

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED.	
01.04.09	
DATE	SIGNATURE



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE No: 6504/09

29343/05

KIEVITSKROON COUNTRY ESTATE (PTY) LTD

PLAINTIFF

V

DEPARTMENT OF LAND AFFAIRS

DEFENDANT

JUDGEMENT

SAPIRE, A J:

The plaintiff owns an extensive rural property near Pretoria on which commodious and attractive buildings have been erected. These buildings standing in a park, house luxurious guest accommodation and facilities for holding social functions. Conferences are a speciality. The defendant is the Department of Land Affairs. It has been incorrectly cited in these proceedings. The incorrect citation, however, has been accepted and the case has proceeded as if the Minister had been correctly cited.

In mid 2004 officers employed by the Defendant decided to hold a prestigious international conference, the theme of which was "Development Information: An African Perspective". The conference was to run over four days. Delegates, both local and from overseas, were to be invited. The theme is esoteric to the unacquainted and its practical importance to the Defendant has not been explained in these proceedings.

The defendant engaged a private company which was referred to as "Bonisiwe" to assist in the logistical organisation for the conference and especially to scout for a suitable venue. The plaintiff's establishment was selected. Bonisiwe informed the plaintiff of the defendant's requirements and requested a provisional booking for the four days over which the conference was to run. Plaintiff welcomed this enquiry and a pro-forma invoice detailing the plaintiff's charges was sent to Bonisiwe together with a document providing for terms and conditions upon which business with the plaintiff was to be

conducted. A provisional booking subject to confirmation was made for the period of the conference.

The defendant's changing requirements were reflected in further pro-forma invoices.

By the 16th of August 2004 despite continuing discussion there had been no confirmation of the booking which Bonisiwe had made. A certain Mr Kaba, a senior official of the defendant had visited the premises from whom it had been expected that confirmation would be forthcoming. This did not happen.

The plaintiff in an e-mail informed the defendant through its agent that the plaintiff required to know whether the booking was confirmed or cancelled. Mention was made that the contract terms which had been submitted duly subscribed should be returned with confirmation together with an order number or payment from the defendant. Defendant did nothing to confirm the booking and the matter dragged on until the plaintiff on the 20th September 2004 again in writing made it clear that unless immediate confirmation was received the booking would lapse. For some reason which is not clear Bonisiwe could not itself confirm the booking and the defendant confirmed the booking now acting through Connex a travel agent through which the defendant was contracted to make such bookings. On the strength of a buying order issued to it Connex issued a voucher guaranteeing payment thereby confirming and securing the booking which until then had been provisional.

Although the defendant did not sign the document in which the terms and conditions upon which the plaintiff did business, it was well aware that such terms and conditions were applicable. Not only had the document been submitted to Bonisiwe when the enquiry was first made, but defendant until a late stage relied on its non signature of the document the existence which it was aware to maintain that the booking had never been confirmed.

Although on the pleadings it was denied that the booking had been confirmed and the case was fought on the basis that the booking was provisional until the contract had been signed it soon became apparent even to the defendant that this defence could not be maintained. The conclusion that a binding contract was constituted by the confirmation of the booking cannot be escaped.

Not long after the confirmation the defendant cancelled the booking. The reason for it so doing is not important. It seems that Ministerial authority for the Defendant to host the conference was required and was not forthcoming. Mrs Biko was instructed to effect the cancellation. This she did after being informed that cancellation would involve liability for a cancellation fee of 100% of the pro forma invoice. Notwithstanding having been so advised the defendant abandoned the reservation.

In view of the cancellation the plaintiff demanded payment of the cancellation fee which was provided for in terms of paragraph 3 of the terms and conditions to which reference has already been made. It is

clear that these terms and conditions were known to and accepted by the defendant as the basis upon which business was done.

The term on which the plaintiff relies provides that on cancellation within 0 to 14 days prior to the event date, (by which we are to understand the first day for which the booking was made), 100 % of the amount charged in the pro-forma invoice would be payable. The last pro-forma invoice was for an amount of R425 960, 00. This is the amount claimed in the summons and which has not been paid by the Defendant.

During the course of the trial I raised a question as to whether the provision for a cancellation fee was not a penalty in terms of the Conventional Penalties Act, 15 of 1962. The defendant up to this point had not been alive to this question and the plea did not contain any reference to the penalty being excessive. After the evidence on both sides had been concluded and before argument, the defendant amended its plea to make the necessary allegations to raise this issue.

I had raised the issue *mero motu* as it seemed to me that the penalty was excessive. The pro-forma invoice included items which involve the supply of consumables to the delegates to the conference. In view of the cancellation the costs of such consumables would not have been incurred by the plaintiff and any consumable which may have been acquired could unless perishable, still be useable. The cancellation to this extent would result in a considerable saving to the plaintiff. Because the question of the penalty was raised after some of plaintiff's witnesses who may have been able give information on the basis of

which an informed calculation of the saving to plaintiff could have been calculated, had completed their testimony, the defendant did not have an opportunity to investigate and establish the cost of the consumables and hence the saving to the plaintiff. No application was made to recall any witness. Those witnesses who were questioned were not able to contribute anything useful.

It is not possible for me on this account to reduce the penalty to the extent of plaintiff's savings. I would also have had to take into account other prejudice to the plaintiff consequent on the cancellation arising from the loss of profit which would emanate from having over 200 guests at the centre for four days, many of whom would at their own expense make use of the plaintiff's facilities during their stay.

A further saving by the plaintiff is the non-payment of VAT which was included in the pro-forma invoice. This requires no evidence as it is a matter of law that VAT is payable at 14% on the invoice value of the goods and services supplied by the Plaintiff as vendor. If as is the case no goods or services are supplied no VAT is payable

I therefore reduce the penalty by deducting the VAT at 14 %. This I do by taking the figure of R425 960, 00 claimed by the plaintiff and multiplying it by 100 /114. In round figures this is R373 650.

The amount should have been paid three days after the cancellation and interest will run from then.

Judgment will therefore be entered against the defendant in favour of the plaintiff for:

1. Payment of R 373 650.00
2. Interest thereon at the rate of 15.5 % per annum from 26th Sept 2004 being the mora date to date of payment ;
3. Costs of the suit.



SAPIRE, AJ

**JUDGE OF THE NORTH GAUTENG HIGH COURT
PRETORIA**