

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2020/03489

In the matter between:

**JOHAN PIETER AVENANT**

**PLAINTIFF**

and

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**DEFENDANT**

**Neutral citation:** *Avenant v Government of the Republic of Namibia* (HC-MD-CIV-ACT-OTH-2020/03489) [2021] NAHCMD 589 (07 December 2021)

**Coram:** RAKOW J

**Heard:** 16, 18 – 19 August 2021; 14 September 2021 and 28 October 2021

**Delivered:** 07 December 2021

**Reasons delivered:** 14 December 2021

**Flynote:** Law of Contract – Lease Agreements – Principles of lease agreements – Roman Law - *Commodatum* or *bruikleen* (Loan for use) – The nature of *commodatum* – The rights and obligations under *commodatum* – Compensation for improvements made on land under *commodatum* – Property lien pending payment of claim.

**Summary:** The plaintiff and the government entered into an agreement for use of government land for farming activities, after the plaintiff's farm was burned down as a result of the negligence of a government employee – The plaintiff then effected considerable improvements to the infrastructure on the government farm, to make it conducive for farming activities – The plaintiff subsequently instituted action against the defendant claiming compensation for the expenses incurred in making the land conducive for farming activities.

*Held* that, the agreement between the parties resembled a contract through which the lender delivers property to the borrower to be used for a certain purpose and to be returned to the lender upon the expiration of the period of time, or after it has served the purpose for which it was lent. An agreement of this nature is derived from Roman Law and as known as a *commodatum*. This type of agreement differs from a lease in that the borrower pays no remuneration for the use of the property.

*Held* that, in order for the plaintiff to be entitled to compensation, he has to prove that the expenses which he or she has incurred with regards to improvements on the land, were indeed necessary expenses and/or useful expenses which improved the usefulness and the economic value of the property.

*Held* further that, the plaintiff is entitled to compensation for the necessary improvements made and that he or she may remove useful and luxurious improvements, if they can be separated from the property without injury to the property.

*Held* that, the plaintiff's claimed was to be upheld in the amount of N\$450 000 with interest, which amount weighed the reasonable expenses for the improvements made against the reasonable wear and tear occasioned by the plaintiff's use and enjoyment of the infrastructure over the years.

*Held* further that, in terms of our Roman and Roman-Dutch law the plaintiff has no lien on the property until such time as the claim is paid.

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**ORDER**

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1. Judgment is granted for the plaintiff in the amount of N\$450 000, provided that it is understood that the plaintiff has no lien on the property.
2. Interest thereon *a tempore morae* at a rate of 20 per cent per annum reckoned from date of judgment to date of payment is granted.
3. Cost of suit.
4. The matter is removed from the roll and regarded as finalized.

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### JUDGMENT

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RAKOW J

#### Introduction

[1] This an action brought by the plaintiff, Mr Avenant, against the defendant. The Government of the Republic of Namibia whereby the plaintiff claims to be a bona fide possessor in respect of his claims for improvements to Farm Retreat No. 283, which is the property of the defendant, held under the Minister of Land Reform who is entrusted and is the competent administrative body to acquire any agricultural land offered for sale and is the responsible official who is assigned to make agricultural land available for agricultural purposes.

[2] The origin and source of this case is in the Settlement Agreement, entered into and signed by the plaintiff and the defendant. This was entered into after a farm owned by the plaintiff, namely Farm Kotzetaal No. 29 in the !Karas Region, burned down on 8 November 2011 as a result of exhaust fumes from a government vehicle. The government then entered into a form of settlement agreement with Mr Avenant, which extended the use of a government farm for farming activities. In order to properly conduct farming activities on the government farm, the plaintiff effected some improvements, for which he now claims compensation.

[3] The plaintiff instituted action against the defendant based on the allegation that during the currency of his tenancy of Unit "A" of Farm Retreat No. 283, for a period of six years from May 2012 to 31 May 2018, and with the knowledge and consent of the defendant, he erected necessary improvements to the premises at a cost of N\$554,000 and which necessary improvements increased the market value of the premises in the amount of N\$420,000.

Issues of fact and law that needs to be resolved at trial

[4] According to the pre-trial order the following issues of fact and law are to be resolved:

- '1.1 Whether Plaintiff is a mala fide possessor of the Farm Retreat No. 283 and further whether he is in unlawful occupation thereof.
- 1.2 Whether Plaintiff has effected necessary improvements, as set out in his Particulars of Claim, to the said premises.
- 1.3 Whether the infrastructure which Plaintiff pointed out to Defendant's Ms. Mclesia Mbaisa during her inspection of Farm Retreat No. 283 on 19 September 2013 was repaired by contractors appointed by Defendant, enabling Plaintiff to conduct efficient farming practices thereon.
- 1.4 Whether the improvements effected by Plaintiff were attended to with Defendant's consent.
- 1.5 Whether the extent of the improvements effected by Plaintiff exceeds his obligation to attend to general maintenance on Defendant's premises.
- 1.6 Whether the improvements done by the Plaintiff or the structures affected on the Defendant's property are the actual costs incurred by the Plaintiff.'

The issues of law to be resolved

- 2.1 Whether the plaintiff is entitled to his claim against the Defendant.

2.2 Whether Plaintiff is a possessor in respect of his claims for improvements bona fide to Farm Retreat No. 283.

2.3 Whether Plaintiff has a lien or right of retention in respect of necessary improvements effected to Farm Retreat No. 283.

2.4 The issue of costs.'

### The evidence

[5] The plaintiff testified himself and called one expert witness, Mr Scholtz. Mr Avenant, the plaintiff testified that he entered into a settlement agreement with the Government of Namibia, which terms read as follows:

- '- The Lessor (The Defendant) shall allocate Unit "A" OF Farm Retreat Number 283 for a period of six (6) years to the Lessee (Plaintiff) with effect from May 2012 to May 2018.
- The Lessor shall pay the Lessee N\$ 1 447 890.00 (One Million Four Hundred and Forty-Seven Thousand Eight Hundred and Ninety Namibian Dollars, representing expenses incurred and future expenses.
- No party shall vary or alter or rescind the conditions of the agreement without the consent of the other party.
- Any amendments and/or variation of the terms and conditions of this agreement shall be reduced to writing.'

[6] He further testified that the agreement was to run from May 2012 till May 2018 but he was only delivered vacant occupation of the premises on 23 September 2013. On 19 September 2013 the plaintiff and some officials from the regional office of the Ministry of Land and Resettlement visited portion A of the farm Retreat. The plaintiff testified as follows:

'On 19 September 2013 I accompanied Ms Mbaisa of Defendant's office to the premises who then proceeded to inspect same. I then discovered that the premises was not fit for its intended use and as a result of the fact that it did not have sufficient and suitable infrastructure to conduct efficient farming practise thereon...

During the aforementioned inspection, I informed Ms Mbaisa in the presence of her driver, Mr Jacobs Tsamareb, of the unsuitability of the premises for farming purposes

specifically due to the several water installations on the premises which were out of order, faulty or dry. I stated that I would have to repair, replace and install new infrastructure on the premises and effect further improvements to the premises in order to farm thereupon. Ms Mbaisa did not seem to have any qualms with my statements.'

[7] The plaintiff also testified that he was aware that the defendant gave instructions to contractors before his occupation of the farm to improve on the infrastructure and that they installed things like pumps and water tanks but some of these pumps were installed at dry bore holes. He testified that through his tendency he informed Mr Engelbrecht, an employee of the Ministry of Lands and Resettlement who took over the duties of Ms Mbaisa, that the condition of the infrastructure on the premises was unfit for farming purposes. Mr Engelbrecht indicated that he should proceed to attend to the improvements of the premises to such an extent as was necessary for farming thereon since the defendant did not have the funds to do so.

[8] Mr Avenant then testified that throughout his tenure at the farm Retreat, he spent, according to a quotation he received from CK Heydt Civil CC, approximately N\$1 764 891.27 on repairs and the improvement of infrastructure on the farm. The actual invoices and receipts he no longer had in his possession as he changed accountants and did not receive the said documents from his previous accountant. This however was no longer the amount relied upon by the plaintiff in light of the evidence that was presented by the expert witness.

[9] The plaintiff further testified, with the aid of objective evidence in the form of 68 photographs taken of all the improvements effected by him during his occupation and gave a description of what each photograph depicts in respect of all the necessary improvements that he effected to the premises. These improvements ranged from improving water installations, repairing the roof of the house on the farm, repairs to the barn on the farm, installing water installations in camps which had no water installation, giving access to drinkable water to the homestead as well as to the people staying on the remainder of farm Retreat, fixing the stock pens and fences including making the fences higher to retain the stock inside the camps, repairing and replacing windmills and windmill heads, reinforcing of water tank stands, erecting mangas and a dipping hole to be able to ensure the health of the stock on the farm, etc. According to the opinion of the expert witness the costs of such installations

amounts to five hundred and fifty-four thousand (N\$554 000). He insisted that such improvements were necessary to proceed and effectively farm on the farm with livestock.

[10] He also testified that some of these fixtures are removable, like the water tanks he installed because they are attached to cement blocks on the ground with fencing wire. He admits writing a letter to the Permanent Secretary of the Ministry of Lands and Resettlement on 21 April 2016 in which he informed the Permanent Secretary that the premises was not fit for its intended use as a result of the fact that it did not have sufficient and suitable infrastructure to conduct efficient farming practices thereon. He indicated that he was many times at the regional office of the Ministry of Lands and Resettlement and took the matter up with Ms Mbaisa when she was still there and then with Mr Engelbrecht.

[11] The plaintiff then presented the expert testimony of Mr Jurie Scholtz. He testified that he has the requisite expertise (experience and knowledge) to assist the court to quantify the reasonable costs incurred by the plaintiff in effecting the necessary improvements to the premises, which amounts to N\$554,000 as per his valuation report. Due to the above necessary improvements effected by the plaintiff on the farm Retreat, the farm's market value increased in the amount of N\$420,000. He also confirmed that he had a visual inspection of all the items listed by the plaintiff and in his opinion all the listed improvements are necessary in order to undertake farming activities on the farm. He also testified that in his opinion, it would be ludicrous to remove them and removing them will have a negative impact on the value of the farm.

[12] On behalf of the defendant, Mr Engelbrecht testified that the official handing over of the farm was initially set for May 2012 but some renovations were done at the farm and as such the plaintiff only occupied it on 23 September 2013. This alteration therefore predicated a change in the terms of the initial lease agreement and therefore, another lease agreement was entered into by the respective parties for a period of six years from the 23 September 2013 to the 23 September 2019. He testified that the plaintiff never got approval from the Executive Director to effect improvements, neither was such a request made in writing. They further requested the plaintiff provide invoices or proof of initial costs for most of the purchases, and he

never attended to such. Plaintiff repeatedly alluded to his bookkeeper not being in possession of such information and further stated that when he changed bookkeepers from the one he used in Upington, South Africa to the one in Keetmanshoop, Namibia, information got lost. On that notion there is no proof to this effect that the Government is liable to the plaintiff for the amounts sought.

[13] The witness clarified that he had discussions with Mr Avenant regarding the improvements and he informed him that decisions with regard to any improvements on government farms should be taken by the accounting officer of such Ministry and that he as original head does not have the power to give authorization for any lease or anyone to do improvements without the consent of the Executive Director.

### Legal considerations

Was the contract entered into between the plaintiff and the defendant a lease agreement?

[14] In *Principles of the law of Sale and Lease*<sup>1</sup>, the authors formulated the definition of a lease as follows:

‘Contracts for lease of property are reciprocal agreements between lessors and lessees, in terms of which the lessors bind themselves to give the lessees the temporary use and enjoyment of property, wholly or in part, and the lessees bind themselves in turn to pay a sum of money as compensation for that use and enjoyment.

They proceeded and listed the essentials of a contract of lease as follows:

- “(a) an undertaking by the lessor to give the lessee the use and enjoyment of the property;
- (b) an agreement between the lessor and the lessee that the lessee’s use and enjoyment is to be temporary;
- (c) an undertaking by the lessee to pay a sum of money in return for the use and enjoyment which he or she will receive, that is, an undertaking by the lessee to pay rent.” ’

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<sup>1</sup> Sale & Lease; E Kahn (ed), M Havenga, P Havenga and J Lotz, 2<sup>nd</sup> edition edited by Bradfield and K Lehmann, Juta 2010.



[15] The element of paying rent seems to be from earliest times an element of a lease agreement. Rent must further be paid in money. In *Black v Scheepers*<sup>2</sup> court dealt with an appeal matter from the magistrate's court and found that the magistrate correctly found:

'that in law the rent payable in terms of a contract of lease must consist of money or of a share of fruits or produce (see *Rosen v Rand Townships Registrar*, 1939 W.L.D. 5), or of a certain portion of the gross produce of the land (see *du Preez v Steenkamp*, 1926 T.P.D. 362). He held that rent cannot consist of services (see *Crous v Crous*, 1937 CPD 250 at p. 257). These propositions of law are of course well established and accepted and it is clear therefore that the obligation to supply meals cannot constitute rent.'

[16] The exception to the general rule that a lease must be for a monetary amount seems to be in the case of agricultural land where the rent in a lease of agricultural land where the lessor and the lessee can agree to payment in the form of a definite quantity or portion of the produce that is generated from the property that has been let.<sup>3</sup> In the current matter before court there is no agreement of any monies or produce to be paid *in lieu* of rent and the agreement therefore does not meet the requirements of a rental agreement.

#### What was the contract for?

[17] The contract between Mr Avenant and the Government of Namibia was contained in the form of a settlement agreement when the Government extended the use of the property for farming activities after the parties came to an agreement regarding the negligent setting alight of Mr Avenant's original farm by a government employee. This type of agreement closely resembles what is understood under *Commadatum* or *bruikleen* (Loan for use). In *W E Cooper's Landlord and Tenant*<sup>4</sup> *Commadatum* is explained as follows:

'(it) is a contract whereby one person (the lender) delivers property to another person (the borrower) to be used for a certain purpose gratuitously and to be returned to the lender

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<sup>2</sup> *Black v Scheepers* - 1972 (1) SA 268 (E) and also supported in *Matchless Investments (Pty) Ltd v Bredeveldt* - 1974 (2) SA 685 (C).

<sup>3</sup> See Grotius 3.19.6 and Voet 19.2.8 as well as *Du Preez v Steenkamp and Another* 1926 TPD 362.

<sup>4</sup> W E Cooper; *Landlord and Tenant*, 2<sup>nd</sup> Edition Juta 1994 page 7; referring to Grotius 3.9.4 and Voet 13.6.1.

upon the expiration of the period of time, or after it has served the purpose for which it was lent. *Commodatum* differs, therefore, from lease in that the borrower pays no remuneration for the use of the property.'

[18] This type of agreement has its roots in Roman law and as per J.A.C. *Thomas in the Textbook of Roman Law*<sup>5</sup> it was later accepted that a *commadatum* can exist over land also, although it was not initially the case under Roman law. The learned writer further explained a *commadatum* as follows:

'*Commadatum* was a loan for use, different from *mutuum* in that the specific thing handed over had to be returned or otherwise disposed of, as agreed, at the end of the loan.'

#### Obligations of the parties under a commodatum

[19] J.A.C. *Thomas in the Textbook of Roman Law*<sup>6</sup> describes the obligations of the parties under a *commodatum* as follows:

'The borrower's principal obligation under the contract was to restore the thing at the end of the loan in the same condition, fair wear and tear excepted: if no specific time had been set for the loan, it had to be returned in a reasonable time ....

Since he profited by the contract, the borrower had normally to show the care of a *bonus paterfamilias*, i.e. was liable for *culpa levis in abstracto* ... He could use the thing only within the terms of the contract and in conformity with its nature.'

[20] Regarding the lender the following was said by J.A.C Thomas:

'The lender had to afford the borrower enjoyment of the thing for the purpose and period, if anything, agreed and to reimburse any exceptional expense incurred by the borrower in looking after the thing ....He was liable also for damage to the borrower caused by defects in the thing of which he knew but which he did not disclose....

To enforce his rights, the lender had the action *commodati directra*, whether *in ius* or *in factum*; the borrower had an *actio contraria*<sup>7</sup> but perhaps a more effective right was that to retain the thing (*ius retentionis*) until he had received anything which was due to him.'

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<sup>5</sup> J.A.C. Thomas in the *Textbook of Roman Law*; North-Holland Publishing Company; 1979 page 274 and further

<sup>6</sup> *Supra*.

<sup>7</sup> Counterclaim.

[21] In *Saridakis t/a Auto Nest v Lamont*<sup>8</sup> the following was said about the duties of the borrower:

‘The main Roman-Dutch writers accepted that, in the absence of some contractual term providing otherwise, a borrower under a contract of commodatum had to exhibit the greatest degree of care, *diligentia summa*, in looking after the property lent to him.’

[22] In Wille’s *Principles of South African Law*<sup>9</sup> under the heading ‘Liability for expenses’ the following is stated:

‘The borrower is responsible for ordinary expenses and costs normally incurred in maintaining and using the borrowed thing eg. the cost of feeding and stabling a horse. In respect of special expenses, however, such as veterinary services for a sick horse, the borrower is entitled to a refund from the lender but has no right of retention to enforce the payment of such a claim.’

Under Roman law, where, similar to the position of a depositor who was also a beneficiary, was liable for both *dolus* and *culpa levis in abstracto* and for expenses incurred by the *depositee* in looking after the thing or damages caused to him by the thing and could like in the instance of a borrower in *commodatum*, retain the thing and this was the position until the time of Justinian.<sup>10</sup>

### The nature of expenses and the value added to the property

[23] In the unreported matter of *Caribbeana Jazz Pizza and Beer Garden CC t/a Zur Oasis Plateau Pizza and Beergarden v La Tangeni Trading CC*<sup>11</sup> Prinsloo J said the following about categories of expenses and improvements:

‘In *Lechoana v Cloete & Others*<sup>12</sup> the court distinguished between three categories of expenses and corresponding improvements, namely:

- (a) Necessary expenses (*impensae necessariae*), which are expenses incurred by one in the preservation or conservation of the property of another.

<sup>8</sup> *Saridakis t/a Auto Nest v Lamont* - 1993 (2) SA 164 (C)

<sup>9</sup> Wille’s *Principles of South African Law*, 9<sup>th</sup> edition general editor Francois du Bois, Juta July 2007 at 961

<sup>10</sup> See J.A.C. Thomas in the Textbook of Roman Law Supra at page 277.

<sup>11</sup> *Caribbeana Jazz Pizza and Beer Garden CC t/a Zur Oasis Plateau Pizza and Beergarden v La Tangeni Trading CC* (HC-MD-CIV-ACT-CON-2017/04051) [2021] NAHCMD 252 (17 May 2021), at paras 120 to 122,

<sup>12</sup> *Lechoana v. Cloete & Others* 1925 AD 536, at 547.

- (b) Useful expenses (*impensae utilis*) incurred on the property. Useful expenses are those which although not necessary, improve the usefulness and possibly the economic value of the property.
- (c) Luxurious expenses (*impensae voluptuariae*) are those that are neither useful nor necessary but serve only to adorn and sometimes increase the value of the property.

The plaintiff as the 'lessee' or bona fide occupier would have an enrichment claim for recovery of expenses that were necessary for the preservation of the property as well as the costs incurred in effecting useful improvements to the property.

However, to succeed with its claim, the plaintiff has the onus to prove its enrichment claim and will discharge the said onus by proving the amount expended on the improvements as well as to what extent it enhanced the value of the property. Whichever is the lesser amount would constitute the sum by which the lessor was enriched, and the lessee impoverished brought about by it.'

[24] In this instance the plaintiff had to proof that the expenses he had with regard to the farm were indeed necessary expenses and/or useful expenses which improved the usefulness and possibly the economic value of the property. It further seems that a lessee is in the same position than a bone fide possessor regarding improvements and compensation for such improvements. It means that the lessee may remove useful and luxurious improvements, if they can be separated from the property without injury to the property.<sup>13</sup>

#### When should the claim be instituted?

[25] One of the questions that according to the pre-trial order should be determined by the court, is the issue regarding whether the plaintiff has a lien or right of retention in respect of necessary improvements effected to Farm Retreat No. 283. From the above discussion under the obligations of the parties under a *commodatum*, it seems that the position regarding retention of the 'thing' changed after the time of Justinian. From the reading of Wille's Principles of South African Law<sup>14</sup> it seem to be no longer the case and as such the 'thing' needs to be returned at the end of the term agreed upon.

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<sup>13</sup> AJ Kerr (1996) The Law of Sale and Lease, Butterworth Publishers, Durban at page 413.

<sup>14</sup> See discussion at 961 of Wille's Principles of South African Law and further.

[26] This is similar to the position that a tenant finds itself in respect to any claim that is instituted. In *Business Aviation Corporation (Pty) Ltd and another v Rand Airport Holdings (Pty) Ltd*<sup>15</sup> (from which the court intends to quote extensively) the lien by a lessee and for that matter a bona fide possessor was discussed and the evolvement of the law summarized as follows:

'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* [1992] ZASCA 208; 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,

<sup>15</sup> *Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd* (179/05) [2006] ZASCA 68; [2006] SCA 72 (RSA); [2007] 1 All SA 421 (SCA) (30 May 2006).

tegens de Pachters ende Bruyckers vande Landen'. The provisions of this placact were re-enacted in almost identical terms on 24 February 1696 in a 'Renovatie-placact' (see GPB part 4 cols 465-7). Because the provisions of the two placacten were so similar, reference is often made to 'the placact', 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 *placacten* 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 *placacten* 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 *placacten* 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 *placacten* 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. ....

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).'

### Interpretation of legal principles

[27] The court finds that the plaintiff was indeed the bone fide possessor of the farm Retreat at the time that the improvements were effected. From the above it is clear that a *commodatum* is a contractual agreement where the lender provides to the borrower a thing for use for a specific period with no rent payable. In this instance the settlement contract between the plaintiff and the defendant agrees that the plaintiff is to have use of the specific farm land for a period of six years. It is also clear that the use of the farm land would be for the plaintiff to effectively conduct farming activities on the land.

[28] The lender also knew that the farm had certain defects which did not make it suitable for farming activities and therefore effected certain repairs and installations to the property to make it usable for farming activities. These repairs and installations however fell short from what was required to properly farm on the premises as per the version of the plaintiff, which necessitated him in installing additional improvements. The 'thing' which was provided to him by the defendant could therefore not be utilized for the purpose that it is intended to be used for and that was the reason why these improvements and in some instances repairs were made.

[29] It is further true that not all the expenditure related to improvements strictly but in some instances relates to repairs made to the existing infrastructure on the farm to allow the conducting of farming and related activities. These should be classified as necessary expenses and should be considered as expenses incurred by the plaintiff

who is expected to have the greatest degree of care towards the thing covered by the *commodatum* agreement.

[30] From the evidence it is clear that the farm was handed over to the plaintiff by an employee of the defendant, one Ms Mbaisa and that the shortfalls, for a lack of a better word, in the infrastructure on the farm was pointed out to her. The plaintiff pointed out to her that the infrastructure should be improved and in some instances installed, to allow for the utilization of the farm for farming purposes. This evidence of the plaintiff stands uncontested. He further testified that he continuously took up the matter via email and personal visits with the regional office of the Ministry of Lands and Resettlement, who represented the defendant in this matter and at no instance was he told to desist from improving the farm. I also accept the evidence of Mr Avenant that Mr Engelbrecht told him that the defendant had no money and that he must proceed with the improvements. This is supported by the fact that Mr Engelbrecht testified that they asked the plaintiff to provide them with the receipts for the actual expenses which he could not do. If Mr Engelbrecht's version is to be believed, that he informed the plaintiff that he does not have permission to effect the improvements, then why would he ask the plaintiff for the receipts dealing with the expenditure towards effecting the improvements?

[31] In this instance I find that the improvement and repairs made was necessary to be able to successfully be able to farm on the said property, which was the initial purpose of the settlement agreement between the parties and as such, the plaintiff did not need permission from the accounting officer to do the said as he continuously brought the defects under the attention of employees of the defendant, designated to deal with these issues.

[32] I further find the onus that rests on the plaintiff, as established in *Lechoana v Cloete & Others*<sup>16</sup> as follows:

'However, to succeed with its claim, the plaintiff has the onus to prove its enrichment claim and will discharge the said onus by proving the amount expended on the improvements as well as to what extent it enhanced the value of the property. Whichever is

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<sup>16</sup> Supra.



the lesser amount would constitute the sum by which the lessor was enriched, and the lessee impoverished brought about by it.’

[33] In this instance the plaintiff called an expert witness who testified in his opinion what the value added to the farm of the defendant was. The amount provided by him, was N\$420 000. In my opinion this is the amount to consider, taken into account that these improvements and repairs were affected over the period 2013-2019 and fair wear and tear is to be accepted. The valuation of the farm was done in 2021 and therefore caters for wear and tear, which should be for the account of the plaintiff.

[34] With regards as to whether the plaintiff has a lien on the property until such time as the claim is paid, the court finds that in terms of our Roman and Roman-Dutch law application he has no such lien. It is no longer recognized as per the discussion above in the matter of *Business Aviation Corporation (Pty) Ltd and another v Rand Airport Holdings (Pty) Ltd*<sup>17</sup>.

[35] In the result, I make the following order:

1. Judgment is granted for the plaintiff in the amount of N\$450 000, provided that it is understood that the plaintiff has no lien on the property.
2. Interest thereon *a tempore morae* at a rate of 20 per cent per annum reckoned from date of judgment to date of payment is granted.
3. Cost of suit.
4. The matter is removed from the roll and regarded as finalized.

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E RAKOW  
Judge

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<sup>17</sup> Supra.

APPEARANCES:

PLAINTIFF:

MR C VAN ZYL

Instructed by Engling, Stritter &amp; Partners, Windhoek

DEFENDANT:

N MUTORWA

Instructed by Office of the Government Attorney,  
Windhoek