

SOUTH AFRICA / JUDGMENT

Culterra Properties (Pty) v Culterra (Pty) Ltd and Others (52908/2009) [2016] ZAGPJHC 281 (10 March 2016) [2016] ZAGPJHC 281

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Weiner

CASE / FILE NUMBER

52908/2009

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case

No: 52908/2009

Reportable:

No
Of
interest to other judges: No
Revised.
In

the matter between:

CULTERRA
PROPERTIES (PTY) LTD
Plaintiff
and
CULTERRA
(PTY)
LTD First
Defendant
CULTERRA
KUNSMIS (PTY)
LTD Second
Defendant
CULTERRA
KWEKERY (NIETGEDACHT)

CC Third
Defendant
ELANDSVLEI
EIENDOMME
CC Fourth
Defendant
SEQUOIA
CC Fifth
Defendant

JUDGMENT

WEINER J

- [1] This case concerns the application of the Conventional Penalties Act 15 of 1962 (“the Act”).
- [2] Sections 1-3 of the Act are relevant and provide as follows:
1. Stipulations for penalties in case of breach of contract to be enforceable
 - (1) A stipulation, hereinafter referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict with a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, hereinafter referred to as a creditor, either by way of a penalty or as liquidated damages, shall, subject to the provisions of this Act, be capable of being enforced in any competent court.
 - (2) Any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty.
 2. Prohibition on cumulation of remedies and limitation on recovery of penalties in respect of defects or delay.
 - (1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.
 - (2) A person who accepts or is obliged to accept defective or non-timeous performance shall not be entitled to recover a penalty in respect of the defect or delay, unless the penalty was expressly stipulated for in respect of that defect or delay.
 3. Reduction of excessive penalty.

If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.”

[3] In order to succeed and reduce the amount of the penalty, the actual prejudice suffered by the defendants must be proved by the plaintiff. See Olivier JA, in *National Sorghum Breweries Ltd (t/a Vivo Africa Breweries) v International Liquor Distributors (Pty) Ltd*[1]. The further applicable legal principles will be expanded upon later in this judgment.

BACKGROUND

[4] The plaintiff and defendants concluded a written agreement of sale on 27 September 2008. The first and second defendants conducted

businesses in the manufacture and supply of compost and fertiliser and related products (the main business) which

businesses they conducted from immovable properties owned by the third, fourth and fifth defendants. The agreement provided for the plaintiff to purchase the businesses together with stock, plant, equipment and vehicles and the immovable properties owned by the third, fourth and fifth defendants. For purposes of convenience, reference will be made to the defendants as a group in this judgment, unless a particular defendant is referred to.

[5] The main business was operated by the first defendant. The purchaser in terms of the initial agreement was a company to be formed. It is common cause that the plaintiff is such company and that the plaintiff is the purchaser in terms of the agreement.

[6] The agreement was subsequently varied by an addendum.

THE INITIAL AGREEMENT

[7] The initial agreement, before the addendum was concluded, provided as follows:

7.1 The plaintiff purchased the business from the defendants for the purchase price;

7.2 The purchase price agreement, was the sum of R32 569 000.00 plus the agreed value of the stock less the potential liability for severance benefits of employees in the sum of R629 519, 02;

7.3 The effective date of the agreement was 1 October 2008;

7.4 R10 000 000.00 of the purchase price was payable within sixty days of the effective date;

7.5 The balance of purchase price (less the stock) together with interest thereon at the rate of 12 percent per annum from the effective date was payable in certain instalments.

7.6 The plaintiff was to furnish a guarantee for the initial payment of R10 000 000 within 30 days of the effective date, i.e. by 1 November 2008;

7.7 The plaintiff was to furnish a guarantee for the balance of the purchase within six months of the effective date, i.e. by 1 April 2009;

7.8 The stock was to be paid for in six payments, the first of which was to occur six months after the effective date and the remaining subsequent payments would occur on a six month basis thereafter. Interest accrued at the rate of 12 percent per annum from the effective date;

7.9 As security for payment of the stock, the plaintiff was obliged, simultaneously with registration of the transfer of the properties into the plaintiff's name, to register a first mortgage bond in the defendants' favour against the title deeds of the Elandsvlei property (owned by the fourth defendant) and the Eerstegeluk property (owned by the fifth defendant).

THE ADDENDUM

[8] The terms of payment were altered fundamentally by the addendum, which was concluded on 3 November 2008.

[9] The addendum provided that payment was to be made as follows:

9.1 The purchase prices (less stock) was payable on registration of transfer of the properties;

9.2 Interest was to accrue from the effective date at the rate of 12 percent per annum;

9.3 The plaintiff was to provide guarantees for the purchase price plus interest by 14 November 2008;

9.4 The provisions relating to the payment of stock were also amended.

[10] Clause 7.1 of the agreement dealt with transfer of the properties and provided as follows:

“Transfer of the Properties and registration of the mortgage bond referred to in 3.6 (if applicable) shall be attended to by the Conveyancer and, subject to the provisions of clause 3.3 above, shall occur as soon as practicably possible after compliance by the parties with their obligations in terms hereof” [Emphasis added].

[11] Clause 11 of the agreement dealt with breach and provided as follows:

“11.1 Should any party commit a breach of this agreement and fail to remedy such breach within fourteen days of receipt of notice requiring such breach to be remedied, the aggrieved party shall be entitled, without prejudice to any of its other rights which it may also have at law, at its option, either:

11.1.1 To terminate this agreement forthwith by notice in writing, without prejudice to its rights to take action against the defaulting party for any damages it may have suffered as a result and, in the event of the aggrieved party being the seller, to retake possession of the Business and to retain as a genuine pre-estimate of damage, any amounts which the Purchaser may have paid to it; or

11.1.2 To claim immediate specific performance of the defaulting party's obligations".

[12] The plaintiff took occupation of the business (including the properties) with effect from 1 October 2008 and Mr Johan Griffioen ("Griffioen") was, from that date, employed as the general manager.

[13] Defendants argued that the plaintiff had to comply with, inter alia, the following obligations:

13.1 by no later than 14 November 2008, furnish guarantees to the reasonable satisfaction of the defendants for payment of the purchase price of the business (excluding the stock) and interest at 12 percent per annum from the effective date, being 1 October 2008;

13.2 make the first of six stock payments on or before 1 April 2009 together with interest thereon at the rate of 12 percent per annum from 1 October 2008;

13.3 make the second stock payment on or before 1 October 2009 together with interest thereon at 12 percent per annum with effect from 1 October 2008.

CANCELLATION

[14] The agreement provided that should any party breach the agreement and fail to remedy the breach within 14 days of receipt of notice requiring such breach to be remedied, the aggrieved party would be entitled to cancel the agreement forthwith. If the innocent party was the seller, it was entitled to repossess and retain the business as a genuine pre-estimate of damage, any amounts which the purchaser had paid to it.

[15] On 1 October 2009 the defendant's attorney, William Inglis ("Inglis") sent a letter of demand calling upon the plaintiff to remedy several breaches of the agreement. The breaches complained of included:

15.1 the failure to furnish guarantees on or before 14 November 2008; and

15.2 the failure to make any stock payments, the first of which had fallen due on 1 April 2009 and second on 1 October 2009.

[16] On 2 October 2009, in response to Inglis' demand for the stock payments due on 1 April and 1 October 2009 respectively, payment was made out of the first defendant's bank account in the sums of R2 313 037.08 and R990 047.00.

[17] On 16 October 2009, Inglis sent another letter to the plaintiff and its attorney, recording inter alia that the guarantee had not been furnished and that only one of the two stock payments by then due had been made. Inglis gave notice that the defendants had elected to cancel the agreement.

[18] On the same day, 16 October 2009, the plaintiff's attorneys acknowledged both letters, disputed that the plaintiff was in breach and disputed the cancellation.

- [19] On 19 October 2009, plaintiff's attorneys sent a guarantee to Inglis issued by Investec in the sum of R15 500 000. This was a lesser amount than the outstanding portion of the purchase price and, in any event, furnished after the cancellation.
- [20] The plaintiff contended that such cancellation by the defendants is invalid and that it constitutes a repudiation of the agreement which the plaintiff accepted. It claims restitution of the amount which it paid to the defendant as part of the purchase price prior to cancellation.
- [21] The plaintiff's view on this point, during the trial, appeared to be that the defendants had, in effect, waived their right to insist on the guarantee being furnished by 14 November 2008. This was by virtue of the fact that the plaintiff continued operating the business and the defendants acquiesced therein. This point was not argued further by the plaintiff in argument.
- [22] The defendants, on the other hand, contend that the cancellation is valid and that they are entitled to retain such payments in terms of clause 11.1 of the agreement.
- [23] The plaintiff, in the alternative, contended that, if the cancellation was in fact valid, the provision relied upon by the defendant constitutes a penalty provision and the plaintiff is entitled to a reduction of such penalty in terms of the Act.
- [24] The plaintiff's submissions in regard to the validity of the cancellation are that proper notice of cancellation could not be given in the absence of a specific date for the transfer of the properties. It submitted that it was obliged to furnish a guarantee which included interest up to the date of transfer. As there was no specified date for transfer, such guarantee could not be provided, because the interest could not be calculated.
- [25] The defendants contend that they were fully entitled to cancel the agreement as the plaintiff had failed to perform in terms thereof.
- [26] The plaintiff's submissions in challenging the defendants' right to cancellation cannot be sustained. It is undisputed that there was a contract, a breach, a letter of demand placing the plaintiff in mora and calling upon it to remedy the breaches and an election to cancel. In my view, the plaintiff has not put forward any basis upon which the cancellation can be attacked. The plaintiff was obliged to furnish a guarantee. It cannot place the burden on the defendants to determine the form thereof. See *Blake and another v Cassim and two others*[2]. A guarantee could have been furnished which included an amount to be calculated which would comprise the interest payable. This is common commercial practice. I accordingly find that the defendant was entitled to cancel the contract upon the grounds that it did.

EXCESSIVE PENALTY

[27] Accordingly, at the hearing, the only remaining issue between the parties was whether or not the plaintiff had discharged the onus in showing that the penalty was excessive in the circumstances.

[28] The plaintiff relies upon payments made in lieu of the guarantee, and improvements and contributions made to the business. This, it contended, shows that the penalty is excessive. These payments and contributions will be dealt with in order to assess whether or not same affect the actual prejudice suffered by the defendants, that being the test which the plaintiff is required to overcome.

PLAINTIFF'S CASE ON DISPROPORTIONATE PENALTY IN RELATION TO THE PREJUDICE SUFFERED BY THE DEFENDANTS

MONIES PAID

[29] It is common cause that a number of payments were made to the defendant's attorney, which, the plaintiff submitted, were not payments against the purchase price but security for payment of the purchase price, in lieu of the guarantee. It is common cause (after an amendment was sought by the defendants and not opposed) that the amount which the plaintiff paid is the sum of R7 800 000, 00. This is the sum which defendants seek to retain as per the penalty clause.

[30] By order of this Court per Lamont J, Inglis was ordered to repay all amounts held in trust by him which the plaintiff had paid and it is common cause that he did so. The defendants also had to pay the shortfall of interest.

[31] In regard to the source of payments made to Inglis, on 2 October 2009, a stock payment was made in the sum of R2 313 037.08. A further sum of R990 047.00 in respect of interest was paid. Both these payments were made from the first defendant's bank account.

[32] Defendants contend that if the plaintiff complied with its obligations, the plaintiff, as purchaser, would have become entitled

to the income generated by the business with effect from the effective date.

[33] However, in the event that the plaintiff failed to fulfil its obligations, it would not be entitled to transfer of the business or the proceeds of any business conducted in the period between the effective date and the date of cancellation of the agreement if cancelled by the defendants. Defendants alleged that the plaintiff accepted this position.

[34] Defendants submitted that as a result of Lamont J's order, these amounts were repaid to the plaintiff. But, having been paid from the first defendant's bank account they were repayable to the first defendant on cancellation of the agreement. This constituted a loss to the defendants in the total amount of R3, 303,084.00, plus mora interest.

[35] The plaintiff contended that it made payments against the purchase price and it seeks to have same refunded. Alternatively, it contended that the amount of the penalty should be reduced in terms of the Act so that a portion should be repaid to the Plaintiff.

[36] The defendants submitted that the plaintiff was not entitled to withdraw any monies from the first defendant's bank account,

alternatively, if they did, in the event of cancellation, these monies would be repayable, alternatively, would constitute the

damages contemplated in clause 11.1.1 of the agreement.

The improvements and/or contributions to the business

[37] The plaintiff claims that in light of the many improvements that it made to the business during the time that it was in control of same, the penalty stipulation is excessive. Details are referred to hereunder.

Employees without remuneration

[38] It is common cause that Griffioen, an employee of the defendants was the general manager of the plaintiff. According to the plaintiff, the directors, Dave Rossiter (Rossiter), Jeremy Davies (Davies) and Grant Yoko (Yoko), actively participated in the business and made material contributions to the business, without remuneration therefor.

[39] The plaintiff procured the employment of a number of persons at the cost of the plaintiff or its directors. The plaintiff utilised

Bernard Rossiter (Bernard), the father of Rossiter, who was an engineer. His services were paid for by Geomechanics, Rossiter's

company. In addition, a boilermaker, Arwe Kotze (Kotze), was employed and paid for by Geomechanics. Similarly Gerald Herbert, who was utilised for electrical work was paid by Davies Civils, the company of Davies. Chris Davies, the brother of Davies cleaned up and ran the workshop and was remunerated by Davies Civils. In addition, the plaintiff found the electrical installations to be below par and Rossiter installed electrical lights on poles to light up the area in front of the bagging plant, allowing work to be carried out over a 24 hour period. This work was performed by Herbert at the expense of Davies Civils.

Trees

[40] The plaintiff submitted, in addition, that Rossiter made an initial contribution of 636 trees. They referred to an invoice submitted by his company in the sum of R517 332.00. Photographs were referred to in evidence which showed the trees, which according to the plaintiff, were set up along the border of the property of the defendants. The trees were not paid for but contributed by Rossiter.

[41] Griffioen initially denied that any trees had been contributed by Rossiter, but did concede that at least some trees had been

contributed. He was unable to put a value to them.

Boreholes

[42] Other improvements, according to the evidence of the plaintiff, were that Rossiter drilled four boreholes on the property and that the cost of approximately R80 000.00 was borne by Rossiter.

[43] Griffioen stated that the defendants were making use of one borehole which had been drilled.

Roads

[44] The plaintiff repaired the internal roads as it contended that there was no proper drainage and the roads were muddy and impassable. In order to solve this problem, Davies brought in earth-working equipment from Davies Civils, such as graders and front end loaders.

Proper internal roads with adequate drainage were constructed and all of these costs, including the equipment, labour and diesel were borne by Davies Civils.

[45] Griffioen stated that such work was not necessary. The business of the defendant had been carried on successfully without these changes to the roads. No discernible benefit accrued to the defendant. Nor did plaintiff put up any documentary evidence of these improvements, the value thereof and/or the cost of the work done by these various persons.

Concrete Plant

[46] A concrete plant, used for manufacturing various concrete items was, according to the plaintiff, not functional when they took over the business. Bernard prepared a report on the requirements to rectify the concrete plant. According to the evidence, he worked on the concrete plant for 53 days with the assistance of Kotze the boilermaker. The concrete plant was made functional and Bernard and Kotze were remunerated entirely by Geomechanics.

[47] According to the defendants, the concrete plant could not be used at all when it repossessed the business, as the methods did not work and were not adopted by the defendants. Griffioen was of the view that the work done on the concrete plant was similarly not necessary and did not add to the value of the business operations.

Compost

[48] It is common cause that the main business of the defendant, as at the effective date, was the manufacturing of compost. Davies occupied the premises next door to the premises of the first defendant and had a large supply of compost on his property. As he was now a partner of the business of the first defendant, he delivered substantial amounts of compost from his property onto the premises of the first defendant. He stated that this was at least a few hundred thousand cubic meters at a value of between R50

- R100.00 per cubic meter. Approximately 80 000 cubic meters with a value of approximately R8 000 000.00 was delivered to the defendant's business premises together with 15 000 cubic meters of top soil at R150.00 per cubic meter, valued at R2 250 000.00.

[49] Griffioen stated that he was unaware of this delivery. There was no documentary proof of this transaction.

Palletising

[50] Davies stated that a proper system of using pallets for conveying bags of compost was introduced by a system of wrapping the bag which made it more efficient for delivery. The defendant contended that these innovations had predated the sale.

Ablution facility

[51] Rossiter, at his own expense, provided a new ablution facility, as he stated that the toilet facilities were in a primitive state. Rossiter referred to a photograph of a toilet in disrepair and to a prefabricated ablution block. However, he conceded under cross-examination that there were other, fully functional toilets on site, in addition to which employees had access to their own personal ablution facilities in their housing on site.

Roof repair

[52] Rossiter referred to the repair of a roof on one of the large facilities in Kwekery. However, the defendants' evidence, which was not challenged, was that the roof had been blown off by wind and was replaced at the cost of the defendants' insurance

underwriter.

Worm Farm

[53] Davies also introduced a worm farm facility and stated that the business was still making use of this facility.

Improvements in financial statements

[54] The plaintiff also contended that during the time that it operated the business, the income statements showed that the financial

position improved substantially. The financial statements of the first defendant for the year ending 31 December 2009 showed a loss in the sum of approximately R52 000.00 for the 2008 year end and a profit in 2009 year end in the sum of R4 900 000.00. The 2009 financial year covers the period during which the plaintiff was in control of the business.

[55] The plaintiff accordingly submitted that such control resulted in a substantial improvement to the profit of the business. This profit continued for the year ending 31 December 2010, where a profit of R8 571 882.00 was shown. The defendants submitted however that the reason the business appeared to be more profitable was that, prior to the sale, there were many liabilities which had to be paid off. This was done prior to the conclusion of the sale. According to Griffioen, when he and his brother purchased Culterra from their father and uncle, they refinanced the vehicles in order to do so. When the business showed a more robust turnover, they paid the balance owing on the vehicles shortly before the sale. This was reflected in the financial statements. After they regained possession, the defendants had to take the business back into debt to purchase new vehicles and equipment to replace the ones sold off by Davies. (This is dealt with below).

Truck refurbishment

[56] Plaintiff claims that a truck was refurbished by Geomechanics and an invoice in the sum of R453 801.82 was produced. It is uncontested that the defendants refused to make payment of such invoice and went to the premises of Geomechanics and removed the vehicle.

[57] The defendants submitted that the defendant would never have spent that amount of money on the repair when the value of a new truck was R1 000 000.00. In any event, the defendant had its own workshop and staff who habitually repaired its own vehicles. This was therefore an unjustified expense which was of no benefit to defendants.

DEFENDANTS' CONTENTIONS REGARDING IMPROVEMENTS

[58] The defendants argued that the majority of these improvements/contributions were nothing more than unsubstantiated claims by the plaintiff's witnesses. There was no documentary evidence presented to support such claims or determine a value to be

placed on such contributions. In addition, defendants re-iterated that reference to these items had no bearing on the defendants'

actual prejudice. Plaintiff contended that the value of these contributions should be taken into account and, in effect, be set off against the prejudice suffered by the defendants. The problem with this submission is twofold: firstly, other than one or two items, the plaintiff has not placed a value on the improvements/contributions. Secondly, the plaintiff led no evidence on the actual prejudice suffered by the defendants against which the value of these improvements/contributions could be set off.

[59] The defendants contend that despite the onus resting on the Plaintiff, they have shown that the actual prejudice suffered by the defendants is in excess of the forfeiture amount and that there is no basis upon which it should be reduced. In this regard, it flows from the authorities that “prejudice” is widely construed and includes financial and other losses.

LEGAL PRINCIPLES

[60] In *Steinberg v Lazard*, [3] Jafta JA (as he then was), in dealing with the onus on a plaintiff to prove that the penalty is out of proportion to the prejudice suffered by the defendants, held as follows:

“[7] The legislature provided protection to a debtor against an excessive penalty. In terms of the section as construed by this Court, the debtor bears the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent (see Smit v Bester 1977(4) SA 937(A) at 942 D-G)”.

[61] In *Western Credit Bank Ltd v Kajee* [4], a decision of a Full Bench of the Natal Provincial Division, Caney, A.J.P., held as follows:

“If the penalty is out of proportion to the prejudice, the Court will reduce the penalty to such extent as it may consider equitable in the circumstances. The words 'out of proportion' do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the Court to intervene. If that had been intended, the Legislature would have said so. What is contemplated, it seems to me, is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce the penalty; But otherwise, if the penalty, the amount of the penalty approximates that of the prejudice, the penalty should be awarded.”

In the same judgment, the learned judge held as follows:

*“The damages suffered by the plaintiff are not the sole criterion, for the operation of sec. 3 of the Act hinges on prejudice, which is wider in its connotation than damages. The full extent of this may be difficult to ascertain in any particular case, but in *Rex v Dhlamini*, 1943 T.P.D. 20 at p.23, followed in *Rex v Williams*, 1943 C.P.D. 206 at p.208, it indicates that prejudice includes ‘far more than pecuniary loss’ and may, according to the circumstances, include impairment of reputation or personal dignity and possibly cover any substantial inconvenience. If the plaintiff contends for any prejudice in a wider sense than damages suffered by it, it will be for it to produce evidence to establish this.” [5]*

However, the final sentence in the preceding passage was later rejected by the SCA in *Steinberg v Lazard* [6]. The Court there held that the onus is on the debtor throughout.

[62] *Snyman J*, in *Van Staden v Central South African Lands and Mines* [7] approved *National Sorghum Breweries Ltd (t/a Vivo Africa Breweries) v International Liquor Distributors (Pty) Ltd* [8] expressing the following views on what constitutes prejudice and how the enquiry into prejudice may proceed:

“It seems to me that everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor in his property, his person, his reputation, his work, his activities, his convenience, his mind, or in any way whatever interferes with his rightful interests as a result of the act or omission of the debtor, must, if it is brought to the notice of the Court, be taken into account by the Court in deciding whether the penalty is out of proportion to the prejudice suffered by the creditor as a result of the act or omission of the debtor.

The test as to all this is, in my view, a subjective test of prejudice. It seems to me that there can be no room for the concept that the prejudice suffered must, as in damages cases, be within the contemplation of the parties... No doubt in most cases the monetary aspect will play an important role, indeed the paramount role in the consideration of the matter by the Court, but one can conceive of circumstances where a seller may sustain no pecuniary loss arising directly out of the breach, yet he may nevertheless be seriously prejudiced in one or other of the ways mentioned. For example, where he, relying on the funds to be received from a sale, incurs a liability in respect of some other transaction; or where his plans for the future are frustrated”.

Olivier JA, in *National Sorghum Breweries Ltd (t/a Vivo Africa Breweries) v International Liquor Distributors (Pty) Ltd* emphasised the nature and incidence of the onus thus:

“To emphasise the point: in order to reduce the amount of the forfeiture, the actual prejudice suffered by the creditor must be proved by the debtor - see Smit v Bester 1977 (4) SA 937 (A) at 942H; Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at B 906E; Chrysafis and Others v Katsapas 1988

- (4) SA 818 (A) at 828I; and see A J Kerr *The Principles of the Law of Contract* 4th ed at 602”[9]. (Emphasis added)

See also *Steinberg v Lazard*[10], regarding the onus throughout.

DEFENDANTS’ FINANCIAL PREJUDICE

Disposal of vehicles

[63] One of the most contentious issues in this matter is the disposal of most of the heavy vehicles which Davies contended were in a very poor state. Most were sold as scrap. Davies Plant Hire (“DPH”), an associated company of Davies Civils, entered into finance agreements in terms of which numerous vehicles were obtained. According to Davies, the amount received from the sale of the scrap vehicles was approximately R450 000.00 which was utilised towards the deposit for the new vehicles. The defendants argued that Davies failed to produce any documentation in this regard. It further submitted that these vehicles were not his to sell. He utilised them as a deposit to purchase other vehicles which were then leased in the name of DPH.

[64] Leasing costs increased in the year ending December 2009 from approximately R2 400 000.00 to R8 000 000.00. This, according to the defendants constitutes a substantial loss, as prior to the sale; the sellers had relied on their own vehicles and equipment, which they

found adequate and which were paid for. Therefore having to incur an extra R6 000 000.00 in respect of leasing costs, clearly prejudicial to them. The schedule of leasing costs in respect of DPH shows that the full hire-purchase cost plus 15% was passed on to the first defendant, although evidence was given by Davies that this was for the insurance of the vehicles. Once again, no documentary evidence was presented in this regard and the defendants submitted that DPH made a profit on the lease of the vehicles.

[65] When the agreement was cancelled, the defendants ceased making payments. It was in arrears. Davies, through his attorney, accordingly advised the defendants that he was removing the vehicles. The plaintiff contended that the defendants could have continued

using the vehicles upon payment of the monthly instalments but they declined to do so. He gave evidence that there was pending litigation in which the finance company claims R13 000 000.00 from him, in terms of his suretyship.

[66] Amanda Van Rensburg, the defendants' account executive, who carried out an analysis, found that the cost price of the "old" vehicles was R8 087 419.25. She also, for the purposes of an audit, following the cancellation of the agreement, did a rough estimate of the amount which would have been recovered if these vehicles had been sold at market value and arrived at the sum of R1 962 000.00.

[67] According to the defendants, these vehicles had a greater value to them than any amount that could be recovered for them on a sale. According to Griffioen, they were in working condition and had been used in the business prior the sale. Although Davies attempted to downplay the value of these items, he was not directly involved in the sales and was in no position to counter the evidence of Griffioen, who had a sound knowledge of the plant and equipment and vehicles.

[68] The defendants accordingly submitted that the plaintiff cannot contend that the prejudice flowing from these ill-considered sales is inconsequential in relation to the penalty. The defendants contended that the direct financial loss alone is R1 962 000.00.

[69] When the defendants repossessed the business, they were obliged to spend R7 478 917.56 replacing some of the vehicles and equipment. They also had to utilise leased vehicles in order to replace those they no longer owned over the period October 2009 to December 2010.

Ngodwana property

[70] The property at Ngodwana came under the management and control of the plaintiff after 1 October 2008. One Tomkinson was put in charge by the plaintiff. The plaintiff wanted to evict the staff who were living there, which caused a certain amount of discontent. Shortly thereafter, on 31 May 2009, there was a fire which was not brought under control and caused a massive loss of stock. The defendants suspected that the fire was caused by the discontented staff. Griffioen gave evidence that the plaintiff had removed a front end loader from the site so that there was no means of isolating the burning pile from the rest, and no

way of dealing with the fire. The plaintiff contended that it took over this property from the defendants and that the precautions were not in place at the time it was taken over.

According to the defendants, the stock at Ngodwana was valued at R1 900 000.00.

- [71] The defendants testified that as a result of the fire, it subsequently lost the contract that it had with Sappi in regard to

the Ngodwana sawmill. Thus the defendants were unable to obtain bulk tree bark for use in making compost fertiliser.

- [72] Sappi, on 1 June 2009, wrote a letter in which they referred to alleged breaches that took place between Sappi and the Plaintiff. The agreement was subsequently cancelled. The breaches apparently related to the loss caused by the fire and the failure to supply precautions. The defendants testified that Sappi has only recently commenced resupplying bark but that it is still not permitted to use Sappi's property to decompose the bark locally and accordingly has suffered a loss in this regard, as it has had to utilise other properties and transport.

Vat and Paye

- [73] The defendants further contended that the agreement provided that the plaintiff would be VAT registered as at the effective date. Neither the plaintiff nor Culterra Organics (which was to be the operating entity) registered. As a result no VAT was paid on its behalf. Had the sale gone through and these companies been registered for VAT, the Plaintiff could have sorted out the VAT issue with SARS, but because the business reverted to the defendants, it was held liable for the VAT penalties. A breakdown was shown in evidence that the penalties amounted to R378 805.14 plus the attorney's fees of R45 699.00 to resolve this and other tax issues. The other tax issues related to the fact that neither the plaintiff nor Culterra Organics registered for UIF, SDL or PAYE. Consequently, the defendant had to pay penalties after the business reverted back to it.

Diversion of debtors' payments

- [74] The defendants submitted that debtors were diverted to the plaintiffs' new bank account with Standard Bank. On 24 November

2009, after the plaintiff's attorney had cancelled the agreement, a letter was sent to customers by the Plaintiff requiring

them to pay all accounts generated between 1 October 2008 and 20 November 2009 into the plaintiff's Standard Bank account. The total amount paid into such account was R513 149.51 to which the defendant was not entitled.

Ancillary amounts

- [75] Certain vehicles belonging to the defendant were parked at DPH, when the contract was cancelled, Davies refused to return them, as a result of which, it was necessary to hire vehicles until the vehicles had been returned.
- [76] The defendants also testified that in or about April 2008, Rossiter removed a mobile wood chipper from the property to do some work for himself off-site. The invoice value of the chipper was R511 907.00 which was never returned.
- [77] The defendants also alleged that when the property was handed back to them, an amount of money which was in the safe, had been removed. They can only speculate as to what happened to the money.

OTHER PREJUDICE

- [78] The defendants claim that on 24 November 2009, just prior to wages becoming due, Culterra Organics obtained an ex parte order freezing the first defendant's bank account. The return date was anticipated and discharged, by Farber AJ on the 23 December 2009. According to the defendants, this caused severe problems for the defendant's business, both financially and reputation wise. Standard Bank had to be approached for bridging finance. Griffioen's father further provided a short term loan of R2 000 000.00 so that wages and creditors could be paid.
- [79] Other aspects of prejudice referred to by the defendant are that after the order of Lamont J was made, and payment had been made by the defendants, a shortfall of approximately R120 000.00 in regard to the accrued interest was outstanding. The defendants

alleged that, in a move calculated to embarrass them, the plaintiff caused a writ to be issued and executed against their single largest customer, Builders Warehouse. The defendants submitted that this was vexatious because they had no prior notice of the intention to execute a writ and had they known, the amount would have paid. In the alternative the plaintiff could have executed against the movable assets of the defendants at any time. It was not necessary to involve a large customer of the defendants. This, according to the defendants caused damage to its goodwill vis a vis Builders Warehouse's relationship with the defendants.

ANALYSIS

OF EVIDENCE

- [80] The defendants criticise the evidence of the plaintiff's witnesses, Rossiter and Davies. They contend that these witnesses

gave evasive and argumentative evidence and could not place a value on any of the alleged improvements. In regard to the innovations to the business, the defendants' submitted that Rossiter and Davies over-stated their role in effecting these changes. They

submitted that these were nothing extraordinary but amounted to normal maintenance, this would have been carried on in the normal

course.

[81] The defendants submitted that their witnesses were credible. They accepted that certain improvements had been made but disputed the impression sought to be portrayed by Rossiter that prior to this sale, the business was not able to adequately operate without the improvements made by the plaintiff.

LEGAL

SUBMISSIONS

[82] The defendants submitted that the plaintiff must prove the actual prejudice suffered by the creditor in order to reduce the amount of the forfeiture. The defendants contend that the plaintiff ignored this requisite, and did not lead any evidence on it. Instead the plaintiff led evidence amounting to little more than unsubstantiated allegations and lay opinions to the effect that the business was in a better shape after the period during which the plaintiff had been in control.

[83] The defendants submitted that the plaintiff has misconstrued the onus resting on it to show that the penalty of R7 800 000.00 was disproportionate to the prejudice suffered by the defendants. It led no evidence on the prejudice actually suffered by the defendants but only evidence on the improvements and/or amounts that the plaintiff had paid.

[84] The defendants contend that the plaintiff had the onus to prove that the defendants unduly benefitted. There was no evidence by the plaintiff in this regard as to precisely what the financial impact was on the company.

[85] The defendant contended that it is clear from the evidence of its witnesses that the partial implementation of the sale had profound adverse consequences for the defendants and the business which they repossessed after the sale fell through.

[86] The defendants submitted that the forfeiture sum of R7 800 000.00 is, in fact, substantially less than the actual patrimonial and other loss suffered by the defendants. It submitted that the court is entitled to take into account other forms of prejudice in order to weigh up the proportionality of the penalty.

[87] The defendants submitted that the losses that they suffered which can be expressed directly in monetary terms are the following:

87.1 payment to Inglis out of the Nedbank account (the defendant's bank account) R3 303 084.00;

87.2 value of the plant, machinery and vehicles sold conservatively estimated at R1 962 000.00;

87.3 loss of bark compost facility at Ngodwana estimated at R1 900 000.00;

87.4 debtor payments diverted to the plaintiff's Standard Bank account of R513 149.51;

87.5 Morbark Chipper R511 907.00;

87.6 Vat penalties of R398 805.00;

87.7 PAYE/UIF penalties of R109 922.84 and

87.8 attorney's fees for resolving SARS claims for VAT and other penalties R45 699.00.

TOTAL: R8 332 660.35.

[88] In addition, the plaintiff lists the other forms of prejudice which cannot be expressed directly in monetary terms:

88.1 the cost of acquiring new vehicles which had to be financed R7 478 917.56;

88.2 the increase in lease costs after Davies sold the first defendant's plant, equipment and vehicles: R5 629 720.00;

88.3 75% increase in transport costs associated with procuring bark from the Lowveld area as they were not allowed to use the Sequoia area;

88.4 the temporary loss of the SAPPI contract;

88.5 the aggravation, business interruption and legal costs caused by the freezing of the bank account and the blockading of the defendants'

vehicles;

88.6 the cash in the safe;

88.7 the sale without compensation of scrap;

88.8 the eviction and relocation of staff and retrenchment of others;

88.9 the aggravation and reputational harm caused by the writ of execution on Builder's Warehouse; and

88.10 loan from Griffioen's father of R2 million.

[89] The defendant accordingly submitted that the improvements, such as they were, are more than cancelled out by the liquidated and unliquidated and intangible forms of prejudice suffered by the defendants. According to the defendants, they would have done better to have claimed damages in the normal way but elected instead to retain the R7 800 000 as rouwkoop, as they are entitled to do.

[90] The defendants argued that although the onus was on the plaintiff to show the defendants' actual prejudice, the plaintiff failed to do so. Plaintiff concentrated on the way in which it improved the business. Although this is a factor which may be taken into account in balancing the prejudice as against the gains, it is not sufficient for the purposes of disturbing the penalty which the defendants claim. The failure by plaintiff's witnesses to provide

confirmatory and/or documentary evidence of the value that the improvements gave to the repossessed business, together with its failure to show the actual prejudice suffered by the defendants is fatal to the plaintiff's case.

[91] Defendants contend that even though it was not their duty to demonstrate that the prejudice suffered was greater than the penalty,

they have done so.

[92] In my view, taking into account the evidence given, and the authorities referred to, the plaintiff has failed to discharge the onus to demonstrate that the penalty imposed was disproportionate to the damages suffered.

COSTS

[93] The defendants claim attorney and client costs on the basis that it was an abject failure of the plaintiff to deal with the onus which rested on it as well as a lack of bona fides and credibility of its witnesses.

[94] In my view, the defendants have not shown that the plaintiff acted in a manner which would result in them being liable for attorney and client costs. The plaintiff believed that it had effected certain improvements and made certain payments. The fact that a court may have found that they have not discharged the onus in proving what is required to overcome a penalty, does not in my view, amount to conduct which warrants attorney and client costs to be paid.

[95] Accordingly, the following order will be made:

95.1 The plaintiff's claim is dismissed;

95.2 The plaintiff is to pay the defendants' costs;

The costs should include the employment of senior counsel.

S WEINER

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA (GLD)

Appearances

For the Plaintiff: N Segal SC

Instructed by: Orelowitz Incorporated

For the Defendant: C Watt-Pringle SC

Instructed by: DRSM Attorneys

Date of hearing: 9 June 2015

Date of Argument: 8 December 2015

Date of Judgment: 10 March 2016

[1] 2001 (2) SA 240 (SCA) at paragraph 7

[2] 2008(5) SA 393 SCA.

[3] 2006 (5) SA 42 SCA at paragraph 7.

[4] 1967 (4) SA 386 (N) at page 391.

[5] Supra fn 3 at page 394

[6] Supra fn 2 at paragraph 10

[7] 1969 (4) SA 349 (W) at p 352H to 353C.

[8] Supra fn 1.

[9] Supra fn 1 at paragraph 8

[10] Supra fn 2 at paragraph 9 to 11

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