IN THE HIGH COURT OF SOUTH AFRICA (SOUTH GAUTENG)

JOHANNESBURG

CASE NO: 2132/13

DATE: 07.03.2013

In the matter between

THE MEDIA CUBE (PROPRIETY) LIMITED Applicant

and

VIVIDEND INCOME FUND LIMITED Defendant

J U D G M E N T

WILLIS, J:

[1] This is an application in terms of which the applicant seeks to assert a lease agreement under the principle of *huur gaat voor koop*. The applicant relies upon a lease agreement in respect of which it was not a party. Furthermore, it relies upon this agreement to enforce it against a

successor in title to the original owner who entered into the agreement upon which the applicant relies.

[2] The agreement relates to what the applicant has more accurately described, in its founding affidavits, as 'advertising structures' rather than what appears in the actual agreement itself as simply 'structures'. The site on which the structures exist is a building known as 158 Jan Smuts Avenue, Rosebank, Johannesburg. The property in question is portion 1 or erf 182, remainder erf 171 the remainder of 181, portion of erf 171 Rosebank, part of which building is also in Walter Avenue, Rosebank.

[3] The agreement in question was entered into between Interspace Media (Pty) Ltd and Vusani Property Investments (Pty) Ltd. Vusani Property Investments (Pty) Ltd was the landlord and Interspace Media (Pty) Ltd was the lessee in respect of the advertising structures. It is important to emphasise at this early stage in the judgment that the lease does not relate to the whole property in question but merely certain advertising structures that have been erected thereupon. The agreement in question to which I have referred was entered into in March 2008.

[4] The applicant makes out the case, in its founding affidavit, that it has spent a considerable amount of money on these structures and also a lot of time and money in maintaining them. That much I certainly accept.

[5] The applicant claims that this lease agreement was ceded to it in terms of an oral agreement. It is correct that the agreement provides that the agreement may be ceded without the permission of Vusani, the landlord, but it also contains a standard non-variation clause stipulating that any variations must be recorded in writing.

[6] The respondent has relied very strongly on the fact, that in terms of the agreement to purchase the property, which was concluded on 6 October 2011 with Vusani (that is Vusani Property Investments (Pty) Ltd) there is an express warranty given that there were no lease agreements in existence and that there was nothing of the kind, which could in any way prejudice its own interests.

[7] Mr *Subel*, who appears for the applicant, has repeatedly emphasised that this point is relevant in as much as the respondent would then have a claim against Vusani rather than as a defence against the applicant. It is correct, to a degree, that the relevance of the warrantees applies *inter se* between the seller of the property and the respondent as purchaser but there is another aspect of significance which needs to be highlighted when one comes to the law and that is that there is nothing on the papers to indicate that the respondent knew of the agreement in question, never mind that the agreement in question applied with the applicant as a party. This is critical when it comes to an evaluation of the application of the *huur gaat voor koop* principle.

[8] Furthermore the respondent has alleged in the answering affidavits in two places that the signage in question was vacant at the relevant time. It is true that there is an argument that can be presented that this protestation about this signage being vacant could apply in a somewhat different context. Nevertheless, the probabilities are that it has to have applied at the time when the purchase agreement was entered into on 6 October 2011 and furthermore the applicant has not, in any way, asserted the fact that the signage contained a display of advertising at the time.

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[9] Mr *Subel* has repeatedly emphasised that the signage would have been visible. Of course this is correct. The signage would have been visible, but that is not the point as far as I can see in this particular case. The question is whether there was advertising on the signage, which would have put the respondent on enquiry as to whether someone else had an interest therein.

[10] As I have said, the applicant relies on the fact that the lease agreement was ceded to it. To my mind, the non-variation clause
20 requiring that any variations be in writing would entail that this assertion be recorded in writing, even though the consent or approval of Vusani Property Investments (Pty) Ltd may have been required.

[11] I should also recall I am doubtful whether signage structures of the kind in question build on immovable property constitutes a kind of lease

that would have been envisaged in Roman/Dutch law when the *huur gaat voor koop principle* was developed. I need not make any final decision on that matter. I merely raise it as a question mark but as I have put it to Mr *Subel* by way of analogy (and I accept that analogies can be very dangerous), if one was walking down the Prinzengracht in Amsterdam in the 17th Century, interested in buying a building and one saw a flagpole without any flag hanging from it, I do not think that the common law would have expected a purchaser to be put on enquiry as to whether somebody was renting that flagpole with a right to hang a flag therefrom. It may be entirely different if the flag, in big bold letters indicated, for example, that the flagpole or the right to hoist flags therefrom belonged to the Dutch East India Company but the owner of the property was not the Dutch East India Company but some other merchant trading operation.

[12] Be that as it may I will now come to the important point of the huur gaat voor koop as set out in the well know case of *Kessoopersadh en Andere v Essop en Ander* 1970 (1) SA 275 (AD). In order for the *huur gaat voor koop* principle or rule of law to operate against a purchaser of immovable property, the purchaser must either have been made aware of the existence of the tenancy (that, of course, is not the case here and I do not understand that to be the applicant's case), or the purchaser should have been put on enquiry by reason of the fact that there were facts to indicate or suggest to it that someone else had an interest of the kind in question.

[13] That on the facts before me is not the case here. The applicant has not made out a case that the respondent knew, at the time of purchasing the property in question, of either the applicant's interest in the signage or any other person's interest in the signage as a matter of enforceable right against it, the purchaser. Accordingly, the application falls to be dismissed.

[14] Although this might seem, at a glance, not to be a matter involving the expertise of two counsel it certainly is, upon closer examination. There are complex points of law and this advertising signage space is clearly in one of the golden miles of the golden city. Accordingly, the costs of two counsel will be allowed.

[15] The following is the order of this court:

> The application is dismissed with costs, which costs are to include the costs of two counsel.

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Counsel for the applicant: Adv A Subel SC, (with him Adv L Hollander)

Counsel for the respondent: Adv F Snyckers SC (with him Adv P Bosman)

Applicant's attorneys: Tugendhaft Wapnick Banchetti and Partners,

Attorneys for the respondent: Fluxmans Inc.