

UNJUSTIFIED ENRICHMENT

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THE RIGHT OF TENANTS TO CLAIM A LIEN IN RESPECT OF IMPROVEMENTS

The right of urban tenants to claim liens (to ensure the payment of compensation by their landlords for necessary and useful improvements that they had made to the leased property during the currency of the lease) was dramatically reinstated in *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings* 2006 (6) SA 605 (SCA), turning around an approach that many, including myself, (see 1993 *Annual Survey* 229 at 237ff and 1994 *Restitution LR* 261) had accepted as correct. (The decision in the court *a quo* is discussed in the chapter on the Law of Lease.)

The existence of this right depends on the interpretation of an ancient Dutch statutory measure which had become part of the South African common law. (*Placaet van den Staten van Hollandt, tegens de Pachtters ende Bruyckers van den Landen* of 26 September 1658, reproduced in the *Groot Placaet-Boek* (1705) vol II col 2515ff, and re-enacted in the *Placaet* of 24 February 1696, reproduced in the *Groot Placaet-Boek* (1705) vol IV col 465ff.)

That the availability of a lien to an urban tenant in twenty-first century South Africa can be governed by rules emanating from seventeenth-century legislation in Holland demonstrates the wonderfully quirky mixture of sources that make up South African law. Although very few legislative provisions of the Estates General during the time that the Cape was administered by the Dutch East India Company had the force of law *proprio vigore* here, the provisions of certain enactments became part of the Roman-Dutch common law because they were adopted as being of general validity by the Roman-Dutch institutional writers — and some were specifically recognized as such by our courts. Certain provisions of the *Placaet* fell into this category. (See *Spies v Lombard* 1950 (3) SA 469 (A) at 481–4.)

But what did the *Placaet* decree? Its most important provision in the current context is that it deprived a lessee of agricultural land of the right to assert a lien in respect of a claim for compensation for improvements effected by him. This meant that the lessee could

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pursue any claim for compensation that he might have, but could not rely on a lien in order to ward off the owner's claim for him to vacate the land. This was decreed in article 10 of the *Placaet*, which reads thus (translated by W E Cooper *Landlord and Tenant* 2 ed (1994) 329 fn 3, quoted by the Supreme Court of Appeal in the *Business Aviation* case):

'Provided, nevertheless, that whenever the owner of any lands, takes them for himself, or lets them to others, he is bound to pay the old lessee, or his heirs, compensation for the structures, which the lessee had erected with the consent of the owner, as well as for ploughing, tilling, sowing and seed corn, to be taxed by the court of the locality, without, however, the lessees being allowed to continue occupying and using the lands, after the expiration of the term of the lease, under the pretext of (a claim for) material or improvements, but may only institute their action for compensation after vacating (the lands).' (para 8)

The lessee's claim for compensation itself was further restricted by articles 11, 12 and 13 of the *Placaet*. As Brand JA summed up these restrictions in the *Business Aviation* case:

'Under article 11 compensation payable for "structures" was restricted to bare materials, not including sand and lime, and excluding the costs of labour. Article 12 dealt with structures erected without the landlord's consent. In respect of these, lessees had no claim for compensation at all, though they were allowed to break down the structures and remove the material before termination of the lease. In terms of article 13, the lessee's right to claim compensation for plantings and trees was virtually abolished in that it was limited to those planted on the instructions of the owner, and then only for the original cost of the plants.' (para 9)

The reason for the *Placaet* was that lessees in Holland during the latter part of the seventeenth century were often in an economically stronger position than their landlords. These lessees exploited their position by routinely making 'improvements' which they knew the owner could not pay for, and in this way effectively prevented him from taking possession of his land after the expiry of his lease.

In *De Beers Consolidated Mines v London and South African Exploration Co* ((1893) 10 SC 359 at 369) Lord De Villiers held (*obiter*) that articles 10–12 of the *Placaet* applied to urban leases as well and this approach was perpetuated in *Rubin v Botha* (1911 AD 568 at 579) and *Van Wezel v Van Wezel's Trustee* (1924 AD 409 at 416) — again *obiter*: (see *Business Aviation* para 30). In *Spies v Lombard* (*supra*) it was held, however, that article 9 of the *Placaet* applied only to agricultural leases and this, as Brand JA pointed out in *Business Aviation* 'cannot be reconciled with the notion that other articles of

the same legislative enactments could have applied to urban leases as well' (para 31).

Nevertheless, in *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W) Van Zyl J held that there could be no justification for continuing to exclude urban land from the ambit of the *Placaet*; and in *Palabora Mining Co Ltd v Coetzer* 1993 (3) SA 306 (T) Mahomed J (as he then was) took the same view. (See 1993 *Annual Survey* 229 at 238.)

In *Business Aviation* the Supreme Court of Appeal finally rejected this approach. In my contribution to the 1993 *Annual Survey* 229 at 238 I described the decision in *Palabora Mining* as 'a bold, but also very sensible, application of the law' and I added that 'it is to be hoped that the Appellate Division will confirm the approach of Mohamed J when the opportunity to do so comes in the future' (at 238). Well, it did not, and I am now utterly persuaded that the decision in *Business Aviation* is correct.

The facts of the case were that Rand Airport Holdings, the owner of the Rand Airport in the vicinity of Johannesburg, had applied for the eviction of the lessee, Business Aviation Corporation, from the site of the airport. One of the defences advanced by Business Aviation was that they were entitled to an enrichment lien until they had been compensated for the necessary and useful improvements which they had made to the property. Rand Airport Holdings, on the other hand, argued that article 10 of the *Placaet* had done away with the lien on which the appellants relied. The defence of Business Aviation that they were entitled to a lien was dismissed in the magistrate's court and, on appeal to the High Court, the magistrate's ruling was upheld. The matter was taken on further appeal to the Supreme Court of Appeal. The Supreme Court of Appeal upheld the appeal and ruled that the *Placaeten* were not applicable to urban tenements and that, therefore, an urban lessee could claim a lien in respect of improvements effected by him.

Brand JA, delivering the judgment of the court, rejected both the historical and policy-based arguments in favour of the *Placaeten* being applicable to urban tenements. The historical argument had two parts, namely (a) that the *Placaeten* had already in Roman-Dutch law been applicable to urban tenements and (b) that, even if they had not in fact been applicable to urban tenements, the fact that it had for so long been the settled view of the law that they did should persuade the court not to interfere with the established position. The policy-based argument was to the effect that it would be inequitable to treat urban lessees differently from rural lessees.

Brand JA dealt with the first part of the historical argument as follows: After outlining the severe restrictions placed on lessees of rural land in seventeenth-century Holland by the *Placaeten* as a result of malpractices by tenants, he stated that there was no reason to think that these malpractices were also perpetrated by urban lessees. Referring to Van Zyl J's judgment in the *Syfrets* case, he commented that, '[a]lthough, of course, this [ie the abuse of right by lessees of urban tenements] might have happened, it is evident that it did not' (para 33). Brand JA substantiated this view as follows:

'This is clear from the exposition of Bodenstien [*Huur van Huizen en Landen volgens het Hedendaagsch Romeinsch-Hollandsch Recht* 116]; from the reference to "pachters" in the preamble of the *Placaeten*; and from the omission of any reference to urban lessees in both *Placaeten*. If urban lessees were guilty of the same malpractices, this would, surely, have been mentioned when the *Placaet* of 1658 was re-enacted in 1696.' (para 33)

He also did not accept the argument in the *Syfrets* case that the language of the *Placaeten* included urban tenements. He remarked that the view in that case 'that the term "landen" was the Dutch rendition of the Latin "*solum*", which means land or soil, is, with respect, equally insupportable (para 34). The reason for this is that '[t]he reference in the *Placaeten* is not merely to "landen" but to "pachters en bruyckers van landen" who were lessees of rural tenements. What is more, the theory would be in conflict with Van der Keessel who does not translate the Dutch term "landen" in the *Placaeten* as "*solum*" but uses the expression (in both [*Thesis Selectae*] Th 674 and *Praelectiones ad Grotium* 13.19.10) "*praediis rusticis*" which means rural property' (ibid).

In respect of the second part of the historical argument, he ruled that it amounted to what 'had been described by Innes J in *Webster v Ellison* 1911 AD 73 at 92 as "that dangerous maxim . . . *communis error facit ius*", which can only find application, Innes J said, if the usage based on error can be described as "uniform and unbroken"' (para 40). But the view that the *Placaeten* applied to urban tenements had not had a uniform and unbroken presence in South African law. This, the judge said, was clear from the way the case law had developed:

'After the *obiter dictum* of Lord De Villiers in *De Beer's* [*De Beer's Consolidated Mines v London & SA Exploration Co* (1893) 10 SC 359], which started it all, there was the commentary by Bodenstien [*Huur van Huizen en Landen volgens het Hedendaagsch Romeinsch-Hollandsch Recht* 111] which showed that Lord De Villiers had been mistaken. Then came the statement in *Rubin*, which was again *obiter*, that the Privy Council had

confirmed the *obiter dictum* by Lord De Villiers in *De Beers*. But after *Rubin*, came *Burrows* [*Burrows v McEvoy* 1921 CPD 229 at 233–4] where Sir John Kotzé not only disagreed with Lord De Villiers — on the basis of Bodenstein — but obviously held the view that he was not prevented by either *De Beers* or *Rubin* from arriving at this contrary conclusion.’ (para 41)

The following dictum by Mohamed J from the *Palabora* case is illustrative of the equality argument advanced in that case as well as by Van Zyl J in the *Syffrets* case at 112:

‘The object of the *Placcaaten* was to prevent the abuses which occupiers of tenements had been perpetrating in asserting claims for compensation for improvements for the purposes of defeating the rights of owners to their property. If this was the object, why should there be a rational distinction between urban and rural tenements? Why should the occupiers of urban tenements continue to have greater scope for abuse than the occupiers of rural tenements?’

‘The answer to these questions which has been suggested is simply that the *Placcaaten*, in their terms, deal specifically with rural land and were, therefore, not intended to be extended to lands in urban areas. I think this is a non-sequitur. Both rural and urban property must be situated on physical land. I can see no reason why abuses by occupiers of such land should be protected in one area and not another. Certainly, if the operation of these *Placcaaten* is to be extended to modern times in South Africa, there can be no persuasive reason of logic or policy why such an extension must be confined to rural tenements only.’ (*Palabora* at 308)

To his argument Brand JA responded that ‘[i]t would hardly improve the position of agricultural lessees if this unfair discrimination against them were to be extended to another group’ (para 35). The road to equal treatment should rather, he opined, be to abolish the rules emanating from *Placcaeten* altogether (*ibid*). It may be expected, therefore, that the Supreme Court of Appeal will consider favourably any challenge to the continued validity of the rules emanating from the *Placcaeten* in respect of agricultural leases — unless it can be demonstrated that the abuses that necessitated the promulgation of the *Placcaeten* in the first place continue to occur in South Africa today.

A CLAIM FOR THE RETURN OF MONEY PAID IN TERMS OF A CAUSA WHICH SUBSEQUENTLY FELL AWAY (*CONDICTIO SINE CAUSA* AS A *CONDICTIO OB CAUSAM FINITAM*)

Jacquesson v Minister of Finance 2006 (3) SA 334 (SCA) (also discussed in the chapter on Financial Institutions and Stock Exchanges) concerned the question whether Jaquesson, who had

been granted amnesty in terms of s 20(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995, was entitled to repayment from the Minister of Finance of moneys that were declared forfeit to the state in terms of regulation 22B of the Exchange Control Regulations.

Jaquesson's company's accounts were blocked at the instructions of the Reserve Bank in 1987. In 1992 Jacquesson was convicted on 1 058 counts of fraud relating to the transfer of sums of money abroad and sentenced to seven years' imprisonment. Two months later, after he had failed to respond to a letter from the Reserve Bank asking him to give reasons why the moneys in the blocked accounts should not be forfeited, these moneys were declared forfeit. Jacquesson twice applied to the court to have the forfeiture set aside, but was unsuccessful on both occasions.

In 2001, however, Jacquesson was given amnesty under s 20(1) of the Promotion of National Unity and Reconciliation Act 34 of 1995, in respect of 'all offences and delicts resulting from the export to the United Kingdom of capital in contravention of the South African Exchange Control Laws, committed during or about the period 1982 to 1987' (para 2). Once he had been given this amnesty, Jacquesson once again attempted to recover the forfeited moneys. His claim against the Minister of Finance to pay to him the forfeited moneys, together with interest and costs, was rejected in the court *a quo* and he appealed against this ruling. The Supreme Court of Appeal (Ponnan JA) dismissed the appeal.

Jaquesson based his claim on the *condictio sine causa* in the guise of a *condictio ob causam finitam*, that is to say the *condictio* used 'to recover money or property that had been transferred in terms of a valid *causa* that has since fallen away' (para 8). The question was therefore whether the *causa*, on the strength of which the moneys had been seized, had indeed fallen away. The court held that it had not been established that the *causa* had fallen away, and its reasoning was as follows:

The moneys that were the object of this application were seized in Jacquesson's account *after* the period during which he illegally transferred funds abroad and for which he was convicted of fraud. The seized money, therefore, had per definition not been transferred abroad and thus could not have been the subject of the charges for which Jacquesson had been convicted, which dealt exclusively with money exported to the United Kingdom. Even if the court were to interpret the amnesty 'in a most liberal and generous way', as the decision in *Azanian Peoples Organisation*

(AZAPO) v *President of the Republic of South Africa* 1996 (4) SA 671 (CC) obliged it to do, it could not hold that the amnesty was applicable to moneys that had not been exported (para 12).

It was unclear from the papers why the money had been seized. The forfeiture had been decreed in terms of regulation 22B of the Exchange Control Regulations and in terms of these regulations there are any number of reasons, other than illegal transfer abroad, in terms of which money can be declared forfeit — and a criminal conviction is also not a prerequisite for such seizure. Ponnann J observed as follows:

‘Two possibilities come to mind: First, the moneys attached were connected to some other contravention of the ECR not covered by the indictment before Didcott J [who heard the case in the court *a quo*]; and, secondly, the attachment and subsequent forfeiture was unlawful and invalid at inception, inasmuch as it was effected in the erroneous belief that those moneys were connected to contraventions of the ECR covered by the indictment before Didcott J.’ (para 11)

Either way, since the amnesty had been granted in respect of ‘offences and delicts resulting from the export to the United Kingdom of capital in contravention of the South African Exchange Control laws’ (para 12) the ‘the grant of amnesty and the consequent setting aside of the conviction is wholly irrelevant to the moneys that were attached and declared forfeit by the Treasury. It must thus follow that the *condictio* fails as the appellant has failed to establish that the *causa* has indeed fallen away’ (para 11).

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