

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A21/2008

DATE:

9 MAY 2008

5 In the matter between:

ELMARIE ROETS

Appellant

And

PYRAMID FREIGHT (PTY) LTD

Respondent

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J U D G M E N TFOURIE, J:

[1] In this matter the appellant appeals against the judgment  
15 of the magistrate in Goodwood ordering her to pay to the  
respondent the sum of R76 666.66 plus interest and  
costs.

[2] The magistrate's reasons were given on 2 March 2007.  
20 Appellant filed her notice of appeal on 4 September  
2007, substantially outside the time period referred to in  
Rule 51(3) of the Magistrates' Court Rules requiring such  
notice of appeal to be filed within 20 days of the court's  
reasons. There is no application for condonation for the

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late filing of the notice of appeal and, in addition, no heads of argument were filed on behalf of the appellant.

5 [3] Today at the hearing of the appeal Mr Wagner appears on behalf of the respondent, but there is no appearance for the appellant. I should mention that yesterday a notice was filed by appellant's attorneys requesting the removal of the appeal from the roll by agreement as the matter has been settled. Mr Wagner, however, informs 10 us that the matter has not been settled, as appears from his letter dated 8 May 2008 addressed to the appellant's attorneys and to which he has had no response. The appeal is accordingly still on the roll and Mr Wagner, as he is entitled to do, has asked us to finally determine the 15 merits thereof.

20 [4] In regard to the merits, the appellant was employed by the respondent as a sales representative until her resignation on 8 April 2004. Prior to her resignation, on 22 April 2002, the parties entered into a written contract pursuant to which the appellant undertook to repay the sum of R80 000 to the respondent in the event of her resignation within two years of certain specialised training being provided to her. In terms of this contract 25 the sum repayable reduced on a sliding scale extending

over the two year period ensuing after the provision of the training.

5 [5] Appellant completed her training on 25 February 2004 and she resigned on 8 April 2004. As a result of her resignation and pursuant to the formula contained in the contract, appellant was obliged to repay to respondent the sum of R76 666.66.

10 [6] In her notice of appeal, the appellant raises only two grounds. Firstly, that the magistrate erred in not finding that the sum claimed was a penalty in terms of the Convention Penalties Act and secondly, that the magistrate erred in not reducing the penalty. It was 15 common cause during the trial that the sum claimed by the respondent is a penalty and it is apparent from the magistrate's reasons that she considered it as such.

[7] The respondent presented the evidence of Ms C Myroff 20 who testified regarding the costs to the respondent of the training provided to the appellant. She prepared a schedule (Exhibit R) in which she calculated the cost of the training program to be R73 193.85. Her evidence in this regard was not challenged.

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[7] It is trite that the *onus* rests upon the party alleging that the penalty is out of proportion to the prejudice suffered, to prove both the existence and the extent of such prejudice. It is clear on the evidence of Ms Myroff that the penalty of R76 666.66 is not at all out of proportion to the financial prejudice of R73 193.85 suffered by respondent. There is, accordingly, no basis upon which this Court should interfere with the order made by the magistrate.

[8] In the result I would dismiss the appeal, with costs.  
WAGLAY, J: I agree.

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WAGLAY, J

FOURIE, J: It is so ordered.

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FOURIE, J