

## Notes

### **Selling property with an existing lease: Understanding the parties' rights and obligations**

#### Overview

The *huur gaat voor koop* is a long-established common law principle meaning 'the lease takes precedence over the sale'. It provides that when immovable property is sold subject to an existing lease, the lease does not terminate as a result of the sale. Instead, the purchaser automatically steps into the position of the landlord upon transfer of ownership. The tenant retains the right to occupy and use the property on the same terms and conditions as agreed with the previous owner. This principle protects tenants against eviction solely because the property has been sold and ensures continuity of lease obligations.

#### Obligations of the parties

##### *Seller (current landlord)*

The seller remains the landlord until transfer of ownership and must:

- Honour the terms of the lease until transfer, including ensuring the tenant's undisturbed use and enjoyment of the property;
- Collect rental and comply with all obligations up to the date of transfer;
- Disclose the existence, terms, and duration of the lease to the purchaser;
- Provide the purchaser and conveyancer with a copy of the lease agreement and existing tenant's details;
- Account to the purchaser for rental, security deposits, and any other amounts on a prorated basis as at transfer; and
- Maintain the property in a condition reasonably fit for the purpose for which it was let, unless otherwise agreed.

Failure to disclose an existing lease may constitute misrepresentation and expose the seller to a claim for damages. Non-disclosure amounts to a latent defect.

##### *Purchaser (incoming landlord)*

Upon transfer, the purchaser automatically steps into the position of landlord and must:

- Recognise and comply with the existing lease, including its duration and terms;
- Respect the tenant's right to occupation until the lease lawfully terminates;
- Assume responsibility for any maintenance obligations from date of transfer;

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- Take control of the tenant's deposit (which must be transferred by the seller or held by the conveyancer, depending on the arrangement).

A purchaser cannot require vacant occupation unless:

- The lease has lawfully expired; or
- The tenant has agreed in writing to vacate.

### *Tenant*

The tenant's rights and obligations remain unchanged by the sale. The tenant must:

- Continue paying rent and complying with the lease terms;
- Use property for the agreed purpose;
- Allow reasonable access for inspections, where permitted by the lease and law;
- Restore the property in the condition agreed upon at termination, subject to fair wear and tear; and
- Vacate the property only once the lease has lawfully terminated.

The tenant is not obliged to renegotiate or terminate the lease because the property has been sold.

### *Estate agent*

Property practitioners owe duties under the common law and Property Practitioners Act.

Agents must:

- Establish whether the property is tenanted and on what terms;
- Obtain and review the lease agreement;
- Disclose the lease fully and accurately to prospective purchasers;
- Avoid marketing the property as 'vacant' unless this is factually and legally correct;
- Ensure that offers to purchase deal clearly with existing lease.

Failure to do so may result in complaints, commission disputes, or liability for damages.

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### Residential leases and statutory protection

Residential leases are regulated by the Rental Housing Act, which:

- Protects tenants against unfair practices;
- Regulates the payment of deposits, inspections, and termination procedures;
- Limits the extent to which lease terms may override tenant protections.

A purchaser cannot lawfully evict a tenant except in compliance with:

- The lease;
- Rental Housing Act; and
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, where applicable.

### Consequences of non-compliance with *huur gaat voor koop*

1. Unlawful eviction: Attempting to remove a tenant solely because the property has been sold may constitute an unlawful eviction in terms of the PIE Act.
2. Court interdict: A tenant may obtain an urgent court interdict preventing eviction or interference with occupation, which may result in legal costs and delays for the purchaser.
3. Damages claim: A tenant may claim damages for loss suffered due to unlawful termination, harassment, or disruption of occupation, including relocation costs and loss of business income (in commercial leases).
4. Breach of sale agreement: A seller who promises vacant occupation where a binding lease exists may be in breach of the sale agreement, which exposes the seller to cancellation or damages claims by the purchaser.
5. Misrepresentation claim: Failure to disclose an existing lease may constitute material misrepresentation, potentially allowing the purchaser to rescind the sale.
6. Transfer delay: Disputes relating to existing leases can delay transfer, particularly where occupation clauses are unclear or contested.
7. Agent liability: Property practitioners may be liable if they incorrectly represented the occupation status of the property or failed to disclose the lease.

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### Practical tips for agents

#### Before marketing:

- Confirm whether the property is tenanted.
- Obtain a signed copy of the lease and verify its duration and renewal clauses.
- Clarify whether the lease is fixed-term or month-to-month.

#### During marketing:

- Market the property honestly as tenanted if applicable.
- Explain to purchasers that the lease survives transfer.
- Avoid statements suggesting that tenants can simply be 'given notice on sale.'

#### Offers to Purchase:

##### Ensure the agreement clearly records:

- Whether the sale is subject to the existing lease;
- The rental amount and deposit;
- Proration of rent and expenses;
- Whether vacant occupation is required (and if so, how and when it will be achieved); and
- Who gives notice to the tenant, if applicable.

#### Transfer process:

- Ensure rental and deposits are properly accounted for.
- Confirm handover of lease administration to the purchaser.
- Manage tenant communication professionally to avoid disputes.

#### Key risk areas to avoid:

- Selling or advertising a tenanted property as vacant.
- Assuming sale cancels the lease.
- Failing to disclose lease terms.
- Ignoring statutory tenant protections.
- Poorly drafted occupational clauses.

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### Conclusion

The sale of property subject to an existing lease requires careful coordination between sellers, purchasers, tenants, and property practitioners. The lease survives the sale, the purchaser becomes the landlord upon transfer, and tenants retain their rights to occupation. Clear communication and accurate documentation are essential to avoid disputes and liability.