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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 1153/2014

In the matter between:

IMMACULATE TRUCK REPAIRS CC Plaintiff

and

CAPITAL ACCEPTANCES LTD Defendant

HEARD ON: 31 OCTOBER 2016

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 16 FEBRUARY 2017

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[1] The matter came to the court by way of action proceedings. The plaintiff sues the defendant for compensatory payment of an amount of R136 287.48, interest thereon at the rate of 15,5% per

annum *a tempore morae* and costs of the action. The action is defended.

[2] I deem it necessary to give some historical background of undisputed facts and facts which, though disputed, could not be seriously denied. The plaintiff is a closed corporation called Immaculate Truck Repairs CC. Its principal place of business is situated at 36 Mill Street Hamilton in Bloemfontein.

[3] The defendant is a company called Capital Acceptances Ltd. Its principal place of business is situated at 100 Grayston Drive, Sandown, Sandton, Johannesburg in Gauteng.

[4] At the centre of the dispute between the parties is a certain motor vehicle with registration number [Z....], engine number 11807654 and chassis number 1XP6D 69X 9VD 609 667. It is described as a 1998 Peterbilt Model 362E Celect Plus 460 Chassis Cab Truck Trador. *Brevitas causa*, I shall refer to this vehicle, with a technically fancy name, simply as a truck and not as a cab or a tractor. The truck is owned by the defendant – see "anx a". It was registered as such on 17 May 2010.

[5] Somehow a third party called Touro Trucking (Pty) Ltd acquired actual possession of the truck. It would appear to me that the corporate enterprise became a *de facto* possessor of the truck prior to 9 March 2012; that the truck broke down somewhere in the Eastern Cape Province and that the breakdown was occasioned by certain mechanical engine defects.

[6] Subsequent to the breakdown the third party and the plaintiff concluded an oral agreement in Bloemfontein during or about early March 2012. The plaintiff was instructed, by the third party, to repair the truck by restoring it to proper functional conditions. The third party's principal contractual obligation was to pay the plaintiff's repair bill. The plaintiff looked up to the third party and not to the defendant for the payment of its costs and expenses relative to the repairs.

[7] Pursuant to the agreement, the plaintiff repaired the defendant's truck. On 9 March 2012 the plaintiff invoiced Touro Trucking (Pty) Ltd, for the repairs it had effect to the truck in accordance with the oral agreement. The plaintiffs repair bill totalled R136 287.48 as would appear from "anx b", a detailed and specified account rendered. According to the plaintiff the repair bill was representative of the necessary expenses as well as the useful expenses incurred to restore the truck to proper working conditions. Touro Trucking (Pty) Ltd failed to settle the plaintiff's account. To the dismay of the plaintiff, the third party was placed under final liquidation on 23 October 2012 by the North Gauteng High Court, Pretoria.

[8] As a result of the third party's winding up, the plaintiff turned to the defendant for compensatory relief. Until then the defendant was unaware of the repairs the plaintiff had allegedly effected to its truck. In confronting the defendant with such a compensation claim, the plaintiff alleged that the plaintiff had acted as a *bona fide gestor* who had, in good faith, managed the affairs of the defendant in the mistaken belief that the plaintiff was managing its

own affairs by incurring the said expenses in connection with the repairs to the truck.

[9] The plaintiff's alternative basis of its compensatory claim against the defendant was that in incurring such expenses for the repair of the truck, the plaintiff had acted with the *bona fide* intention of benefitting the owner of the trucker, being the defendant. However, the plaintiff acknowledged that the defendant was under no contractual obligation whatsoever to compensate the plaintiff for the costs and expenses incurred in respect of the repairs to the truck.

[10] The defendant repudiated the plaintiff's compensatory claim. The defendant denied the foundation of such claim and demanded immediate return of the truck on the ground that the defendant was the *de iure dominus* of the truck and that it was not privy to the agreement to have it repaired. The plaintiff refused to release the truck on the ground that the plaintiff was the lawful holder of the *ius retentionis* – armed with the salvage lien. As a result of those conflicting stances or irreconcilable positions the defendant approached the court earlier on by way of motion proceedings and successfully reclaimed the return of the truck by means of *rei vindicatio* application.

[11] On 13 March 2014 the plaintiff, aggrieved by the lawful dispossession, caused a summons to be issued by the registrar against the defendant to enforce its compensatory claim. The sheriffs served the summons upon the defendant on 24 March 2014.

[12] The defendant's notice of intention to defend was served and filed on 2 April 2014. On 8 May 2014 the defendant's plea was served and filed.

[13] In its plea the defendant denied the following allegations by the plaintiff:

- that the plaintiff was a duly registered entity with the principal place of business as stated in the summons;
- that this court has jurisdiction to entertain the matter on the alleged grounds or at all;
- that the plaintiff and Touro Trucking (Pty) Ltd had ever concluded an agreement for the repair of the truck;
- that Touro Trucking had, before its liquidation failed to settle the plaintiff's repair bill of R136 287-48;
- that the plaintiff had effected repairs to the truck with the intention of claiming reimbursement for expenses necessarily and usefully incurred;
- that the plaintiff had acted as *a bona fide gestor* who, in the mistaken belief that it was managing its own affairs, had managed the affairs of the defendant;
- that the plaintiff, had alternatively repaired the truck with the *bona fide* intention of benefiting the owner of the truck;
- that the defendant had benefited from the repairs at the expens of the plaintiff who was thereby impoverished;
- that the defendant was, therefore, liable to compensate the plaintiff for the expenses incurred to repair the truck by virtue of the extended *actio negotiorum gestorum* and in the alternative;

- that the repairs so effected by the plaintiff to the defendant's truck had usefully increased the value thereof by R136 287.48.

[14] The defendant admitted the following averments by the plaintiff:

- that the defendant was the lawful owner of the truck;
- that Touro Trucking was placed under final winding-up;
- that the defendant was unaware that the plaintiff had managed repairs to its truck; and
- that the defendant was not contractually bound to compensate the plaintiff for any expenses incurred to repair the truck.

Those then were the undisputed material facts of the case.

[15] The hearing started on 17 November 2015. The plaintiff, led the evidence of its expert, Mr Rodney Edmund Stanton. He testified that the repairs to the truck were necessary in order to repair the engine of the truck. It was then agreed between the parties that the plaintiff had spent R74 595.68 on motor spares to repair the truck. The plaintiff's case was then closed.

The hearing was resumed on 31 November 2016. The defendant then applied for an order absolving it from the instance. The basis of the absolution application was that the plaintiff had not proved that the alleged expenses were necessary or that the defendant was enriched. The application was unsuccessful. Thereupon the defendant closed its case.

[16] The plaintiff pleaded that it managed the affairs of the defendant in the mistaken belief that it was managing its own affairs. It pleaded further that in so mistakenly managing the affairs of the defendant, it acted as a *bona fide gestor*. Furthermore, the plaintiff's sole witness, Mr Stanton, testified that the plaintiff was never aware of the fact that ownership of the truck vested in the defendant. That then was the plaintiff's main cause of action.

[17] The plaintiff's alternative compensatory claim, to main claim based on the extended *action negotiorum gestrum*, was grounded on the remedial action of unjustified enrichment of a *dominus* by an improver. The plaintiff alleged that the repairs had usefully increased the value of the truck by R136 287.48. In a nutshell, that was the plaintiff's alternative cause of action. In my view, nothing significant turns on this alternative since the extended *actio negotiorum gestrum* as already pleaded is, by its very nature, a remedial action founded on unjustified enrichment.

[18] The crucial question to be decided in the case is whether the expenses incurred by the plaintiff in effecting the repairs to the defendant's truck were necessary expenses. The residual question, which only arises if the crucial question is positively decided, is the precise *quantum* of such necessary expenses.

[19] On behalf of the plaintiff, Mr Olivier contended that the evidence adduced in support of the plaintiff's pleaded case was more than sufficient to prove that the compensatory claim sought falls

squarely within the category of expenses classified as necessary expense incurred by the plaintiff. Therefore, counsel contended that the plaintiffs did not have to show that the value of the truck was thereby actually increased. Consequently counsel submitted that a proper case had been made out for the grant of judgment with costs as prayed for by the plaintiff.

[20] On behalf of the defendant, Mr Du Plessis sharply differed. Counsel contended, on the contrary, that the plaintiff had adduced no evidence to show that the expenses incurred were indeed necessary expenses for the preservation or protection of the truck. Moreover, in developing his argument further, counsel additionally contended that the plaintiff had also adduced no evidence to show whether the defendant was enriched and, if so, the *quantum* of such unjustified enrichment. Accordingly counsel submitted that, in view of such lack of evidence, no proper case had been made out for the relief sought by the plaintiff. Counsel urged me, therefore, to dismiss the plaintiff claim with costs. In the alternative, counsel urged me to grant absolution from the instance with costs.

[21] Some cursory overview of applicable legal principles as expounded through caselaw appears necessary in order to clarify the issues.

The legal concept – *negotiorum gesto,* entails voluntary management by one person, called the *gestor*, of the affairs of another, called *dominus* without the consent or knowledge of the latter. Simply put, *negotiorum gestio* boils down to unauthorized administration. See an article by Mr Justice DH van Zyl and the authorities there cited.

[22] The essentials or requisites of for a claim arising from *negotiorum gestio* are the following:

"(a) The affairs managed by the *gestor* must have been those of another. *Turkstra v Massyn [1959] 1 All SA 263 (T), 1959 (1) SA 40 (T) p. 47*

(b) The *dominus* must have been ignorant of the fact that her or his affairs were being managed. Turkstra v Massyn [1959] 1 All SA 263 (T), 1959 (1) SA 40 (T) p. 47
North West Arts Council v Sekhabi [1996] 3 All SA 361 (B)

A *dominus* who is aware of the management of her or his affairs and does nothing about it is regarded as having authorised it tacitly.

(c) The intention to manage the affairs of another is perhaps the most significant requisite for a claim based on *negotiorum gestio*. This intention includes the intention to claim reimbursement for expenses necessarily or usefully incurred by the *gestor*.
Odendaal v Van Oudtshoorn [1968] 3 All SA 482 (T), 1968 (3) SA 433 (T) p. 437
Maritime Motors (Pty) Ltd v Von Steiger 2001 (2) SA 584 (SE)

(d) The management of the *dominus's* affairs should have been conducted in a reasonable way (utiliter coeptum), at least at the commencement of the *gestio*. The result of this rule is that a claim will arise even if the *gestio* is ultimately unsuccessful. A *gestor* who employed an unreasonable method does not have a claim for disbursements."
per DH van Zyl J – LAWSA Second Ed Vol 17 p 20-37.

[23] The plaintiff claims compensation from the defendant for the costs and expenses incurred in connection with certain repairs to the truck. At all times material to the dispute, the defendant was the outright owner of the truck so repaired. The repairs as effected constituted no pure unauthorized management of one's affairs by another. Instead the plaintiff's cause of action is based on the extended *actio negotiorum gestrum* as stated in par 11.2 summons. Such remedial action is available to a party in a case where the basic requisite of the *actio negotiorum gestrum termed animus negotia aliena gerendi* (one's intention to manage the affairs of another) is shown to be on the part of the improver or manager. LTC Harms: Amaler's Precedents of Pleadings 7th edition p. 298.

[24] There are four instances in which the *gestor's* claim against the *dominus* is considered to be limited to the extent of the unjustified enrichment of the *dominus*. Only one of the four instances is relevant to the matter at hand. The *gestor's* claim is limited, among others, in the case where the *gestor* manages the affairs of another in the mistaken but *bona fide* belief that they are his or her own **Standard Bank Financial Services Ltd v Taylan (Pty) Ltd** 1979 (4) ALL SA 1(c), 1979 (2) SA 383 (c).

[25] The *dominus* is required to reimburse the *gestor* for the necessary expenses and the useful expenses only. The *dominus* is not generally required to reimburse the *gestor* for luxurious expense save in certain exceptional circumstances which are not

relevant to the current matter. The *gestor's* right to be reimbursed is subject to the general limitation that the *dominus*, as the defendant, is liable for no more than his or her actual enrichment. The extent of the *dominus* actual enrichment is not necessarily the same as the *gestor's* actual expenses incurred. Since the *gestor's* action is fundamentally derived from an enrichment action, non-enrichment of the *dominus* is, of course a good defence to the *gestor's* action – LAWSA: Volume 9 Second Edition par 224. The *gestor* has no claim for his or her own labour – **Harrisen v Marchant** 1941 WLD 16 at 20 - 21.

[26] It is trite that the right of a *bona fide* possessor to claim compensation for necessary and useful expenses incurred in effecting necessary and useful improvements to the property of another was recognised in Roman-Dutch Law. It has since been received in modern South African Law through caselaw. A *bona fide* possessor's right to claim compensation for luxurious expenses incurred in effecting luxurious improvements to the properly of another stands on a different footing. Such a claim is restricted to cases where the property owner intends to retain the luxurious improvements or to cases where the property owner intends to sell the property whose marked value has been enhanced on account of the luxurious improvements. LAWSA: Volume 9 Second Edition para 123. In this instance only the necessary expenses are of primary concern to the parties. All the same I shall also refer to useful expenses seeing that the summons shows that the plaintiff also claimed compensation on this basis.

[27] As regards necessary expenses, the measure of compensation for such expenses is full reimbursement by the enriched owner in favour of the impoverished *bona fide* possessor. The ratio is that the owner has been enriched in that, if it were not for the voluntary act of the *bona fide* possessor, the owner himself or herself would, in any event, have had to incur such necessary expenses. **Voet 6. 1. 36; Lechoana v Cloete** 1925 AD 536. *Impensae necessariae*, that is to say necessary expenses are regarded as expenses, incurred by a *bona fide* possessor because they were necessary for the preservation or protection of the property. **Nortje v Pool** 1966 (3) SA 96 (A) at 131.

[28] Money expended in connection with the preservation of property constitutes necessary expenses. A *bona fide* possessor, as a voluntary actor, who dispenses of money, material or similar necessary preservatives, is entitled to be reimbursed in full. The possessor's right for full reimbursement is qualified and subject to the limitation that the owner's obligation to reimburse the possessor cannot exceed the extent of his or her actual enrichment. This is the rule of equity. **Rhoode v De Kok & Another** 2013 (3) SA 123 (SCA) par [14].

[29] The defining characteristic of necessary expenses is its preservative nature. They are incurred by a *bona fide* possessor with the sole intention of protecting another's property from perishing or from the corrosive and adverse effects of

depreciation. It is precisely this distinctive and individualistic character which distinguishes the particular type of expenses from the other two categories of expenses. Here the intention of a *bona fide* possessor is neither to usefully enhance the market value of the property nor to luxuriously or lavishly improve its prestigious image with decorative finesse.

[30] As regards useful expenses, the measure of compensation due to the *bona fide* possessor is limited to the amount by which the value of the owner's property was increased by the expenses incurred or the amount of the actual expenses incurred by the possessor. However, the measure of compensation the possessor can claim from the owner is limited to the less of the two amounts. **<u>Fletcher & Fletcher v Bulaway Waterworks Co Ltd</u>** 1915 AD 636 at 648. This is a rule of equity. The court has a wide discretion – **Rhoode**, *supra* [15] and the authorities there cited. *Impensae utiles* are expenses incurred by a possessor with the intention of enhancing the value of the property by effecting useful improvement thereon.

[31] The law is clear. A *bona fide* possessor has a right of retention over the property preserved or improved. The *ius retentionis* protects a possessor's possession of the property until an owner compensates a possessor for the expenses incurred in connection with useful improvements or necessary improvements effected to the property. A possessor's right to be reimbursed for necessary and useful expenses, as protected by the salvage or improvement lien, is qualified.

[32] In **<u>United Apostolic Faith Church v Boksburg Christian Academy</u>** 2011 (6) SA 156 (GSJ) par [31] Willis J, as he then was, said the following about what the qualification entails and, more importantly, the onus.

> "The right is, however, qualified to the extent that the improvements must, on the facts, **be useful or necessary and properly quantified**. **The onus is on the retentor to establish these facts**. A right of retention will only, however, exist where the retentor in fact has a claim founded in enrichment against the owner. Without any unjustified enrichment, neither a claim nor a right of retention can prevail."

It is evident, therefore, that the claimant has to prove the connective tissue between impoverishment and enrichment.

[33] The plaintiff claims compensation in respect of the necessary expenses as well as the useful expenses. To sum the law, the following legal position emerged from all the authorities cited above:

33.1 Where the expenses were **necessary** for the preservation or protection of the property (*impensae necessariae*), the possessor is entitled to reimbursement of all his or her expenses, subject to the limitation that the defendant is liable for no more that his or her actual enrichment;

33.2 Where the possessor has effected **useful** improvements to the property *(impensae utiles)* he or she is entitled either to his or her actual expenses or the amount by which the value of the property has been enhanced, whichever is the lesser;

33.3 The *onus* is on the plaintiff to prove both amounts;

33.4 The *gestor* is not entitled to remuneration for his or her labour.

[34] Now I turn back to the instant matter. I proceed to examine the facts and to consider them in the light of the applicable legal principles as outlined above. Before these action proceedings were initiated, the defendant as the applicant launched motion proceedings to reclaim possession of the truck. It asserted its real right of ownership in respect of the truck – *ius rei vindication*. The plaintiff as the respondent, opposed such vindicatory application for the redelivery of the truck in its possession. To protect its possession of the truck, the plaintiff relied on an improvement lien – *ius retentionis*. To overcome that hurdle, the defendant provided security in order to provisionally regain physical possession of the truck.

[35] The mere fact that the defendant has provided security, in the place of the plaintiff’s improvement lien in order to obtain possession of the truck, does not detract from the fact that the plaintiff even now still relies on such a lien to protect its

possession. Let me put it differently. By accepting the conditional security which the defendant provided, the plaintiff did not, in law, renounce its right of retention to protect its possession of the truck. It follows, therefore, that the plaintiff's lien is as live here and now in these current action proceedings as it was there and there in those recent motion proceedings.

[36] The enquiry is twofold. Its first essential is that the person claiming protection of his or her possession by way of a salvage lien (on the grounds that (s)he has incurred necessary expenses in order to preserve the property from depreciating or perishing) – must show that he was put to expense.

King's Hall Motor Co v Wickens & McNichol 1931 NPD 37 at 44 per Hawthorn AJ, as he then was. In the instant matter, the plaintiff is the person whose duty it is to discharge that first huddle of the onus.

[37] It was the plaintiffs case, as pleaded, that it incurred necessary expenses as well as useful expenses in connection with the truck. I shall revert to the latter category of expenses later. For now I first want to deal with the necessary expenses. The hallmark of the necessary expenses lies in the possessor's good faith to prevent depreciation of the property. The plaintiff's witness, Mr Stanton testified that the truck had broken down somewhere near Queenstown in the Eastern Cape Province; that the plaintiff towed it from the scene of the breakdown to its industrial workplace in Bloemfontein; that the plaintiff incurred certain

expenses to buy spares; that the plaintiff spent time, labour and other resources working on the truck in order to restore it to its good state of repairs.

[38] As earlier pointed out, necessary expenses have to be exclusively incurred for a recognised purpose - that is to preserve a property by preventing or minimizing its depreciation. There was no evidence at all that the truck would have materially depreciated if the plaintiff had only towed and garaged it. The rest of the resources and money expended on the truck did not constitute necessary expense. I have no idea as to how much expenses were incurred relative to the towing and the garaging of the truck were. **<u>Naidoo v Sanbonani Express Freight & Another</u>** 2008 (5) SA D per Levinsohn DJP. But even if such expenses were specified, they would still not have qualified as necessary expenses within the context of the equitable legal principles. This is so because during his indirect evidence, the plaintiff's witness conceded that the truck was towed and stored for the purpose of repairing and not for the purpose of preserving it voetstoot. This was the first and material crack between the plaintiff case as pleaded and its case as improvised. Moreover, there was no evidence as to unfavourable circumstances prevailing on the scene of the breakdown at Queenstown. As a result of such a glaring omission, I have no idea as to what really made the plaintiff to believe the truck was in danger of depreciating unless it was towed to Bloemfontein, a considerable distance from Queenstown. If the preservation of the truck was a material

consideration, the truck could easily have been preserved at Queenstown, a town only 10 km away from the scene.

[39] At the initial level of showing that the plaintiff, as the possessor of the truck, was put to expense in the form of necessary expenses, the plaintiff really had an insurmountable mountain to climb. Where there was no proven impoverishment in the form of necessary expenses, there could have been no question of corresponding enrichment. It follows logically – **United Apostolic**, supra. I would, therefore, dismiss the claim as regards necessary expenses. This concludes the enquiry as regards the first leg of the first essential. That, however, is not the end of the enquiry in relation to the first essential.

[40] The first essential of the enquiry as already indicated, dictates that an improver who relies on an improvement lien to claim protection of his (or her) possession must show that (s)he was put to expense **King's Hall**, *supra*.

Now I proceed to examine the facts and to apply the first essential of the enquiry in relation to the useful expenses.

[41] It was the plaintiffs further case that it had also incurred useful expenses in connection with the truck. Now it is to this second component of the plaintiff's claim that I turn. The hallmark of *impensae utiles* revolves around the possessor's good intention to enhance the value of the property. As a *bona fide* possessor, the plaintiff would ordinarily have a right of retention in respect of the truck until compensated by the defendant for the useful

improvements the plaintiff has made to the property. Until the defendant compensates the plaintiff, the improvement lien remains in place to protect its *de iure* possession notwithstanding the fact that the defendant is the current *de facto* possessor of the truck.

[42] The plaintiff's sole witness gave evidence that the plaintiff took possession of the truck in order to have it repaired. The defendant disputed the evidence that the plaintiffs repair bill, "anx b", was representative of the fair and reasonable amount of the useful expenses incurred by the plaintiff. However, the defendant agreed that the sum of R74 595.68 was a reasonably accurate reflection of the useful expenses incurred by the plaintiff to improve the truck.

[43] Apart from the concession made by the defendant, the quantum of the plaintiffs invoice remained disputed. Save for the sum of the actual useful expenses admitted by the defendant, the plaintiff has failed to prove any further useful expenses. No evidence whatsoever was led on the balance of the claim which the defendant vigorously disputed. The plaintiff's right of retention is not absolute but relative. In **United Apostolic**, *supra* at [31] Willis J, as he then was, expressed the following apposite view about the retentor's right:

> "The right is, however, qualified to the extent that the improvements must, on the facts, **be useful** or necessary **and properly quantified**."

[44] According to Mr Stanton's indirect testimony, the truck was valued at R95 000 by John Williams Motors. He confirmed that the

amount represented the truck valuation after the repairs were done. He explained that the amount was a trade-in value and not resale value. He estimated the resale market value of the repaired truck to be approximately R210 000 – R230 000. The difficulty I had with all these figures was, firstly that they constituted new evidence and secondly, that they were not supported by any documentary evidence.

[45] I am persuaded by Mr Du Plessis' submission that, as regards useful expenses, the plaintiff failed to adduce any reliable evidence relating to towing charges, labour charges, garaging charges, expected profit and the reasonableness of any portion of its alleged useful expenses. It has been held that a possessor relying on a retention lien to recover or claim useful expenses must prove the actual amount expended – **<u>Abelman v Webber</u> [1928] TPD 398**. That the plaintiff failed to do.

[46] In the circums, it cannot be convincingly argued that the plaintiff was put to expense in the form of useful expenses equal to the amount as claimed in the summons. It follows, therefore, that the second leg of the first essential of the equitable enquiry was also not established by the plaintiff. Later I shall revert to the portion of the plaintiff's useful expenses which the defendant conceded. This disposes of the first essential of the enquiry.

[47] The second essential which the plaintiff as the possessor, had to prove was that the defendant, as the owner, was enriched in the sense that the value of the truck was enhanced by the useful improvements. The improvement lien rests upon the equitable

principle that no one shall be enriched at the expense of another – **King's Hall**, *supra*.

[48] In a case like this, the ultimate enquiry concerns enrichment. Therefore, it is incumbent upon an improver who alleges unjust enrichment of the owner to establish it by means of credible and reliable evidence – **Naidoo**, *supra* [15]. It was not done in this instance. There is not a tittle of evidence to establish unjust enrichment. In my view the defendant has not quantified the actual sum of its useful expenses, the value of the truck before the useful improvements were made, the enhanced value of the truck after the useful improvements were made and the extent of the defendant's enrichment. All these figures were of vital importance to put me in an informed position in order to determine whether the defendant was unjustly enriched as alleged.

[49] It was clear and obvious to me that the plaintiff misconceived the legal nature of useful expenses. The correct measure of compensation is neither the reimbursement of the actual useful expenses incurred or the actual extent of enrichment gained but rather the smaller figure of the two. The plaintiff equates the sum of its alleged actual expenses, R136 287.48 as the equivalent of the defendant's unjust enrichment. Such a method was materially flawed. That was not the correct way to do it. It is conceivable that, in principle, the two figures may theoretically be the same. However, that was not the case here. In this matter, however, there was not a tittle of any figures to prove such a mathematical equation.

> "[17] A similar situation presents itself in the instant case. The first respondent has in my view **not led any evidence whatsoever to demonstrate the quantum of the unjust enrichment**. There is no indication of the place where the goods were stored and the costs of storage, the costs of insurance and moreover why it would have been in the interests of the owner of the goods to store them in the first place. In my view the first respondent has signally failed to prove the existence of a salvage lien."
>
> **Naidoo**, *supra*, per Levinsohn DJP.

[50] Consequently, I am not persuaded that the plaintiff, as the possessor and improver relying on an improvement lien to claim reimbursement for useful expenses has discharged the onus. It was incumbent upon the plaintiff to show:

- firstly, that the plaintiff as an improver, was put to expense, in other words impoverished, in the sense that but for the useful expenses the value of its estate would not have decreased as it did, and
- secondly, that the defendant, as the owner, was enriched thereby, in the sense that but for the useful expenses the value of the truck would not have increased as it did.

These cardinal requisites were not satisfied.

[51] Now a question may arise as to whether the plaintiff is not entitled to be awarded the proven sum of its useful expenses as admitted by the defendant. At worst for the defendant, the plaintiff may get R74 545.68 at most but can never be entitled to reimbursement exceeding the sum admitted by the defendant. However, the plaintiff is not even entitled to claim that money as a portion of its

legitimate reimbursement. Firstly, there was no evidence that the admitted amount represented the actual useful expenses the plaintiff had incurred. Secondly, there was no evidence of the actual amount of the defendant's enrichment, which enrichment amount, the amount of the reimbursement is not supposed to exceed. Thirdly, I am in the dark as to whether the admitted amount is greater or smaller than the unknown amount of the defendant's alleged enrichment.

[52] In my view the plaintiff, *qua a bona fide* possessor, also had a real difficulty in this contest at the ultimate level of this enquiry of equity to establish that the owner was unjustly enriched and the possessor's unjustly impoverished. Since it was not shown that the one was enriched at the expense of another, there exists no valid improvement lien on the strength of which the improver's continued retention of the truck can be sanctioned. Put differently: It was not shown that the plaintiff is a *bona fide* possessor who has been inequitably impoverished as a result of its unauthorised but equitably useful management of the defendant's affairs. Because the plaintiff has failed to demonstrate unjust enrichment, it follows, as a matter of logic, therefore, that a cardinal requisite of an improvement lien was amiss. I would, therefore dismiss the claim.

[53] A similar factual situation arose in **McCarthy Rental Ltd v Shortdistance Carriers CC** 2001 (3) SA 482 (SCA). In that case, as in this case, the court was concerned with a typical instance of improvements made to an owner's motor vehicle without a contract between the repairer and the owner. In those

circumstances the repairer was, in law not regarded as a typical *gestor* of ancient times. Although a contractless improver or repairer was not originally recognised as a typical *gestor*, he was accorded, in common law, the same defensive remedy as the ancient *gestor*.

[54] Such repairer was designated as a *bona fide* possessor who, in pretty much the same way as the *gestor*, could exercise a retention lien in order to claim compensatory reimbursement for the actual useful expenses incurred or for the increase in the market value brought about by useful improvement – whichever amount of the two was the lesser.

[55] Because law is dynamic, the legal position of a *bona fide* possessor changed for the better. The shortcoming of a *bona fide* possessor's defensive remedy was that the retention lien could not afford a retentor any protection once physical possession was lost. The law developed and an improver or repairer who no longer has possession of the usefully improved property was granted an offensive remedy as well.
In **McCarthy**, *supra* par [12] Schultz JA had this to say about the remedial extension of the *negotiorum gestrum* principle:

"The Roman-Dutch law developed on the Roman law in the respect that the improver was not confined to the defensive remedy of exercising his lien, but was granted an action (*De Vos* at 98). Thus the fact that in the case before us the garage has given up possession voluntarily does not leave it remediless. It may sue, as it has done."

[56] The plaintiff heavily relied on the decision in **McCarthy, *supra*** [17] where the court per Schultz JA said:

> "On the face of it he was enriched by the receipt of the repaired truck without there being a countervailing performance on his part, juridically connected with that enrichment."

[57] It is significant to read the above passage with what the judge said further down in the same paragraph. He continued:

> "The upshot is that the owner was enriched *sine causa.* **The amount of the enrichment was agreed at R186 000**. By clear implication this meant that the market value of the damaged truck was agreed to have been raised by that amount by necessary and useful expenditure."

The agreement between those parties implicitly entailed that they were at *idem* that the improver was put to expense, in other words impoverished to the tune of R186 000 useful expenses. That was the first implication. The agreement also implicitly entailed that the owner had gained an unfair advantage at the expense of the improver, in other words enriched to the tune of the same amount of R186 000 useful improvements.

[58] In this matter the upshot of it all is that neither the amount of the alleged useful expenses nor that of the alleged enrichment was agreed upon. The plaintiff failed to quantify, not only the amount of the alleged enrichment but also of the alleged useful expenses. Quite obviously, the case relied upon was distinguishable from the present case where the allegation of enrichment was in dispute as was the allegation of the actual useful expenses.

[59] The plaintiff's submission that a lien, salvage or improvement, was inoperative in this matter was untenable. In these circumstance, a lien was very much alive and operative. It was still available to the plaintiff as a *bona fide* improver. But a lien would not establish a cause of action. That is so because a lien is a dilatory defence – a recognised defensive remedy against an owner's (dis)possessive remedy of *rei vindication*. However, by itself, a lien does not ground an action. It logically follows, therefore, that a possessor would not have a lien unless (s)he has a cause of action and would not have a cause of action unless (s)he has a lien – **Sandton Square Finance (Pty) Ltd & Others v Vigliotli & Another** 1997 (1) SA 826 (W); **McCarthy**, *supra*, par [12].

[60] Now the costs. The defendant emerged as the successful party. Therefore, the costs must follow success. On 17 November 2015 the matter was postponed *sine die*. The postponement was at the special request and instance of counsel for the plaintiff. He needed some time to prepare written heads of argument. Given those circumstances, it is only fair, just and equitable that such reserved costs be for the plaintiff's account.

[61] Accordingly I make the following order:

61.1 The action is dismissed with costs.

61.2 The costs shall include those previously reserved.

M.H. RAMPAI, J

On behalf of the plaintiff:	Adv. J.L. Olivier Instructed by: Safety & Associates Bloemfontein
On behalf of the defendant:	Adv. D.T. v R Du Plessis SC Instructed by: JL Jordaan Attorneys Bloemfontein