

SOUTH AFRICA / JUDGMENT

Steinberg v Lazard [2005] ZAGPHC 363; 20/03/01 (18 February 2005)

[2005] ZAGPHC 363

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

8520/03

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IN

THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND

LOCAL DIVISION)

JOHANNESBURG

CASE

NO: 8520/03

DATE:2005-02-18

In

the matter between:

COLLIN

STEINBERG.....

Plaintiff

and

TERANCE

LAZARD.....

Defendant

JUDGMENT

WILLIS, J: The parties have come to court by way of a stated case in terms of Rule 33. In the "Agreed Statement of Case" the following appears:

"The parties agree as follows:

A. Agreed facts.

1. The parties entered into an agreement annexed hereto as Annexure A on 6 June 2001 which agreement still subsists.
2. The defendant admits that he had breached the agreement in that he did not complete the dwelling house at 158 Empire Place, Sandhurst,

Sandton by 30 June 2002 as stipulated for in clause 9.1 of the agreement but only completed the dwelling house by 15 June 2004.

3. The plaintiff only completed the dwelling house on the property by 30 September 2002.
4. Clause 9.1 of the agreement stipulates that should either party fail to comply with the undertaking to complete the erection of a dwelling house on the respective properties by 30 June 2002, the defaulting party shall be obliged to pay to the other a penalty of R50 000 per month or part thereof, for the period of the delay in completing the erection of the dwelling house.
5. The penalty stipulation in clause 9.1 of the agreement is a penalty as defined in the Conventional Penalties Act 15 of 1962.
6. The plaintiff afforded the defendant due notice in terms of the agreement to remedy his breach.

7. 7.1 The plaintiff's claim for the period 1 July 2002 to

30 September 2002 is extinguished by set off against the defendant's entitlement under the penalty clause for the corresponding period.

7.2 The plaintiff waives one half of his claim in respect of the month of June 2004.

7.3 The plaintiff's claim is therefore for payment of the sum of R1 075 000 and interest at 15,5 percent per annum *a tempore mora* to date of final payment.

8. This honourable court should decide the matter without any evidence, only legal argument will be advanced.
9. Each party will bear his own costs in respect of this action. The costs of appeal if any, do not form part of such costs and will be dealt with in the ordinary course.

10. The only issues to be decided between the parties in the adjudication of this matter are set out under B below.

B. Issues in dispute

11. The only defence pleaded by the defendant on which he will rely is that:

11.1 He denies that he is liable to pay any penalty amount;

11.2 In the event of this honourable court finding that a penalty is payable the penalty of R50 000 per month or part thereof, is out of proportion to the prejudice suffered by the plaintiff as a result of the defendant's default in that:

11.3 The plaintiff did not suffer any pecuniary or patrimonial loss as a result of the defendant's breach;

11.4 The plaintiff did not suffer any other damages or prejudice as a result of the defendant's breach.

12. This honourable court is requested to determine: 1 2.1 Whether the penalty is due and payable;

12.2 If so, whether in the full amount or whether the penalty stands to be reduced; 12.3 If so, to what extent.

C. Plaintiff's contentions.

13. The plaintiff does not rely as part of his cause of action on any pecuniary or patrimonial loss or any other damages which he may or may not have suffered as a result of the defendant's breach.
14. It is not necessary for the plaintiff to plead that he suffered any damages or prejudice as a result of the defendant's breach.
15. The penalty provision is enforceable and the plaintiff is entitled to the full penalty plus interest unless the defendant proves otherwise.

D. Defendant's contention.

16. The plaintiff has not pleaded or adduced evidence that he has suffered any damages or prejudice as a result of the defendant's breach and therefore no penalty is payable.

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7. Alternatively if the court finds that penalty is still payable the penalty stands to be reduced.

E. Court order.

18. 18.1 The plaintiff claims judgment in the amount of R1 075 000 plus interest at 15,5 percent a tempore mora.

18.2 The defendant claims dismissal of the claim, alternatively judgment in such lesser amount as the court may determine."

As appears from the agreed facts the relevant clause is clause 9.1 of the agreement. It reads as follows:

"The purchaser (i.e. the plaintiff) agrees and undertakes to procure that the corporation (i.e. a close corporation in which the plaintiff had a member's interest) completes the erection of a dwelling house on the property by no later than 30 June 2002 by which date the seller (i.e. the defendant) and agrees and undertakes to complete a dwelling house on the land at 158 Empire Place, Sandhurst, Sandton which is owned by Portion 5/8 Erf 11, Sandhurst CC (registration number CD 1 990/007583/23). Should either party fail to comply with the aforesaid undertaking he shall be obliged and hereby agrees to pay the other a penalty of R50 000 (fifty thousand rand) per month or part thereof for the period of the delay in completing the erection of the dwelling house." It is important to emphasise that this obligation was mutual and reciprocal as between the plaintiff and the defendant. In other words each party agreed that in the event of the other's default a penalty of R50 000 would be paid by the one to the other.

The relevant agreement was individually crafted for the parties. It bears all the hallmarks of having been professionally drafted, most probably by attorneys. In my view it is fair to assume that the parties carefully and soberly entered into the agreement after fully considering all issues that were relevant as between themselves. It is not difficult speculate on precisely which factors operated upon the minds of the parties at the time when they entered into the agreement.

Section 1 (1) of the Conventional Penalties Act 15 of 1962 reads as follows:

"A stipulation, hereinafter referred to as a penalty stimulation, 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 penalty or his liquidated damages, shall, subject to the provisions of this act be capable of being enforced in any competent court." In other words, the opening section of the Act emphasises a principle that is trite in our law: *pacta sunt servanda*, This section is, however, qualified by the provisions of section 3 which reads as follows:

"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."

The law, in my respectful opinion, has been definitively settled in the case of *Smit v Bester* 1977 (4) SA 937 (AJ) where Kloppe AJA, delivering the judgment of the court, said as follows at 942D:

"Na my mening blyk dit dat waar 'n hof met 'n straf bedrag te doen kry, rus die bewyslas op die skuldenaar om te bewys dat die straf bedrag buite verhouding is tot die nadeel wat die skuldeiser gely het en dat dit gevolglik verminder behoort te word en tot welke mate. In werklikheid is dit 'n vergunning wat die skuldenaar wie die hof vra, nl dat die hof sy diskresie om die strafbedrag te verminder, in sy guns uitgeoefen omdat dit andersom regverdig teenoor horn sou wees as dit nie gedoen word nie. Wanneer die skuldenaar prima facie bewys gelewer het dat die straf bedrag verminder behoort te word, dan rus daar 'n weerleggingslas op die skuldeiser om die skuldenaar se prima facie saak te ontsenu indien dit vir horn moontlik is." In the case of *Bank of Lisbon international v Venter & 'n Ander* 1 990 (41 SA 463 (A) Botha JA stated as follows at 474 J to 475 A:

"Daarteenoor kan artikel 2(1) vergelyk word met artikel 3 van die Wet op Strafbedinge, ten aansien waarvan dit duidelik is dat 'n hof in 'n bestrede saak nie ongevraagd 'n vermindering van die strafbedrag sal oorweeg nie - die verweerder moet die grondslag van 'n vermindering beweer en bewys." (my emphasis)

In the case of *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v international Liquor Distributors (Pty) Ltd* [2000] ZASCA 159; 2001 (2) SA 232 (SCA) the following is said by Olivier JA in delivering the judgment of the court at para (81:

"It follows that, although the forfeiture clause in Shembe arose, as it inevitably must, from the contract between the parties, its *raison d'etre* and validity are to be found in the damage suffered by the creditor. 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." (my emphasis) In the case of *Du Piessis v Oribi Estates (Pty) Ltd & Others* 1972 (3) SA 75 (N) Miller J said at 80C:

"It is recognised that the prejudice referred to in section 3 embraces concepts beyond pecuniary loss." In my opinion the defendant has failed to discharge the "weerleggingslas" which rests upon him. Nothing has been put before me to indicate that the penalty is or may be out of proportion to the prejudice suffered by the creditor. Accordingly my finding is that the penalty is indeed due and payable.

The following order is made:

1. The defendant is to pay the plaintiff
 - (a) The sum of R1 075 000.
 - (b) Interest at the rate of 15,5 percent per annum on R350 000 of the aforesaid sum from 1 May 2003 to date of payment.
 - (c) In respect of the remaining amounts due interest at the rate of 15,5 percent per annum is to be paid from the last day of each successive month in which each successive payment of R50 000 became due to date of payment.

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