IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)

Case No:2433/2007

In the matter between:

TREMENDOUS PROPERTY	1st Plaintiff
INVESTMENT 8 CC	
WILLIAM STEPHEN KIRSTEN	2nd Plaintiff
versus	
KENNTNER WILDERNESS DUNE DEVELOPMENT (PTY) LTD	Defendant

JUDGMENT delivered this 7th day of February 2012

NDITA; J

[1] This is an action in which the plaintiff claims the recovery of an amount of R100 000,00 (one hundred thousand) retained by the defendant under a forfeiture clause in a contract for the sale of land described as Erf 2168, Wilderness, George, Western Cape.

Pleadings

[2] According to the particulars of claim the plaintiff and the second defendant entered into an agreement for the sale of 8789 square metres of land for a purchase price of R3 800 000,00 (three million eight hundred and thousand).The second plaintiff nominated the first plaintiff as the purchaser, but irrevocably bound himself as surety and co-principal debtor for all obligations of the first plaintiff. Thus, he is sued in that capacity. In terms of the contract, the plaintiff had to pay R100, 000,00 as a deposit on account of the purchase price within 24 hours of the acceptance of the offer. The balance of purchase price was to be secured by a suitable bank guarantee to be furnished within 60 (sixty) days of the acceptance of the offer. The deed of sale provided that the defendant would be entitled to cancel the contract by a 7 (seven) day notice in writing to the plaintiff if the plaintiff failed to comply with any of the provisions thereof. In terms of clause 12.1.1, in the event of a cancellation, the plaintiff would forfeit the amount of R100 000,00 paid as a deposit.

[3] The plaintiff paid the amount of R100 000,00 but failed to provide a guarantee within the specified period and the defendant thereupon cancelled the contract. The cancellation was pursuant to a letter of the 26th July 2004 wherein the plaintiff confirmed that it was unable to deliver the guarantee. The letter read as follows:

"Dear Mr Erasmus

We are unfortunately unable to deliver guarantees for the Wilderness Property. It would greatly appreciated if you could pay the deposit which we have already paid to you back to us in the following account..."

[4] The defendant on 27 July 2004, also in a letter, drew the attention of the plaintiff to the forfeiture clause in paragraph 21.1.1 of the agreement. On the same day the plaintiff wrote to the defendant and stated that:

"Unfortunately I had to cancel the contract because of co-shareholders who could not deliver their share of finances.

I have in the mean time made a plan to carry on with this contract. Imperial Bank will contact you".

Indeed, later that very day, Imperial Bank confirmed that it had approved a loan in respect of the first plaintiff. The letter was in the following terms:

"Dear Sir

TRANSFER: KENNTNER WILDERNESS DUNE DEVELOPMENT (PTY) LTD/ W S KIRSTEN OR NOMINEE
PROPERTY: ERF 2168 WILDERNESS

We hereby confirm that loan has been approved for the above-mentioned client in the name of Tremendous Property Investments 8 CC.

Our attorneys Stadler and Swart will be instructed to attend to the documents as well as the registration of the bond. The contact person is Maryke Landman and can be contacted at (044) 8744090.

We will instruct them to issue your client with a guarantee as soon as possible.

We trust that you will find the above in order."

[5] Upon receipt of the Imperial Bank letter referred to above, the defendant advised the plaintiff that the sale already been cancelled due to the plaintiff's breach, and that in order to avoid further wasted costs, the plaintiff should not instruct its attorneys to proceed with the preparation of any documents. The plaintiff accepted the position as espoused by the defendant but pointed out that if the property had been sold for more than the amount offered by the plaintiff, the defendant could not claim to have suffered any damages and as such, the plaintiff was entitled to the return of the monies paid as a deposit. It is common cause that at the time of the hearing of the matter, the property in question had not been sold.

[6] The stipulation in the deed of sale for the defendant to retain the sum of R100 000,00 already paid, so avers the plaintiff, was a penalty stipulation within the meaning of section 4 of the Conventional Penalties Act 15 of 1962. Furthermore, the plaintiff claimed that it had a right to recover the money as the penalty was out of proportion to the prejudice suffered by the defendant. In addition, the defendant failed to mitigate its damages in the light of the fact that:

1) the plaintiff after cancellation of the contract, offered to purchase the property at the same price provided for in the cancelled contract of sale, but the defendant refused to accept

such an offer; which in turn would have the effect of lessening the damages and

2) the defendant withdrew the property from the market.

[7] Although the question of mitigation of damages was not pleaded by the plaintiff, in order to ensure that justice is done on the basis of what is just, fair and reasonable, I am obliged to consider it.[1]

[8] In response to the plaintiff's allegations, the defendant denied that the amount of R100 000,00 was out of proportion to the prejudice it suffered and pleaded that:

1. it was unable to sell the property to another purchaser for the same price;
2. the highest offer received for the property after cancellation was R3 000 000, 00 (three million) in which event it would suffer damages in the sum of R800 00,00(eight hundred thousand)'
3. the defendant will suffer further damages because of the delayed transfer once the property is eventually sold; and
4. the defendant is being held liable for payment of R210,000,00 (two hundred and ten) estate agents commission to George Real Estate on the sale of the property to the plaintiff.

[1] See Courtis v Rutherford and Sons CC & OTHERS V Sasfin (Pty) Ltd [1999] 3 All SA 639 (c)

[9] The defendant further pleaded that it suffered aggravation and inconvenience as a result of the cancellation of the agreement. Up to this point, the facts are common cause between the parties.

[10] In an attempt to demonstrate unreasonableness on the part of the defendant in failing to consider the plaintiff's offer to repurchase the property, accompanied by the guarantee from Imperial Bank after cancellation of the contract resulting in failure to mitigate damages, as well as to prove that the penalty was out of proportion to the harm caused by the plaintiff's breach, the plaintiff led the evidence of Mr Rian Kirsten. The defendant on the other hand sought to elicit facts to prove that the prejudice it suffered due to the plaintiff's breach render the penalty to be way below the harm it suffered, and as such is not out of proportion. Whereas the defendant does not have to plead and prove that it had done what is reasonable to mitigate its damages[2], given the fact that the onus is on the plaintiff, it nonetheless called Mr Erasmus in support the its contention.

Plaintiff's evidence

[11] Mr Rian Kirsten, a member of the first plaintiff, and also the second plaintiff's son and business partner confirmed the common cause facts alluded to earlier in this judgment. He and the second plaintiff are experienced property developers who between themselves had sold 8 properties . Mr Kirsten further confirmed that when the 60 days for the deliverance of the guarantee expired and plaintiffs were still unable to deliver

[2] See R H Christie, The Law of Contract in South Africa, 4th ed, Butterwoths, at page 641

the guarantee, they requested an extension of 14 days in an email dated 07 June 2004 wherein they stated that:

"Mnr Erasmus

Ons lening is goedgekeur by Imperial Bank. Al wat ons nou nog moet doen is die dokumente deur stuur vir hulle om te se waarvandaan die deposite kom. Ek het 'n week gesukkel om 'n afspraak te kry by my nuwe Standar Bank bestuurder – nou het ek 'n afspraak gekry, en nou is hy siek en die area bestuurder is op 'n kursus. Ons het twee maande terug ons bank verander van BOE/Nedbank na Standard Bank en ons eiendom is nog nie oorgebring Standard Bank toe nie.

Mnr Erasmus, ek soek nie 'n verkoning nie –ek vra net vir veertien dae uitstel.

WS KIRSTEN"

[12] On 8 June 2004, the defendant in response to the above email granted the fourteen day extension requested by the plaintiff. Mr Kirsten in his evidence however, did not shed any light as to what steps pursuant to the extension were taken to realise the provisioning of the requisite guarantee. The fourteen day extension expired on 21 June 2004 and by that time the guarantee had not been delivered. To this end, Mr Kirsten once again did not explain what the circumstances of the plaintiff were but confirmed that on 26 July 2004, the plaintiff in an email, advised the defendant that they were unfortunately unable to deliver the guarantee and as such sought a refund of the of the R100 000,00 deposit. Significantly, whilst not disputing that the contract was cancelled by the defendant because the plaintiff could not deliver

a guarantee, Mr Kirsten denied that the defendant was not able to sell the property to another purchaser at the same price on the basis that the plaintiff had made an offer of R3 800,000, 00 which was rejected by the defendant. Furthermore, Mr Kirsten, in cross-examination conceded that he was aware from previous transactions that conveyancers at attorney's firms draft all the documents necessary to give effect to the sale, and for that, they are entitled to charge for remuneration for services rendered. Even if registration does not take place, an attorney is entitled to charge a percentage of the prescribed fee. And this included preparing a court application to get the necessary clearance from the municipality.

[13] Clause 21 of the sale agreement provides that:

> *"The seller is liable for payment of commission at the rate of 7% (seven percent) excluding VAT, of the purchase price. The commission is payable to George Real Estate and/ or nominees on date of transfer of the LAND into the name of the PURCHASER."*

To this end, Mr Kirsten gave evidence to the effect that the estate agent responsible for the sale of the property in question, Mr Chris Van Niekerk advised that he would not insist on payment before the transfer of the property. This assertion was however, not confirmed as Mr Van Niekerk was not called to give evidence in support thereof.

[14] Mr Stelzner put to Mr Kirsten the actuary calculations projecting, based on the applicable repo rate, an estimate of the earnings the defendant

would have received had the plaintiff delivered the guarantee. The witness confirmed that the estimate of a loss of R200 000, 00 per annum as a consequence of the plaintiff's breach seemed correct. He also did not dispute that as at the time of the hearing of this matter, the property in question had not been sold.

The Defendant's evidence

[15] Mr Frederik Petrus Erasmus is an attorney and director of the defendant. In addition to confirming the facts which are not dispute, he testified that since the breach, the defendant has not been able to sell the property. According to the witness, on 06 April 2004, the defendant received an offer for the purchase of the property for an amount of R3,500 000,00 excluding VAT from a certain Mr Basson. This offer not only exceeded the offer of R3, 800 000,00 made by the plaintiff as the latter included 14% VAT and the monetary difference was R199 00, 00 (one hundred and ninety nine thousand), it provided for a 10% deposit, whereas the plaintiffs paid 2,8% deposit. Because of good relations between the defendant and the estate agent, Mr Van Niekerk, who had introduced the plaintiff, the defendant accepted the plaintiff's smaller offer. A second reason is that the Basson offer had precedent conditions requiring the defendant to obtain zoning subdivision approval before 30 September 2004.

[16] With regard to the inconvenience suffered by the defendant as a result of the breach, Mr Erasmus testified that as soon as the agreement was entered into, the defendant took immediate steps to prepare the transfer

documentation. The documentation had to be amended on advice from the second plaintiff that the property was no longer being purchased in his name but under that of the first plaintiff . Mr Erasmus gave evidence to the effect that the amendment caused him to suffer aggravation, both as an attorney and as a director of the defendant mainly because it required not the simple changing of names but perusal of resolutions and matters pertinent to close corporations. This was so because different considerations apply to close corporations on registration of property. Throughout this period, so testified Mr Erasmus, he was in constant telephonic contact with the director of the defendant who lives in Germany. According to the witness, the inconvenience and embarrassment commenced as soon as the plaintiff failed to deliver the guarantee after the expiry of the 60 days provided for in the sale agreement as he had to consistently explain to the owner of the property the cause and reason for the delay. This was coupled with the delay on the part of the George municipality to issue the rates clearance certificate. The delay necessitated taking immediate steps to ensure that the certificate would be available when transfer of the property was effected. In order to achieve this objective, the defendant prepared papers for an urgent court application compelling the municipality to furnish the certificate. All of these endeavours were aimed at attempting to ensure that when the guarantee would be furnished, transfer would be effected immediately. Because of the cancellation, the urgent application was abandoned as there was no longer expediency in approaching the court. The same application was brought in the year 2006. At this instance it included a rezoning application. According to Mr Erasmus, the rezoning application was brought in anticipation of prospective

purchasers demanding same. The municipality conceded prior to the hearing and an order as prayed for by the defendant was granted.

[17] After the expiry of 14 day extension for the delivery of the guarantee by the plaintiff, the defendant made numerous telephone calls to the plaintiff with a view to enquire about the provisioning of the guarantee to no avail. It is not in dispute that the defendant heard from the plaintiff only on 26 July 2004 in an email indicating that the latter could not provide the guarantee.

[18] According to Mr Erasmus's evidence, although it was open to the defendant to pursue an action for damages, it elected to rely on the forfeiture clause to satisfy the damages caused by the cancellation.

[19] Under cross-examination, Mr Erasmus was ceaselessly quizzed on the fact that the wasted costs pertaining to the bringing of the rates clearance certificate application were not completely occasioned by the sale agreement with the plaintiffs as it was based on the earlier application that the defendants did not pursue, almost word for word. He was adamant that there were additions to the subsequent application although in substance it more or less was the same as the earlier one. In any event, so testified Mr Erasmus, it remained necessary to revisit and readdress all of the contents of the application as a period of two years had lapsed after the drafting of the papers. The witness conceded that there no longer was liability for the estate agent commission in the sum of R210 000,00 as the claim had prescribed, but that in itself did not detract from the fact that an inconvenience was caused by

having to consistently attend to enquiries from the estate agent Mr Van Niekerk with regard to his claim for commission. The witness readily conceded that most of the inconvenience and aggravation arose as a result of work performed prior to the cancellation. Another issue raised by cross-examination was that in the light of the fact that the clearance certificate was obtained two years after cancellation of the contract, it may be inferred that the defendant could not effectively give transfer even if there was no cancellation and that that should have had an impact on the interest calculations depicted in the actuary report on page 160 of exhibit A. Mr Erasmus explained and reiterated that the application was not moved due to the cancellation. Had there been no breach, then the defendant would without a doubt have approached the court on an urgent basis as the papers had already been prepared. Furthermore, according to Mr Erasmus, it should be borne in mind that the calculations in the report were based on a conservative amount of R3 000 000,00 which is far less than the actual amount of the sale of the property, i,e R3 800 000,00.

[20] It will be well to recall that a day after the cancellation of the contract, the plaintiff stated in an email that it had made a plan to continue with the contract and Imperial Bank would be in touch with the defendant. In response to an assertion that the defendant would not have suffered any damages if it had accepted the offer, Mr Erasmus testified that the defendant was not in a position to accept the offer for two reasons. Firstly, the contract had already been cancelled and it could not be revived. Secondly, the letter from Imperial Bank did not specify the precise loan amount which had been approved. By

October 2004, the property was withdrawn from the market as the defendant was exploring various alternatives. According to the evidence of Mr Erasmus, as at September 2011, the defendant had lost interest amounting to approximately R800 00,00

The Issues

[21] It must be stated from the outset that in argument the plaintiff's counsel Mr Coetzee prudently did not persist with the argument that the plaintiff's letter advising the defendant that it wished to continue with the cancelled contract constituted a valid offer in terms of the Alienation of Land Act. Neither was it a revival of the cancelled contract of sale, as same would constitute a new agreement which had to comply with section 2(1) of the Land Act referred to above.

[22] The issues for determination are therefore as follows:

1. Whether the penalty is out of proportion to the prejudice caused by the breach. If it is, what is the margin of the disproportion?
2. Whether the defendant failed to mitigate, avoid, prevent or minimise accumulation of damages thereby entitling the plaintiff to the reduction of the penalty amount.

[23] The burden of proving that the amount of R100 000,00 is out of proportion to the prejudice suffered by the defendant and that the defendant failed to mitigate damages, thus rendering the penalty to be out of proportion

to the prejudice suffered, as well the extent to which the penalty should be reduced, rests with the plaintiff.

Applicable legal principles

[24] The plaintiff relies on the Conventional Penalties Act 15 of 1962. Section 1 of the Act reads:

> "(1) A stipulation, herein after referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict of a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, herein after 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 become so liable, is in this Act referred to as a penalty."

Section 3 provides as follows:

> *"If upon the hearing of 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 an extent as it may consider equitable under the circumstances. Provided that in determining the extent of the 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".*

[25] I must from the outset deal with the submission made by Counsel for the plaintiff, Mr Coetzee, to the effect that there should be a distinction between prejudice or damages suffered in the course of the contract on the one hand and then damages and prejudice suffered as a result of cancellation (my underlining). Mr Coetzee further argued that if the cancellation is the determining factor then whatever preceded the cancellation is not to be taken into account. This contention is unmeritorious for two reasons. Firstly, the wording of section 3 is clear and unambiguous; the phrase used is *"by reason of"* not *"as a result of"* the breach. Secondly, the phrase clearly does not call for the chronological analysis of what followed the cancellation, it calls for an exercise of determining what is causally linked to that which section 3 provides for. This point is succinctly set out by Bamford[3] as follows:

> *"In considering whether on a balance of probabilities, a penalty is out of proportion to the total prejudice, the court will, in exercising its discretion, take into account not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission."*

Similarly in **Van Staden v Central SA Lands and Mines**[4] the court said:

> *"It seems to me that everything that can be 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 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.*

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[3] Bamford 1972 SALJ page 229 at 234
[4] 1969 (4) SA 349 (W) 352-353

The test to all this is, in my view, subjective 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; nor is the date of the affliction of the harm or hurt relevant. If when the matter is heard by the court the harm or hurt has been inflicted, or if it appears that it might reasonably be expected to occur at some future date, the Court will have regard to it. 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."

Having regard to the above dictum, it seems to me that if this court were to embark on the exercise suggested by the plaintiff, that would defeat the very purpose of the provisions of section 3.

[26] The purpose of the provisions of section 3 were further considered and explained in **Western Credit Bank Ltd v Kajee**[5] in the following manner:

"If the penalty is out of proportion to the prejudice, the Court will reduce the penalty to such an 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 penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be rewarded."

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[5] 1967 (4) SA 386 (N) at 391 B-D

[27] I indicated earlier on in this judgment that the plaintiff bears the onus of proving that the penalty is disproportionate to the prejudice. With regard thereto, as well the position of the creditor, the Supreme Court of Appeal recently authoritatively restated the applicable principles **in Steinberg v Lazard**[6] and stated that:

> *"[6] Since it is common cause that the appellant has breached the terms of the undertaking, the respondent is entitled to the full penalty amount unless it is reduced in terms of s 3 of the Conventional Penalties Act of 1962...*
>
> *[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 1997 (4) SA 937 (A) at 942D-G).*
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> *[8] It was submitted on behalf of the appellant that , although the onus is on the debtor to establish the absence of prejudice, some prejudice is nonetheless an essential allegation to be made by a creditor who seeks enforcement of a penalty. That submission has no merit. There is absolutely no need for the creditor to allege that prejudice in claiming a penalty. The onus being on the debtor, it is for the debtor to allege and prove its absence, albeit that that might call for only prima facie evidence initially."*

[28] The weighing of the proportionality of the prejudice entails the exercise of a discretion. **In Western Bank Ltd v Meyer; De Waal; Swart & Ano.**,[7] the

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[6] 2006 (5) SA 42 SCA at paras 6-8
[7] 1973 (4) SA 697 at 701 B-C

court outlined certain features which ought to be taken into account and held thus:

> *" There are certain other general features which require consideration. Generally speaking, persons are free to contract on any terms they wish, provided that they do not infringe any recognised principle of public policy or rule of law, and such contracts when entered into freely and voluntarily, are held sacred and enforced by our Courts."*

Flowing from the above, and as correctly submitted by Mr Stelzener, it stands to reason that the Court in the exercise of its discretion should bear in mind that the object of the penalty clause is to compel the debtor to implement his obligations under the contract by providing harsh consequences should he or she default, but if it nevertheless is of the opinion that the penalty is unduly severe to an extent that it offends against the Court's sense of justice and equity, or there is good reason in law and the facts, then it shall reduce the penalty. It however, must not be swayed to ameliorate the provisions of a contract even when it feels that a party has struck a bad bargain.[8] That much is evident from section 1 of the Act which emphatically provides that penalties and pre-estimates of liquidated damages are enforceable.

[29] The pleadings reveal that the high water mark of the plaintiff's case is that the defendant failed to mitigate the damages it suffered by refusing to accept the plaintiff's offer after the contract was cancelled. The legal principles pertaining to mitigation of damages are that the defendant is bound to take reasonable steps to minimise his damages when faced with consequences of a breach by the plaintiff and the onus of proof, in *casu*, rests with the plaintiff.

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[8] Grinaker Construction (Tvl) (Pty) (Ltd) v Transvaal Provincial Administration 1982 (1) SA 96 (T)

The principle was elaborated upon by the Appellate Division (as it then was) in **Hazis v Transvaal and Delgoa Bay**[9] and at page 388 it was held that:

> *"This rule about mitigating of damages relates not to what the claimant in fact did, but to what he should have done. It is in essence a claim based on negligence_-neglect do what a reasonable man would do if placed in the position of the person claiming damages. The defendant in such a claim says "admitting that in fact you suffered damages, you only have yourself to blame for having suffered so much, or at all, because you did not take reasonable steps to protect yourself and, therefore, me" Both on principle and on precedent the burden of proving that the claimant for damages did not take reasonable steps to mitigate the damage which he actually suffered is upon the one who asserts that those reasonable steps were not taken."*

[30] Similarly, in **Courtis v Rutherford and Sons CC &others v Safin (Pty) Ltd** Van Zyl J, [10] reaffirmed the above principle and held that the duty to mitigate damages meant that a plaintiff should (within reason) prevent, avoid or minimise the accumulation of damages by effluxion of time.

Evaluation of the applicable law and evidence

[31] It is clear from the decisions I have earlier referred to in this judgment that the plaintiff bears the onus of alleging and proving that the defendant has suffered prejudice in an amount less than the penalty. Similarly, it must be borne in mind that the plaintiff bears the burden of proving that the defendant failed to mitigate its damages and that the penalty is hence out of proportion to the prejudice suffered by the defendant as required by section 3 of the Act.

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[9] 1939 AD 372
[10] [1999] 3 All SA 639 (C)

[32] It is common cause that the plaintiff failed to deliver the guarantee at the agreed time which resulted in the cancellation of the contract. The defendant on 27 July cancelled the agreement as it was entitled to in terms of clause 12. It must be mentioned from the outset that during the cross-examination of the defendant's witness, as well as in argument much, was made of the fact that the defendant failed to give before cancellation the notice of seven days as set out in the agreement. It has long been accepted law that when a time of performance is fixed, such as in *casu*, the debtor's failure to perform by that time is a breach, and no demand is necessary to make it so. In addition, the fact that the defendant chose not to pursue a damages action but instead relied on the penalty clause in an endeavour to reduce its loss, is a non-starter.

[33] The first question to be answered, taking into account the legal principles and the evidence, is whether it appears to the court that the penalty is out of proportion to the prejudice suffered by the creditor. The meaning to be assigned to the words, *'if it appears'* was determined in **Maiden v David Jones (Pty) Ltd**[11] and the court came to the conclusion that a court will not reduce a penalty if it is clear or plain that the penalty is not out of proportion to the prejudice suffered.

[34] Mr Kirsten, an experienced property developer, under cross examination accepted and understood the purpose of the forfeiture clause.

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[11] 1969 (1) SA 59 (N) at page 64

This concession is bolstered and acknowledged in a letter written by the plaintiff's attorney, Messrs Raubenheimers, to the effect plaintiff accepted the cancellation but calculations were necessary in order to determine whether the defendant was entitled to the full amount of R100 000, 00 paid as deposit. The letter goes further and states that:

> *" If the property was indeed sold for more than our client offered, then your client suffered no damages and our clients are entitled to the return of the monies currently held by you in trust."*

The evidence of Mr Erasmus to the effect that up to the present day, the property has not been sold is undisputed. Offers received were less than the price for which the plaintiff had contracted to buy the property. The highest offer received for the property after cancellation was for an amount of R3000 000, 00 (three million). On this basis, it can be accepted that the plaintiff accepted that it would not be entitled to a full refund. When Mr Kirsten was confronted with the interest the defendant had lost in the capital sum of approximately R800 000,00 based on the actuarial calculations, he conceded that it is possible that the calculations *"looked correct"*.

[35] The plaintiff could not dispute that all the work performed in preparation for the transfer of the property constituted wasted costs occasioned by the cancellation, but for the portion that could be salvaged and used for the launching of the urgent court application with a view to obtaining the rates clearance certificate. The same applies to time spent by the defendant assisting the plaintiff's consultants, Delplan, with the rezoning application. Even if it may be accepted that the seller on his own accord delayed the reselling of the property by withdrawing it from the market, the loss cause

caused by the breach remains exceedingly more than the amount paid as a deposit. In view of these considerations, and applying the dictum in **Maiden v David Jones (Pty) Ltd**[12] this is not a matter where it can be said that it is clear or plain that the penalty is out of proportion to the prejudice suffered. In my view, the plaintiff failed to prove that the penalty is disproportionate to damages suffered by the defendant.

[36] In evaluating the proportionality or lack thereof of a stipulated penalty, the failure to mitigate is one the factors a court will take into account. I have indicated earlier in this judgment that the plaintiff basis its contention on the fact that the defendant declined an offer to buy the property for the same price after cancellation. The circumstances around the second offer are somewhat puzzling. This I say for three reasons. Firstly, on 26 July 2004, the plaintiff stated that it was unable to deliver on the guarantee and requested a refund of the deposit paid. As soon as the defendant cancelled the agreement on 27 July 2004 stating that despite an extension until 21 June 2004, the plaintiff still failed to provide the guarantee and that the deposit would be forfeited, the second plaintiff immediately somersaulted and explained that the shareholders could not deliver their share of the finances but that he had in the meantime made a plan to carry on with the contract. The meantime obviously referred to the hours after the receipt of the cancellation letter. This I say because the cancellation was faxed through on the same day the guarantee from Imperial bank was obtained. In short, as soon as the plaintiff realised that the defendant was holding it to the terms of the contract and

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[12] Supra fn 11

refusing to refund the deposit, it all of a sudden managed to secure a guarantee from Imperial Bank, whereas only the previous day it sought a refund of its deposit professing inability to raise the guarantee. This conduct is in my view opportunistic. Secondly, the letter from Imperial Bank refers to a loan which has been approved but does not state the amount for which a guarantee would be issued. It will be recalled that the cancelled contract was not subject to a bond registration and as such unconditional. Clearly, the defendant was justified in refusing an offer which differed materially from the cancelled contract. Thirdly, by the time the plaintiff approached the bank, it was well aware of the fact that there was no agreement in place as it had been cancelled. Given the experience the second plaintiff has in property development, it should have been clear that the letter arrangement with the bank did not revive the cancelled contract.

[37] The aggravation and inconvenience caused by the plaintiff's cavalier attitude towards the terms of the contract and the opportunistic change of mind when faced with the consequences of the breach point to one conclusion that even if the defendant had a duty to mitigate the damages, the circumstances presented to it by the plaintiff precluded it from exercising such responsibility as there was no valid offer, neither was the cancelled agreement revived. I find difficult to believe that the plaintiff who had been granted a fourteen day extension, after which he nonchalantly and without even the courtesy of a full explanation simply advised that he was unable to furnish a guarantee and requested a refund would have the audacity to expect the defendant to mitigate costs on facts such as these. I am of the firm view

that no reasonable person in the circumstances of the defendant would have done anything more than it had. In my judgment, the plaintiff failed to discharge the onus of proving that the defendant failed to mitigate the damages and as such, the plaintiff is not entitled to the reduction of the penalty.

[38] Having held that the plaintiff to discharge the requisite onus that the penalty is out of proportion to the prejudice, their claim falls to be dismissed with costs. In the circumstances the following order will issue:

The plaintiff's claim is dismissed with costs, which costs are to be paid by the plaintiffs jointly and severally, the one paying the other to be absolved.

T. NDITA

Judge: Western Cape High Court