on the judgment of Wessels CJ in *Uys & another v Sam Friedman Ltd*[25] for his dictum that a determination whether or not an option to purchase is collateral to the lease depends on the interpretation of all the terms of the agreement. In *Uys*, the court considered whether the lease conferred upon the lessee an option of renewal which had influenced the rental and said:

'If the option to renew a lease is a term or condition of the lease, as indeed in law it is, then it is difficult to see how it can be regarded as severable from the lease more than any other term of the contract. Indeed the right to renew on the part of the lessee may be a most important consideration and may very materially affect the rent payable, as we see at once when we consider the case of a shop where the right to carry on trade in a particular locality is an important part of the goodwill. The right to renew a lease which

[23] 1984 (1) SA 121 (A) at 126D-G.
[24] 1955 (4) SA 74 (SR).
[25] 1935 AD 165 at 166.

may form so important a part of the contract is no different from any other term or condition of the lease.'[26]

[24] My view is further, fortified by Broome J's skepticism of the notion that options to purchase are collateral to a lease, expressed in *Archibald & Co v Strachan & Co*[27] as follows:

'The proposition that an option to purchase is not incident to the relation of lessor and lessee may, for what it is worth, be accepted as in accordance with our law. But the contracting parties may insert in their contract what terms they please, and those terms, whether or not they are incident to the relation of lessor and lessee, are manifestly incident to the contract itself, for the parties have so made them.'

[25] I can articulate my conviction that no inequity arises from extending the protection afforded by the rule no better than was done by Greenberg JP in *Boshoff v Theron*.[28] In that case the issue was whether a seller of leased premises was divested of his obligation to provide his tenant with a power of attorney to enable him to draw water for watering his crops after the sale of the property. The court held:

'It does not seem a harsh provision that, in return for protection afforded him by the maxim, he should be required to look to the purchaser, in place of the seller, for performance of the lessor's obligations. In the ordinary obligations owed by a lessor … it can make little difference to the lessee who his lessor is, in so far as his legal rights are concerned … [because] as regards the lessor, there is ordinarily no *delectus personae*; the property itself generally affords the lessee sufficient security for the performance of the lessor's obligations. The position may be different where the lease provides for an obligation on the lessor which calls for some special quality on his part … It is clear …

[26] At 166. See also *Transvaal Mortgage Loan and Finance Co Ltd v Aronson* 1904 TS 864 at 866-867.
[27] 1944 NPD 40 at 43.
[28] 1940 TPD 299 at 303-304.

that the purchaser is bound by all the "material" terms of a contract of lease entered into by his predecessor in title.'

[26] To further bolster the appellant's contention, an attempt was made to conflate the option to purchase with the right of pre-emption. It was argued that transfer of rights and obligations *ex lege* cannot take place in the case of an option to purchase for the same reason that the new owner would not automatically be substituted for the original lessor in relation to obligations arising from the right of pre-emption.

[27] I find no merit in this submission because it ignores the fundamental difference between the two rights. As was pointed out by the respondent the right of pre-emption must be offered to the lessee and exercised before a sale of the leased property to a third party. Where the lessee declines to purchase the property, the owner may then sell to a third party. This means that by the time the third party comes on to the scene the pre-emptor has already disappeared. The right has been extinguished. There is therefore no room for a substitution and there is no one to replace.

[28] Neither am I persuaded by the contention that the approach advocated by Cooper and Kerr, whether or not an option falls within the ambit of the '*huur gaat voor koop*' rule, must depend upon the facts of each case and on the severability or otherwise of the right from the main agreement, was wrong because (a) it improperly sought to import principles applicable to options to renew a lease contract to options to purchase and (b) would result in uncertainty contrary to the objectives of s 2(1) of the Act. Examples given

in support of the latter submission were that a determination of questions whether the grant of the option influenced the fixing of the rent and the identity of the party against whom the option could be exercised had the potential of creating disputes of fact and conflicting interpretations.

[29] As I have said, I have no difficulty with the impugned approach. Reference must again be made to the *sui generis* nature of the rule and the fact that our courts accepted, early on, that the rule was not invariable in its operation and did not produce the same result wherever it was applied.[29]

[30] I have attempted to show in paragraph [22] that the first concern has no basis as principles relating to options to renew are equally applicable to options to purchase. The perceived risk of uncertainty is, in my view, similarly baseless. The exclusion in *Mignoel Properties*[30] of 'collateral rights unconnected with the lease' from the rule's protection, without specifying what those rights are, indicates a determination of those rights on a case by case basis. And the relevance of s 2(1) of the Act needs first to be established before its requirements are imposed on the case. In any event, our courts have the means and are capable of resolving disputes of fact wherever they arise.

[31] Mindful of the dangers of arguing by way of analogy, I nevertheless find resonance in the remarks of Corbett CJ in *Administrator, Transvaal v Traub*.[31] The remarks related to the doctrine of legitimate expectation which,

[29] See *Graham v Local and Overseas Investments (Pty) Ltd* 1942 AD 95 at 111.
[30] At 1051A.
[31] 1989 (4) SA 731 (A).

albeit a different concept from the '*huur gaat voor koop'* rule existing in a different legal sphere, similarly evolved as a concept based on equitable principles, to promote procedural fairness in administrative decision-making, from 'judicial attempts to mediate between individual interests and collective demands in the modern administrative state'.[32] Notably, the learned chief justice expressed no qualms with the fact that the concept, which is not well defined, is applied on a case by case basis and merely sounded this caution:[33]

'[W]hereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb.'

[32] In sum, I consider that the answer lies in whether the respondent's option was a material part of the lease agreement. There is evidence available, which was adduced at the trial, from which the parties' intention in this regard may be ascertained. I may just point out that the court below had made adverse credibility findings against the appellant's witness, Mr Codron, who had represented Quantum both in the lease negotiations and the subsequent sale transaction.

[33] There was, happily, no controversy regarding the evidence relevant for this part of the enquiry. It seems to me that this issue may be disposed of

[32] Prof Robert E Riggs (1988) 36 *American Journal of Comparative Law* at 395.
[33] At 761E-G.

shortly by reference to a portion of Codron's testimony-in-chief. He was examined as follows:

'Do you recall when the reference to an option to purchase was first raised?

Prior to signing the offer to lease the issue was raised because of the substantial amount of money being put in by [the respondent].

…

And it was raised in what context?

If we would consider selling [the respondent] the property in future.

…

And what was your response to the proposal with regard to an option?

I discussed it with my partner who viewed it favourably as long as certain conditions were adhered to.

Firstly, how did you arrive at the [option] price?

We projected the rental going forward for twenty-four months. That was the R18 000,00 a month [rental] escalating – I can't recall what the escalations were – but escalating over twenty-four months. And then applying a rate of capitalization on the asset at that point. That came to – we were satisfied with R2m plus VAT at that point … amenable to granting an option, but subject to conditions.'

[34] It is clear from this evidence that the substantial improvements that were going to be effected by the respondent on the premises directly influenced the amount of rental that was to be paid therefor and vice versa. It further provides ample support for the respondent's version testified to by one of its directors, Mr Karriem, that without the grant of the option it would not have expended R2m towards improving premises that did not belong to it which it could not recoup at the expiry of the lease, and that without the option there would have been no lease. Without a shadow of doubt, the

option was intended to be an integral, material part of the lease agreement.[34] In my view, it is binding on the appellant.

[35] It is binding for another reason too. The appellant agreed to clause 6.4.2 in the deed of sale and, upon transfer, engaged in correspondence with the respondent acknowledging the option. It was, however, argued on its behalf that the clause was merely intended to put it on guard that Quantum owed an obligation to the respondent in order to protect it from a claim for damages in the event that the respondent sought to enforce the option against it; that it was, in any event, vague and did not indicate which agreement it referred to, alternatively that it referred to the offer to lease to which the respondent was not party, because of its mention of 'subject to subdivision'.

[36] I find no ambiguity in the clause. It is so that it does not expressly refer to any specific agreement. It must, however, be considered that in terms of clause 10(b) of the offer to lease, Quantum's 'standard Agreement of Lease would be prepared and signed by both parties *in substitution*' thereof on acceptance of the offer. The lease agreement therefore superceded the offer to lease as it had been signed when the deed of sale was concluded and was the only agreement in existence at the material time. It is only reasonable to assume that that fact would have been brought to the

[34] There is another debate relating to the view that a new owner is bound by 'all the material terms' of the lease or 'terms integral' to the lease. Authors such as W E Cooper *Landlord and Tenant* 2ed (1994) pp 297 – 300; A S Mathews 1966 *Annual Survey* 116, De Wet (whose views relating to the scope of the maxim, have nevertheless, since been dismissed by this court as indicated) (1944) 8 *THRHR* 241 have, for a variety of reasons, criticized the view. The reasons include that it may be difficult to determine which terms are material or non-material and that as the lessor's substitute, the new owner should be bound by all the terms of the contract. I do not propose to engage in the debate as none of these concerns arise in the present case.

appellant's attention or that it would have itself discovered it in its due diligence exercise specified in the deed of sale.

[37] In any event, the clause refers to 'the existing tenant, Ottery Toyota'. That is the respondent's trading name. The reference to it excludes any possibility that the clause could refer to Expectra, the lessee in the offer to lease which exited the scene when the lease agreement was concluded. I also think that nothing turns on the reference to the subdivision of the premises which was reflected only in the offer to lease. Such condition is, in any case, implied by law, and it should be noted that the other disputed conditions (included in the offer to lease but not in the lease itself) are not mentioned in clause 6.4.2, which points to a reference to the lease itself.

[38] I am satisfied in the circumstances that the appellant accepted the validity of the option and its binding effect upon itself albeit, perhaps,[35] subject to the disputed conditions. On the assumption that the finding of an *ex lege* substitution of the appellant as lessor in Quantum's place is not sufficient to meet the requirement of a written option to purchase signed by its grantor in terms of the provisions of s 2(1) of the Act, my view is that Clause 6.4.2 fulfils such requirement.

[39] In the premises, I find that a valid option agreement exists which was capable of being exercised and was in fact validly exercised by the respondent. These findings dispense with the need to consider a further string to the appellant's bow, that there is an array of remedies available to a

[35] I deal more fully with the fate of the disputed conditions hereinbelow.

lessee that it can invoke against the original lessor to protect its interests, such as a claim for specific performance or damages or an interdict which divests from the respondent any need for the protection offered by the '*huur gaat voor koop*' rule.

[40] It now remains to consider the appellant's counterclaim for rectification. The appellant seeks rectification of the option agreement by the insertion of the words 'excluding VAT' after the option price and, at the end thereof, the phrase 'subject to approval from Pick `n Pay, approval from the City Council for sub-division of the property and approval from Quantum to a reciprocal access and parking agreement'.

[41] There was conflicting oral evidence regarding the omission of the disputed conditions in the lease agreement. According to Karriem, the respondent successfully negotiated the exclusion of the conditions through the Adamses and the lease agreement was accordingly prepared by the appellant to reflect the changes. Codron, on the other hand, denied any agreement to omit the conditions. He testified that the lease agreement was a different document from that drawn by the appellant's agent and furnished to the respondent for signature, presumably amended unilaterally by the respondent's attorneys. He noticed the omission before signing the lease agreement and contacted Mrs Adams to enquire about the unauthorized changes. Mrs Adams acknowledged the mistake and they agreed to an addendum to be drawn by the appellant rectifying the situation. In the meantime, he signed the lease agreement in its unchanged form to

accommodate the respondent which needed it urgently to secure finance. Inexplicably, the addendum was never signed and he did not know what finally happened to it. The court below dismissed Codron's testimony in this regard as improbable.

[42] It was argued before us that the basis for the appellant's claim for rectification set out in its pleadings, a bona fide common error, was not established by the evidence and that the addendum referred to by Codron was similarly not pleaded by the appellant. Parties should, of course, define the issues in their pleadings so that they each know what case they have to meet[36] and should, therefore, be limited to such pleadings.[37] However, it is equally trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues.[38]

[43] Thus, whilst there may be merit in the respondent's contentions in this regard, I do not consider myself bound to decide the issue on the basis of the inconsistent evidence. The reason is that the parties' intention regarding the terms of the lease is readily ascertainable from the option granted by Quantum to the respondent. I believe that it would be remiss of this court to ignore such clear, objective evidentiary material which was

[36] See, for example, *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 178.
[37] *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107G-H.
[38] *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A); *Middleton v Carr* 1949 (2) SA 374 (A); *Shill v Milner* 1937 AD 101.

fully canvassed at the trial where none of the parties can claim to have been misled by the state of the pleadings.

[44] The validity of the offer to lease in which the disputed conditions were contained was not brought into question. As stated above, in terms of its clause 10, the signed offer had the status of a binding lease until substituted by a standard lease agreement. Significantly, in the event that a standard lease agreement did not come into being, the offer to lease would continue to bind the parties. It could be no clearer from the plain language of this clause that the intention of the contracting parties was that the provisions of the offer would be transposed to the lease agreement in their entirety, failing which they would remain bound by its terms. That being so, it must be accepted that the disputed conditions were intended to be part of the lease agreement and that their omission from this document was an error. The appellant is, therefore, entitled to rectification in the terms it proposes.

[45] In the result, I would dismiss the appeal but order rectification of the lease agreement as prayed in the counterclaim; each party to pay its own costs at both tiers of the proceedings in view of the substantial success which they have both enjoyed.

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MML MAYA
JUDGE OF APPEAL

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JUDGMENT

HURT AJA (MPATI P, MTHIYANE, LEWIS JJA concurring):

[46] I have had the benefit of reading the judgment prepared by my colleague, Maya JA. Unfortunately, I find myself in respectful disagreement with her conclusion that a valid agreement of sale resulted from the exercise of the option.

[47] The background facts have been set out in detail by Maya JA, but it is convenient to recount those which I regard as particularly pertinent to the view which I take. For ease of identification I shall refer to the parties as follows: the original owner of the leased property with which this appeal is concerned will be referred to as 'Quantum', the appellant as 'Spearhead' and the respondent as 'E and D Motors'. In October 2002 Quantum let premises in a shopping centre to a company called Expectra 534 (Pty) Ltd. The written lease agreement contained a provision to the effect that the tenant was granted an option to purchase the leased premises plus an additional area in the shopping centre, within two years, at a price of R2 million, subject to certain conditions. It was agreed that this lease agreement was in provisional form and was to remain in force pending the conclusion of a 'final agreement'. [49] In February 2003 the 'final agreement' was signed, but, in the interim, it had been agreed that E and D Motors would be substituted as lessee (E and D Motors having the same directors and shareholders as Expectra 534 (Pty) Ltd). The existence of the option was

confirmed in this lease agreement (this time the grant being in favour of E and D Motors) and a plan of the shopping centre was annexed to the lease showing the area which was to be subject to the option (and which was approximately twice the size of the premises actually leased by E and D Motors). No reference was made in this version of the option to the conditions previously stipulated in the lease signed by Expectra. Shortly after this 'final lease' was concluded, Quantum sold the shopping centre to Spearhead. The contract of sale contained a reference to the existence of the option in terms which will be set out later. At some time shortly after transfer of the property to Spearhead, E and D Motors exercised the option in a signed letter addressed to Spearhead, tendering to pay the purchase price of R2 million. After certain correspondence was exchanged, Spearhead adopted the stance that it was not obliged to honour the option. E and D Motors then instituted the action for specific performance, ie transfer of the property to them against their tender of payment.

[48] In the court below, Zondi J held that Spearhead had purchased the shopping centre with knowledge of the existence of the option in favour of E and D Motors. He placed emphasis on correspondence by Spearhead's attorney after E and D Motors' purported exercise of the option, in which it was stated that Spearhead was 'bound' by the exercise.[39] As to the contention that there was no compliance with the formalities required for a valid alienation of immovable property, the learned judge held, as I understand his judgment, that the principle of *huur gaat voor koop* had the effect, *ex lege*, of substituting Spearhead for Quantum for all purposes of the lease

[39] It should be noted that the attorney was not authorized in writing to write this letter to E and D Motors.

agreement. These 'purposes' included the grant of the option and, I presume, the legal consequence of the substitution was that Spearhead was to be regarded as the grantor of the option and Quantum's signature of the lease was to be regarded as that of Spearhead once the property had been transferred to Spearhead.[40] If my interpretation of the findings of the court below is correct, then I consider that the learned judge overstated the law as it currently stands with regard to the consequences of the *huur gaat voor koop* principle.

[49] In argument before us, the primary contention by Mr Mullins, for Spearhead, was that his client was not bound by the option to purchase. He submitted that the obligations in respect of the option were not transferred to Spearhead when it took transfer of the property pursuant to the sale. He further contended that no valid 'deed of alienation', complying with the formalities prescribed by the Alienation of Land Act 68 of 1981 ('the Act'), had come into being as a result of the cumulative transactions between the parties and that the claim for specific performance of a contract of sale by Spearhead to E and D Motors must accordingly fail. Mr van Riet, for E and D Motors, based his claims to validity of the exercise of the option on two contentions. The first was that the transfer of rights and obligations pursuant to the *huur gaat voor koop* rule occurred *ex lege* and, as such, the

[40] This is my interpretation of the learned judge's approach from the following passage in para 39 of his judgment, in which he dealt with the contention that there was no compliance with the statutory formalities: 'The option agreement in the present matter was transferred by virtue of the principle *huur gaat voor koop* from Quantum Leap to the defendant [Spearhead] which entitled the plaintiff [E and D Motors] to exercise its rights as against the defendant directly. The option which the plaintiff seeks to exercise is contained in the lease agreement which it concluded with Quantum Leap. In other words the defendant was substituted *ex lege* for Quantum Leap (the original lessor) and the latter fell out of the picture. On being substituted the defendant acquired by operation of law all the rights and obligations of Quantum Leap under the lease.'

substitution of Spearhead for Quantum was automatic. Accordingly, so the contention ran, the option which had been granted and signed by Quantum must be treated as an option signed by Spearhead, so that the exercise by E and D Motors must, in law, bring into being a valid contract of sale by Spearhead to E and D Motors. Mr van Riet's second contention was that the written lease by Quantum to E and D Motors, which had been signed by both of them, and the contract of sale signed by Spearhead, obliged Spearhead to honour the option if exercised by E and D Motors. The exercise of this option by the signature and transmission of the letter from E and D Motors to Spearhead, he contended, would in any event bring into existence a contract complying with the formalities prescribed by the Act.

[50] Two comparatively recent decisions by this court have restated the basic principles upon which the *huur gaat voor koop* rule is to operate. The first is *Mignoel Properties (Pty) Ltd v Kneebone* 1989 (4) SA 1042 (A), in which Friedman AJA held that:[41]

'. . . 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.'

The second decision is *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A) at 939, where Corbett CJ extended

[41] At 1050I – 1051A.

the principle stated in *Mignoel* by confirming that the lessee does not have an election whether to proceed with the lease – he is bound, just as the purchaser is, to the terms of the lease as they stood between him and the original lessor. Apart from this gloss, the decision in *Genna-Wae* endorsed the principle quoted above from *Mignoel*.

'Collateral rights unconnected with the lease.'

[51] The authors Cooper[42] and Kerr[43] suggest that the question of what are 'collateral rights unconnected with the lease' must be decided on a casuistic basis, dependent upon the intention of the parties as gleaned from a consideration of the contract as a whole (or possibly the contractual matrix, where more than one contract is involved). Options to renew present no difficulty. It has long been the position that such options, constituting, as they do, obligations due by the landlord in his capacity as such, are a fundamental part of the lease arrangement and should not be regarded as 'collateral' or 'unconnected with the lease'.[44] It is the authors' approach to options to purchase with which I have difficulty. Stating that options to purchase 'present a more difficult problem', Kerr[45] refers to the decisions in *Ginsberg v Nefdt* (1908) (25) SC 680 and *Archibald & Co Ltd v Strachan & Co Ltd* 1944 NPD 40 as examples (as I understand the learned author) of cases in which *huur gaat voor koop* operated in favour of a lessee who had an option to purchase and, accordingly, against the prospective purchaser.

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[42] *Landlord and Tenant* (2 ed) p 303.
[43] *The Law of Sale and Lease* (3 ed) p 442 and also writing in 14 (2) Lawsa (2nd reissue) para 46.
[44] *Shalala & another v Gelb* 1950 (1) SA 851 (C) at 856 to 864.
[45] *Op cit* pp 441 – 442.

After then referring to the apparently contrary decision by Ogilvie Thompson J in *Shalala v Gelb* the learned author states:

'With The Hon Mr Justice Cooper it is thought that the correct approach is to enquire whether the option to purchase was an integral part of the original lease or not; if it was, as for example where it was an inducement to contract, or its presence had a bearing on the rent agreed upon, then it is protected by the rule *huur gaat voor koop;* if it was not, as for example when it is clearly supplementary to the main agreement, then it is not protected.'

I very much doubt that the test thus proposed will assist in dealing with the difficulty.

[52] It must be borne in mind that the principle of *huur gaat voor koop* operates in regard to the purchaser of leased property regardless of whether he has notice of the existence or the terms of the prior lease.[46] The object of the rule is an equitable one, namely to protect the right of the lessee to continued occupation of the property. It is perhaps not surprising that such a rule, which does not have its origins in one or other of the recognized principles of contract, should give rise to vigorous debate about its effects and its limits.[47] But it can hardly be equitable to bind an innocent purchaser to an option to purchase which may well be for a price less than that which he has just paid to acquire the property, simply because the option forms an 'integral part' of the lease to which he has succeeded. In my view, the problem must be approached from an objective point of view which keeps in focus the basic object of *huur gaat voor koop*. On this approach, the

[46] *Shalala at* 862.
[47] See *Kessoopersadh v Essop* 1970 (1) SA 265 (A) at 282 – 283.

question is simply whether the 'collateral right' (or the collateral obligation) relates to the lessee's real right of occupation *as lessee*. It seems to me that this question can hardly ever be answered in the affirmative when it relates to the rights and obligations flowing from an option to purchase. The guarded statement by Ogilvie Thompson J in *Shalala,* to the effect that the maxim *huur gaat voor koop* has no application as between competitors for dominium[48] has been criticized by the writers to whom I have made reference earlier, but in my view it encapsulates a legal conclusion which fits very comfortably into the scheme of application of the *huur gaat voor koop* rule.

[53] An option to purchase incorporates a *pactum de contrahendo* in which the grantor undertakes irrevocably to keep an offer to sell open, usually for a specified or determinable period. The grant may be subject to certain contingencies and/or conditions.[49] The rights conferred by it are purely personal to the grantee. Assuming that the option is granted in respect of the leased property (for, if it is not, then it can hardly be regarded as part of the landlord's obligations to his tenant *'as lessor'*), then the anomalous situation arises that, by selling to the purchaser, the landlord jeopardizes the *pactum*. The common law in this situation (quite apart from the *huur gaat voor koop* rule) is clear. If the purchaser had notice of the existence of the option prior to purchasing, he must be taken to have bought the property subject to the lessee's personal right against the landlord to exercise it. If the purchaser did not have notice of the option, there is no rule in the common law (again

[48] At 865.
[49] *Hirschowitz v Moolman* 1985 (3) 739 (A) at 765 – 766.

apart from the possible application of *huur gaat voor koop*) which would render the purchaser bound to an obligation of which he was unaware. The question is whether the development of the *huur gaat voor koop* principle in our law has included, or should include, the *ex lege* transfer of obligations arising out of an option to purchase, granted by the original landlord, to the purchaser of leased property. Certainly, an examination of the reported decisions concerning options to purchase in this context does not reveal any such development.

The Case Law on the Exercise of Options to Purchase.

[54] There are three reported cases in which the exercise of an option to purchase, granted to a lessee, occurred after the original landlord had sold the leased property.[50] The first such decision is *Ginsberg v Nefdt* (1908) 25 SC 680. The lease in this matter included the grant to the lessee of an option to purchase the leased property. The landlord sold the property to a third party during the currency of the lease. The lessee applied to interdict the transfer of the property to the purchaser. The purchaser agreed to be bound by the lessee's option but, for some reason which is not clear, the court granted the interdict to protect the lessee's option. It appears that the option had not been exercised at the time when the matter came to court, nor is there any indication as to whether the option was to be exercised against the original landlord or the purchaser. Given that an interdict against the purchaser was granted, though, it seems that the parties contemplated that the option was to be exercised against the former.

[50] These are, as far as I have been able to ascertain, the only three cases in which this aspect has been dealt with.

[55] The second case is *Archibald & Co Ltd v Strachan & Co Ltd* 1944 NPD 40. Insofar as they relate to the issues in this matter, the facts are briefly that the landlord had granted the lessee an option to purchase the leased property, such option being incorporated in the agreement of lease. The landlord subsequently sold the property but, for reasons which are not recorded, transfer of the property was not passed to the purchaser. Nearly 18 months after the conclusion of the contract of sale, the lessee exercised his option by directing a written acceptance of it to the original landlord. The landlord thereupon notified the purchaser that the sale to him had 'fallen away' by virtue of the lessee's decision to exercise the option. The purchaser sought an order of specific performance against the landlord but his application was dismissed. The court held that the purchaser had concluded the contract of sale in the full knowledge of the existence of the option and was accordingly bound to recognize the lessee's entitlement to exercise it. Here again, the lessee had exercised the option against the original landlord and not against the purchaser.

[56] In *Van der Pol v Symington* 1971 (4) 472 (T), the original lessor (who had granted the lessee an option to purchase) had died during the currency of the lease and the property was transferred to her son by her executor. The lessee exercised the option against the son. The court held that the son was bound by the option, regardless of whether he had knowledge of the lease before he took transfer, on the basis that he was a gratuitous successor to the original lessor. The question whether, by exercising the option, the lessee

had brought into being a written contract between himself and the son was not considered. Nor was this an application of the principle of *huur gaat voor koop* because the son had not purchased the property but had acquired his title as an heir.[51]

[57] A significant feature of both *Ginsberg* and *Archibald* is that the option was exercised against the grantor and not the purchaser and the court, in each case, applied the doctrine of notice as the basis for finding that the prior right of the lessee under his option prevailed over the subsequent right of the purchaser to transfer of the property.[52] Nor, in either of the two cases, had there been transfer to the purchaser, and although there was a passing reference in *Ginsberg* to the 'well known proposition . . . that lease goes before sale', the court appeared to be applying the principles of a 'double sale', and not *huur gaat voor koop.*The result is that there is no reported decision in our case law to the effect that the obligations arising out of an option to purchase are transferred *ex lege* and without express or tacit assignment, to the purchaser of leased property. Nor, on the basis of what I have set out above, is there any reason to extend the effects of the *huur gaat voor koop* rule to include such a transfer.

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[51] There is one other decision in which an option to purchase leased property was considered in this particular context, namely *Shalala v Gelb* 1950 (1) SA 851 (C) at p 862. However, it was considered only for the purpose of differentiating it from an option to renew the lease and although Ogilvie Thompson J made a statement to the effect that the principle *huur gaat voor koop* does not apply to options to purchase, the *dictum* was plainly *obiter* and has been treated as such in subsequent cases.

[52] The remaining cases cited by Kerr in this context, viz *Levy v Banket Holdings (Pvt) Ltd* 1956 (3) SA 558 (FC) and *Sandmann v Schaefer* 1969 (4) SA 524 (SWA), deal with the question of 'collateral terms' in a lease and not with the application of *huur gaat voor koop*.

[58] I have already indicated that such an extension would operate unfairly against an 'innocent purchaser' (ie one who purchases the leased property in ignorance of the terms of the agreement between the landlord and the tenant). As to the 'purchaser with notice', the doctrine of notice, in my view, provides adequate protection to the tenant in respect of his rights in terms of the option, as is apparent from the decisions referred to in para 57, above. The situation of the tenant who invokes the doctrine of notice against a purchaser of the leased property in these circumstances has recently been clarified by this court in *Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA), particularly in paras 17 and 18. In that case the respondent had purchased a portion of a property on the basis that the portion was to be subdivided and transferred to the respondent together with the registration of a servitude which was to give the respondent access to the subdivision. Before transfer or registration of the servitude, the owner of the property had been liquidated. The liquidator sold the whole property to Investec Bank, the contract of sale making express reference to the uncompleted sale to the respondent and specifically recording that the property being sold did not include the portion sold to the respondent. Investec Bank later sold the whole property to the appellant. The contract between Investec Bank and the appellant made no mention of the prior sale of portion of the property to the respondent, but it was common cause that the appellant was aware of the respondent's right to claim transfer of, and have the servitude registered in favour of, the portion of the property.

[59] The respondent had sued the appellant for transfer of the portion of the property to it and for an order that the appellant do whatever was necessary to register the servitude over the remainder of the property in favour of the respondent. The appellant had contended that the respondent had no right to claim transfer from it, but that the doctrine of notice required the respondent first to set aside the sale to the appellant and then to claim transfer from Investec Bank. This defence had failed in the court of first instance, nor did it succeed before this court. After a careful examination of the consequences of 'double sales' to purchasers with notice, Brand JA said:[53]

'(I)n the case of a servitude, application of the doctrine of notice does not require that the transfer of the property to the purchaser be set aside so as to enable the beneficiary under the servitude agreement first to claim registration of the servitude against the seller before the property is retransferred to the purchaser subject to the registered servitude. The beneficiary's claim is allowed directly against the purchaser (see eg *Grant and Another v Stonestreet and Others*[54] *(supra)* 7). That there is no privity of contract between the beneficiary and the purchaser is not seen as an insurmountable hurdle. Why then, it may in my view rightfully be asked, should the position be any different when the same doctrine is applied in the instance of double sales?

My suggestion is not that in the successive-purchaser situation B (the first buyer) should always be allowed to claim transfer directly from C (the second). The doctrine of notice is an equitable remedy and its manner of

[53] Paras 17 and 18.
[54] 1968 (4) SA 1 (A).

application should be determined largely by what is considered to be equitable to all concerned in the circumstances of the particular case. Where the whole property is first sold to B and then to C, the most equitable solution will probably be to restore A and C to their former position – by ordering cancellation of the transfer and repayment of the purchase price – before A is ordered to transfer the property to B. But in this case the position is substantially different. (The respondent) claims transfer of . . . portion of the railway siding only. Cancellation of the successive transfers of the whole property to Investec and the (appellant) will therefore require that the remainder of the property be retransferred first to Investec and then to the (appellant). . . . No reason has been suggested, and I can think of none, why this cumbersome and wasteful process would be in anybody's interest.'

[60] It seems to me that, in general, the equitable process of rearrangement contemplated in this judgment will be applicable to a situation where a lessee seeks to enforce his right to delivery pursuant to the exercise of his option against the original lessor, regardless of whether the option related to the whole of the property sold or to only a portion of it. The fact is that there is no 'equitable need' to postulate an *ex lege* transfer of the obligations arising out of the option to the purchaser in order to protect the lessee's option against a purchaser with notice.

[61] I conclude, therefore, that the obligations arising from an option to purchase the leased property, granted by the lessor, are not, by the operation of the rule *huur gaat voor koop,* transferred *ex lege* to the purchaser of the

property. It follows that a lessee, seeking to exercise such an option (always assuming, of course, that the relevant contracts do not constitute an assignment of the lessor's obligations to the purchaser) must do so as against the grantor and not against the purchaser. Where, however, there has been a transfer of the property to a purchaser with notice of the option, the lessee, having thus exercised his option, will generally be able to claim transfer of the property from the purchaser. The submissions on behalf of E and D Motors to the effect that it was entitled to exercise the option against Spearhead merely by operation of the *huur gaat voor koop* rule must, in my view, fail.

[62] That leaves the contention by the respondent that the lease, the contract of sale to Spearhead and the letter from E and D Motors to Spearhead purporting to exercise the option, read together, constitute a written deed of alienation complying with the provisions of the Alienation of Land Act 68 of 1981. There is no doubt that the grant of the option in the written lease by Quantum to E and D Motors constituted an offer to sell complying with the requisite formalities.[55] The fact that the written offer and the written acceptance may be embodied in different documents is not a bar to compliance with the Act.[56] The question is whether the agreement of sale from Quantum to Spearhead can be construed as an assignment of Quantum's obligations in terms of the option to Spearhead, complying with the statutory formalities. The only mention, in the contract of sale, of the option granted to E and D Motors is to be found in clause 6.4, which reads:

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[55] *Venter v Birchholtz* 1972 (1) SA 276 (A) at 283 – 284.
[56] *Johnston v Leal* 1980 (3) SA 927 (A) at p 937H; *Hirschowitz* p 758B to C.

'6.4 The Seller warrants and undertakes to the Purchaser –

6.4.1 the Seller is the owner of and has the absolute right to dispose of the property to the Purchaser in accordance with the provisions of this agreement;

6.4.2 no agreements have been entered into by the Seller whereby any restrictive conditions or servitudes or other real rights attach to the property or in terms of which any person, natural or corporate, is entitled to obtain any real rights to the property, save for the existing tenant, Ottery Toyota,[57] who have limited rights to purchase their section subject to a subdivision of the land;

6.4.3 no notice has been received by the Seller of the intention of any authority to expropriate the property or any portion thereof nor is the Seller aware of any intention to expropriate the property or any portion thereof by any such authority;

6.4.4 as far as the Seller is aware the current use of the property and buildings by the existing tenants is lawful and is not in contravention of any applicable zoning scheme and/or conditions of title;

6.4.5 as far as the seller is aware no building encroaches over any boundary or building line or similar restriction;

6.4.6 as far as the Seller is aware no building or improvement on any adjoining property encroaches onto the property.'

[63] I have purposely quoted the clause in full to set clause 6.4.2 in its context. I do not think that the clause can, by the furthest stretch of imaginative interpretation, be construed as an assignment by Quantum to

[57] The trade name of E and D Motors.

Spearhead of any obligations, let alone the obligations arising out of the option. Nor is it couched as an offer by Spearhead to endorse the option in favour of E and D Motors. What the seller is saying in this clause is plainly along the following lines: 'Take notice that there is an option which entitles Ottery Toyota to purchase a portion of the property if the land is appropriately subdivided'. The sale of the subdivision to E and D Motors would not be frustrated by the fact that Quantum was no longer the owner and, indeed, the tenor of the stipulation is simply that, if the option is exercised (against Quantum), Spearhead may later be required to transfer the subdivision to E and D Motors. It is a classic situation where the doctrine of notice would apply. But that, to my mind, is as far as the clause can be taken.

[64] It follows that, in my view, the appeal should succeed. The following order is made:

1 The appeal is allowed with costs, such costs to include the costs of two counsel.

2 The order of the court below is set aside and the following order substituted therefor:

'The plaintiff's claim is dismissed with costs, such costs to include the costs of two counsel.'

_____

NV HURT
ACTING JUDGE OF APPEAL

Appearances:

For Appellant: S Mullins SC
A D Brown

Instructed by
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Lovius Block, Bloemfontein

For Respondent: R S Van Riet SC

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