REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: A5004/14
DATE: 12 NOVEMBER 2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

9.12.2014 .....
DATE SIGNATURE

In the matter between:

THE MEDIA CUBE (PTY) LTD **APPELLANT**

and

VIVIDEND INCOME FUND LIMITED **RESPONDENT**

J U D G M E N T

Windell J
INTRODUCTION

[1] This is an appeal with the leave of the Supreme Court of Appeal against the judgment of Willis J.

[2] The appellant, Media Cube Pty (Ltd), sought an order against the respondent, Vividend Income Fund Limited, declaring a lease agreement binding on the respondent. The appellant contended that the lease agreement was concluded between the appellant's predecessor and the respondent's predecessor, which was orally ceded by the appellant's predecessor to the appellant. The appellant contended that, by virtue of the *huur gaat voor koop* principle, the respondent was bound to recognise the appellant as lessee.

[3] The appellant had also claimed a spoliation order. This was abandoned at the hearing of the appeal.

THE LEASE AGREEMENT

[4] The agreement provides for the letting of a portion of an immovable property, namely certain designated areas on the outside of the building, and not the whole property. The appellant's predecessor was given the sole and exclusive right to "fix", display and exhibit advertisements in the designated areas during the term of the agreement. The agreement made provision for the construction of "structures" where the advertisements would be displayed. The appellant's predecessor was entitled but not obliged to construct and erect the structures on the designated areas and in accordance with approved plans. The structures were to remain the sole property of the appellant's predecessor, and the respondent's predecessor had the obligation to "notify interested third parties" of this. The respondent's predecessor was entitled, but not obliged, to cancel the agreement should the appellant's predecessor not contract an advertiser for 6 months consecutively. The respondent's predecessor was entitled to a percentage of the advertising revenue as consideration.

THE ISSUES

[5] There is a factual dispute relating to the lease agreement. The respondent denies the existence of the lease agreement. The parties are however in agreement that the nature of the document the appellant relies on, and which forms the basis of this application, is a lease agreement. The respondent submits that, even if there had been such an agreement, the *huur gaat voor koop* principle cannot apply because the lease agreement the appellant relies on is not the type of agreement which would attract the *huur gaat voor koop* principle.

[6] Respondent submits that the *huur gaat voor koop* principle was historically designed to protect lessees of land and houses and to alleviate the position of a lessee under the Roman/Dutch Law. See *Kessoopersadh en 'n Ander v Essop en 'n Ander* 1970 (1) SA 265 (A). It was submitted that the rule is limited to leases of land and buildings. See *Genna-Wae Properties (pty) Ltd v Medio–Tronics (Natal) (Pty) Ltd* 1995 (2) SA 926 (A). The respondent contends that the principle can therefore not be extended to the letting of space on the outside of a building.

[7] The respondent further submits that, even if the *huur gaat voor koop* principle is applicable to the agreement, the applicant failed to prove that he was in possession or occupation of the leased premises during the sale of the immovable property.

[8] The court a quo did not enter the factual dispute and assumed in favour of the appellant that there was a lease agreement between the parties and that it was the type of agreement in which the *huur gaat voor koop* principle would apply. The court a quo dismissed the application on a legal interpretation of the requirements for the *huur gaat voor koop* principle.

[9] It is similarly not necessary for this Court to resolve the factual dispute as to the existence of the lease agreement or whether it is the type of agreement that would attract the *huur gaat voor koop* principle. It is assumed for purposes of this appeal that there was a lease agreement between the parties and that the *huur gaat voor koop* principle would apply.

[10] The only issue left for determination is if the appellant proved the requisite conditions to make the *huur gaat voor koop* applicable to the lease agreement.

HUUR GAAT VOOR KOOP

[11] For the *huur gaat voor koop* principle to apply one of two conditions must be proved by the lessee:

1. That the purchaser was aware of the lease; or
2. That the lessee was possessing or occupying the leased premises in such a way as to place the purchaser on guard or on notice that someone such as the lessee had an interest in the leased premises.

[12] It is trite that the appropriate time for testing for the presence of either of these conditions is at the time of concluding the sale agreement for the acquisition of the immovable property. This is so because once the sale has been concluded the purchaser is bound and it would be inequitable and irrelevant to the logic of the doctrine to bind the purchaser to knowledge acquired only at a date after the purchase of the property. See *Kessoopersadh* supra.

[13] The appellant contends that it has been in occupation of the leased premises at the time of the sale of the immovable property as it had over the period of the lease agreement regularly let advertising space on its structures to third parties. It

regularly attended the property for purposes of repairing and inspecting the advertising structures. Applicant avers that the mere fact that the structures existed is sufficient to prove occupation as the agreement provides for occupation through the construction and erection of the advertising structures. What is relevant for the purposes of *huur gaat voor koop* is an objectively discernable, or open, factual occupation. If it is found that the appellant was in open occupation the respondent is bound by the lease agreement irrespective of whether or not the respondent had knowledge of the lease agreement at the date of the sale of the property.

[14] It is common cause that the respondent was not aware of the lease agreement when it bought the immovable property. For the appellant to succeed it must prove that it was in occupation of the leased premises in a manner that ought to have placed the respondent on notice.

[15] In *Shalala and Another v Gelb* 1950 (1) SA 851 (C) it was held that the *huur gaat voor koop* doctrine is based on notice or constructive notice on the part of the purchaser of the rights of the lessee. It was pointed out that constructive notice of the lease is derived from the circumstances of the lessee's occupation of the premises. It was found that this constructive notice is the legal justification for holding that, in conformity with the maxim *huur gaat voor koop*, the purchaser is bound to recognise the tenant's existing tenancy.

[16] In *Judd v Fourie (1881-1882) 2 EDC 41* at page 55 the court stated the following:

> *" Or if one purchases property over which some person other than the owner is exercising a right, this exercise of a right should put the purchaser on his guard, and compel him to enquire by what authority this right is exercised.*

The rule of our law, that "hire goes before sale," may be viewed as in another form an illustration of the same principle."

[17] The kind of occupation required for the *huur gaat voor koop* principle is based on the equitable doctrine of notice. For the principle to apply it must be occupation that puts the new owner on enquiry as to the presence of a tenant.

[18] In an attempt to demonstrate that it was in occupation of the leased premises the appellant averred in its replying affidavit that advertising revenue was generated during the months preceding the sale agreement. As proof, the appellant attached to his replying affidavit a statement dated **July 2010** (my emphasis) for a four month period. This out-dated document supports the respondent's contention that the signage was not being used during October 2011 when the sale was concluded. This is exacerbated by the fact that the seller of the immovable property entered into a head lease agreement with the respondent during the sale of the immovable property in terms of which the respondent let the external signage back to the seller and where it was specifically included as premises which are not the subject of any existing lease agreement.

[19] The court *a quo* was, in my view, correct in dismissing the application based on the fact that the appellant did not set out sufficient facts to prove that it was in occupation. Except for a few general averments regarding inspection and maintenance of the structures, and having access to the building, the appellant did not set out any facts which show that the appellant was in occupation at the time of the sale of the immovable property in a manner that was objectively discernible. There was no averment in the founding affidavit that there was any advertising on the structures at the time of the sale. If there was advertising it might have placed

the purchaser on guard. The presence of the structures alone, without any advertising, does not constitute the kind of occupation necessary for the operation of the *huur gaat voor koop* principle. Nor could the respondent have been placed on notice by any income from the lease of the designated areas, as there had apparently been none since sometime in 2010.

[20] In the result the following order is made:

1. The appeal is dismissed with costs, which includes the costs of two counsel.

L WINDELL
JUDGE OF THE HIGH COURT

I agree

S.YACOOB
ACTING JUDGE OF THE HIGH COURT

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO: A5004/14
DATE: 12 NOVEMBER 2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

5-12-14

WRIGHT J

In the matter between:

THE MEDIA CUBE (PTY) LTD **APPELLANT**

and

VIVIDEND INCOME FUND LIMITED **RESPONDENT**

J U D G M E N T

WRIGHT J

The litigation thus far

1. The appellant company, Media launched an urgent application in January 2013 against the respondent company, Vividend. Media sought orders declaring that a lease agreement was binding on Vividend and interdicting Vividend from impeding Media's rights under the lease. Media sought too, an

order that Vividend forthwith restore Media to possession of the leased premises and grant Media access thereto. The urgent court declined to hear the case on its merits. Willis J, as he then was, later dismissed the application on its merits and a subsequent application by Media for leave to appeal. This appeal is with the leave of the SCA.

Media's case

2. On 19 March 2008 Interspace Media (Pty) Ltd concluded a written " *Media Alliance Agreement* " with Vusani Properties (Pty) Ltd:
   2.1. under clause 1.3.9 *'structures'* was defined as " advertising structures where advertisements may be displayed, **to be constructed** on certain designated areas at the site.... " (My emphasis)
   2.2. under clause 2 Vusani granted to Interspace the sole and exclusive right to affix adverts and display them on a building in Johannesburg.
   2.3. under clause 4.3 the adverts and related equipment would remain the property of Interspace and not be subject to any hypothec of any landlord of Vusani.
   2.4. under clause 7.1 Vusani was to allow Interspace such access to the building as was reasonably required to erect the advertising structures and maintain them.
   2.5. under clause 8.2 Interspace would pay to Vusani 50% of the net advertising revenue received by Interspace from its advertising customers.
   2.6. under clause 21.3 Interspace was entitled to cede, assign and delegate its rights and obligations under the agreement without the consent of Vusani.
   2.7. under clause 21.4 no amendment or consensual cancellation of the agreement was to be binding unless recorded in writing and signed by the parties.
   2.8. under clause 3 the agreement was to endure for an initial period of 5 years. Thereafter it would endure for further 5 year periods until either party gave 6 months notice to the other.

3. On 15 January 2010 Media orally took cession of Interspace's rights under clause 21.3 of the agreement, which agreement, properly construed was a lease agreement.
4. Late in 2011 Vusani sold the building to Vividend.
5. On 23 May 2012 Vividend took transfer of the property from Vusani.
6. The agreement, in the absence of notice from either party to it terminating the agreement, was extended for a second 5 year period from March 2013 to March 2018.
7. The large conspicuous advertising structures on the outside of the building should have and did put Vividend on its guard that a tenant might have rights to the building. Vividend is bound to the lease under the rule that *huur gaat voor koop*.
8. In November 2012 Mr Witt, a director of Vividend conceded to Mr Swartz, a director of Media that Media enjoyed the rights claimed by it as leasee.
9. Media has spent a lot of money erecting the structures necessary for the display of adverts. The structures have been on the building since 2007.
10. Media's representatives have regularly, over a number of years, been to the premises to repair, adjust and maintain the structures. Accordingly Media has occupied the building at least for the purpose of the *huur gaat voor koop* rule and for the purpose of being spoliated from the building.
11. Shortly before the launching of the urgent application Vividend had unlawfully prevented Media's representatives from gaining access to the building to maintain the advertising structures and to display the adverts of Media's clients.

Vividend's answer

12. Prior to purchasing the building from Vusani , Mr Witt, a director of Vividend enquired from Vusani's representatives as to the leases in place over the building . He was furnished with a schedule which contained no reference to the Media Alliance agreement.
13. In December 2011 Vusani and Vividend concluded a written lease agreement of their own pursuant to which Vusani rented from Vividend the vacant space

in the building. Any rent received from sub tenants would accrue to Vusani. This agreement identified the advertising signage as unlet.

14. When Mr Witt met with Vusani representatives on 27 February 2012 he was told that there was no agreement in place in regard to signage.

15. Prior to Vividend purchasing the building from Vusani, Mr Witt had perused tenancy schedules, rental recovery schedules and monthly income statements for the previous 3 years. These documents had been supplied by Vusani to Vividend as part of a due diligence exercise. There was no indication of a signage lease or rental for signage.

16. The allegation that Mr Witt at a meeting conceded Media's rights under the lease is denied.

17. Mr Witt says that in March 2012 he met with Mr Swartz to discuss the question of signage. Mr Swartz told Mr Witt that Mr Swartz had a potential customer, Visa. Mr Swartz proposed that revenue be shared. Mr Witt was amenable to the advertising but told Mr Swartz that he would revert on the question of sharing advertising revenue. No agreement was finalized. Mr Witt says that Mr Swartz never mentioned the existence of the Media Alliance agreement or any signage agreement.

18. On 24 May 2012 Mr Witt emailed Mr Swartz effectively challenging him to provide evidence of any lease or signage agreement. Mr Swartz provided none.

19. Mr Witt concludes that the Media Alliance agreement is a recent fabrication. He says that if it was not it would have surfaced long before it did which was some time after May 2012.

20. Vividend is unaware that representatives of Media attended at the building from the time that Vividend took transfer of the property in May 2012 for the purpose of repairing, testing or inspecting the structures. Vividend points out that on Media's version the Media Alliance agreement was signed in 2008 in apparent contradiction to Media's case that its structures had been on the building since 2007. It is well to note that clause 1.3.9 of the Media Alliance agreement, signed on 19 March 2008 by Interspace and Vusani referred to structures " *to be constructed.*"

Media's reply

21. Mr Swart does not explain why the Media Alliance agreement took so long to materialise. Nor does he explain the bald allegation in the founding affidavit that the structures are Media's and have been since 2007.

Conclusion

22. In my view Vividend raises a bona fide dispute of fact about the existence of the Media Alliance agreement at the time of the sale of the property by Vusani to Vividend, and consequently about the validity of the alleged cession. This being so the application was on shaky ground insofar as it relied on a cession of rights under a lease or on rights against Vividend under the rule *huur gaat voor koop*. At a minimum, Media had to prove that it occupied the building before it could rely either on the *huur gaat voor koop* rule or on a spoliation. Media relied on its allegation that the advertising structures (as opposed to advertisements themselves) were on the building from 2007. It also relied on the allegation of regular access to the building by its employees or contractors.

23. In my view Media proved no spoliation, insofar as it relied on access to the building. Media through its representatives had no more than a personal right to occasional access. Such right would have fallen short of occupation or possession necessary to found a case in spoliation. Media's case that it also occupied or possessed the building for the purpose of being spoliated through the alleged fact that its advertising structures were affixed to the building would founder on the bona fide dispute of fact relating to its alleged ownership of the advertising structures. However, I decline to hold that Media should have foreseen the material disputes of fact that emerged from the papers. The papers do not show clearly that Mr Swartz and Witt were not at cross-purposes at one period in the chronology of events. On 5 October 2012, Media's attorneys wrote to Vividend providing details of the Media Alliance Agreement. On 23 October 2012, Vividend's attorneys replied. The point taken was that the agreement is not a lease and that the *huur gaat voor koop* rule did not apply. It was not suggested that the agreement was a fiction.

24. There is room for the view that the agreement is a lease. Both parties, at some point or another have considered the use of the space as hire, generating rental. I am not sure that the mere fact that the space in question is on the vertical plane rather than on the horizontal is relevant. The rule *huur gaat vuur koop* applies to leases of land and buildings. **Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd 1995 (2) SA 926 AD** at 932 E-G.

25. I feel that it would be overly robust to decide this matter on paper. Apart from the disputed validity of the agreement and cession, the extent of Media's occupation is disputed. I would make the following order:

26.

26.1. The appeal is allowed with costs.

26.2. The order of Willis J dismissing the main application is set aside.

26.3. The respondent is to pay:

26.3.1. the costs of the application for leave to appeal before Willis J, and

26.3.2. the costs of the proceedings in the SCA

26.4. The Notice of Motion stands as a simple summons.

26.5. The Answering Affidavit stands as a Notice of Intention to Defend delivered on the day on which judgment in the Appeal is handed down.

26.6. Thereafter the matter is to proceed as an action under the Uniform Rules.

GC WRIGHT J
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

WINDELL J
I disagree

YACOOB AJ
I disagree.

On behalf of the Applicant:	Adv A Subel SC
	082 450 4055
Instructed by:	TWB – Tugendhaft Wapnick
On behalf of the Respondent:	Adv Snyckers SC and
	082 781 4981
	Adv BM Gilbert
	083 853 3082
Instructed by:	Fluxmans Inc
Date of Hearing:	12 November 2014
Date of Judgment:	5 December 2014