

# Contract out of common law

## Handling compensation for improvements to leased premises

Daily News Tuesday November 9 2010

LANDLORDS are responsible for internal maintenance and repairs under the common law.

This can be changed by inserting a written clause that shifts the responsibility to the tenant, which is strictly construed by the courts, with the onus of proof on the landlord or landlady (*Sarkin v Koren* 1949 (3) SA 545 (C)).

Can a tenant then invoke the *enrichment lien* for taking on the landlord's duty to repair and maintain the dwelling?

Abuse of any aspect of our law can result in our courts, and especially the Constitutional Court, when approached by interested parties, to develop the common law to protect individuals and society.

It is also possible for a tenant of a rural lease to approach the Constitutional Court to challenge the 17<sup>th</sup> century Placaeten of Holland.

The prevailing conditions of Holland that necessitated legal reform does not relate to the South African context, and may unfairly discriminate against rural leases.

Let us, however, look at what is meant by enrichment lien and how it affects the right of a tenant who has carried out improvements.

### Enrichment Lien

A lien means the right to possess or hold onto the property until the debt is paid.

Enrichment refers to increasing or improving. An enrichment lien is therefore the right a tenant of urban leases has to hold onto the leased property for useful improvements until the landlord ('debtor') pays the costs to the tenant ('creditor').

An enrichment lien would be good grounds for refusing to vacate the dwelling.

Briefly, let us look at the historical context that changed the law, preventing tenants of rural leases to use an enrichment lien and a Supreme Court of Appeal judgment that allows South African tenants the right to

retain possession of the dwelling or property after the lease is terminated.

### Common law of Holland

Imagine a situation where the lease was terminated, but the tenant refused to move out of the property, claiming cost for repairs and improvements.

The tenant was protected by law to remain in possession of the leased property until the landlord compensated for the improvements.

This was the common law in Holland, but tenants of agricultural property began to deliberately effect costly repairs that led to public violence.

Significantly, the cost of repairs and improvements permanently deprived landlords of their property because the landlords could not compensate their tenants.

### Statute of Holland

This abuse by tenants of agricultural leases resulted in the passing of statutes, or legal decrees, or a declaration called Placaeten (singular, Placaet) in Holland in 1658 and 1696 that ended the tenant's right to retain property for necessary and useful improvements.

This change in the law of Holland did, however, allow tenants of agricultural property the right to claim compensation on the following grounds: -

- the landlord had to give permission to carry out repairs or effect improvements;
- the tenant filed a claim for compensation only after vacating the property.

There was no doubt that our rural tenancies followed the Roman-Dutch law, since the South African common law is based on it. The restrictions introduced in seventeenth century Holland therefore applied to South

African rural leases, but there was no clarity whether this law affected tenants of urban leases.

### **South African law**

In a unanimous judgment in *Business Aviation Corporation v Rand Airport Holdings* 2006 SCA 72, the Supreme Court of Appeal clarified this debate.

It held that a tenant who is in possession of the leased property in an urban area has an enrichment lien for expenses he / she incurred.

The tenant's expenses must relate to:-

- a) protect or preserve the landlord's property

- b) the useful improvements to the property

An enrichment lien allows a tenant to remain in possession of the property when the lease is terminated until the landlord / lady has compensated the tenant for the costs of necessary and useful improvements. Should the landlord issue a proper notice terminating the lease, duly served on the tenant, the tenant can refuse to vacate because of the claim for reimbursement for necessary and useful improvements. The tenant has this right in the absence of governing provisions of the lease.

### **Governing clause**

A governing clause would restrict the tenant from holding over for compensation. The following are examples of such a clause: -

- The tenant shall not make any structural or other alterations, additions to or improvements in the dwelling without prior written consent of the landlord/ lady.
- Should the tenant make any alterations or improvements, the tenant shall be required, before the expiry or termination of this agreement to remove the additions and reinstate the dwelling to the condition in which they were before the improvements and /or alterations were made. The tenant shall have no claim for compensation.
- Any alteration and /or improvement shall become the landlord's property without any compensation being payable to the tenant in respect thereof.
- In the event of any dispute arising as to whether any alteration or addition is structural, non-structural or merely a fixture or fitting, a certificate of any architect appointed by the landlord, who will act as experts and not arbitrators, shall be final and binding upon the parties.

The architect's cost will be borne by the tenant.

- The tenant agrees that the dwelling is fitted with the existing fixtures listed in part A, clause 1.2.4 and agrees not to remove these for any reason whatsoever. The tenant agrees to reimburse the landlord the full cost of replacing any fixture and fitting, which may be damaged, or missing at the termination date of this agreement. The tenant further agrees to have no claim against the landlord for any cost incurred by the tenant for useful repairs and improvements.

*Dr Sayed Iqbal Mohamed* is the chairperson, *Organisation of Civic Rights*. For tenants' rights advice, contact Pretty Gumede or Loshni Naidoo at 031 304 6451