

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No : 595/15

In the matter between :

AECI Limited t/a Nulandis

Plaintiff

And

Shane Dellis

Defendant

Judgment

Lopes J

[1] The plaintiff in this action, AECI Limited, which trades as 'Nulandis', sued the defendant, Shane Dellis, for payment of the sum of R160 000 together with interest and costs.

[2] The facts which are common cause between the parties are as follows :

- (a) Mr Tatham, the Regional Sales Manager of Nulandis in KwaZulu-Natal, sought out Mr Dellis as a prospective agent for the promotion and sale of Nulandis products in the area covering Eshowe, the Nkwaleni Valley and Melmoth in KwaZulu-Natal..
- (b) On the 5th March 2014 the parties concluded a written agreement, the material terms of which were :
 - (i) that Mr Dellis would be appointed as the exclusive agent of Nulandis in the areas of Eshowe, the Nkwaleni Valley and Melmoth, with the right to procure purchase orders for selling Nulandis's products to its customers in the area;
 - (ii) the agreement commenced on the 1st March 2014, and was to continue for an initial period (referred to as the 'critical period');
 - (iii) Nulandis undertook to pay Mr Dellis a fixed commission of R40 000,00 per month during the critical period, until such time as Mr Dellis could operate on a commission basis only. The critical period would not exceed 24 months;
 - (iv) that if the agreement was terminated during the critical period for any reason other than one of the reasons set out in clause 10.1.2 of the agreement, Mr Dellis would be liable in terms of clause 10.1.1 to pay back the plaintiff the fixed commission (or 'Allowance' as it is also described) paid to him;

- (v) Mr Dellis agreed not to act as an agent, for a period of one year after the termination of his contract with plaintiff, for any other company, within the areas of Eshowe, the Nkweleni Valley and Melmoth.
- (c) At least four payments were made by Nulandis to Mr Dellis. They were :
 - (i) R34 226,72 on the 25th March 2014;
 - (ii) R30 922,48 on the 25th April 2014;
 - (iii) R30 922,48 on the 24th May 2014;
 - (iv) R30 992,48 on the 25th June 2014.
- (d) A further payment of R50 000 was made by Nulandis to Mr Dellis. The parties were uncertain of the date when it was paid, and Mr Dellis was unsure whether it was paid at all. It plays no part in the deliberations in this action.
- (e) On the 25th June 2014, four months after starting work as an agent for Nulandis, Mr Dellis tendered his resignation. He proffered no reasons for doing so in his letter of resignation.
- (f) After resigning Mr Dellis immediately went to work for Farm-Ag, who had, prior to his resignation, approached him and requested him to do so. Farm-Ag supplies farmers with similar products to Nulandis, and operates in direct opposition to it.
- (g) Mr Dellis regarded his function as agent for Nulandis as being required to establish the Nulandis brand of farming products, open accounts for farmers, and sell products to them. The products are mainly chemicals used in the

production of sugar cane, timber, citrus crops, avocado pears, macadamia nuts and a small quantity of vegetables.

- (h) Ancillary to the function of selling products, Mr Dellis would work with farmers, giving advice on the benefits of the Nulandis products and their application to crops.
- (i) In the four months during which he operated as an agent for Nulandis, Mr Dellis opened 15 to 16 accounts, and made sales of approximately R11 000, resulting in a gross profit on sales of some R300.
- (j) In addition, Mr Dellis attended various training courses, and was involved in the S A Avocado Growers Association and the Macadamia Growers Association. He also erected or constructed a storage area for products supplied to him by Nulandis on a consignment basis. Mr Dellis continues to use that depot for the storage of Farm-Ag products.
- (k) Mr Dellis conceded that when he tendered his resignation, he was aware of the clause in the contract requiring him to pay back the fixed commission he received, as well as the restraint of trade.

[3] In his plea, Mr Dellis advanced two reasons why he should not have to repay Nulandis the allowances paid to him :

- (a) he was an employee, and not an independent contractor or agent;
- (b) the repayment of the allowances would constitute a conventional penalty in terms of the Conventional Penalties Act, 1962. In this regard, the penalty

which Nulandis sought to enforce was excessive and out of proportion to the prejudice suffered by Nulandis.

[4] Mr Tatham testified for Nulandis, and Mr Dellis gave evidence on his own behalf. I accept that both witnesses gave their evidence honestly, and no credibility issues arise in respect of either of them. Mr Dellis did not suggest that he regarded himself as an employee in terms of the Basic Conditions of Employment Act, 1997.

[5] Mr *Veerasamy*, who appeared for Mr Dellis submitted that the defence raised in the pleadings that Mr Dellis was an employee, was a red herring. This is because even if Mr Dellis was an employee, the conventional penalty argument would still be applicable. Mr *Veerasamy* did not advance any submissions that Mr Dellis should be regarded as an employee. I have accordingly not dealt with this issue, which I consider, in any event, to have no merit.

[6] Mr *Veerasamy* accepted that Mr Dellis bore the onus of demonstrating that the alleged penalty was disproportionate to the prejudice suffered by Nulandis. He submitted that the prejudice to Nulandis was non-existent because :

(a) Mr Dellis worked for four months, covering 40 000 hectares over the Eshowe, Nkweleni Valley and Melmoth areas, trying to establish recognition for the Nulandis brand and for Nulandis products, where little or no recognition previously existed;

- (b) No suggestion was made by Nulandis that Mr Dellis had not tried to do so diligently and honestly;
- (c) If Mr Dellis had to repay the commission of R40 000 per month, he would have worked for nothing, and Nulandis would have had the benefit of his labours free of charge.

[7] Mr *E/s*, who appeared for Nulandis submitted that the provisions of the agreement did not constitute a penalty stipulation, particularly where Mr Dellis had left to pursue employment with a direct competitor. Mr *E/s* submitted that Mr Dellis had obtained the full benefit of the allowances, and, in terms of the agreement, he was obliged to repay those amounts to Nulandis.

[8] The relevant clauses in the agreement were, inter alia, :

'10.1 In consideration for its services to the Company in terms of this Agreement, the Company shall pay to the Agent a fixed commission of R40,000.00 (Forty Thousand Rand) per month. The payment of a fixed commission will be reviewed from time to time until such a date whereby the Agent will be able to operate on a commission basis only. The critical period will not exceed 24 (Twenty Four) months.

10.1.1 If the Agreement is terminated for any reason other than those listed in subsection 10.1.2, the Allowance paid to the Agent in terms of this subsection will become payable by the Agent to the Company on the date of such termination.

10.1.2 If the Agreement is terminated as a result of the Agent's death, or objective inability to continue acting as Agent in terms of the Agreement resulting from the Agent's death or physical or mental disability to reasonably continue, then the Allowances then due shall not

be reclaimable by the Company from the Agent. The proof of such disability shall rest upon the Agent and shall be buttressed by two independent and suitably qualified medical practitioners.

10.1.3 The Company may, in its sole and absolute discretion, waive and abandon any of its rights to claim the Allowance(s) from the Agent depending on the circumstances surrounding the termination of the Agreement.

[9] The Conventional Penalties Act, 1962 provides :

‘1. 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. Prohibition on accumulation of remedies and limitation on recovery of penalties in respect of defects or delay. –

...

(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. Reduction of excessive penalties. –

If upon a 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 interests, but every other rightful interest which may be affected by the act of omission in question.'

[10] In his evidence, Mr Dellis conceded that his termination of the contract was not for any of the reasons set out in clause 10.1.2 of the agreement, and accordingly clause 10.1.1 became operative. The R160 000 which had been paid by Nulandis to Mr Dellis became repayable on the date of his termination of the agreement, which was the 25th June 2014.

[11] The issues which remain for me to decide are :

- (a) whether clause 10.1.2 constituted a conventional penalty in terms of the Act; and if so;
- (b) whether the penalty is out of proportion to the prejudice suffered by Nulandis by reason of the resignation of Mr Dellis.

[12] It is clear from the evidence in this matter, and in particular that given by Mr Dellis, that he terminated the agreement by resigning. There was no suggestion that he did so because of any conduct on the part of Nulandis or its employees. Mr Dellis admitted in evidence that the reason for his resignation was an offer made to him by Farm-Ag, which included better terms than he was given by Nulandis.

[13] In *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) the Appellate Division held that unless the liability of the debtor to pay a penalty derived from a breach of contract, the stipulation relied upon by the creditor would not qualify as a penalty.

[14] In *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N) the Court considered the question of who bore the onus of establishing that the penalty was out of proportion to the prejudice suffered by the creditor. At page 63 A the court stated :

‘The nature of the prejudice suffered by the creditor may vary greatly from case to case, and it may be that in some cases the prejudice may for all practical purposes be equivalent to damages and nothing else. It may also be that it is for the creditor who contends that he has suffered prejudice, other than pecuniary loss, to establish that he has suffered such prejudice. In our view, however, the Legislature did not intend that in all cases where a penalty or liquid damages have been agreed upon, the creditor would first have to prove his damages before he could recover.’

[15] At page 64 E the court continued :

‘In the result, if in this matter we are left in doubt as to whether or not the penalty is markedly or unfairly out of proportion to the prejudice, then the penalty falls to be enforced as agreed. If, therefore, in this case, we are left with no *data* enabling us to establish that there was a disproportion or the extent of such disproportion, then the magistrate correctly awarded the creditor the full amount of the agreed penalty.’

[16] In *Chrysafis and Others v Katsapas* 1988 (4) SA 818 (A) at 828 H, Hoexter J.A stated :

‘Upon a reading of the affidavits filed in the application so it seems to me, it does not appear *prima facie* that the penalty stipulated is out of proportion to the prejudice suffered by the sellers. Accordingly the onus is on the debtor (the respondent) to show that the forfeiture is disproportionate to the prejudice suffered by the creditors; and to what extent it should be reduced. See *Smit v Bester* 1977 (4) SA 937 (A) at 941 A – 943 A.’

[17] In *Smit*, the court held that a court can *mero motu* reduce the penalty when it *prima facie* appears from the pleadings that the penalty is out of proportion to the prejudice which the creditor suffered.

[18] In this matter Nulandis agreed to pay Mr Dellis a fixed commission of R40 000 per month on condition that if he terminated his employment prior to the expiry of the period of two years, he would be liable to repay the commission unless he resigned for one of the reasons set out in clause 10.1.2..

[19] Mr Dellis could advance no reason why he should not repay the sum of R160 000, save for stating that various expenses which he had incurred fell to be deducted from the amount, and that he should not be called upon to repay the whole amount. His evidence, however, was extremely vague with regard to what items should be deducted, let alone any quantification of those items.

[20] In the circumstances I do not believe that the stipulation that Mr Dellis repay the monies advanced as commission to him falls within the ambit of a conventional

penalty as set out in the Act. What the contract envisages is that Mr Dellis would need some funding assistance in order to establish himself, and prior to being able to earn commission. There is no doubt that this would take some time and the parties' agreement on a period of 24 months is evidence of that. The evidence of both parties was that the fixed commission of R40 000 per month was in the nature of assistance, and would cease to be paid in the event that Mr Dellis was so successful that the commissions payable to him exceeded that amount, and he could, as it were, stand on his own two feet.

[21] Mr Dellis, however, terminated his employment because it suited him to do so, and in pursuit of greater income. The repayment is simply the return to Nulandis of monies which were advanced to Mr Dellis in order to enable him to sustain himself in the short term. It is incorrect to suggest, as Mr *Veerasingh* has done, that in the event that the money is ordered to be repaid, Mr Dellis would have provided his labour to Nulandis for no reward whatsoever. The evidence of Mr Dellis was that during the four months, he underwent some training, and had considerable exposure to clients in the area described above. That he then took up employment with a direct competitor, will no doubt ensure that the training and experience he gained during his employment with Nulandis will operate in his favour in securing future sales of farm products to Farm-Ag. It was no doubt for this very reason that a restraint of trade clause was included in the agreement, albeit that it was not relied upon by Nulandis after Mr Dellis terminated his employment.

[22] Mr Veerasamy submitted that in terms of clause 10.1.2, Mr Dellis could only terminate his employment upon death or disability, without rendering himself liable to repay the fixed commissions advanced to him. I do not agree. What the provisions of clause 10.1.1 and 10.1.2 envisage is that if Mr Dellis wished to terminate his employment within the 24 month period for his own reasons, he would be obliged to repay the advances paid to him. These clauses do not in any way negate any rights which Mr Dellis may have had to terminate his employment consequent upon a breach of the agreement by Nulandis. The clause does not in any way restrict Mr Dellis's common law rights to cancel the contract for a breach by Nulandis. In my view this is a clause in favour of Mr Dellis, and is similar in nature to that which was referred to in *Sun Packaging*. It does not constitute a penalty stipulation, and, whilst his willingness to be employed by Farm-Ag may have constituted a breach by him of the agreement with Nulandis, his resignation per se did not.

[23] In all the circumstances I am not satisfied that Mr Dellis has discharged the onus upon him of demonstrating that the amount repayable was a penalty in terms of the Act. Even if it was, no evidence has been led to demonstrate that it was out of proportion to any prejudice which may have been suffered by Nulandis.

[24] Accordingly, Nulandis is entitled to be paid the sum of R160 000. Mr *Els* agreed that the correct interest rate applicable should be nine per cent per annum from the date of service of the summons. He (properly, in my view) sought costs on the appropriate Magistrates' Court scale.

[25] In the circumstances I make the following order :

- (a) The defendant is directed to pay to the plaintiff the sum of R160 000.
- (b) The defendant is directed to pay interest on the sum of R160 000 calculated at the rate of nine per cent per annum from the 30th January 2015 to date of payment.
- (c) The defendant is directed to pay the plaintiff's costs of suit, calculated on the appropriate Magistrates' Court scale.

Date of hearing 19th October 2015

Date of judgment : 23rd October 2015

Counsel for the Plaintiff :A P J Els (instructed by Thom Attorneys)

Counsel for the Defendant : I Veerasamy (instructed by Gregor Erasmus Attorneys)