



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case Number: 3645/2015

In the matter between

OPTIC POWERLINES (PTY) LTD

Applicant

and

J P HATTINGH trading as HAT KONTRUKSIE

Respondent

HEARD ON: 25 AUGUST 2016

JUDGMENT BY: FISCHER, AJ

DELIVERED ON: 8 SEPTEMBER 2016

I INTRODUCTION

[1] The applicant (“the defendant”) approaches this Court in terms of Rule 42 of the Uniform Rules of Court for the

rescission of a judgment by consent granted on 1 October 2015 pursuant to the conclusion of a written settlement agreement with the respondent (“the plaintiff”).

- [2] The application by the defendant is premised on the allegation that the judgment by consent was erroneously granted in that the Court not only failed *mero motu* to find that the settlement agreement referred to therein contained an unfair and excessive “penalty” but thereafter failed to deal appropriately therewith.
- [3] In the alternative, the defendant seeks that the order of Court, incorporating the settlement agreement, be varied by deleting the clause contained therein incorporating what is alleged to be an excessive “penalty”. Further ancillary relief relating to a writ of execution issued pursuant to the judgment is also sought.

II THE RELEVANT BACKGROUND FACTS

- [4] On 4 August 2015 JP Hattingh t/a Hat Konstruksie (the plaintiff) instituted an action against Optic Power Lines (Pty) Ltd (the defendant) for payment of the sum of R467 353,10 together with interest and costs.
- [5] The plaintiff’s cause of action was based on an oral agreement of lease concluded between the parties on 20 September 2013 in terms whereof the defendant leased certain specified heavy earthmoving machinery from plaintiff

over a period of almost two years at an agreed upon hourly/daily tariff as well as the cost of fuel. According to the plaintiff the defendant had made various and substantial payments over a sixteen month period where after it defaulted leaving the balance now claimed.

- [6] The defendant entered appearance to defend the action pursuant to which the plaintiff launched an application for summary judgment supported by a founding affidavit in which the plaintiff acknowledged under oath a subsequent payment of a further amount of R73 328,19 thereby reducing the amount allegedly due, owing and payable to R394 024,91.
- [7] On 30 September 2015 and in belated opposition to the application for summary judgment, one Masia Lawrence Matsena (Matsena), the tax and accounting manager in the employ of the defendant, deposed to an answering affidavit challenging the correctness of the calculation of the balance claimed by the plaintiff.
- [8] Later the same day a settlement agreement, titled "*Skikkingsooreenkoms*", was sent by the attorneys representing the plaintiff to Matsena, who thereafter proceeded to sign such document at Lanseria on 30 September 2015. The settlement agreement was returned to Bloemfontein where it was subsequently signed on behalf of plaintiff by his attorney of record on 1 October 2015. Later that same day Moloi J was approached in chambers

and, by agreement between the parties, the aforementioned settlement agreement was made an order of Court.

[9] In terms of the settlement agreement, the particulars of which will be dealt with more fully herein below, the defendant undertook to settle a stipulated reduced amount of R250 675,58, which included costs relating to the summary judgment application, by means of three payments on three specified dates failing which it was agreed that the defendant would be obliged to pay the larger balance of R394 024,91 dealt with in the application for summary judgment.

[10] The defendant failed to pay the last two payments on the stipulated dates (it is common cause that the payments were two and nine days late respectively) as a result of which the plaintiff claimed that he was now entitled to the balance of the larger amount together with interest and costs less all payments made in terms of the schedule, albeit it belatedly, as agreed upon (R394 024,91 less payments plus interest and costs) totalling R171 845,80, the breakdown of which was fully set out in an annexure to the defendants founding papers.

[11] It is the defendant's case that the clause in the settlement agreement which was made an order of Court entitling the plaintiff to the larger amount (less any payments already made) should any payments in respect of the lesser amount not be made timeously, is nothing more than a penalty clause which Moloi J should have challenged and dealt with

mero motu in chambers, alternatively that the penalty clause should be deleted from what is in effect a Court judgment.

III THE SETTLEMENT AGREEMENT/ORDER

[12] The action was settled in terms of a written and signed agreement of settlement which was made an order of Court on 1 October 2016. It is necessary for purposes hereof to recite the whole settlement agreement which reads as follows:

“Skikkingsooreenkoms

DIE PARTYE BEVESTIG hiermee dat die verskillende dispute geskik is op die basis soos hierna uiteengesit, en by ooreenkoms versoek albei partye dat hierdie skikkingsooreenkoms vervat word in ‘n bevel van bogemelde Agbare Hof:

1.

Die verweerder sal aan die eiser se prokureurs betaal by wyse van elektroniese fonds oorplasing na die bedoelde prokureurs se trustrekening waarvan die besonderhede as volg is :

Nedbank rekening No. [1....]

Waterfront takkode 110234 (Verwysing G22176);

1.1 Voor of op 31 Oktober 2015 die bedrag van : R124 337,79;

1.2 Voor of op 30 November 2015 die bedrag van R124 337,79;

2.

Die verweerder sal aan die eiser se prokureurs die ooreengekome bedrag van R2 000,00 betaal synde die koste

veroorzaak deur die uitstel van die aansoek om summiere vonnis op 1 Oktober 2015 na 15 Oktober 2015 en handelinge gepaardgaande daarmee, as gevolg van die verweerder se versuim om tydig sy opponerende verklarings tot die aansoek om summiere vonnis te liasseer, welke bedrag betaal sal word ook by wyse van elektroniese fonds oorplasing na die prokureurs se voormelde bankrekening voor of op Maandag, 5 Oktober 2015.

3.

Indien bogemelde betalings deur die verweerder tydig, volledig en stiptelik gemaak word, sal dit deur die eiser aanvaar word in volle vereffening van alle eise wat hy teen die verweerder het en sal elke party aanspreeklik wees vir betaling van sy eie koste in hierdie aksie.

4.

Indien die verweerder sou versuim om enige van voormelde drie betalings volledig, tydig en stiptelik te maak, sal die verweerder aanspreeklik wees vir betaling aan die eiser vir die volle bedrag soos gevorder en bevestig in die eedsverklaring van die eiser gedateer 11 September 2015, naamlik R394 024,91 plus rente daarop teen die koers van 9% per jaar gereken vanaf 21 Augustus 2015 tot datum van betaling daarvan plus eiser se gedingskoste en wel binne 10 dae na datum van die Takseermeester se allokatur op die getakseerde kosterekening van die eiser se prokureurs plus moratore rente daarop, indien van toepassing, teen die koers van 9% per jaar."

- [13] Mr van der Merwe, on behalf of the defendant, submitted that clause 4 of the settlement agreement contains a penalty provision and that if regard be had to the relevant provisions of the **Conventional Penalties Act 15 of 1962** ("the Act"),

the balance the plaintiff was now seeking to enforce by means of a writ of execution was disproportionate to the prejudice the plaintiff had allegedly suffered as a result of the late payments and that, in the circumstances, this Court had a “*positive duty*” to rescind the judgment in terms of rule 42, alternatively vary the settlement agreement by deleting the offending clause 4 thereof.

[14] Mr C Ploos van Amstel S.C. on behalf of the plaintiff submitted that the settlement agreement was analogous to an “*incidental credit agreement*” as defined in section 1 of the **National Credit Act 34 of 2005** in that, *in casu*, nothing more than two prices had been quoted for settlement of the account with the lower price being applicable if the account was settled on or before a pre-determined date(s) and the higher price being applicable should the account not have been paid by such earlier dates. Notwithstanding the fact that the provisions of the **National Credit Act** prevail over those of the **Conventional Penalties Act** to the extent that such provisions are in conflict with each other(see s 172(1) read with Schedule 1 thereof), I do not deem it necessary for purposes hereof to make any finding in this regard for reasons that will become apparent later.

[15] I do however deem it apposite to have regard to not only the relevant provisions of the **Conventional Penalties Act 15 of 1962** (“the Act”) but, in addition thereto, the approach developed by the Courts in determining whether or not a contractual provision such as that complained of is in fact a

penalty and if so, whether or not the penalty contained therein is out of proportion to the prejudice suffered by the plaintiff in his capacity as a creditor and falls to be dealt with.

IV THE CONVENTIONAL PENALTIES ACT 15 OF 1962:

[16] Sections 1 to 4 of the **Conventional Penalties Act 15 of 1962** provide as follows:

- “(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.*
- 2(1) *A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.*
- (2) *A person who accepts or is obliged to accept defective or non-timeous performance shall not be entitled to recover a penalty in respect of the defect or delay unless the penalty*

was expressly stipulated for in respect of that defect or delay.

3. *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.*

4. *A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, the man liable for the performance of anything thereunder, shall have effect to the extent and subject to the conditions prescribed in ss1 – 3 inclusive, as if it were a penalty stipulation."*

[17] The parties to a contract not infrequently include a term in their contract which seeks to bind the one party to pay a pre-determined sum of money and forfeit all payments already made in the event of such party committing a specified breach. What is quite clear from a reading of "the Act" as well as the relevant authorities is that "the Act" has two objectives:

- (i) To state unequivocally that a penalty stipulation arising out of a contractual obligation is in fact enforceable at law; and
- (ii) To prevent enforcing or exacting an excessive penalty out of proportion to the prejudice actually suffered by the creditor and to thereby further prevent the creditor from enforcing both a penalty and damages (see **Van Staden v The Central SA Lands & Mines** 1969 (4) SA p 349 (W) at 351 D – F.)

[18] Of relevance *in casu* is that “the Act” does not prohibit parties to a contract from avoiding the application of the provisions of “the Act” by agreeing in their contract to the payment of an admitted lesser amount as a reward for timeous performance rather than to couch the relevant terms of the agreement as a penalty for subsequent breach. (See **Sun Packaging (Pty) Ltd v Vreulink** 1996 (4) SA p 176 (A) at 185I – J.)

[19] In determining what was envisaged when the agreement was concluded regard must be had to the actual intention of the parties as the case law quite clearly demonstrates that a proper interpretation of the particular agreement will assist in determining whether the provision in question is to be regarded as a penalty, alternatively is not a penalty. (See **SA Mutual Life Assurance Society v Uys** 1970 (4) SA 489 (O) and **Massey-Ferguson (SA) Ltd v Ermelo Motors (Pty) Ltd** 1973(4) SA 206 (T); **DA Mata v Otto** 1972 (3) SA 858 (A) at

872 and **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd** 1982 (1) SA 389 (A) at 438C to 439A.)

[20] Mr van der Merwe sought to rely upon the **Massey-Ferguson** case *supra* in advancing the argument that, *in casu*, this Court was dealing with a penalty for breach which by far exceeded the “*amount agreed upon in the settlement*”.

[21] In the **Massey-Ferguson** case the plaintiff instituted an action for payment of R81 670,77, being the purchase price of certain goods sold and delivered together with payment in respect of certain further goods pursuant to which the defendant filed a plea and counterclaim. Thereafter the action was settled out of Court in terms whereof the defendant acknowledged liability in a lesser amount totalling R65 000,00 and undertook to repay such amount by means of several monthly instalments over a period of some 18 months. It was further agreed that should any one instalment not be paid on due date, alternatively should the defendant commit any other breach of the settlement, then in such event the plaintiff would be entitled to “*reinstate this action and apply for judgment of 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.*” (See the **Massey-Ferguson** case *supra*, at 207E to 208D). The Court found that a settlement had been reached whereby the defendant acknowledged its liability in an amount of R65 000,00, that a *transactio* had accordingly been effected and that the original debt of R81

670,77 had thereby been wiped out. (See the **Massey-Ferguson** case *supra*, at 215F – G.)

[22] The Court found that “....(t)he stipulation to pay, on breach, the full amount of the (plaintiff’s claim) as set out in the combined summons constitutes ... in so far as this amount exceeds the amount agreed upon in the settlement, a penalty in terms of the Act...” (See **Massey-Ferguson** case *supra*, at 215G – H). The Court furthermore found that there was a disproportionality in respect of the “*penalty*” the plaintiff sought to enforce in that “*this amount exceeds the amount agreed upon in the settlement*” and was accordingly a penalty way out of proportion to the actual prejudice suffered by reason of the defendant’s default. (See **Massey-Ferguson** case *supra*, at 215H and further.)

[23] *In casu* I am called upon to decide whether the contractual provision contained in clause 4 of the settlement agreement is in fact a penalty in the sense that it may be interpreted as a stipulation in terms whereof a debtor such as the present defendant shall, in respect of an omission or failure in terms of it’s contractual obligations, be liable to pay a further sum of money to the creditor (*in casu* the plaintiff) in the sense that “*something additional* ” must now be paid by the defendant. What falls to be asked and answered is whether the obligation by the defendant to pay the larger amount resulted in the plaintiff obtaining far more than what was already owing to him (See **Parekh v Shah Jehan Cinemas & Others** 1982 (3) SA 618(D) at 626B – H).

- [24] In the **Massey-Ferguson** case the Court found, as already pointed out, that the defendant had only acknowledged its indebtedness in the sum of R65 000,00 and that any other larger amount had been “wiped out”.(at **215G**).
- [25] *In casu* a literal translation of clause 4 of the settlement agreement stipulates unequivocally that should any one of the three payments totalling R250 675,58 not be paid on due date then in such event the larger sum of R394 024,91 as confirmed under oath by the plaintiff, would become due, owing and payable. In the absence of any evidence and/or allegations to the contrary, it must be accepted on the face of it that at the time of the conclusion of the settlement agreement the defendant acknowledged in writing that two amounts were due, owing and payable and that if it performed promptly and timeously, it would receive a substantial discount, failing which the larger amount **it admitted it owed** would become due, owing and payable. It must furthermore be accepted on the strength of what was placed before me that in breaching the settlement agreement nothing more accrued to the plaintiff than what was agreed upon and in fact already owing to him. (See **Parekh** case *supra*, at 628F).
- [26] In the circumstances I am of the view that the Court order incorporating the settlement agreement does not contain a penalty clause and that in view thereof issues relating to what Moloi J allegedly should have done *mero motu* as well

as the questions of disproportionality and prejudice become irrelevant.

V THE COURT ORDER

[27] It is trite that a settlement agreement incorporated in and subsequently made an order of Court falls to be interpreted like any other Court order or judgment and that a direct consequence thereof is that the *lis* between the parties comes to an end. The *lis* as such becomes *res iudicata* and in practice will not be lightly tampered with and/or set aside (See Eke v Parsons 2015 (11) BCOR 1319 CC and Schierhaut v Union Government 1927 AD 94 at 98.)

[28] *In casu* the defendant relies upon the provisions of rule 42 of the Uniform Rules of Court. Mr van der Merwe cast his net as wide as possible in seeking to rely on one or more of the provisions of rule 42 relating to orders or judgments erroneously sought/granted, alternatively orders or judgments containing ambiguity and/or potent error or omission, and orders or judgments granted as a result of a common mistake. Nothing was placed before me in an attempt to persuade me that there was an error, ambiguity or common mistake. Of further significance is that no allegations and/or evidence and/or affidavit by the signatory to the settlement agreement on behalf of the defendant (Matsena), or anyone else for that matter, was placed before me dealing with the reasons as to why I should consider

impugning the court order and making a finding in favour of the defendant.

[29] Even if I was to have found that the defendant had undertaken to pay more than it had acknowledged it in fact owed, the defendant failed to quantify the amount and persuade me as to what, in its opinion, a reasonable reduction of what it claimed was a penalty amount, would be. (See **Citybank N.O. South Africa Branch v Paul N.O. & Another** 2003 (4) 180 (TPD) at para [21] to para [30]).

[30] In seeking to persuade me to reduce the extent of the penalty provision the onus is on the defendant to prove to what extent the penalty is disproportionate to the prejudice and to what extent, if at all, it should be reduced. (See **Company Unique Finance (Pty) Ltd & Another v Johannesburg Northern Metropolitan Local Council & Another** 2011 (1) SA 440 (GSJ) at 467G – 468J.) *In casu* and having found that the Court order does not contain a penalty provision, I deem it unnecessary to deal any further with the aforementioned shortcomings in the defendant's case. For similar reasons I deem it unnecessary to deal with the protracted time lapse between the granting of the order incorporating the settlement agreement and the launching of the current application in May 2016 (some 6½ months).

[31] Ironically, the defendant performed, albeit belatedly, in terms of the Court order incorporating the settlement agreement,

not only thereby acquiescing but as importantly giving effect thereto. The only logical inference to be drawn therefrom is that the defendant regarded itself as bound by the court order and only sought to challenge it once the plaintiff sought to enforce the consequences of non-compliance. In the absence of any suggestion that there was a patent error or mistake common to both parties I am obliged to accept that Matsena willingly and knowingly bound the defendant contractually. On the facts placed before me I cannot but find that the application cannot succeed. Mr C Ploos van Amstel S.C., on behalf of the plaintiff, did not persist with the written submission contained in his heads of argument that this Court should consider a punitive cost order. I am inclined to agree with him.

[32] In the circumstances the following order is made:

The application is dismissed with costs.

P.U. FISCHER, AJ

On behalf of the applicant: Adv. B. Van der Merwe
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of the respondent: Adv. C. Ploos van Amstel SC
Instructed by:
Hill McHardy & Herst Inc.
BLOEMFONTEIN