NOT REPORTABLE 21 SEPTEMBER 2007

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 21236//2003

In the matter between:

FRIK VAN RENSBURG APPLICANT

And

34.

JACQUES RUBEN EYBERS

1ST Respondent

2ND Respondent

JOHAN RUBEN EYBERS

JUDGMENT

RAULINGA. AJ

[1] In this matter Applicant approaches the court with an application for the following relief:

1.1 That the settlement agreement per annexure "8083" to the founding affidavit be made an order of court.

1.2 That the Respondents be ordered to pay the applicant the amount of R 122 819, 99 plus interest at a rate of 15.5% per annum, jointly and severally, the one paying and the other to be absolved.

1.3 Costs of the application.

1.4 Further and/or alternative relief.

[2] The respondents oppose the application on the grounds that the penalty is out of proportion to the prejudice suffered by the applicant and that the amount of R 2 623, 79 interest and the capital amount have been paid.

[3] Respondents have filed an application for the applicant to pay costs for condonation, which emanates from a letter sent to the respondent by the applicant advising that respondent should apply for condonation. Now, therefore, the respondents instead are of the view that the applicant is being unreasonable and that he is the one who must pay the costs.

[4] As can be seen from the papers, the respondents application is ancillary to applicant's application, and they will be dealt with together.

[5] The applicant is Frick Van Rensburg, an adult person residing at 225 Cindy Street, Waterkloof, Pretoria, Gauteng.

[6] The first respondent is Johan Ruben Eybers, an adult male residing at 509 Ridgeway, Waterkloof, Pretoria.

[7] First and second respondents are partners in Eybers & Associates Interior Bk, a close corporation with its head office at suite 2, 267 Waterkloof Road, Brooklyn, Pretoria.

[8] The parties concluded a settlement agreement on the 28th September 2006.

[9] Once the settlement agreement was concluded, respondents made the first payment on the 7th October 2006, the second payment on the ih

November 2006 and the third payment on the 8th December 2006, instead of the yth December 2006. The applicant avers that the respondents were out of time with the last instalment. The applicant now claims relief for interest at 15.5% per annum on the capital

amount.

[10] The applicant argues that since the parties have settled for an amount R 1500 00 and that since the respondents failed to honour the contract, the original amount of R 1 77 437, 00 should become due and payable. The respondents reject this contention.

[11] In **Burger v Central South African Railways 1903 TS 576** Innes CJ said that:

> *"our law does not recognise the right of* a *court to release* a *contracting party from the consequences of an agreement duly entered into by him merely because that agreement appears to be unreasonable."*

[12] "And even before the demise of the exception doli qeneralis it was settled that the exception would not be used to give relief against unfair terms or the fact that the other party had driven a *hard, harsh bargain."* R. H. Christie: *'The Law of Contract in South Africa* page 14. He goes further to say the following:

> *"But this general principle whittled away by the common law, which will not enforce* a *contract that is unreasonable in restraint of trade, or an unreasonable term in* a *contract that is signed without being read or in an unsigned document such* as a *ticket."* Christie, *supra,* page 15.

[14] The original summons was issued for a claim of R 177 432, 00 plus interest at the rate of 15.5% per annum with effect from the 30th July 2003. On the 28th September 2006 this amount was replaced by an amount of R 150 000 when the parties entered into a settlement agreement. **Massey-Ferguson (South Africa) Ltd v Ermelo Motors**

(pty) Ltd and Others 1973 (4) SA 206 (T) at 215 E-G, in which Viljoen said:

> *"No matter the applicant might have proved in the trial initiated by it,* a *settlement was reached whereby the respondents acknowledged liability in an amount* of *R* 65 *000,* 00 *and whereby the parties agreed in what manner this amount should be paid. A transaction was effected and the original debt was wiped out".*

[15] In *casu* the parties concluded a settlement agreement of R 150 000, 00 which wipes out the original debt of R 177 437, 00. Had the respondents performed timeously in terms of the settlement their obligation was to pay R 150 000, 00 with interest at the rate of 15.5% per annum. Massey-Ferguson (SA) Ltd v Ermelo Motors Ltd *supra* at 215 G-H.

[16] A claim for interest in breach of the *in duplum* rule did not differ in principle from for example, a claim in breach of section 3 (1) of the Conventional Penalties Act 15 of 1962, which prohibited the recovery of damages in addition to or instead of a penalty clause. F & I Advisors (EDMS) BPK en 'n Ander v Eerste Nationale Bank Van Suidelike Afrika BPK 1999 (1) SA 515 (SCA at 525 E-G/H.

[17] In Western Bank Ltd v Meyer Western Bank Ltd, Western Bank Ltd v De Waal and Western Bank Ltd v Swart and Another 1973 (4) SA 697 (T) it was said that the court in the exercise of its discretion should only interfere if, bearing in mind that an object of a penalty clause is to compel the debtor to implement his obligations under the contract by providing harsh consequences should he default, it never the less 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. The court held that as the amounts claimed were out of proportion to the prejudice, that they

should be reduced by the amounts that they exceeded the actual prejudice.

[18] In casu, in terms of the settlement agreement the respondents were to pay R 150 000, 00 plus 15.5% per annum failing which the original amount of R 177 437,00 would become due and payable.

[19] If there is any prejudice that the applicant would have suffered under the settlement agreement is the non-payment of the outstanding amount plus interest immediately after the 7th December 2006. The respondents failed to pay the last instalment of R 50 000, 00 plus interest on the th December 2006 and as a result the applicant suffered prejudice.

[20] However, the respondents paid the amount of R 50 000, 00 on the 8th December 2006 and later on paid an amount of R 2 623, 79 interest. This leaves the applicant prejudiced for a day by an amount of R 50 000, 00 plus interest and thereafter interest outstanding from the 8th December 2006 to date.

[21] The intention of the parties, in *casu,* was to consider the stipulations as a penalty clause. See Christie *supra* at page 562, where the following is said:

> *"If the object* of *such term is to act in terrorem and dissuade the party from committing* a *breach for fear* of *the consequence, it is properly described* as a *penalty clause."*

[22] The conclusion of the agreement of the 28th September 2007 was to inflict fear on the respondents so that they could be under an obligation to pay. It is my undertaking, this amounts to a penalty clause.

[23] There is no water tight definition or description on when a penalty is considered to be out of proportion to the prejudice suffered by the creditor.

[24] The case of **Van Staden v Central SA Lands and Mines 1969 (4) SA 349 (W) at 352-353,** gives guidance:

> *"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 authorities, 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.* [11]

[25] I am of the view that the decision must be a principled one. The court should be able to link the proportionality to the prejudice suffered.

[26] I now deal with late filing and condonation.

[27] The Notice of Motion was delivered to the respondents' attorneys on 20th February 2007. The Notice of Intention to Oppose was delivered to the applicant's attorneys one day late on the 28th February 2007.

[29] The respondents failed to file their answering affidavit within fifteen (15) days.

[30] Once the answering affidavit was filled, applicant suggested to the respondents to formally apply for condonation. Respondents have now

[28] On 17th May 2007 the matter had to be postponed at the instance of the respondents because they had not yet filed an answering affidavit. On the same day the court ordered that the respondents pay the costs on an attorney and client scale and further, that the respondents should file their answering affidavits within fifteen (15) days.

applied for condonation for which applicant requests that respondents should pay the costs.

[31] In **United Plant Hire (pty) Ltd v Hills and Others 1976 (1) SA 708 (AD) at 720 E-F** the court held that:

> *"It is well settled that, In considering applications for condonation, the Gourl has* a *discretion, to be exercised judicially upon* a *consideration* of *all* of *the facts; and that in essence it is* a *question* of *fairness to both sides ... relevant considerations may include the degree* of *non-compliance with the Rules, the explanation therefore, the prospects* of *success on appeal, the imporlance* of *the case, the respondent's interest in the finality* of *his judgment, the convenience* of *the Gourl, and the avoidance* of *unnecessary delay in the administration* of *justice. "*

[32] The respondents in *casu,* give a number of reasons for the late filing of papers, most of which are not acceptable; to wit:

32.1. Die leer van die respondent was per abuis nie gedagboek nie en is daar dus nagelaat om betyds 'n opponerende eedsverklaring van die Respondente voor te berei.

32.2. Die Kennisgewing van Plasing van die aansoek vir aanhoor op 17 Mei 2007, was op ons kantore beteken en was die datum eweneens nie in my dagboek aangeteken nie.

32.3. My vader is op 15 April 2007 oorlede en was ek vir ongebeer 10 (tien) dae nie op kantoor nie.

32.4. Dit was eers op 16 Mei 2007 dat ek bewus geword het van die aanhoor van die aansoek op 17 Mei 2007.

33.This was the explanation given for the postponement of the 17th May 2007. No sufficient explanation is given for failure to comply with the 15 days as indicated in the court order. When the factors are taken cumulatively it is clear that there has been disregard of the rules by the respondents.

35.However, in view of the fact that there was a time when the attorney for the respondents was absent from work as a result of his father's death, condonation is granted but at a cost.

35. **It is therefore ordered:**

(i) That the settlement agreement is made an order of court.

(ii) That the penalty is reduced to an amount which is to the nearest fraction of % of R 122 819, 99 with interest at 15.5% per annum.

(iii) That the respondents are to pay the said amount to the plaintiff jointly and severally, the one paying the other to be absolved.

(iv) That respondents pay the costs for condonation on an attorney and client scale.

(v) That each party pays its own costs for this application.

T. J. RAULINGA ACTING JUDGE OF THE HIGH COURT