Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 9928/2022

Before: The Hon. Mr Justice Binns-Ward
Hearing: 16 May 2023
Judgment: 22 May 2023

In the matter between:

PENDIGO TRADE AND INVESTMENT (PTY) LTD

t/a ITEC FINANCE Plaintiff

and

SUZANNE MICHELLE POTGIETER Defendant

Summary judgment – Section 3 of Conventional Penalties Act 15 of 1962 – Statement in *Premier Finance Corporation (Pty) Ltd v Steenkamp* 1974 (3) SA 141 (D) that '*summary judgment proceedings are wholly inappropriate for recovering a penalty*' explained and qualified – Summary judgment granted.

JUDGMENT

BINNS-WARD J:

[1] Bergrivier Diesel (Pty) Ltd t/a Potgieter Transport entered into a written agreement in September 2017 in terms of which it hired certain goods from the plaintiff for a minimum period of 60 months. The rental was payable monthly in advance. It was set at R15372.90 per month inclusive of VAT at the commencement of the lease, to increase annually by 10 per cent.

[2] It is not necessary to describe the terms of the agreement in detail. It was common ground that the goods in question were purchased by the plaintiff at the instance of Potgieter Transport for the sole purpose of being hired to it. The agreement recorded that the plaintiff did not warrant the quality of the goods or that they were fit for purpose. As the plaintiff's counsel aptly observed, the contract between the plaintiff and Potgieter Transport was in essence 'a financing agreement'. The goods in question were itemised in the agreement, in several instances with reference to their respective serial numbers. The agreement was not subject to the National Credit Act 34 of 2005.

[3] Clause 17 of the hire agreement provided:

> 'You [ie Potgieter Transport] acknowledge and agree:
>
> 1. that you selected and inspected the goods prior to signing the Agreement and/or the Schedule and are satisfied with the goods and that they suit your purpose;
> 2. that all warranties implied by the common law are excluded and that no representations of any nature have been made by or on our behalf; and
> 3. that once the Schedule to the Agreement is signed by you, all the risk in the goods passes to you.'

[4] On the same day that the hire agreement was concluded, the defendant executed a document entitled 'Guarantee', in terms of which, insofar as currently relevant, she bound herself in favour of the hirer or its cessionaries as surety for, and co-principal debtor with, Potgieter Transport in respect of the latter's obligations under the hire agreement.[1]

[5] Potgieter Transport fell into arrears with the payment of rental in terms of the hire agreement. As at 1 February 2022, the amount in arrears was R332 898.07. Clause 7.2 of the agreement permitted the plaintiff in the given circumstances to terminate the contract, take possession of the goods, claim the outstanding rentals and also '*as agreed pre-estimated liquidated damages, the aggregate value of the rentals which would have been payable in terms of the Agreement up to the earliest possible date upon which this Agreement could otherwise have terminated by notice*'. The plaintiff elected to exercise its rights in terms of the subclause. It alleges the value of future rentals that would have been payable in respect of the executory period of the contract when it was cancelled is in the sum of R109 399.60.

[6] In the current action, the plaintiff has sued the defendant on the basis of the forementioned 'guarantee' for payment of R442 297.67, being the sum of the arrears and future rentals described in the preceding paragraph. The defendant opposed the claim and delivered a plea in which she raised the following defences:

1. An allegation that the goods rented to Potgieter Transport were '*from the outset' faulty and/or defective, not fit for their intended purpose*' and '*could not be used or enjoyed ... as contemplated by the Hire Agreement*'

2. A denial that Potgieter Transport had been in arrears with its rental payments, it being pleaded that the principal debtor was entitled to withhold payment in terms

[1] The term 'guarantee' is often used synonymously with 'suretyship' in common parlance. The type of contract properly called a guarantee is, however, of a quite distinct character. As to the distinction between the two forms of contract, see Forsyth & Pretorius, *Caney's Law of Suretyship* 6ed (Juta), Chapter 2 §3.

of the *exceptio non adimpleti contractus*, '*alternatively, the Plaintiff's breach of the Hire Agreement, to the defects which, after notice, Plaintiff failed to rectified*' (sic).

3. That '[i]*nsofar as Plaintiff claims pre-estimated liquidated damages, ... such a claim constitutes a penalty in terms of Section 1(1) of the Conventional Penalties Act 15 of 1962 ("the Act")*' and '*the future rentals payable constitute a penalty ...* [which] *is excessive ...taking into consideration that (1) the principal debtor notified the plaintiff during or about October 2017 of the defects and tendered return of the goods;* [and] *(2) Plaintiff has to date failed to take delivery of the goods or to mitigate its damages*'

[7] The plaintiff applied in terms of Rule 32 for summary judgment. In her opposing affidavit, the defendant reiterated the defences advanced in her plea. In the affidavit, however, she averred that the plaintiff had failed to perform under the hire agreement in that it had not delivered the stipulated goods to the principal debtor. The defendant made the following averments in that regard:

'22. In its present form, the plea records only that goods delivered were defective, unfit for their intended purpose and/or could not be used.

23. To be clear, there has, in fact, been no proper performance by the plaintiff at all. I say so since the plaintiff persistently failed to deliver the goods contracted for. Instead the plaintiff provided the Principal Debtor with goods which fell beyond, and usually below, the specifications set out in the Master Agreement of Hire. By failing to deliver the specified goods, the plaintiff wholly failed to perform its obligations under the Master Agreement of Hire.

24. In the circumstances, I humbly submit that my defence as to the goods is not that the goods were defective, but rather, that the goods as contemplated by the Master Agreement of Hire were never delivered in the first place.

25. I cannot account for the above as I was never consulted in the preparation of the plea.'

[8] The defendant sought to explain her stated non-involvement in the preparation of her original plea by averring that she had sold Potgieter Transport as a going concern to a certain Mr Imraan Chand on 1 March 2021, and that when proceedings were instituted against her in June 2022 Mr Chand had informed her that he would refer the matter to his attorneys, Potgieter & Associates. She averred that she had thereafter heard nothing further. Potgieter & Associates was the firm of attorneys that initially placed itself on record as the defendant's attorneys of record in the action. It filed a notice of withdrawal as attorneys of record on 4 November 2022. Notice of set down of the summary judgment application was thereafter served by the sheriff on 9 November 2022, and the defendant's current attorneys of record placed themselves on record by notice also dated 9 November 2022. The summary judgment application was set down for hearing on 29 November and notice of the defendant's intention to oppose the application and amend her plea was given on 25 November 2022.

[9] The amendment to the plea provided in relevant as follows:

'Save to admit the conclusion of the Master Agreement of Hire on the terms alleged, the Defendant denies the remaining allegations contained in this paragraph [it is not clear what 'remaining allegations' the pleader had in mind], in particular, the allegation that the Plaintiff delivered the goods to the Principal Debtor. In amplification:

3.1 The goods delivered by the Plaintiff to the Principal Debtor fell beyond and predominantly below, the specifications set out in the Master Agreement of Hire;

3.2 As such, the Plaintiff therefore failed to deliver the goods contracted for under the Master Agreement of Hire; and

3.3 Accordingly, the Plaintiff has wholly failed to perform its obligations under the Master Agreement of Hire.'

[10] It is undisputed that the principal debtor paid the rental in terms of hire agreement for more than two years before falling into arrears. (During argument of the application, the plaintiff's counsel stated, without objection from the defendant's counsel, that 32 months' rental had been paid.) In her amended plea the defendant pleaded that '*to the extent that the Principal Debtor made any payments to the Plaintiff during the course of the Master Agreement of Hire, such payments were made in good faith, as a show of the Principal Debtor's willingness and ability to perform*'.

[11] The requirements that a defendant has to satisfy to avoid summary judgment are trite; see *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), at 228B-H and *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 426A-E. The amended rule 32 has not affected the position; see *Tumileng Trading CC v National Security and Fire (Pty) Ltd; E and D Security Systems CC v National Security and Fire (Pty) Ltd* [2020] ZAWCHC 28 (30 April 2020); 2020 (6) SA 624 (WCC), endorsed in *Cohen N.O and Others v D* [2023] ZASCA 56 (20 April 2023); [2023] JOL 58657 (SCA), at para 29.

[12] If a defendant can show on the face of it that it has a legally cognisable defence and that the defence is genuine or bona fide, summary judgment must be refused. The defendant's prospects of success are irrelevant. As I remarked in *Tumileng* supra, at para 25, 'The assessment of whether a defence is bona fide is made with regard to the manner in

which it has been substantiated in the opposing affidavit; viz. upon a consideration of the extent to which "*the nature and grounds of the defence and the material facts relied upon therefor*" have been canvassed by the deponent. That was the method by which the court traditionally tested, insofar as it was possible on paper, whether the defence described by the defendant was "contrived", in other words not bona fide.'

[13] The defence that the plaintiff failed to deliver the goods that were subject of the hire agreement has been stated in the baldest of terms. The hire agreement does not contain any specifications in respect of those goods. The goods concerned are merely identified in the schedule to the agreement. It is in any event clear from the provisions of the hire agreement alluded to earlier in this judgment that the plaintiff would have had no interest in the performance specifications of the goods because the hirer chose them and the lessor gave no warranty concerning their performance or suitability.

[14] The complaints about the performance of the goods articulated in the defendant's affidavit therefore appear to be irrelevant. It is also not at all clear why they were raised if the defence actually is that the goods that the plaintiff placed in Potgieter Transport's possession were not those listed in the schedule to the hire agreement.

[15] If the goods that the plaintiff supplied to Potgieter were not those stipulated in the schedule to that agreement, one would have expected the defendant to be able to describe the character of the goods that the principal debtor did receive, so as to demonstrate the difference between what was given and what was listed in the schedule to the hire agreement. Moreover, if there had been a wholesale non-performance by the plaintiff of the nature described by the defendant, one would have expected an immediate protest from Potgieter Transport that the goods were not those that it had chosen. There is no evidence at all of any such protest, nor is there an explanation as to the peculiar absence of one.

[16] All that the defendant has done is to attach to her opposing affidavit an exchange of email correspondence early in November 2017 between one Alwyn van Deventer, apparently of Potgieter Transport, and the plaintiff, in which Van Deventer complained about some unidentified computer software (it is referred to in the email as '*this app'*) not functioning satisfactorily. The response suggested that the problem might have to do with an ADSL line, and mooted as a solution running the app '*over a Diginet line'*. (The court can take judicial notice that ADSL and Diginet lines are two means of internet connectivity offered by Telkom.) The connection between 'the app' referred to in the correspondence and any of the goods described in the schedule to the hire agreement is not evident. The evidence also does not explain the relevance of correspondence about a complaint about an unidentified app if the issue was that the plaintiff had failed to deliver the goods that Potgieter Transport had agreed to lease from it.

[17] The evidence adduced by the defendant concerning the plaintiff's alleged non-performance in terms of the hire agreement is not only inexplicably opaque, it is also inconsistent with the inherent probabilities. Why would any business pay rental in a not insignificant amount for more than two years on goods that it had not agreed to hire, and which it was unable to use? In the context of the defendant's failure to describe the goods placed in principal debtor's possession and what it did with them, the suggestion that the payments were an act of good faith kept up in the hope that the plaintiff would eventually provide the items listed in the schedule to the hire agreement seems risible. The cumulative effect of the aforementioned deficiencies in the setting out of her defence by the defendant leave the court unpersuaded as to its genuineness.

[18] The defendant's counsel correctly conceded that if the defendant had failed to make out a bona fide defence on the basis of her contention that the plaintiff had failed to place the principal debtor in possession of the goods subject of the lease, the question of her reliance

on the *exceptio non adimpleti contractus* did not arise for consideration. There is accordingly no need to discuss it.

[19] The defendant's reliance on the Conventional Penalties Act 15 of 1962 can bear only on that part of the plaintiff's claim for payment of R109 399.60 in respect of the rentals that the principal debtor would liable to pay from termination of the hire agreement to the end of the stipulated initial 60-month period of the lease. I accept, despite the plaintiff's contention to the contrary, that its claim for pre-estimated (or liquidated) damages in terms of the agreement is pursuant to a penalty stipulation with the meaning of the Act.[2]

[20] Section 3 of the Conventional Penalties Act provides:

> '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.'

[21] The wording of s 3 can be construed to the effect that its provisions may be applied by the court *suo motu*. It has been remarked in that regard that the provision not only invests the court with a power to make an equitable order but also imposes a duty upon it to do so when a penalty appears to it out of proportion in the sense contemplated. Not having had the

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[2] Section 1 of the Act provides:
'***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.'

benefit of argument on the point, I have assumed for the purposes of this judgment that the authorities that have construed s 3 of the Conventional Penalties Act to impose a duty on the court in appropriate cases to apply the provision *mero motu*, which appears to imply an inquisitorial approach, were correctly decided. That construction is, however, not easy to reconcile with the appeal court authority referred to later in this judgment that has held that s 3 places a true onus on a debtor seeking to mitigate the effect of a penalty stipulation to prove that the penalty is disproportionate to the prejudice suffered and to what extent, which appears to imply a strictly adversarial approach.

[22] In the current matter the extent of the penalty does not appear to me, on the face of it, to be out of proportion. It equates, subject to the effect of any mitigatory measures that the plaintiff might reasonably be expected to avail of, to the sum that the plaintiff, absent the penalty stipulation, would have been able to claim by way of general contractual damages, viz. the amount necessary to put the plaintiff, in monetary terms, in the position it would have been if the principal debtor had not breached the contract.

[23] Insofar, however, as the defendant would apparently nevertheless seek to persuade a trial court that the penalty was disproportionate, she would bear the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent; see *National Sorghum Breweries (Pty) Limited t/a Vivo Africa Breweries v International Liquor Distributors (Pty) Limited* [2000] ZASCA 70 (28 November 2000); 2001 (2) SA 232 (SCA); [2001] 1 All SA 417 (A) at para 8 and *Steinberg v Lazard* [2006] ZASCA 55 (31 March 2006); 2006 (5) SA 42 (SCA) at para 7, citing *Smit v Bester* 1977 (4) SA 937 (A) at 942D – G. The defendant has not given any indication in her opposing affidavit of the evidence she would adduce to discharge the onus. (This was perhaps not surprising because the exercise would necessarily have entailed admitting the plaintiff's claim to some extent, even if in a

lesser sum than that prayed for in the summons. The plaintiff would then, on any approach, have been entitled to summary judgment on the admitted amount.)

[24] As the defendant failed to give any indication in her opposing affidavit of how she might be able to discharge the onus in terms of s 3 of the Conventional Penalties Act, I would have been inclined without more ado to hold that there was nothing in her reliance on the provision. However, it came to my notice that there is a statement in *Christie's Law of Contract in South Africa* that suggests '*summary judgment proceedings are wholly inappropriate for recovering a penalty*'.[3] *Premier Finance Corporation (Pty) Ltd v Steenkamp* 1974 (3) SA 141 (D) at 144B and *Peters v Janda* 1981 (2) SA 339 (Z) are cited in support of the proposition.[4] I therefore invited, and subsequently gratefully received, post-hearing submissions from counsel on the point.

[25] A consideration of the first mentioned judgment cited in *Christie* reveals that although Howard J, in *Premier Finance Corporation*, did indeed state that '*summary judgment proceedings are wholly inappropriate for recovering a penalty*', the learned judge did not intend to state that position as an unqualified premise. As always, the intended import of the statement is to be found not in the quoted words read in isolation, but rather from considering them with regard to the context in which they were employed.

[26] It was common ground in *Premier Finance Corporation* that summary judgment should be refused because the defendants had shown that they had bona fide defences to the plaintiff's claim. The only issue that the court had to determine was whether the plaintiff should have to pay the defendants' costs of suit in the application because it knew or should

[3] GB Bradfield, *Christie's Law of Contract in South Africa*, 7ed (LexisNexis) at p. 664. That is the most recent edition of the work provided to judges in the Western Cape Division of the High Court. Counsel advised that it is repeated in the current (8th) edition.

[4] Id. in footnote 471.

reasonably have appreciated before bringing the application that summary judgment proceedings were inappropriate in the peculiar circumstances of that case.

[27] The defendants in *Premier Finance Corporation* had stood as sureties for the principal debtor in respect of the latter's obligations in terms of its purchase by way of a hire purchase agreement of an 'Engel injection moulding machine complete with dies and heads and moulds'. Similarly to the position in the current matter, the hire purchase agreement provided that in the event of a default by the purchaser, the credit provider could cancel the agreement, repossess the goods and claim payment of all of the instalments that would have been payable over the executory period of the contract. In that case, the credit provider cancelled the 60-month hire purchase agreement after the elapse of only one year of the contract period and sought, in terms of the penalty stipulation, to exact payment of the instalments that would have fallen due over the remaining four years of the hire purchase term.

[28] Responding to the defendants' contention that the plaintiff should have foreseen in the circumstances of that case that they would ask the court, in terms of s 3 of the Conventional Penalties Act, to reduce its claim,[5] and therefore should never have applied for summary judgment, Howard J said (at p. 144D-G) –

> 'I do not consider that there is sufficient proof that the plaintiff knew or must have known that the question of the penalty would be raised. Nevertheless, I think that under the circumstances of this case the plaintiff acted at its peril in applying for summary judgment. In view of the nature of the plaintiff's business its credit manager was probably aware of the operation of the Conventional Penalties Act, and in any event it was represented by attorneys. Its representatives knew that a very substantial

[5] At that time applications for summary judgment were brought and determined before the delivery by the defendant of a plea.

> portion of the claim represented finance charges the payment of which had in terms of the agreement been spread over a period of five years and that it was seeking to recover payment of such finance charges after the expiry of only one year of that period. If they had paused to consider these facts they would have realised that the question of the penalty would in all probability be raised by the defendants or the Court. The Court would probably have acted *mero motu* even if the defendants had not taken the point, for the word "may" in sec. 3 of the Act does not merely confer a discretion, but a power coupled with a duty. (See *Western Credit Bank Ltd*. v *Kajee*, 1967 (4) SA 386 (N) at p. 391B; [6] *Western Bank Ltd*. v *Meyer; de Waal; Swart and Another*, 1973 (4) SA 697 (T) at p. 699E). In my view the plaintiff ought reasonably to have expected the question of the penalty to be raised, and if it launched the application without giving due consideration to that possibility it deserves to be ordered to pay the defendants' costs.'

See also *Bester v Smit* 1976 (4) SA 751 (C) at 760E-G. It is clear from the passage just quoted from *Premier Finance Corporation* and that cited in *Bester v Smit* that the court in both matters apprehended that the equitable mitigation of the stipulated penalties being claimed in those cases was, *on the facts pleaded by the plaintiff*, a readily foreseeable triable issue.

[29] The statement from the judgment in *Premier Finance Corporation* that is quoted in *Christie* appears in the following passage (at p. 144B-C):

> 'In my opinion summary judgment proceedings are totally inappropriate for deciding whether a penalty is out of proportion to the prejudice suffered, or for determining the extent to which a penalty should be reduced. I agree with Mr. *Gordon* that <u>in this case</u>

[6] The judgment in *Kajee* should be read subject to the qualifications concerning it expressed in *Steinberg v Lazard* supra, at para 9-10.

> the application for summary judgment was bound to fail once the question of the penalty was raised. I did not understand Mr. *Law* to dispute this. His answer to Mr.*Gordon's* submissions on this part of the case was that it had not been proved that the plaintiff *must* have known that the point would be raised, and that it was entitled to make and persist with the application until such time as the point was taken'

The phrase that I have underlined in the passage makes it clear that the statement in the preceding sentence, which is quoted in *Christie*, was not intended to imply that a defendant has only to refer to s 3 of the Conventional Penalties Act to ward off a summary judgment application or that a plaintiff seeking to exact a penalty was in every case precluded from applying for summary judgment.

[30] The import of the judgment is that where it appears that the application of s 3 of the Act is or could be a cognisable issue in a case, summary judgment is wholly inappropriate because a forensic investigation into the proportionality of the penalty will be necessary. *Premier Finance Corporation* was an example of a matter in which the probably unfairly disproportionate effect of the penalty was manifest on the pleaded facts. In other words, it was the sort of case in which the court arguably would be under a duty to investigate the justness of enforcing the penalty even if the defendants did not raise the issue themselves.

[31] In a case like the instant one, where the penalty on its face did not appear to be disproportionate, it would be for a defendant intending to rely on s 3 to plead the alleged disproportionality in its plea and to expand on the bases for its contention in any affidavit subsequently deposed to in opposing a summary judgment application. In the summary judgment proceedings, such a defendant would be expected to establish the bona fides of its invocation of the provision by giving an indication of the evidence it would adduce to discharge the onus on it to prove that the penalty was disproportionate to the prejudice suffered and to what extent. Merely identifying that the claim involved the enforcement of a

penalty stipulation and referring to s 3 would not be sufficient, without more, to make out a cognisable defence or establish the existence of a triable issue.

[32] *Peters v Janda* involved an application for summary judgment in which the Zimbabwean equivalent of s 3 of the Conventional Penalties Act was invoked. Far from endorsing the proposition that summary judgment was inappropriate in every case in which recovery of a penalty was sought, Waddington J, referring to the statement in *Premier Finance Corporation* that is quoted in *Christie*, said (at p. 343G), '*I would not be prepared to go so far as to say that this would be the inevitable result in every such case*'.

[33] The matter of *Citibank NA, South Africa Branch v Paul NO and Another* 2003 (4) SA 180 (T), to which the plaintiff's counsel referred in argument, serves as an example of a matter in which, albeit without any consideration of Howard J's statement in *Premier Finance Corporation* or the treatment thereof in *Christie*, summary judgment was granted in the face of the defendant's purported reliance on s 3 of the Conventional Penalties Act.

[34] For these reasons I have not been persuaded that the defendant has a bona fide defence to the plaintiff's claim.

[35] The plaintiff claimed costs against the defendant on the scale as between attorney and *own* client. Whilst the hire agreement provides for costs on that scale in proceedings between the plaintiff and the principal debtor, the 'guarantee' upon which the defendant has been sued in the current proceedings provides (in clause 11) for costs on the less punitive scale as between attorney and client.

[36] An order will therefore issue in the following terms:

1. Summary judgment is granted against the defendant in favour of the plaintiff for payment of the sum of R442 297.67, together with interest thereon *a*

tempore morae at six per cent above the prevailing base rate at which the plaintiff's bankers advance loans on overdraft.

2. The defendant shall be liable for the plaintiff's costs of suit on the scale as between attorney and client.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff's counsel:	**M. Botha** **(Heads of argument drafted by G. Loubser.)**
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