THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

REPORTABLE
Case number : 179/05

In the matter between :

BUSINESS AVIATION CORPORATION (PTY) LTD	**FIRST APPELLANT**
ORPHEUS PANAYIOTOU	**SECOND APPELLANT**
and	
RAND AIRPORT HOLDINGS (PTY) LTD	**RESPONDENT**

CORAM : **HOWIE P, FARLAM, BRAND, CLOETE *et* LEWIS JJA**

HEARD : **4 MAY 2006**
DELIVERED : **30 MAY 2006**

Summary: Enrichment lien arising from improvements effected by lessee to leased property during currency of lease – question whether abolished in respect of urban leases by *placaeten* of 1658 and 1696.

Neutral citation: This judgment may be referred to as *Business Aviation Corporation v Rand Airport Holdings* [2006] SCA 72 (RSA)

BRAND JA/

BRAND JA:

[1] This appeal has its origin in the magistrate's court for the district of Germiston. The respondent ('plaintiff') is the owner of the Rand Airport near Johannesburg. The appellants ('defendants') occupied parts of that property ('the property') in terms of an oral lease agreement. Proceedings commenced when the plaintiff sought an eviction order against the defendants on the basis that the lease was a monthly tenancy, terminable on one month's notice and that the defendants had failed to vacate the property, despite proper notice having been duly given to them on its behalf.

[2] The defendants raised two defences in the alternative. First, that the lease was not a monthly tenancy, but a long term lease which entitled them to occupy the property for at least another five years. Alternatively, that they had expended an amount of several million rand on necessary and useful improvements of the property for which they had not been compensated and that they were consequently entitled to retain the property under an enrichment lien.

[3] The outcome of the main defence depended on issues of credibility, which the magistrate decided in favour of the plaintiff. The alternative defence was also dismissed by the magistrate, essentially on the acceptance of the plaintiff's contention that the lien relied upon by the defendants had been abolished by two *placaeten* that were promulgated by the Estates of Holland during the 17th century. In the result, the magistrate granted an eviction order against the defendants.

[4] The appeal against the magistrate's order was dismissed by the Johannesburg High Court (Goldstein J, Khampepe J concurring). Its judgment has since been reported *sub nom Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 (2) SA 95 (W). As appears from the reported judgment, Goldstein J first examined the magistrate's credibility findings underlying the rejection of the defendants' main defence of a long term lease (paras 4-10). On this issue he decided (in para 10) that the defendants' criticism of these credibility findings could not be sustained. He then proceeded to consider the alternative defence based on a right of retention arising from an improvement lien (paras 11-15) and concluded that the magistrate's dismissal of this defence should also be upheld.

[5] Though the defendants sought leave to pursue a further appeal to this court against the rejection of both their defences, the court *a quo* granted them leave to appeal only 'in respect of the existence in law, or not, of the lien for which [they] contend'. The magistrate's finding that the lease under which the defendants were entitled to occupy the property had been duly terminated by one month's notice, therefore stands.

[6] An appropriate starting point for a discussion of the questions raised by the appeal appears to be a statement of the generally accepted principle that in Roman Dutch Law, following Roman Law, lessees were originally in the same position as *bona fide* possessors as far as claims for improvements to leased properties were concerned. It follows that, absent any governing provisions in the contract of lease, lessees, like bona fide possessors, had an enrichment claim for the recovery of expenses that were necessary for the protection or preservation of the property (called *impensae necessariae*) as well as for expenses incurred in effecting useful improvements to the property (called *impensae utiles*). (See eg *Nortje v Pool NO* 1966 (3) SA 96 (A) at 131.) More pertinent for present purposes, lessees, like *bona fide* possessors, who were still in possession of the leased property, also had an enrichment lien (a *ius retentionis*), that allowed them to retain the property until their claims for compensation had been satisfied (see eg Digest 19.2.55.1; De Groot *Inleydinge tot de Hollandsche Rechtsgeleerdheid* 2.10.8; Van der Keessel *Praelectiones Iuris Hodierni ad Grotium* 2.10.8; Van der Keessel *Theses Selectae Iuris Hollandici et Zelandici* Th. 213 (Lorentz's translation 2 ed (1901) p 73); *De Beers Consolidated Mines v London and SA Exploration Company* (1893) 10 SC 359 at 367; *Lechoana v Cloete* 1925 AD 536 at 549; *Lessing v Steyn* 1953 (4) SA 193 (O) at 199C-D; *Syfrets Participation Bond Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 (1) SA 106 (W) at 110F-H; Bodenstein *Huur van Huizen en Landen volgens het Hedendaagsch Romeinsch-Hollandsch Recht* p 116; R W Lee *An Introduction to Roman Dutch Law* 5 ed p 304; Van der Merwe *Sakereg,* 2 ed p 164; A J Kerr *The Law of Sale and Lease* 3 ed p 466; Ellison Kahn (ed) *Principles of the Law of Sale and Lease* p 89. As to enrichment liens in general, see also eg *United Building Society v Smookler's Trustees and Golombick's Trustee* 1906 TS 623 at 626-629; *Brooklyn House Furnishers (Pty) Ltd v Knoetze and Sons* 1970 (3) SA 264 (A) at 270-272 and *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 84J-85D).

[7] Malpractices amongst lessees led, however, to legislation by the Estates of Holland on two occasions, which severely restricted their right to compensation for improvements.

The first enactment was promulgated on 26 September 1658. It is to be found in the *Groot Placaet-Boeck* part 2 cols 2515-2520 under the rubric '*Placaet vande Staten van Hollandt, tegens de Pachters ende Bruyckers vande Landen*'. The provisions of this *placae*t were re-enacted in almost identical terms on 24 February 1696 in a '*Renovatie-placaet'* (see GPB part 4 cols 465-7). Because the provisions of the two *placaeten* were so similar, reference is often made to 'the *placaet*', singular, meaning the earlier one of 1658 (see eg *De Beers* supra at 368; *Rubin v Botha* 1911 AD 568 at 579; *Spies v Lombard* 1950 (3) SA 469 (A) at 473A and 476D-E).

[8] Four articles of the *placaeten* dealt with claims for improvements, namely, articles 10 to 13. Of these the most important for present purposes was art 10, which is translated as follows by W E Cooper *Landlord and Tenant* 2 ed p 329 note 3:

'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).'

(For the original Dutch, see eg Cooper loc cit*; Syfrets Participation Bond Managers* supra at 110I-111A). For other, very similar, translations, see Lee *Commentary* 92 and George Wille *Landlord and Tenant in South Africa*, 5 ed at p 270.

[9] The import of art 10 is clear. Though lessees retained their right to claim compensation for improvements, the claim was limited to improvements effected with the landlord's consent. Moreover, they lost their right of retention in the form of a lien. At the end of the lease period they first had to vacate the property before they could institute their claim for compensation. Articles 11, 12 and 13 limited the lessees' right to compensation even further. Under art 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 art 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 (see eg Cooper op cit p 329-330).

[10] The question whether the *placaeten* ever became part of South African law and, if so, to what extent, was pertinently raised and discussed by this court in *Spies v Lombard* supra. The article relied on by the appellant in that matter, Spies, was art 9 of the *placaeten* which essentially rendered it unlawful for lessees to sublet the property or assign the lease without the owner's written consent. The argument raised in answer by the respondent, Lombard, was that the p*lacaeten* were promulgated by the Estates of Holland, which had no legislative powers outside that province. Consequently, so Lombard's argument went, these legislative enactments could have no application *proprio vigore* to the other provinces of the Netherlands or to the Dutch possessions beyond the seas, including the Cape Colony (see 481G-482A). Van den Heever JA, with the other two members of the court concurring, agreed with this argument as far as it went (see 482H). However, so he held, although the *placaeten* did not apply to South Africa *proprio vigore*, some of the rules derived from the *placaeten* had become part of our law through reception by the courts. These rules he then summarised as follows (at 484C-D):

'(1) that it is unlawful to sub-let rural land without the landlord's consent and that consequently the sub-lessee cannot invoke his contract against the landlord and (2) one, not now relevant, relating to improvements on leased land.'

The rules in category (2) were subsequently identified as those contained in articles 10, 11, 12 and 13 of the *placaeten* (see eg in *Lessing v Steyn* 1953 (4) SA 193 (O) 201C-H; De Wet & Van Wyk *Kontraktereg & Handelsreg* 5 ed p 361 note 37; Cooper op cit p 330).

[11] At this stage it can therefore be accepted as being beyond controversy that the provisions of art 10 relied upon by the plaintiff did become part of our law. What remains controversial, however, is the question which is pivotal to the appeal, namely, whether the provisions of art 10 are limited to rural properties or whether they extend to urban tenements as well. It is pivotal because the property involved, which forms part of the Rand Airport, can, of course, not be described as 'rural'. If art 10 should therefore be confined to rural tenements, as argued by the defendants, the provisions of the article will have no impact on the availability of the enrichment lien for which they contend.

[12] The historical background to the pivotal question thus arising dates back to the judgment of De Villiers CJ in *De Beers Consolidated Mines v London and SA Exploration Company* supra. While the Chief Justice earlier held the view, in *De Vries v Alexander* (1880) Foord Rep 43 at 47), that the prohibition against sub-letting without the owner's written consent in art 9 of the *placaeten* was restricted to agricultural tenements or 'country lands', he stated in *De Beers* (at 369 and 370), *obiter*, as it turned out, that art 12 of the

same legislative enactments applied to urban leases as well. As appears from the judgment in *De Vries* (at 47), the view that Lord de Villiers held with regard to art 9 was based on the express statement by Van der Keessel Th. 674 that this article only applied in *praediis rusticis*, which was translated by the Chief Justice himself as 'country lands' (see also Lorenz op cit at 242). With reference to his earlier judgment, Lord de Villiers said in *De Beers* (at 369-370):

'The 9th article had never been accepted in Holland as altering the civil law in regard to the sub-letting of urban tenements, but it does not follow that some of the other articles may not have been accepted as generally applicable. Some of the later writers, notably Van der Keessel (Thes. 213), accept the 10th, 11th and 12th articles as having been incorporated into the common law of Holland and Friesland relating to landlord and tenant.'

[13] The Chief Justice's first reason for holding that the application of articles 10 to 12 also extended to urban leases, was therefore that Van der Keessel did not specifically refer to lessees of agricultural property, but to lessees in general, when he dealt with these four articles in his *Theses Selectae* at Th. 213 (ad Grotium 2.10.8), which is in contrast with his discussion of art 9 in Th. 674. The second reason for his view, the Chief Justice formulated as follows (at 369):

'The *Placaat* does not mention urban tenements, but it clearly was not intended to place agricultural lessees in a better position than urban lessees. Every article of it restricts the ancient common law rights of lessees.'

[14] I find myself in respectful agreement, however, with academic authors who are of the view that neither of the two reasons for the Chief Justice's *obiter* statement can be sustained (see eg Bodenstein op cit p 111-112; De Wet & Van Wyk op cit p 362 note 47; Cooper op cit p 335-6; Kerr op cit p 472-4; Van der Merwe op cit p 166; Kahn op cit p 91). His last mentioned consideration, that the *placaeten* were not intended to place agricultural lessees in a *better* position, cannot be taken literally. After all, as Lord de Villiers himself pointed out in the final sentence of his statement quoted above, the very purpose and effect of the *placaeten* were to impose severe restrictions on the ancient common law rights of the lessees involved. The statement as it stands must therefore be ascribed to a slip of the pen.

[15] What the Chief Justice clearly intended to say was that there is no apparent reason why the Estates of Holland would have intended to place lessees of agricultural properties in a *worse* position than their urban counterparts. Even so, the answer to this consideration seems to be the one suggested by Bodenstein (op cit p 112) and endorsed

by the later authors to whom I have referred (in para 14 above). It is based on the premise that the *placaeten* were Dutch statutes of the 17th century and they are therefore to be given the meaning they bore at the time of their promulgation. Accordingly, the search for a potential reason for discrimination against agricultural lessees must be confined to circumstances prevailing at that time. Fortunately for succeeding generations, the ancient legislature had deemed it necessary to describe the evil or mischief that the *placaeten* were aimed at quite explicitly in the introductory preamble to the enactments. The reason for promulgation of the *placaeten,* so the preamble stated, was to curb the *moetwilligheden* (malpractices or abuses) by '*pachters ende huyrluyden*' (lessees) which led to quarrels between them and the owners of the leased properties and eventually caused violent unrest amongst the populace. One of these malpractices, described in the preamble, was that the lessees retained and continued to occupy the leased property after the expiration of the lease period, without entering into a new lease and against the will of the owners, '*onder pretext*', inter alia, of '*beterschappe*' (improvements) and '*timmeragie*' (erection of structures). (See also *Spies v Lombard* supra at 478F-479H.) What the lessees actually did in practice, so we are told by Bodenstein (op cit p 120), was to abuse their common law right of retention arising from an enrichment lien by deliberately effecting costly improvements to the leased property, for which they knew the owners could not afford to compensate them, so as to effectively deprive the owners of their property permanently. (See also *Lessing v Steyn* supra at 199D-E.) Against this background, the reason suggested by Bodenstein (op cit p 112) as to why the Estates of Holland did not extend the *placaeten* to lessees of urban properties, was that '*van huurders van huizen hooren wij die klacht nooit*' (because the same complaints were never made against lessees of urban tenements).

[16] The Chief Justice's further reason for holding that articles 10 to 12 should not be restricted to agricultural leases, was, as I have said (in para 13 above) that when Van der Keessel discussed these articles in his *Theses Selectae* Th. 213 he drew no distinction between urban and agricultural tenements, as he had done with reference to art 9 (in Th. 674). However, as is pointed out by academic authors, when Van der Keessel explained the import of articles 10 to 12 in his more comprehensive *Praelectiones* (*ad Grotium* 2.10.8 – Gonin's translation (1963) Vol 2 at 162-3) he stated quite clearly that they applied only to '*colonis sive conductoribus agrorum*', ie lessees of agricultural land. (See also Bodenstein op cit p 112; Cooper op cit p 335; Kerr op cit p 472.)

[17] Further support for the proposition that, in Holland, the provisions of the *placaeten* as a whole – and not only those of art 9 – were limited to agricultural property, appears from the following *dictum* by Van den Heever JA in *Spies v Lombard* supra 476H:

'The prohibition is directed against "*Bruyckers ofte Pachters*". "*Pachters*" are of course lessees of rural land. A '*bruycker*' is according to the '*Woordenboek der Nederlandsche Taal*' . . . "*In't bijzonder "Houder", gebruiker (hetzij als pachter, hetzij anderzins) van eene boerderij met bijbehoorende landerijen*".'

(See also *Burrows v McEvoy* 1921 CPD 229 at 233.)

[18] The conclusion is therefore unavoidable: the statement in *De Beers,* that articles 10 to 12 of the *placaeten* were not intended to be limited to agricultural property and therefore also extended to urban leases, was clearly wrong. Fortunately, as I have said, that statement was *obiter*. This is so because the determination of the issue between the parties in *De Beers* turned on the interpretation of clause 4 of their lease agreement. In fact, Innes QC for the appellants, who were eventually successful, is recorded to have argued expressly (at 363) that 'the whole case must turn on section 4 of the lease; it is not to be decided on the common law, but on the terms of a definite agreement'. And, as Lord de Villiers himself said (at 370), the position of the appellants would have been even better if art 12 of the *placaeten* did not apply to urban tenements.

[19] The appeal to the Privy Council against the judgment of the Cape Supreme Court in *De Beers* was unsuccessful (see *The London and SA Exploration Company Ltd v De Beers Consolidated Mines Ltd* (1895) 12 SC 107; [1895] AC 451 (PC); Taitz: Privy Council Reports 348). The Judicial Committee of the Privy Council also concluded, however, that the case turned on an interpretation of clause 4 of the lease. Consequently it was found unnecessary to express any view on the principles of South African common law. This much appears clearly from the following observations by Lord MacNaghten (at 108) – with reference to the conclusions of the High Court of Griqualand, which were contrary to those arrived at by Lord de Villiers:

'A most able argument on the Roman-Dutch Law in force in the Colony was addressed to their Lordships by [counsel for the appellant] in support of the view which commended itself to the High Court of Griqualand. Their Lordships, however, see no reason to think that the conclusions at which the Supreme Court arrived are in any respect erroneous. In their Lordships' opinion, it is not necessary to say more on this part of the case, because it appears to them, as it appeared to the Supreme Court, that provisions in the lease, which were certainly not forbidden by law, authorised the respondents to remove the buildings as they did.'

[20] In the circumstances I find myself in respectful agreement with Van den Heever JA in *Spies v Lombard* supra (at 483H) when he found the following remarks by Innes J in *Rubin v Botha* supra at 579 rather surprising:

'[B]ut the claims of a tenant have been much simplified by the application, at the instance of the Cape Supreme Court (with the subsequent approval of the Privy Council), of many of the provisions of the Placaat of 1658 to urban as well as rural leases (*De Beers v London and SA Exploration Co*. . . .).'

The statement in *Rubin* was again *obiter*, because, as Innes J went on to point out immediately after the quoted statement (at 579):

'The facts of the present dispute, however, take it quite outside the ordinary lines of similar inquiries. We have here to do with a claimant who is neither a possessor nor an ordinary lessee . . . .'

[21] In *Burrows v McEvoy* supra at 233-4 Kotzé JP (with Van Zyl J concurring) obviously held the view, rightly, I think, that *De Beers* did not preclude him from deciding that art 12 of the *placaeten* 'does not directly affect the question of an urban lease which is the case with which we have to deal'. With reference to the judgment of Lord de Villiers in *De Beers* he said the following (at 234):

'The late Chief Justice . . . remarked that, while the placaat does not mention urban tenements, it was not intended to place agricultural lessees in a better position than urban lessees. That the latter should not be in a worse position than the former may be conceded; but I have always considered that this placaat was rather intended to curb and restrict the pretended claims of lessees of land in the country (*ten platten lande*) than introduced in order to ease and improve their position; and I notice that Professor Bodenstein in his well reasoned Thesis '*Huur van Huizen en Landen*', page 111ff., also holds this view.'

[22] Three years later, however, this court came to the conclusion, without any reference to the judgment of Sir John Kotzé in *Burrows* or to Bodenstein, that the applicability of art 12 of the *placaeten* to urban properties had been finally decided in *De Beers*. The case was *Van Wezel v Van Wezel's Trustee* 1924 AD 409, where Wessels JA expressed himself as follows (at 416):

'The Placaat of 1658, sec. 12, G.P. 13, Vol. 2, p. 2515, altered the civil law in regard to "Pachters en de Bruijckers van Landen" and allowed these to remove, during the currency of the lease, all structures erected by them on the leased lands. . . . It is questionable whether the Placaat altered the civil law in respect of every kind of lease or whether it only referred to certain agricultural leases, but be that as it may, the Cape Supreme Court, in a decision approved of by the Privy Council, decided that it referred to all leases so that lessees of both rural and urban properties who, annex materials . . . to the soil . . . have the right to remove the materials during the currency of the lease. *De Beers Consolidated Mines* v *London & SA Exploration Co.* (10 S.C. 359).'

(See also the further statements to the same effect at 418.)

[23] For reasons that should by now be evident, the statement by Wessels JA with regard to urban leases is insupportable in at least three respects. First, it was never really 'questionable' whether the *placaeten* applied to urban leases as well. They were clearly limited to leases of agricultural properties. Secondly, the statement to the contrary by Lord de Villiers in *De Beers* cannot be regarded as authoritative, because it turned out to be both *obiter* and erroneous. Thirdly, that statement had not been approved by the Privy Council in a considered judgment.

[24] Nevertheless, the *dictum* by Wessels JA in *Van Wezel* quoted above became the nub of the court *a quo*'s judgment in this matter. Though the *dictum* only referred to art 12, Goldstein J held (in para 15 at 98H-I), that it must, because of the interrelationship between articles 10, 11 and 12, be understood to refer to art 10 as well. With respect, I think this must be so. It is the further conclusion by Goldstein J that the statement by Wessels JA concerning urban leases was part of the *ratio decidendi* and therefore not *obiter* (see para 13 at 97H-I and para 15 at 98I-99B) that requires further investigation.

[25] There is a difference of opinion amongst academic authors as to whether the statement in *Van Wezel* regarding urban lessees was *obiter,* or not. While J A van der Walt (1989) 52 *THRHR* 590 p 595) is of the view that it was *obiter*, Cooper (op cit p 335) clearly thought that it was not (see also, eg Wille & Millin *Mercantile Law of South Africa* 18 ed p 336). The answer to the debate clearly lies in the identification of the issues that were decided in *Van Wezel*. From the summary of the facts (at 412-413) it appears that there were three properties involved. Their description seems to indicate that, in combination, they constituted a dairy farm and were thus all intended for agricultural use. But this is not clear and Wessels JA found any specific classification unnecessary. The question is: why? In the court *a quo,* Goldstein J expressed the view (in para 15 at 98H-I) that it was because Wessels JA had already decided that there was no difference in the position of urban and agricultural tenants and that any classification would therefore be of no consequence. I do not believe, however, that the answer is that simple.

[26] As also appears from the summary of the facts, one Leendert van Wezel had hired the three properties from De Beers Company. Although the leases were monthly tenancies, Leendert, like other tenants of De Beers, relied on the practice of the lessor never to terminate these leases. Consequently, Leendert erected structures of a permanent nature on the leased properties. In 1920 he sold his dairy together with these improvements on the properties to his son, Rudolph. He also delivered the improvements

to Rudolph, as far as physical delivery could be made. Thereafter Leendert's estate was sequestrated. Competing claims to the improvements were brought by Rudolph and by the trustee in Leendert's insolvent estate. The trustee's argument was that the structures had, through attachment, become part of the immovable property on which they stood and that they could therefore not have been transferred by Leendert. Rudolph denied that the structures became attached to the leased property and contended that they therefore remained movable. The first issue for determination was therefore whether the structures erected by Leendert did in law become part of the leased property or whether they remained movable. On this issue Wessels JA held that, because 'all these structures are fixed to the soil and were placed there for a permanent purpose' they became immovable property in law (at 415).

[27] For his second argument, Rudolph relied on art 12 of the *placaeten,* which, it will be remembered, allows the lessee to break down structures that were erected without the landlord's consent and to remove the materials prior to the expiry of the lease. The effect of this article, so Rudolph's argument went, is that, as between lessor and lessee, even things that were affixed to the soil are always in law to be regarded as movable. According to this argument, the article therefore constituted an exception to the principle of Roman-Dutch law which is encapsulated in the maxim *quicquid inaedificatur solo cedit*; ie whatever is built on the soil accedes to the soil.

[28] Wessels JA considered this argument (at 416-418) and found himself unable to agree with the notion that art 12 was intended to alter so fundamental a principle of civil law as *quicquid inaedificatur solo cedit*. Despite the article, he said, the principle therefore remains that structures erected by lessees on a permanent basis assume the character of the immovable property to which they acceded and the lessee therefore did not remain the owner of these structures. The only effect of art 12 was to afford lessees the right to break down structures erected by them and to remove the material during the currency of the lease.

[29] Leendert therefore did not retain ownership of the structures. They became the property of De Beers when he attached them to the soil. All he could sell to his son, Rudolph, was the right to break down these structures and remove the materials before the expiry of his lease. But, so Wessels JA held (at 419-420):

'[T]he right to come upon the property, to break down the structures and to remove them can only be exercised by the lessee as long as he himself has control of the leased plot; this right cannot be divorced from the lease. As soon, therefore, as Leendert van Wezel became insolvent the control over the leased property passed to his trustee and after that Leendert himself had no longer a right to break down the structures and take to himself the materials; *a fortiori*, therefore, Rudolph had no right to come upon the property and break down the structures. What Rudolph van Wezel got for his money was not a right of ownership in the structures together with a right to come upon the property and remove them, but only a right to come upon the plot so long as Leendert had control over it, and there to break down the structures and to make himself the owner of each part as it was severed from the immovable property.'

[30] To sum up: In *Van Wezel* it was the successor in title to the lessee, and not the lessor, who relied on the provisions of the *placaeten.* This in itself was rather exceptional, having regard to the limitations that the *placaeten* imposed on the common law rights of lessees. What Wessels JA eventually held, however, was that art 12 of the *placaeten* did not advance the successor in title's cause, because the lessee ceased to have control over the property prior to the removal of the materials. Whether art 12 of the *placaeten* applied or not could therefore make no difference to the outcome of the case. *A fortiori,* it would make no difference whether the *placaeten* applied to urban properties. That is why it was found unnecessary to decide whether the properties under consideration should be classified as urban or agricultural. The statement to the effect that the *placaeten* also applied to urban properties was therefore not part of the *ratio decidendi*; it was *obiter* and thus not binding on the court *a quo*.

[31] After *Van Wezel,* it was held by this court in *Spies v Lombard* supra that art 9 of the *placaeten* applied only to agricultural leases. This in itself was not new. As I have said (in para 11 above), Lord de Villiers himself held the same view about art 9, nearly 80 years before *Spies*, in *De Vries v Alexander* supra. More significant for present purposes, however, as pointed out by several academic authors (see eg Kerr op cit p 475 *et seq*; Kahn op cit p 91), is that the underlying reasoning of Van den Heever JA in *Spies* cannot be reconciled with the notion that other articles of the same legislative enactments, could have applied to urban leases as well. First, Van den Heever JA demonstrated (at 476H), with reference to the dictionary meaning of '*Bruyckers ofte pachters',* that the *placaeten* as a whole were directed exclusively at the lessees of rural properties. Secondly, he explained (at 478G-H), that according to the preamble to the *placaeten,* the perpetrators of the malpractices they were intended to curb, were the same lessees of agricultural tenements.

[32] Without any reference to *Spies*, however, it was held in two subsequent decisions of the High Court that art 10 did in fact extend to urban leases. This occurred in *Syfrets Participation Bond Managers v Estate & Co-op Wine Distributors (Pty) Ltd* supra and in *Palabora Mining Co Ltd v Coetzer* 1993 (3) SA 306 (T). In *Syfrets*, Van Zyl J referred to the criticism of the proposition in question by academic authors as well as in the judgment of Kotzé JP in *Burrows*. He then commented as follows (at 111I-112C):

'I must respectfully differ from the criticism aforesaid and the suggestion in the *Burrows* case. It is true that the placaeten deal specifically with rural land but that does not, to my mind, exclude land situated in urban areas on the basis, as it were, of the maxim *inclusio unius est exclusio alterius*. The abuses which were taking place in respect of lessees of rural land or tenements might equally have been perpetuated in respect of urban land or tenements. The common denominator would be the land ('landen') and not the examples given of abuses perpetrated on such land. Land or 'landen' is the rendition of the Latin *solum*, which means land, earth, ground, soil or the like and is not limited to that situated in any particular area. It is this *solum* which figures in the maxims *omne quod inaedificatur solo cedit* (*Just Inst* 2.1.29) and *superficies solo cedit* (*Gai Inst* 273) in regard to *inaedificatio* as a means of acquiring ownership by the accession of movable to immovable things. In any event it would, in my view, be most inequitable to grant the lessee of an urban tenement a lien but to deny it to the lessee of a rural tenement. In modern law there is no justification for making such a distinction.'

[33] The reference by Van Zyl J to the *inclusio unius* maxim is, with respect, difficult to understand. Urban lessees are not excluded from the operation of the *placaeten* because of any reliance on this maxim. They are excluded because the wording of the *placaeten* clearly restrict their operation to agricultural lessees. The further proposition that the abuses by the agricultural lessee referred to in the *placaeten* 'might equally have been perpetrated in respect of urban land or tenements', cannot prevail. Although, of course, this *might* have happened, it is evident that it did not. This is clear from the exposition of Bodenstein (see para 14); 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.

[34] The theory espoused by Van Zyl J that the term '*landen*' was the Dutch rendition of the Latin '*solum*', which means land or soil, is, with respect, equally insupportable. The 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 Th. 674 and *Praelectiones ad Grotium* 13.19.10) '*praediis rusticis*' which means rural property.

[35] As to the final consideration adopted by Van Zyl J, that it would be inequitable and unfair to deny agricultural lessees a lien which is afforded to their urban counterparts, I again find myself in respectful disagreement. The severe limitations (and not only the denial of a lien) imposed by the *placaeten* on the common law rights of agricultural lessees to claim compensation for improvements, are by their very nature inequitable and unfair to whomever they apply. But these limitations were grafted upon our common law for reasons of ancient origin which no longer exist. It would hardly improve the position of agricultural lessees if this unfair discrimination against them were to be extended to another group. To help them the *placaeten* would have to be abolished. Whether or not that should be done is, however, not the question in this case. Moreover, as had been pointed out by academic authors (see eg Van der Walt (1984) 101 *SALJ* p 257 at p 258 and (1989) 52 *THRHR* p 590 at 596) the extension of the disadvantages imposed by the *placaeten* to the further category of urban lessees would not resolve their inherent anomalies and inequity. So, for example, they will still not apply to putative lessees (see eg *Lechoana v Cloete* supra; *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636; *Nortje v Pool NO* supra at 129-130; *Weilbach v Grobler* 1982 (2) SA 15 (O) 26). In consequence, the 'lessee' under an invalid lease will still be in a substantially better position than one with a valid lease.

[36] In *Palabora Mining Co Ltd v Coetzer* supra Mahomed J also concluded, as I have said, that art 10 of the *placaeten* extended to urban leases. In the main, he was persuaded by the reasoning of Van Zyl J in *Syfrets*, particularly by the consideration that the contrary view would result in unfairness to and discrimination against agricultural lessees (at 308F-J). For the reasons I have given, I do not consider, however, that the anti-discrimination argument can prevail.

[37] It follows that, in my view, the provisions of the *placaeten* relied upon by the plaintiff never applied to urban leases. Furthermore, I am not persuaded by the arguments advanced in *Syfrets* and *Palabora Mining* that these inherently anomalous provisions should be extended to a broader category of lessees. I therefore find myself in disagreement with the court *a quo*'s conclusion that art 10 of the *placaeten* provides an answer to the defendants' reliance on an enrichment lien.

[38] The plaintiff's final argument was, however, that even in the event of this conclusion, this court should nonetheless not interfere with what was described as a well-established rule of our law. Support for this argument was sought in a number of cases where this court showed a clear reluctance to interfere with settled legal principles, even where those principles were shown to have their origin in incorrect interpretations of the law (see eg *Holmes' Executor v Rawbone* 1954 (3) SA 703 (A) at 711; *Glazer v Glazer NO* 1963 (4) SA 694 (A) at 706H-707A; *Cullinan v Noordkaaplandse Aartappelkernmoer-kwekers Koöperasie Bpk* 1972 (1) SA 761 (A) at 767F-768E; *Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780E-G; *Horowitz v Brock* 1988 (2) SA 160 (A) at 186F-187D). As appears from these cases, the reason for such reluctance was that, for example testators or parties to contracts would have arranged their affairs on the basis that the legal principles concerned were settled.

[39] According to the plaintiff's argument, the likelihood is that this also happened in the case of the hypothesis that the *placaeten* apply to urban leases. Even though the hypothesis now turns out to be based on a misinterpretation of the law, so the argument went, parties to urban leases had probably acted for years on the basis of legal advice that their contracts were subject to the provisions of these ancient enactments. On this basis, the plaintiff contended, lessors would have thought it unnecessary to impose contractual limitations on their lessees' right to claim compensation for improvements or to provide for the exclusion of enrichment liens. This likelihood, it was further argued, was borne out by the fact that the question regarding the application of the *placaeten* to urban leases only arose in three reported cases, including the present, during the last 80 years.

[40] What the plaintiff's argument amounts to, in my view, is a reliance on the maxim which 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'. The mere fact that decisions based on a wrong interpretation of the law were given many years ago, would not be sufficient reason for refusing to correct the error, because, so Innes J said (at 93):

'If it were otherwise, the result would be an unfortunate one. For when does a decision become so venerable that its original error is to be regarded as modifying the law?'

(See also Solomon J in *Webster v Ellison* supra at 98-99; *Du Plessis NO v Strauss* 1988 (2) SA 105 (A) 141F-142H.)

[41] Acceptance of the thesis that the *placaeten* also extended to urban tenements cannot, in my view, be described as either uniform or unbroken. I believe that this appears from the historical evolution which I have described earlier in this judgment. After the *obiter dictum* of Lord de Villiers in *De Beers*, which started it all, there was the commentary by Bodenstein 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* 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.

[42] Quite understandably, the plaintiff relied heavily on the statement by Wessels JA in *Van Wezel* (quoted in para 22 above) to the effect that, because *De Beers* had been confirmed by the Privy Council, the extension of the *placaeten* to urban properties must be accepted as part of our law. I say quite understandably because it was primarily on the basis of this statement by Wessels JA that a number of earlier textbooks on the subject presented this as a settled principle of our law (see eg R W Lee & A M Honoré *South African Law of Obligations* 1 ed (1950) p 102; R W Lee *An Introduction to Roman-Dutch Law* 5 ed (1953) p 305; George Wille *Landlord and Tenant in South Africa* 5 ed (1956) p 270; H R Hahlo & Ellison Kahn *The Union of South Africa, The Development of its Laws and Constitution* (1960) p 693; A J Kerr *The Law of Lease* (1968) p 150).

[43] However, as I have endeavoured to demonstrate earlier, a proper analysis of the judgment in *Van Wezel* would have shown that the oft cited statement by Wessels JA was not part of the *ratio decidendi* in that case. Moreover, that *obiter* statement lost its persuasive force because of the later judgment of Van den Heever JA in *Spies*. What appeared clearly from *Spies* was that the *placaeten* as a whole – including articles 10 to 13 – were only directed at '*bruyckers, ofte pachters vande landen*' who were lessees of agricultural land and that the *obiter dictum* in *De Beers* was therefore patently wrong. What is more, it was pointed out by Van den Heever JA (at 483H), that this *obiter dictum* had not been approved by the Privy Council. It should be evident that this final remark effectively deprived the *obiter* statement by Wessels JA in *Van Wezel* of its whole substructure.

[44] In the circumstances it hardly comes as a surprise that, after *Spies*, virtually all the textbooks on the subject aligned themselves with the position that the *placaeten* did not apply to urban leases. (See eg Van der Merwe *Sakereg* 2 ed p 166; De Wet & Van Wyk *Kontrakte- en Handelsreg* Vol 1 5 ed p 362 n 47; De Vos *Verrykingsaanspreeklikheid* 3 ed p 105 n 52; A J Kerr *The Law of Sale and Lease* 3 ed p 471 et seq; W E Cooper *Landlord & Tenant* 2 ed p 335 et seq; Ellison Kahn (ed) *Principles of the Law of Sale and Lease* p 91; 9 *LAWSA* 2 ed p 135 n 5; Reinhard Zimmerman, Daniël Visser and Kenneth Reid (eds) *Mixed Legal Systems in Comparative Perspective, Property and Obligations in Scotland and South Africa* p 320. Contrast Wille & Millin *Mercantile Law of South Africa* 18ed p 337-338; J T R Gibson S*outh African Mercantile and Company Law* 8ed p 189.)

[45] It is true that judicial authority again went the other way in both *Syfrets* and *Palabora Mining*. The point is, however, that in the circumstances, acceptance of the hypothesis that the *placaeten* also applied to urban leases could hardly be said to be either unbroken or uniform. It follows that those who concluded their contracts on the basis of this hypothesis did so at their peril. But I would be surprised if many had done so. The plaintiff's contention that they did is based on the fact that the issue under consideration arose in only three reported cases (including the present matter) in the last 80 years. This, in my view, amounts to a *non sequitur*. A much more likely explanation is that, because of the uncertainty surrounding the issue, matters pertaining to claims for improvements and resulting enrichment liens had been and still are expressly regulated in most contracts of lease. (See eg J P Naude (ed) *6 Butterworths Forms and Precedents* Part 1 '*Leases*' p 36.) It follows that the plaintiff's argument premised upon long-standing and uniform practice must also fail.

[46] For these reasons:

1. The appeal is upheld with costs.
2. The order of the court *a quo* is set aside and replaced by the following:
   '(a) The appeal is upheld with costs.
   (b) The matter is referred back to the magistrate's court for continuation of the trial on the outstanding issues.'

……
F D J BRAND
JUDGE OF APPEAL

Concur:

HOWIE P
FARLAM
CLOETE
LEWIS JJA