CASE NO.: I

H. CHARNY & COMP (PTY) LTD VS SEGALL & MATHESON PROP

O'Linn, J
1995/09/20

CIVIL LAW

Landlord and Tenant - Prescription of claim for compensation for improvement to leased urban tenements.

Held (1) In the absence of agreement between the parties, the debt becomes due as soon as the improvements were made and not after termination of the lease and vacation of the leased property.

Held (2) The only relevant event that need therefore take place is the completion of the attachment which constitutes the improvement and which results in the materials used becoming immovable.

Held (3) The Dutch Placeat of 26/9/1658 deal with agricultural land and not socalled "urban" tenements" and is not applicable to the latter.

Held (4) The decisions in Syfrets Participation Land Managers Ltd v Estate & Coop. Wine Distributors (Pty) Ltd, 1989(1) SA 106(W) at 112G - AA3C and Palaborwa Mining Co. Ltd v Coetzer. 1993(3) SA 306 (T) at 308 C - D not followed.

CASE NO. I 1201/95

IN THE HIGH COURT OF NAMIBIA

In the matter between

H CHARNY & COMPANY (PTY) LTD **PLAINTIFF**

versus

SEGALL & MATHESON PROPERTIES **DEFENDANT**

CORAM: O'LINN, J.

Heard on: 1995.08.29

Delivered on: 1995.09.20

JUDGMENT

O'LINN, J.: Plaintiff H Charny & Co. (Pty) Ltd, instituted an action against defendant, Segall and Matheson Properties, for compensation for improvements to a property which had been leased by defendant to plaintiff.

The principal claim is based on an alleged explicit agreement between the parties in terms of which the lessor undertook to compensate the lessee after the termination of the lease for the costs of material used to effect the improvements .

In the alternative however, the plaintiff relies on the alleged common law remedy of a lessee to be reimbursed, after the expiration of the lease, for expenses incurred during the currency of the lease which allegedly increased the value of the leased property and so enriched the lessor.

The defendant raised a special plea of prescription against both the principal as well as alternative claims.

It was agreed between the parties that the special plea should be adjudicated on by the Court without any evidence being led by any of the parties.

On the 28th August 1995, the day before the hearing of argument, it was agreed that plaintiff would not pursue the special plea on the principal claim at this stage and that argument would only be addressed to the Court in regard to the alternative claim.

Ms Viviers Turck appeared before me for the defendant and Mr Maritz for the plaintiff.

For the purpose of the decision on the special plea it was agreed between the parties that the allegation by plaintiff that the improvements were made during the period October 1987 - February 1988, should be accepted. It is furthermore common cause that the lease terminated on 31st October 1990 and that action was only instituted on 11.09.91, the date of service of the combined summons on the defendant, i.e. more than three years after completion of the improvements but less than three years after termination of the lease.

Defendant's plea of prescription is based on section 11(d) of the Prescription Act 68 of 1969 (as amended) , the relevant part of which provides as follows:

> "11. The period of prescription of debts shall be the

following:

(d) save where an Act of Parliament provides otherwise, three years in respect of any other debt."

Section 12(1) of the said Act provides as follows:

> "Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due."

It is common cause between the parties that the applicable prescription period in the case of plaintiff's alternative claim is that provided in the aforesaid section 11(d) i.e. three (3) years. The main dispute between the parties however relates to the question "when the debt is due" because the three (3) years could only run from the date when the alleged debt became due.

If the debt became due as soon as the improvements were made, then the plea of prescription must succeed. If however the debt only became due after termination of the lease and vacation of the property by the lessee, then the plea of prescription must fail.

This result again depends mainly on whether the contention of Ms Viviers Turck is sound to the effect that the Placaeten of 1658 and 1696 received into South African and Namibian Law are applicable to compensation for improvements effected by lessees to so-called "urban tenements" or

conversely, whether Mr Maritz is correct in contending in the first place that the said Placaeten apply also to urban tenements. For the purpose of this dispute it is also common cause that the property in question in this action must be regarded as an urban tenement.

For the purpose of this argument Ms Viviers Turck relied inter alia on the following writers and decisions. W E Cooper: Law of Landlord and Tenant, 2nd edition, 335-336 ;
De Vos: Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg, (3rd ed.) 165;
De Wet & Yeats: Die Suid-Afrikaanse Kontrakte en Handelsreg, (4th ed.) by J C de Wet & A H van Wyk, 1978 at 319;
The Law of South Africa, Vol. 9, the contribution by J G Lotz, p 63, par 96;
The Trustees in insolvency of Lyons & Stone v The Land S A Exploration Company, (1890) 6 HCG 217 at 223; Burrow v McEnvoy, 1921 CPD 229 at 234.

Mr Maritz conceded that the writers Cooper, De Wet and Yeats, Joubert and De Vos and the decisions referred to supra are against him, but rely in turn on the following writers and decisions:
Wille: Landlord and Tenant in South Africa, (3rd ed.) 253; Kerr: The Law of Lease, (1969)(1st ed.) 180;
Gibson, Comrie & Stander: South African Mercantile & Company Law 6th ed 208-209;

?

Exploration Co., (1893) 10 SC 359 and 368 and 375;

The London & South African Exploration Co. Ltd v De Beers Consolidated Mines Ltd, (1895) 12 SC 107;

Rubin v Botha, 1911 AD 568 at 579;

Van Wezel v Van Wezel's Trustee, 1924 AD 409 at 416 and 418;

Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors (Ptv) Ltd, 1989(1) SA 106 (W) at 112G -113C;

Palaborwa Mining Co. Ltd v Coetzer, 1993(3) SA 306 (T) at 308C - D.

In reply Ms Viviers Turck also drew the Court's attention to the following commentaries on respectively the judgments in Syfrets Participation Bond Managers Ltd case, supra and the Palaborwa Mining Co. Ltd case supra.

Annual Survey of South African Law, 1989, the contribution by Martin Brassy at 83/84.

Tydskrif vir Hedendaagse Romeins-Hollandse Reg, Vol. 32, 1989, the contribution by A J Van der Walt, University of South Africa at 590-599.

Annual Survey of South African Law, 1993, contribution by D P Visser at 237/238.

In addition to the above authorities, the following can be added to those who hold the view that the "Placaeten" were not extended to the lease of houses, (huishuur) or so-called urban tenements.

C G Van der Merwe, Sakereg, (2nd ed.) at 166.

Bodenstein, Huur van Huizen en Landen volgens het Heedandaagsch Romeinsch-Hollandsch Recht, 111 ev.

It is necessary to comment briefly on the nature and weight of the aforesaid opinions of the writers and commentators and relevant Court decisions. It is best to commence with the decision of Cape Supreme Court in De Beers Consolidated Mines v London & South African Exploration Co., supra, which led the way with the view that the aforesaid Placaeten applied also to so-called urban tenements and are not restricted to agricultural land.

It is quite clear from the decision itself as well as from most of the authorities referred to, that the decision was an obiter dictum in the first place and secondly - not based on sound reasoning. Even some of these authorities who accept that the Placaeten have been extended to urban tenements by means of Court decisions, strongly criticise the said decision. It is instructive to quote the following comment from "The Law of Lease", by Kerr, the 1969 edition, at p 147-148 and 149-150.

> "The land in question in De Beers Consolidated Mines v London and South African Exploration Co., (1893) 10 SC 359, was an urban tenement. De Villiers C.J., after acknowledging that the placaten originally applied only to rural tenements said that van der Kessel in Th. 213 had accepted Articles 10, 11 and 12 "as having been incorporated into the common law of Holland and Friesland relating to landlord and tenant.' It is correct that in Th. 213 van der Kessel mentions, 'a lessee' without qualification but in his Praelectiones, which have only recently been published for the first time, and of which the Theses are substantially abbreviations, he mentions that the placaat was enacted *i.v.m. pagters of huurders van lande' - 'de colonis sive conductoribus agrorum'. It appears therefore that

the authority on which the learned Chief Justice relied is not as strong as he thought.

Another argument was used. 'The Placaat', said the learned Chief Justice, 'clearly was not intended to place agricultural lessees in a better position than urban lessees.' This may be conceded - the intention seems to have been 'to curb and restrict the pretended claims of lessees of land in the country (ten platten lande)' - but it does not follow, as de Villiers C.J. apparently thought, that therefore the placaat should be extended to urban leases as well. If the placaat refers only lessees of rural property such lessees were in a worse position than urban lessees, not in a better one, because urban lessees then have their common law rights which include the right to remove structures and rights to compensation similar to the right of bona fide possessors. Indeed de Villiers C.J. himself said that 'every article of it [the Placaat] restricts the ancient common law rights of lessees' and how can a lessee with restricted rights be in a better position than one with unrestricted rights?" .....

"To return to De Beers' case and the question of the application of the Placaat to leases of urban property. The authority cited in favour of the application of the Placaat to such property cannot bear the weight the court put upon it and the argument put forward appears to be unfounded. It may be noted, moreover, that the decision in favour of the lessee was confirmed by the Privy Council on appeal without reference to any authority, such reference being unnecessary as the lease in question expressly conferred the right to remove. Clause 4 had a proviso reading:

> 'Provided always that if no rent be due and unpaid the lessees their successors and assigns shall be at liberty during their tenancy to remove all such improvements (save and except boundary fences) as shall be capable of removal without injury to the

land itself.'

In other words all that was said on the Roman-Dutch and South African law in the Supreme Court was obiter. This is clear from the report itself. De Villiers C.J. introduced his exposition with the following words, at p. 366:

> 'Before considering what special rights, if any, are reserved to the defendants by the deed of lease, it would be well to inquire what rights they would have enjoyed, as against the lessors, if the deed had been silent upon the subject of improvements to be effected and removed before the expiration of the term.'

But the deed was not silent on the subject and the parties' rights were those agreed upon, not those given by the residual rules.

De Beers' case has since been followed in actions relating to rural properties and there are obiter dicta in its favour in Rubin v Botha, 1911 AD 568. The main authority behind it is van Wezel v van Wezel's Trustee, 1924 AD 409, which concerned urban property. This decision lifts the extension of the rules of the Placaat to urban leases out of the category of obiter dicta into the category of rationes decidendi.

It appears therefore that the law at present is that Articles 10-13 of the Placaat apply both to rural and to urban leases. This, however, does not end the matter because there are circumstances in which courts consider themselves at liberty to make a change in the law. It is suggested that a change should be introduced in this branch of the law and that it is within the competence of the courts to revert to the position where the Placaat applied only to leases of rural property. Some might go further and say that if a change is to be made the Placaat should be declared

> not to be in force at all but it is thought that such a step should be left to the Legislature. The Legislature might well give the matter its attention." Compare: Law of Lease, 2nd ed., at 167-168, 169-170.

The only reason why Kerr reluctantly accepts that articles 10 - 13 of the Placaeten apply both to rural and urban leases is the decision in Van Wezel v Van Wezel's Trustee, supra, which according to the learned author "concerned" urban property and therefor "lifts the extension of the rules in the Placaet to urban leases out of the category of obiter dicta into the category of rationes decidendi." (My emphasis)

In this regard it is important to note that the learned commentator A J van der Walt in his detailed discussion of the decision in Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors, in Hedendaagse Romeins-Hollandse Reg, supra at p 595 contends that the decision in Van Wezel v Van Wezel's Trustee, supra, is equally obiter (i.e. as is the decision in Rubin v Botha, supra) "in view of the fact that the case related to agricultural land and the decision mainly dealt with permanent attachment of improvements and the implication thereof for the attached material. "

(My translation from the Afrikaans).

It is apposite to remark here that although the Van Wezel decision assumed without more that the De Beer' s case had purported to apply the Placaeten to urban leases, and that the Privy Council had approved the decision on appeal,

Wessels, J.A. inter alia said:

> ""It is questionable whether the Placaet altered the civil law in regard to 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 by the Privy Council, decided that it referred to all leases so that lessees of both rural and urban properties who annex materials (not being growing trees) to the sail, are presumed to do so for the sake of temporary and not perpetual use and as between themselves and the owners of the land, they have the right to remove the materials during the currency of the lease." (My emphasis).

The leases in the Van Wezel case, were open stands. This is probably why Van der Walt in his discussion regarded the property in question as 'agricultural' and the main issue as one relating to attachment to such land.

Wessels, J.A. may for the same reason not have regarded it necessary to consider and decide whether or not the Placaeten can rightly be extended to urban tenements. The fact that Wessels, J.A. also assumed that the "Privy Council had approved the decision" either did not intend to suggest that the Privy Council had approved the obiter dictum in the De Beers case relating to the extension of the Placaeten to urban tenements, or he had failed to notice that the Privy Council had based its judgment, confirming the decision of the Cape Supreme Court, not at all on the issue of extension of the Placaeten, but solely on the terms of the contract between the parties. However that may be, the said decision of the Privy Council is in the said circumstances, no

authority whatsoever for the extension of the Placaeten to lessees of urban tenements. It follows that if the learned judges of appeal in Van Wezel's case or those in any other decision, relied or relies on the said judgment by the Privy Council as authority for such extension, then such decision or decisions are with respect based on grave error and need not be followed.

It seems unfortunate that when Van Wezel's case was decided, the decision in Burrows v McEnvoy, particularly the judgment of Kotze, J. P. was not considered, probably because the decision was not available.

The Burrows v McEnvoy decision, given by three judges of the Cape Provincial Division of the Supreme Court, did in turn not refer at all to the decision in Rubin v Botha, 1911 AD supra, at 579. This may be because it regarded the Rubin v Botha judgment as obiter.

Kotze, J. P. in his judgment also relied on the writing of Professor Bodenstein in his thesis - "Huur van Huizen en Landen".

Van der Walt also refers to the view expressed by the learned Chief Justice in the De Beers decision a t 369-370 that the Placaeten "clearly was not intended to place agricultural lessees in a better position than urban lessees" ought to read "it clearly was not intended to place agricultural lessees in a worse position than urban lessees." See also Kerr, The Law of Lease, supra at 148.

Van der Walt disagrees with the approach and dictum in the decision by Van Zyl, J. in the Syfrets case supra. Van der Walt says:

> "In the Syfrets case the Court however chose the extensive method of interpretation of the word 'landen' which according to the Court is the common element by means of which the scope of the application of the Placaeten should be measured. (111G - 112B) Considering that the Placaeten are so expressly brought in to combat the abuse of rights therein specified, and in consideration of the fact that the distinction between agricultural land and urban land for the purposes of the Placaeten is rather based on the use than on the place where the land is situated, it appears more acceptable to accept that the failure to mention urban land and the absence of examples of abuse in connection therewith must be seen as an indication of the fact that the Placaeten are restricted to agricultural land .....
>
> The Court's second reason for the decision .....
> is
> also not persuasive. It is for instance contended (112 B - C) that it will be unreasonable to make the distinction between urban and rural leases, with the result that the lessee of agricultural land is selected
> for prejudicial treatment..... The anomaly is the
> direct result of the intentionally prejudicial effect of the Placaeten for a specified group of lessees. To extend the prejudice just to spread it evenly, would be in conflict of all and every principle of interpretation. The normal principles of
> interpretation require rather that the disadvantage (prejudice) is restricted by the law only to the clearly defined group, anomaly notwithstanding. If the anomalies which flow from the application of the Placaeten because

> extended, but that they must rather be repealed .... " (My translation from the Afrikaans).

See also the judgment of Van den Heever, J.A. in Spies v Lombard, 1950(3) SA 469 AD, at 476 G-H and 483 C-H.

In the 1989 Annual Survey Martin Brassey at 83/84 summarises the effect of the decision in Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors (Pty) Ltd, supra without approving or disapproving.

He however had this to say:

> "The Placaeten have been described as 'evincing a monumental unreasonableness, so that their survival into modern law must be counted a minor misfortune'. (H R Hahlo and Ellison Kahn, The Union of South Africa: The Development of its laws and constitution [1960] 693)
>
> Over the years attempts have been made to pare down their scope by suggesting either that, because they draw on instances from rural life, they do not apply to urban tenements or that they do not apply to necessary improvements, compensation for which, (so the argument goes), is claimable as though the lessee were a negotiorum gestor. (See e.g. De Beers Consolidated Mines v London & South African Exploration Co., (1893) 10 SC 359 at 369). For proponents of these views there is nought for comfort in Syfrets Participation Bond Managers Ltd v Estate & Co-op Wine Distributors (Pty) Ltd, 1989(1) SA 106 (W)." (My emphasis).

The last known decision on the issue is the judgment of Mahomed, J. as he then was, in Palaborwa Mining Co. Ltd v

Coetzer, 1993(3) SA 306 (T) 308 C - I.

The learned judge agreed with the judgment of Van Zyl, J. in the Syfrets case and followed the same reasoning in all essential respects. The criticism of Van der Walt in Tydskrif vir Hedendaagse Romeins Hollandse Reg, supra at 590 - 599, therefor applies mutatis mutandis also to the latter judgment and need not be repeated. Unfortunately the learned judge does not deal with the said criticism in his judgment. It is also said in the Palaborwa decision:

> "De Villiers, C.J. in the De Beers Consolidated Mines case put it on the basis that the 'Placaet was not intended to place agricultural lessees in a better position than urban lessees.' I find myself in respectful agreement with that view."

As pointed out by the commentator Van der Walt and others, this quotation taken over also in the Syfrets decision from the De Beers decision, appears to be expressed in error and should perhaps have read "it clearly was not intended to place agricultural lessees in a worse position than urban lessees."

The argument in Palaborwa continues as follows:

"The obiect of the Placaeten was to prevent to abuses which occupiers of tenements had been perpetrating in asserting claims for compensation for improvements for the purposes of defeating the owners of property. If this was the object, why should there be a rational distinction between urban and rural tenements?" (My emphasis).

The first difficulty I have with this argument is that the factual statement in the first sentence which is used as the launching pad for the argument is, with great respect, not correct. The Placaeten deal clearly with abuses on agricultural land and no others. That much is conceded by all the writers and almost all, if not all the Court decisions. The object therefore must have been to deal with such abuses in relation to agricultural land. The object could not have been to deal with types of leases where the targeted abuses are unknown. If abuses were known in relation to lease of urban tenements, why would they not have been identified in the Placaeten in a similar manner as in the case of agricultural leases.

Furthermore, the heading and/or introduction to the aforesaid Placaeten is:

> "Placaet van de Staten van Holland, tegen de Pachters ende Bruyckers van de landen....."

It is therefore expressly stated against whom the Placaet of 26 September 1658, reenacted on 24 February 1696, was enacted. "Pachters and Bruyckers van de landen as stated by Van den Heever J.A. in Spies v Lombard supra at 476 G-H, clearly refer respectively to lessees of rural land and "gebruikers" (i.e. users) of "eene boerderij met bijbehorende landerijen." (i.e. as farming enterprise with cultivated fields or lands which belong thereto) .

occupiers of urban tenements continue to have greater scope for abuse than the occupiers of rural tenements?"

The first answer is that there in fact is a rational as well as a radical difference between a so-called urban tenement and a rural tenement and the leases pertaining to such tenements, not only in the days of the enactment of the Placaeten but also subsequently.

Secondly, it seems to me that when the lease is of a particular house or building then the scope for improvements and claims for improvements appears to be not only different, but less than when the lease is for agricultural land, whether or not the agricultural land already has some buildings on it.

It was also argued in the same judgment at 308 H:

> "Both rural and urban land 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 in another." (My emphasis).

It appears to me that the correct distinction is not so much that between one area and another. In the case of the rural tenement the land is used primarily for agricultural purposes and in the case of the so-called urban tenement, the lease relates primarily to the building for residential or business purposes, even though there may also be e.g., a flower garden, forming part of the premises leased. Compare also Van der Walt, supra at 595.

The argument for equalisation in the interests of justice is unconvincing. It seems to me that one cannot make equal what is inherently unequal. For the rest, I find myself in respectful agreement in substance with the argument of Van der Walt, supra at 592 - 596.

There is also some comment on the Palaborwa decision in the 1993 /Annual Survey of the South African Law where D P Visser shortly summarises the findings and implications of the decision and describes the decision as "at once bold, but also a very sensible application of the law."

The learned judge in the Palaborwa case also relied at 308 D - E for support of the view expressed by Van Zyl, J. in the Syfrets case, inter alia on Wille, Landlord and Tenant at 270; Gibson, South African Mercantile & Company Law, 2nd ed., at 157 and Kerr, The Law of Lease, at 150 and 180.

Wille, in the 5th ed., at 270, does not express any opinion on the correctness or otherwise of the decisions referred to. The authors however clearly express their doubt as to the correctness of the dicta by stating:

> "It is questionable whether the Placaets altered civil law in respect of every kind of lease, or whether they referred to certain agricultural leases only, but the approval of the Privy Council disposes of the doubt on the point." (My emphasis).

The only reason given by Wille for the view that the doubt is removed is the decision of the Privy Council. But as shown supra, this decision is no authority because it

decided the appeal only on the application of the terms of the written contract between the parties.

Kerr, as already indicated supra, strongly criticises the aforesaid decisions, but only accept the extension of the Placaeten to urban tenements as part of the law, because he accepted that the decision of the Appellate Division in the Van Wezel decision was in point and not as argued by Van der Walt, supra at 595, also obiter.

Gibson, assisted by Comrie, in their work South African Mercantile and Company Law, 6th ed., at 208, enumerates the authority for and against the application of the Placaeten to all leases, including that of urban tenements. The authors then come to the conclusion that "on the whole, the authority favours Wille's view."

In the footnote No. 33 at 208 the learned authors however point out:

"It should, however, be borne in mind that this proposition is doubtful. Several writers are of the view that the Placaet rely only to rural properties. (See in addition to the authorities quoted in the text, Bodenstein, Huur van Huizen en Landen, 111 et seq., De Vos, Verrykingsaanspreeklikheid .... 74 ; cf Hahlo and Kahn, Union of South Africa, 693, Lee and Honore, Obligations 390). In view of the inequitable nature of the Placaet the Courts would be unlikely to extend its application to urban property were the matter to come before them for the first time. But the weight of authority remains with Wille's view." (My emphasis).

When the views of Wille and Kerr are however correctly analysed, it does not appear that the weight of authority is on the side of extension of the provisions of the Placaeten to urban tenements.

The learned authors of South African Mercantile Law, supra, also refer to the decision in Spies v Lombard, supra. It is important to note that when Van den Heever, J.A., who gave the judgment of the Court, dealt with the Placaet of September 1658, he unequivocally stated when dealing with the 9th article of the said Placaet:

> "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' edited by Muller and Kluyver 'In't bijzonder "Houder", gebruiker (hetzij als pachter, hetzij anderzins) van eene boerderii met bijbehoorende landerijen' ." (My emphasis) .

See judgment at 476 G-H.

Van den Heever further laid down the following principle relating to the interpretation and application of Placaet.

> "The Placaet is a Dutch statute and has to be given the meaning it bore at the time of its promulgation."

If follows from this dictum that when a South African or Namibian Court decides the ambit of the application of Dutch Placaeten in our law, the intention against the background in Holland must first be determined, not whether or not its scope should be extended in our circumstances.

When dealing with the decision of the Cape Supreme Court in the De Beers case, Van der Heever made it clear at 483 C -H of the report, that the judgment of De Villiers, C.J. was obiter and that the Privy Council "decided no more than that the lessees who were at liberty, according to the terms of their lease 'during their tenancy to remove all such improvements (i.e. made by themselves) as shall be capable of removal without injury to the land itself may do so with impunity." (My emphasis).

As to the decisions in Rubin v Botha and Van Wezel v Van Wezel's Trustee, Van der Heever had this to say at F - H:

> "Lessees, as has often been pointed out in the Cape cases, especially in De Beers Mines v London & South African Exploration Company (10 Juta, 359), stand on a different footing from other occupiers as their rights have been defined by special legislation.
>
> In this judgment Maasdorp, J.P., concurred and Innes, J.A. remarked:
>
> > 'but the claims of a tenant have been much simplified by the application at the instance of the Cape Supreme Court (with subsequent approval of the Privy Council), of many of the provisions of the Placaat of 1658 to urban as well as rural leases.'
>
> As we have seen that 'approval', if it can be so termed, was rather equivocal.
>
> In Van Wezel v Van Wezel's Trustee (1924, AD 409) this Court held that
>
> 'The placaat of 1658, sec. 12, altered the civil

> law in regard to "Pachters ende Bruyckers van Landen" and allowed these to remove, during the currency of the lease, all structures erected by them on the leased lands'."

It is clear that the learned judges Van Zyl and Mahomed applied the extensive method of interpretation respectively in the decisions in the Syfrets case and the Palaborwa case, supra.

In my respectful view, the extensive mode of interpretation is not appropriate when deciding the extent of the application of the Placaeten, whether in the form of analogical interpretation or inclusive interpretation. According to Steyn, Die Uitleg van Wette, 5th ed., at 44/45, common law authorities exclude the operation of the analogical interpretation with respect to:

(i) Enactments altering the common law;

(ii) enactments imposing burdens and penalties;

(iii) enactments employing restrictive words/language; and

(iv) enactments aimed at specific circumstances and applicable to specific persons only. (My emphasis)

See also: Du Plessis, The Interpretation of Statutes, 155/156.

If these principles are applicable to the interpretation of the aforesaid Placaeten, the result would clearly be that the provisions of the Placaeten are not to be extended to urban tenements. The inclusive form of interpretation is also not appropriate, because the first requirement for inclusive interpretation is that the sought implication can only be drawn from other provisions of the enactment and provided the implication is a necessary one.

See: - The Interpretation of Statutes, supra, at 156.

There are no other provisions of the said Placaeten from which such an inference may be drawn and certainly not provisions from which such an implication is a necessary implication.

Furthermore, it is presumed that an enactment does not alter the existing law more than is it necessary.

See: - Interpretation of Statutes, supra, 69-73.

The further rule of interpretation applicable is that the meaning of the words of a statute must be determined by reference to all structurally relevant elements, one of which is the context. The context again does not merely denote language of the rest of the statute, but includes its matter, its apparent purpose and scope and within limits, its background. There can be no doubt that this approach is certainly applicable, particularly when the words used are to some extent ambiguous and the "clear, ordinary meaning"

of the provision cannot be ascertained.

See: - Interpretation of Statutes, supra, 107-108.

In my view, it can certainly not be said that "the clear and ordinary meaning" of the provisions of the Placaeten is that they extend to urban tenements. To the contrary - they seem not so to extend. But at least, when the matter, apparent purpose, scope and background of the enactment of the Placaeten are considered, their provisions clearly were not intended to extend to urban tenements and do not extend to urban tenements.

For the above reasons, I do not agree with the decisions of Van Zyl, J. and Mahomed, J. (as the latter was at the time), in the Syfrets case and the Palaborwa case discussed supra. In my respectful view the provisions of the aforesaid Placaeten were not extended to urban tenements in South African Law and also not to Namibian Law.

If follows from the aforesaid conclusion, that the plaintiff cannot rely on the extension of the Placaeten to urban tenements to meet the special plea of prescription on the ground that the debt based on a claim for compensation for improvements, only became due on the date on which the lease was terminated and on which the plaintiff vacated the leased property.

But Mr Maritz relied in the alternative on the following grounds for submitting that, irrespective of the application

of the Placaeten, "the right of a lessee to claim compensation and the obligation of the lessor to pay such compensation will only arise upon the termination of the lease and the vacation of the property by the lessee." He reasons as follows:

1. "Although it is accepted that, when dealing with the extent of the remedies available to a bona fide possessor, it does not and cannot follow that the remedies are also identical as to the point in time when the right to claim compensation for such improvements accrues to the lessee."

2. "A bona fide possessor intends, when he affixes structures to the land or structural additions, to do so for his own and permanent benefit - per definition he must not be aware at such time that the land belongs to another. His right to claim compensation and to retain the land pending payment of such compensation accrues only from the moment he becomes aware that he is not the owner of the land in question. Prescription can therefore only commence to run from such point in time."

3. "The lessee, however, knows at all times that he or she is not the owner of the land and that the land would have to be returned to the owner upon termination of the lease.

Whereas necessary improvements cannot be removed, as they have been effected with the purpose of protecting or preserving the leased property (and removal thereof would thus be a direct and permanent injury to the leased property), there is a presumption that annexation of materials to the land for the purpose of bringing about useful or luxurious improvements are of a temporary and not a permanent nature.

4. In the absence of evidence to rebut the aforesaid presumption, a tenant does not lose his ownership in the property annexed, for it remains movable unless it has been so incorporated into the land or structure as to become ipso facto immovable.

5. On the assumption that the Placaeten does not apply, a lessee's right of removal 'would be beyond doubt, subject of course to the landlord's right to prevent any injury to the soil or any diminution of his security for rent and damages'.

6. If a lessee retains the right to remove structures and additions (which may include buildings with foundations in certain instances) until the date of termination of the lease upon which date such structural improvements and additions would become the property of the landowner (see Oosthuizen's case, supra at 693) it follows that the compensation to which the lessee may be entitled

to can only be determined on that date....."

Ms Viviers Turck took issue with this argument and submitted that the lessee of urban tenements is in the same position as the bona fide possessor, also in that prescription, in the case of enrichment claims by bona fide possessors, commence as soon as the work, which resulted in the landlord's enrichment, is completed.

It is necessary to pause here to point out that it is common cause that the claim of plaintiff in the present case is for the actual costs of material used to make attachments to the immovable property of the lessor and that these attachments constitute necessary, alternatively useful, improvements.

In the further particulars supplied by the plaintiff, plaintiff also conceded that the "attachments" cannot be removed by the plaintiff. By this admission I understand that it is physically impossible to remove the "attachments" and that the "attachments", after "attachment", became immoveables at the time of its attachment.

It is conceded by Mr Maritz that necessary improvements cannot be removed once made. However he argued that "structures and additions" can be removed if they constitute useful or luxurious improvements (which may include buildings with foundations in certain instances) until the date of termination of the lease upon which date such structural improvements and additions would become the property of the landowner. The so-called presumption relied

on by Mr Maritz under point 3 of his argument supra, even if it is tenable in law, is completely rebutted by the admission in the further particulars that the attachments in the instant case, became in effect, immoveables.

The decision in Anglo American (OFS) Housing Co. Ltd v Commissioner of Inland Revenue, 1959(4) SA 279 (W) at 281 H-A, relied on by Mr Maritz, is no authority for the proposition that structures and additions such as buildings with foundations can be removed by a lessee of an urban tenement until termination of the lease. In my view the correct position is set out in the following authorities:

De Vos; Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg, supra, 226-227.

Carey Miller, The acquisition and Protection of Ownership, 12.

Van der Merwe, Sakereg, 2nd ed., 247.

But whether or not a lessee has the right until the termination of the lease to remove even those useful and luxurious improvements which have become immoveables, that does not mean that the debt of the owner to pay compensation to the lessee, only becomes due on the termination of the lease. The right to compensation for the cost of improvements is neither dependant on the right to remove, nor to the real right of a lien over the property until the compensation claimed, is paid.

Should the lessee however claim compensation, he would have made an election and his right to removal will fall away.

The fact that the real right to a lien over the property-continues until the lessee is paid for the improvements, does not mean that the right to claim compensation does not accrue once the improvements have been made and the materials used have become part of an immovable and so immovable itself. Of course, once the claim for compensation is made within the period of three years from the date of the making of the improvements, the lien would remain effective until payment is made to the lessee.

The distinction which Mr Maritz attempted to draw between the bona fide possessor and the lessee as set out in points 2 and 3 supra, is also untenable. However, some distinction can legitimately be made, namely: The bona fide possessor's right to claim compensation accrues as from the moment he becomes aware that he is not the owner of the land in question. The lessee knows from the beginning that he or she is not the owner. The lessee's right to claim need therefore not, as in the case of the bona fide possessor, wait for a point in time when such possessor becomes aware that he or she is not the owner. The distinction aforesaid is no justification for saying that his or her claim for compensation should be postponed until termination of the lease. The only relevant event that need therefore take place is the completion of the "attachment" which constitutes the improvement and which resulted in the materials used becoming immovable. It is also known at that point in time whether the improvement is a necessary, useful or luxurious one, what the cost of the material was and/or the extent to which the value of the property was enhanced,

if at all. It is also in the interest of both lessor and lessee that the claim, if any, should accrue as soon as the attachment has been completed. There is therefore no reason in logic and/or in fairness, why the accrual of the right to claim compensation should be postponed until the date of termination of the lease.

See also: De Wet and Yeats, Kontraktereg en Handelsreg, 4th ed., 263.

I also agree with Ms Viviers Turck that the Prescription Act "envisages finality and certainty of claims ....."

Ms Viviers Turck also relied on the following dictum in Lydenburg Voorspoed Korporasie v Els, 1966(3) SA 34 (TDP) at 37 H:

> "It would be tantamount to leaving the determination of the period of prescription entirely in the hands of the person against whom it would otherwise be running, which is quite contrary, in my view, to the principles of the Prescription Act."

See also: De Wet & Yeats: Kontraktereg en Handelsreg, (4th ed.) at 263.

Although of course the period of prescription is not left entirely in the hands of the lessee if Mr Maritz's argument is followed, the prescription is at least postponed to the date of termination of the lease and this could be a considerable period after the completion of the improvements.

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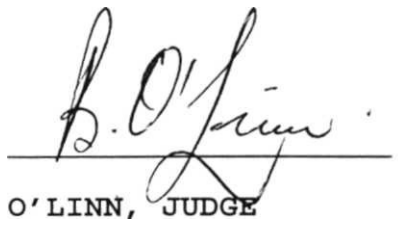
The interpretation relied on by Mr Maritz would abort the aforesaid aim of the Prescription Act.

It follows from the above reasoning that plaintiff's right to claim compensation for materials accrued at the time the improvements were completed, i.e. on 1st March 1988. The action was however only instituted on 11/09/1991, more than three years after such accrual. As a consequence the plaintiff's alternative claim had become prescribed in accordance with section 11(d) of the Prescription Act, No. 68 of 1969.

In the result:

Defendant's special plea relating to the plaintiff's alternative claim is upheld with costs.



O'LINN, JUDGE

ON BEHALF OF THE PLAINTIFF ADV. J D G MARITZ

ON BEHALF OF THE DEFENDANT ADV. S VIVIER TURCK