IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

REPORTABLE

CASE NO: 14082/2011

In the matter between:

TETRA PAK S.A (PTY) LIMITED — Plaintiff

and

BLAKEY INVESTMENTS (PTY) LIMITED — First Defendant

SUMAN PANDAY — Second Defendant

ORDER

(a) The judgment granted by the registrar on 6 March 2020 is rescinded and set aside.

(b) The penalty provided for in the settlement agreement of 17 May 2019 is reduced to nil and clause 4 thereof declared unenforceable.

(c) It is declared that the defendants have complied fully with their obligations under the settlement agreement.

(d) The plaintiff (the respondent in the application) is ordered to pay the costs of the application.

JUDGMENT

Delivered on: 11 March 2021

Ploos van Amstel J

[1] The applicants in this matter (the defendants in the action) seek an order declaring that they have complied fully with their obligations under a settlement agreement, and, in the alternative, an order reducing to nil, or setting aside, a penalty of R15 million provided for in the settlement agreement.

[2] The background of the matter is as follows. In May 2019 an action between Tetra Pak S.A. (Pty) Limited, as plaintiff, and Blakey Investments (Pty) Limited and Suman Panday, as defendants, came up for trial. The cause of action was fraud and the claim substantial. The defendants complained about the plaintiff's discovery and threatened to ask for an adjournment. This led to settlement discussions, and on 17 May 2019 a written settlement agreement was concluded. It provided for an undertaking by the defendants to pay to the plaintiff the sum of R25 million and to execute a consent to judgment in that amount. It provided further that 'the aforesaid' was compromised on the basis that the defendants would pay to the plaintiff the sum of R10 million in instalments. The balance of the R25 million would only be payable in the event of any of the instalments not being paid timeously.

[3] Pursuant to the settlement agreement the defendants paid a sum of R5 million to the plaintiff by way of an electronic fund transfer. The balance of R5 million was payable in eight equal consecutive monthly instalments, commencing on 30 June 2019, each in the sum of R625 000. Interest on the reducing balance would be paid simultaneously with the last instalment on 31 January 2020. The agreement provided that the balance of R5 million would be secured by eight post-dated cheques, each in the sum of R625 000. The cheques were duly provided to the plaintiff.

[4] From the end of June 2019 the plaintiff presented a cheque at the end of each month, and they were duly paid. The cheque presented at the end of December

2019 was however not paid, as the bank was unable to contact Mr Panday for his confirmation. He was overseas on vacation.

[5] In January 2020 the plaintiff notified the defendants that the instalment that was due at the end of December had not been paid. This was rectified on Mr Panday's return, and a payment was made by electronic fund transfer. The plaintiff however adopted the stance that as a result of the late payment the amount of R25 million had automatically become due and payable. It applied for judgment on the confession to judgment, which was granted by the Registrar.

[6] In the notice of motion the applicants sought an order for the judgment to be rescinded on the basis that the plaintiff had failed to give the notice required in terms of the settlement agreement. This was not disputed on the papers. The application for rescission was not opposed and will be granted.

[7] The main issues before me are whether the instalment in question was paid timeously, and, if it was not, whether the provision relating to the payment of R25 million was a penalty as defined in the Conventional Penalties Act 15 of 1962.

The payment of the December instalment

[8] I think it will be convenient to continue to refer to the parties as they were in the action. Counsel for the defendants submitted that the delivery of the post-dated cheques constituted payment of the instalments referred to in the settlement agreement, provided that the cheques were not dishonoured. He based the submission on 'an express term of the settlement agreement that payment would be discharged by cheque. No other means of payment would suffice, and that is the mechanism the parties chose'. There is no such term in the settlement agreement. Clause 3.2 provides for payment of R5 million by electronic fund transfer and the balance of R5 million in eight equal monthly instalments. There is no provision in the agreement that payment had to be made by cheque. The post-dated cheques served as security for the balance. Nothing in the agreement precluded the defendants from paying one or more of the instalments by electronic fund transfer.

[9] Nevertheless, it seems plain that the parties had agreed that payment could be made by cheque. Although the agreement provided that the balance of R5 million would be secured by eight post-dated cheques, the cheques were the mode of payment. The plaintiff presented one of the cheques every month, and six instalments were paid in this fashion. In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton & another* 1973 (3) SA 685 (A) at 693F-G Holmes JA said the following:

'In general, payment by cheque is *prima facie* regarded as immediate payment subject to a condition. The condition is that the cheque be honoured on presentation. When the cheque is so honoured, the date of payment of the debt is the date of the giving of the cheque. Conversely, if the cheque is dishonoured there has been no payment.'

[10] Counsel for the plaintiff accepted this, but submitted that the cheque was never honoured and that therefore its delivery to the plaintiff did not constitute payment. Section 45(1)(a) of the Bills of Exchange Act 34 of 1964 provides that 'a bill is dishonoured by non-payment if it is duly presented for payment and payment is refused or cannot be obtained'. It is common cause that the payment of the cheque had not been stopped, and that there were sufficient funds in the account to meet it. There is no evidence on the papers that the bank refused payment of the cheque, or that payment could not be obtained. The position appears to be that, as part of the bank's security checks where large value cheques are issued for processing, the cheque processing centre makes telephonic contact with the drawer. Because Mr Panday was oversees on vacation the bank was unable to make contact with him. I do not consider that to have been a refusal of payment. It was rather a delay in payment pending a security check. Counsel for the plaintiff accepted that if confirmation from Mr Panday was obtained a day or two later, and payment made by the bank in early January, that would have been a timeous payment of the December instalment.

[11] The reason why the cheque was never honoured was that it was not presented again, as the instalment was paid by electronic transfer. The cheque was therefore not dishonoured. In those circumstances there was no late payment and the sum of R25 million did not become payable.

[12] In case this conclusion is wrong, and there had been a late payment, I consider the consequences thereof.

The Conventional Penalties Act

[13] Counsel for the defendants submitted that the provision relating to the payment of R25 million was a penalty as defined in the Act, that the plaintiff suffered no prejudice, and that the penalty should be reduced to nil or set aside in terms of s 3 of the Act.

[14] Counsel for the plaintiff contended that the provision was a discount, not a penalty, in the sense that the amount owing was R25 million, discounted to R10 million on condition that the instalments were paid on due date. He submitted that the consequence of the late payment was that the defendants forfeited the discount and became liable to pay the full amount owing.

[15] I turn to consider the nature and effect of the provision. If it is not a penalty, then it cannot be moderated.

[16] Section 1(1) of the Act provides as follows:

'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.'

Section 3 provides that:

'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…'

[17] Counsel for the plaintiff placed considerable reliance on the decision in *Optic Powerlines (Pty) Ltd v Hattingh* 2016 JDR 1730 (FB). The plaintiff in that matter had applied for summary judgment in an amount of R394 024, on a claim for rentals in

respect of earthmoving machinery. A settlement agreement was concluded in terms of which the defendant undertook to settle a stipulated reduced amount of R250 675, which included the costs of the summary judgment application, by way of three payments on specified dates, failing which it was agreed that the defendant would be obliged to pay the larger balance of R394 024 dealt with in the application for summary judgment. The defendant paid the last two instalments late, and the plaintiff applied for judgment on the settlement agreement, for the balance of the larger amount. The judgment was granted. In a subsequent application for it to be rescinded the defendant argued that the provision relating to payment of the larger amount was a penalty stipulation and should be deleted. Fischer AJ found that in the settlement agreement the defendant had acknowledged that it owed two amounts and that if it performed timeously it would receive a discount, failing which the larger amount it admitted it owed would become payable. He said it followed that nothing more accrued to the plaintiff than was agreed upon and in fact already owing to him. The larger amount was therefore not a penalty.

[18] In *Parekh v Shah Jehan Cinemas (Pty) Ltd & others* 1982 (3) SA 618 (D) it was contended that an acceleration clause in a settlement agreement constituted a penalty. Leon J at 625D-E referred to a judgment by Wessels JA in *Da Mata v Otto NO* 1972 (3) SA 858 (A) in which he held that in order to decide whether a stipulation amounted to a penalty it had to be ascertained 'whether the parties intended the stipulation to operate *in terrorem*, ie as a penalty in the common law sense, (in Afrikaans - "by wyse van straf").' Leon J said at 626A-B that '*in terrorem*' has been judicially interpreted as applying to a stipulation to force a party to comply with the terms of a contract by means of 'onbillike dwang'. He concluded that the common law read with the Act showed that in order to constitute a penalty there must be something added to a debtor's obligation to pay his debt. He said a stipulation which ensures that a debtor pays no more than he owes cannot be regarded as being '*in terrorem'*, i.e. forcing the debtor to comply with the terms of his contract by means of 'onbillike dwang'. He held that the acceleration clause only obliged the defendants to pay what they admitted they owed, and was not a penalty.

[19] In *Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd & others* 1973 (4) SA 206 (T), which was relied on by counsel for the defendants, the approach was the same. The plaintiff had instituted an action in which it claimed

payment of two amounts, totalling R84 570, with interest and costs. The defendant delivered a plea and a counterclaim. The action was later settled. The defendant acknowledged liability in, and undertook to pay, a sum of R65 000 by way of a first payment and the balance in monthly instalments. The settlement agreement provided that should any one instalment not be paid on due date, then the plaintiff would be entitled to re-instate the action and apply for judgment in the full amount of its claim as set out in the combined summons, less any amounts paid as at the date of the application for judgment. The defendant fell in arrears with the instalments, in consequence of which the plaintiff applied for judgment for payment of the amounts originally claimed in the action, less what had been paid. Viljoen J held that no matter what the plaintiff might have proved in the trial, a settlement had been reached whereby the defendant acknowledged liability in an amount of R65 000 and whereby the parties agreed in what manner the amount would be paid. He said a *transactio* was effected and the original debt was wiped out. He held that the stipulation to pay, on breach, the full amount of the claim in the summons constituted, in so far as that amount exceeded the amount agreed upon in the settlement, a penalty in terms of the Act. In other words, the defendant would have had to pay an amount that was higher than what it was liable for.

[20] *De Pinto & another v Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A) is an example of a case where a clause in a lease agreement was held not to be a penalty. De Villiers JA said the test was whether the parties intended the clause to operate *in terrorem*, i.e. as a penalty in the common law sense. He held that it did not, and provided for a discount on the rentals on the basis that the lease would be maintained. If it was not, the defendant would be liable for the rentals it had agreed to pay in terms of the original lease.

[21] I mention in passing that Botha JA said in *Bank of Lisbon International Ltd v Venter en 'n Ander* 1990 (4) SA 463 (A) at 476A that an intention *in terrorem* may not in all cases be a requirement for a stipulation to qualify as a penalty. In *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) Nestadt JA said at 183H that he was not sure that the problem in identifying a penalty is in truth one of interpretation. He said, with reference to *Auby and Pastellides (Pty) Ltd v Glen Anil Investments (Pty) Ltd* 1960 (4) SA 865 (A) that it may be that it is basically one as to the legal effect of the clause. In that case Schreiner JA said the following at 872F-G:

'In the revised edition of Williston on *Contract* the learned author, in sec. 777, discusses the question how far the question of penalty or liquidated damages is in truth a question of interpretation. It is difficult to disagree with his view that the question is basically one as to the legal effect of the contract and that this does not depend simply on its meaning or on the expressed intention of the parties.'

[22] This brings me to the settlement agreement. The word 'discount' does not appear in it. If the difference between the amounts of R25 million and R10 million was a discount, then it was a 60% discount. There is no explanation on the papers as to why such a substantial discount was given, save for the statement that it was part of the settlement. The agreement itself says the amount of R25 million was compromised on the basis that only R10 million would be paid, provided that it was paid in accordance with the agreement.

[23] Counsel for the plaintiff sought to demonstrate with reference to the pleadings that there was in fact no penalty, as the plaintiff would in the trial have been awarded at least that amount. The amount claimed in the particulars of claim, dated 8 December 2011, was R10 048 122, with interest at the rate of 15,5%. This was increased by way of an amendment, in January 2016, to a sum of R14 941 528, with interest at the same rate. The settlement agreement was concluded on 17 May 2019. He contended that if the plaintiff had succeeded in the full amount of its claim, interest and costs it would have received more than R25 million.

[24] The defendants dispute this. They say on their calculations the plaintiff would have been entitled to about R4 million plus interest and costs, which would have amounted to about R10 million, which is what they settled on.

[25] Counsel for the plaintiff contended that the defendants had acknowledged liability in the settlement agreement for the amount of R25 million. This is not what the agreement says. It contains no admission of liability with regard to the plaintiff's claim in the action. It records an undertaking by the defendants to pay the plaintiff the sum of R25 million, which 'shall be compromised on the terms below'. Those terms provided for payment to the plaintiff of a sum of R10 million by way of instalments, and a further provision that in the event of any instalment not being paid timeously the amount of R25 million would automatically become due and payable.

[26] The provision relating to the payment of R25 million seems to me to be *in terrorem*. A late payment of one instalment would increase the defendants' liability from R10 million to R25 million. I think this qualifies as 'onbillike dwang'. Further, the extra payment is not something that the defendants were liable for from the outset. That was not established, and they did not acknowledge liability for it. The defendants plainly agreed to the penalty of R15 million because they were confident the R10 million would be paid when due, and not because they accepted liability for it, subject to a discount.

[27] The provision relating to the payment of R25 million was therefore a penalty stipulation. Counsel for the plaintiff accepted that the plaintiff earned interest on the late payment for the period of 16 days until it was paid. He did not contend that the plaintiff suffered any prejudice as a result of the late payment. It will therefore be equitable to reduce the penalty to nil.

[28] It was common cause that the full amount of R10 million has been paid, together with all interest thereon. I think in those circumstances it will suffice to declare clause 4 of the settlement agreement unenforceable, and to grant the declaratory order sought by the defendants.

[29] I make the following order:

(a) The judgment granted by the registrar on 6 March 2020 is rescinded and set aside.

(b) The penalty provided for in the settlement agreement of 17 May 2019 is reduced to nil and clause 4 thereof declared unenforceable.

(c) It is declared that the defendants have complied fully with their obligations under the settlement agreement.

(d) The plaintiff (the respondent in the application) is ordered to pay the costs of the application.

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Ploos van Amstel J

Appearances:

For the Plaintiff	:	J Marais SC
Instructed by	:	Norton Rose Fulbright
	:	Durban
For the Defendants'	:	A Stokes SC
Instructed by	:	Larson Falconer Hassan
	:	Durban
Date Judgment Reserved	:	24 February 2021
Date of Judgment	:	11 March 2021