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

CASE NO: 5580/06

NOT REPORTABLE **DATE: 29/4/2009**

In the matter between:

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD Plaintiff

and

LEON HATTINGH T/A CORNER SAVINGS SUPERMARKET Defendant

JUDGMENT

MURPHY J

1. The plaintiff has issued summons against the defendant for payment of a sum of R113 732, 51 together with interest thereon at a rate of 6% above the prime bank lending rate.

2. The plaintiff's cause of action is based on a master rental agreement ("the agreement") entered into between the plaintiff and the defendant on or about 19 April 2005 in terms of which the defendant leased certain office automation equipment against payment of a monthly rental of R2018,94. It is common cause that the defendant fell into arrears with his payment

and that the plaintiff then elected to cancel the agreement in terms of clause 9 thereof. Clause 9 of the agreement reads as follows:

> "9. BREACH; if User defaults in the punctual payment of any monies as it falls due in terms of this agreement; or fails to comply with any of the terms and conditions of, or its obligations under this agreement; or commits any act of insolvency, or being a natural person, assigns, surrenders or attempts to assign or surrender his estate; or allows a default judgement to remain unsatisfied for a period of seven days or be refused rescission within fourteen days of any default judgement, or is sequestrated or placed under judicial management or wound up, whether provisionally or finally; or abandons the goods; or compromises with any of its creditors or endeavours or attempts to do so; or makes any incorrect or untrue statement or representations in connection with this agreement or User's financial affairs or any particulars relevant thereto; or breaches any rights, under this agreement, then and upon the occurrence of any of these events Hirer may elect without prejudice to any of its rights to;
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> 9.1 Immediately terminate this agreement, take possession of the goods, retain all amounts already paid by User and claim all amounts which are in arrears at date of termination together with as pre-estimated liquidated damages, the future rentals which would have fallen due in terms of this agreement from the date of termination until the end of the period stipulated in the schedule on which this agreement could have terminated by notice, or,
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> 9.2 Without terminating this agreement, claim immediate payment of all amounts which are due and/or all rentals which would have fallen due in terms of this agreement until the earliest possible date on which this agreement could have terminated by notice, all of which shall be immediately due and payable. The Hirer shall, pending payment of those amounts, be entitled to be possessed of the goods and to retain possession thereof on condition that against such full payment the Hirer shall return the goods to the User who shall not be entitled to any rebate or abatement of rentals of other amounts by reason of its loss or possession.

9.3 User shall pay the Hirer interest on any amounts owing in terms of clause 9.1 and 9.2 at 6% above the publicly quoted prime interest rate of the Hirer's bankers at the nominal annual rate compounded monthly. Said interest shall accrue from due date for payment to date of payment receipt by Hirer.

9.4 Hirer may appropriate any payments made by or on behalf of User to any indebtedness of whatsoever nature of User to Hirer.

3. The plaintiff claims that the defendant is indebted in the amount claimed in the summons, such amounts being made up of an arrears rental amount of R10 766,57 and future rentals in the amount of R102 965,94.

4. During the course of the proceedings it became common cause that the defendant was indeed in arrears. He however denied that he had any further obligations to the plaintiff on the grounds that the plaintiff had repudiated the contract which repudiation he had accepted. More specifically he pleaded that during December 2005 the representative of the plaintiff unlawfully and without his consent repossessed the goods and that such constituted a repudiation. The defendant has also raised the further defences that the pre-estimated damages in the sum of the future rentals amounts to an unreasonable penalty in terms of the Conventional Penalties Act 15 of 1962, and furthermore that the plaintiff failed to mitigate its damages.

5. The plaintiff called three witnesses while the defendant closed his case without calling any.

6. Mr Jannie Vermeulen, the legal manager of the plaintiff, testified that the plaintiff is a financier of office automation equipment and that the equipment in this case was bought from a supplier and then rented to the defendant. He confirmed his signature on the certificate of indebtedness and confirmed that this certificate indicated that the defendant is indebted to the plaintiff in the amount claimed in respect of both arrear and future rentals.

7. It emerged in cross-examination that during November 2005 an amount of R6000 had been paid in respect of the equipment but was not allocated to the defendant's account due to no proper reference number on the deposit slip. This amount was credited to the defendant's account only after receipt of the defendant's plea and the amount of the claim was reduced accordingly. It seems that this payment was made by or on behalf of a third party in whose possession the goods were placed by the defendant. This payment does not detract from the fact that the defendant was still in arrears at the time the goods were repossessed by virtue of the fact that the last payment received from the defendant personally was on 19 April 2005 and that a letter of demand dated 27 July 2005 indicated the arrear amount as being R6072,71. At the time when the R6000 was received in November 2005, a further four months rental had not been paid by the defendant. Accordingly, there can be no doubt that the defendant was in fact in breach at the time the goods were repossessed in December 2005.

8. Mrs Brenda Freislich testified that she was employed by the plaintiff as a credit controller. Her duties include, after receiving a debtors age analysis, contacting a client to make arrangement for the payment of any arrear amounts. The defendant was one of the clients on her list of clients in arrears. She made various phone calls to the defendant and left messages which were never returned. A letter of demand was sent to the defendant and he failed to respond to this. She accordingly instructed the loss-control department to send a risk mitigation official to visit the defendant's business premises and to collect the arrears, obtain new debit details and to ask for an explanation from the defendant for failing to contact her.

9. The risk mitigation official, Mr William Botha, responded to this instruction. His written notes indicate that the defendant was overseas until December 2005. During October 2005, Botha left a business card at the defendant's premises.

10. Freislich testified that some time after this, the exact date not being clear, she was contacted by a person from the supplier of the equipment, Ronmar, who informed her that the defendant had sold the business about four months earlier and that the new owner would pay an amount of R6000 for the three months he had used the equipment. According to her this payment was never made. However, as I have explained, it was in fact made but not correctly referenced and only discovered at a later date. Being unaware of any payment she then instructed loss-control to

repossess the equipment. She stated that she believed the plaintiff had the right to repossess the equipment, because it was in possession of a third party.

11. It would seem that Freislich was also of the view that she had the entitlement to take possession of the goods in terms of clause 9 of the agreement which on breach gives the plaintiff the right to terminate the agreement and take possession of the goods, to retain all amounts already paid and to claim future rentals. The first breach was obviously the failure to pay the monthly rentals. However, the defendant acted contrary to the terms of clause 13 of the agreement by surrendering possession of the goods to a third party without the consent of the plaintiff. The relevant clause is clause 13.1 which reads as follows:

> "13. USE OF THE GOODS
>
> 13.1 User shall at all times keep the goods in its possession and under its control and shall take reasonable care in the use of goods. User shall at its own expense maintain the goods in proper working order and keep the goods free from attachment, hypothec, or other legal charge or process. User shall not sell, let, loan, pledge, transfer or otherwise encumber or alienate the goods in any way or permit any lien to arise in respect of the goods and shall not cede, assign or delegate any of its rights or obligations in terms of this agreement. The goods shall be operated at User's cost and controlled only by properly trained, licensed and qualified persons. User shall comply with the specification, instructions and recommendations of the manufacturer for the operation, service, maintenance and/or repair of the goods or any part thereof."

12. Mr William Botha, the risk mitigation official, testified that his duties were to attend to the clients who were in arrears. He would make demand of the arrears, collect them, and make additional arrangements for payment. He confirmed that he received an instruction from the plaintiff to visit the business premises of the defendant.

13. On the day that he repossessed the goods in December 2005, he visited the defendant's premises where he was informed by a woman there that she and her associates were the new owners of the business. The staff of the business then pointed out the equipment to him which was packed in boxes and stored in a storeroom at the back of the business. He then proceeded to the defendant's home address but was unable to find the defendant there. He contacted the defendant by telephone, who told him that he was out of town and would not be able to come to the business premises. Botha then returned to the business premises and repossessed the equipment in the presence of the new owner, a representative of Renmor and a colleague who had accompanied him. He testified that the new owner of the business indicated to him that he did not have any use for the equipment as he had already acquired other equipment and that the equipment was taking up room. In other words, the new owner of the business did not object to the repossession of the goods and in fact consented to it.

14. As I indicated at the outset, the defendant closed his case without testifying or calling any witness to testify on his behalf, despite the fact that both he and his wife were present at court.

15. Having regard to the admitted fact that the defendant was indeed in arrears with his payment and that he had failed to keep the goods in his possession and under his control, one may safely conclude that the defendant was in breach of the agreement; and thus that the plaintiff was entitled to terminate the agreement and to seek the remedies afforded by clause 9 of the agreement.

16. The defendant has contended that the plaintiff was obliged to convey its election to cancel the agreement to the defendant but failed to do so until issuing summons. I am prepared to accept for the purposes of argument that the first occasion on which the plaintiff formally communicated to the defendant that it had elected to cancel the agreement was with the issuing of summons. An argument could be made that the repossession of the goods by Botha was tantamount to cancellation and that such had been communicated by such action. However, for reasons that will become apparent presently, it is unnecessary to determine whether that indeed was the case in this instance.

17. It is common cause that the plaintiff repossessed the goods without the intervention of a court order. I accept the criticism leveled at Botha's evidence by counsel for the defendant that his testimony regarding the

telephonic discussion on the date of repossession was somewhat vague. Botha has done approximately ten thousand repossessions since the repossession of the defendant and hence it is understandable that he could not give precise evidence as to whether or not the defendant had consented to the repossession. On this premise, therefore, the defendant argued that the repossession amounted to a repudiation.

18. There was some debate in argument about whether or not clause 9.1 could be interpreted to mean that the plaintiff may take possession of the goods without a court order. Counsel for the defendant submitted that to interpret the agreement in such a way would be contrary to policy in that it violated the fundamental principle that no person should be allowed to take the law into his own hands. Proceeding on the basis of that argument, he submitted further that the plaintiff by repossessing the goods without a court order or the consent of the defendant repudiated the agreement, that the defendant accepted that repudiation and hence was relieved from the obligation to perform or tender performance in terms of the agreement.

19. I am prepared to accept for the sake of argument that clause 9 would normally oblige the plaintiff to take possession of goods only with the consent of the debtor or in terms of a court order. However, the principle disallowing repossession without consent or a court order applies only to dispossessing a dissenting person in possession. The evidence in this case shows that the defendant had in fact abandoned possession of the

goods in breach of clause 13 of the agreement and had wrongfully delegated his obligations under the agreement to the third party. Moreover, the uncontested evidence of Botha is that the third party consented to his repossessing the goods.

20. Clause 2 of the agreement is also relevant. It reads as follows:

> "Ownership of the goods shall vest in the Hirer and nothing in this agreement shall be construed as conferring on the User or any other person on its behalf any right, title or interest in the goods other than as User. The User shall not acquire ownership on the delivery or during or after the determination of this agreement."

It is quite clear from this clause that the parties intended the plaintiff to remain owner of the goods both throughout and after the termination of the agreement. It is trite that an owner who has been deprived of his property against his will is, as a general rule, entitled to vindicate it from any person who is in possession of it. In our law that is so irrespective of whether the person is a *bona* or *mala fide* possessor or occupier, and there is no need to compensate him for its value even where the latter acquired it justifiably. It is furthermore irrelevant whether the owner parted with possession of his property of his own accord, for example by lending or leasing it to a person (such as in this case) who has then subsequently alienated it or delivered it to the defendant - *Morum Bros Ltd v Nepgen* 1916 CPD 392 at 394.

21. When the plaintiff discovered that the goods were unlawfully in the possession of a third party, it was entitled as owner to exercise its rights of ownership and to vindicate the property by taking it back into its possession. There is also no question of an unlawful spoliation, because the undisputed evidence is that the third party consented to the repossession. Thereafter, the right of cancellation, communicated in the particulars of claim, was properly exercised and the plaintiff became entitled to invoke the rights and remedies provided for in clause 9. By exercising its rights as owner in terms of clause 2 read with clause 13 of the agreement, and by repossessing the equipment from the possession of a third party, the plaintiff did not exhibit a deliberate and unequivocal intention not to be bound by the terms of the agreement. It was simply asserting its rights of ownership to protect the goods in circumstances resulting from a breach of contract by the defendant. Taking possession of the goods from a consenting third party with no right or interest in them does not of itself constitute a repudiation of the contract.

22. As I have stated, the defendant has pleaded that the plaintiff's claim for the future rental as pre-estimated liquidated damages constitutes a conventional penalty as contemplated in the Conventional Penalties Act 15 of 1962. He submitted further that the amount is out of proportion to the prejudice suffered by the plaintiff and accordingly sought a reduction of the penalty in terms of section 3 of the Act. Moreover, although it was not pleaded, the defendant has enlarged upon that argument by contending that the plaintiff failed to mitigate its damages.

23. Section 1 of the Act reads:

> "(1) A stipulation, herein after referred to as a penalty stipulation, whereby it is provided that any person shall, in respect of an act or omission in conflict of a contractual obligation, be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person, herein after 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.
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> (2) Any sum of money for the payment of which or anything for the delivery or performance of which a person may become so liable, is in this Act referred to as a penalty."

24. Section 3 of the Act provides:

> "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 creditors proprietary interest, but every other rightful interest which may be affected by the act or omission in question."

25. The parties are in agreement that the claim for future rentals allowed in terms of clause 9.1 of the agreement is indeed a penalty. Usually a plaintiff who relies on a penalty need not prove his damages for the penalty stipulation to come into operation. The onus of proof is on the

defendant to convince the court that a penalty ought to be reduced as well as the extent of such moderation - *Smit v Bester* 1977 (4) SA 937 (A). The basis for moderation of a penalty is that it should be shown to be out of proportion to the prejudice suffered by a creditor.

26. The starting point is to consider the actual and potential prejudice for the plaintiff. The Act employs the concept of prejudice and this clearly includes more than patrimonial loss. A court is entitled to have regard to every rightful interest of a creditor that is affected by the breach of contract and this concept may be widely interpreted. It includes affective loss, inconvenience etc., which are not normally regarded as compensable. In *Van Staden v SA Central Lands and Mines* 1969 (4) SA 349 (W) at 352 Snyman J said:

> "Everything that can reasonably be considered to harm or hurt, or be calculated to harm or hurt a creditor and his property, his person, his reputation, his work, his activities, 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."

27. Once the court has determined what it considers to be the extent of the creditor's prejudice, it must compare that prejudice with the penalty in order to ascertain whether or not it is out of proportion to it. A court will normally only intervene if the penalty deviates markedly from the

prejudice. In *Western Credit Credit Bank Ltd v Kajee* 1967 (4) SA 396 (N) at 391 the court held:

> "The words "out of proportion" do not postulate that the penalty must be outrageously excessive in relation to the prejudice for the court to intervene. If that had been intended, the Legislature would have said so. What is contemplated… is that the penalty is to be reduced if it has no relation to the prejudice, if it is markedly, not infinitesimally, beyond the prejudice, if the excess is such that it would be unfair to the debtor not to reduce the penalty; but otherwise, if the amount of the penalty approximates that of the prejudice, the penalty should be awarded."

28. That said there is obviously no precise measure which can be used and the court may, when it considers a penalty to be excessive, moderate such penalty to the extent which it considers it to be equitable in the circumstances. In this regard it may consider factors such as the conduct of the parties, their relationship, their relative bargaining power, the nature of the plaintiff's business, the reason for the breach of contract, and attempts by the debtor to reduce the creditor's damage - see Bamford 1972 *SALJ* 234. The test is essentially one of reasonableness in which a court should take cognizance of the legitimate aims and purpose of the penalty and the reasonableness of the relationship between the penalty and the creditor's actual and potential prejudice.

29. In *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) at 241A-B the Supreme Court of Appeal upheld the earlier Appellate Division decision in *Smit v Bester*. In order to reduce the

amount of the forfeiture, the actual prejudice suffered by the creditor must be proved by the debtor. This was recently reaffirmed in *Steinburg v Lazard* 2006 (5) SA 52 (SCA) at 46C-D where the court held:

> "The creditor does not have to prove any prejudice because the penalty clause he seeks to enforce is in his favour… Although the High Court found that the appellant has failed to discharge the onus which rested on him, it incorrectly described such onus as the burden of adducing evidence in rebuttal (weerleggingslas). What burdened him was not just the duty to lead evidence but the full legal onus."

30. From the foregoing decisions it follows that the defendant bears the burden of alleging and proving that the plaintiff has suffered prejudice in an amount less than the penalty and accordingly the amount of the abatement of the plaintiff's claim.

31. There is not much before me in the way of evidence with regard to the extent of the plaintiff's prejudice. However, it is common cause that the plaintiff was the financier of the goods, rather than the supplier thereof. The plaintiff thus only facilitated the purchase of the equipment from the supplier at the defendant's special instance and request in order to rent the equipment to the defendant. The equipment and its specifications were negotiated directly between the supplier and the defendant. The plaintiff made an initial capital layout to the supplier and this amount has not been repaid. The plaintiff is not in the business of trading in automated office equipment and thus has no showrooms at its disposal in which to dispose of the repossessed equipment. The plaintiff therefore

claims no more than it would have been entitled to in terms of the agreement, if the defendant had complied fully with his obligations. It contended that it should not be required to mitigate its losses by entering into economically unviable transactions involving second hand equipment.

32. Against that though, Mr Vermeulen testified that after repossessing the goods the plaintiff simply left them in its storeroom without attempting to sell or rehire them to other customers. The plaintiff repossessed the goods approximately 9 months after the commencement of the agreement. Consequently, there remained 51 months of the agreement to run when the plaintiff repossessed the goods. He was unable to give a satisfactory answer as to why the plaintiff did not attempt to sell or rehire the goods in some attempt to mitigate its damages. Counsel for the defendant submitted by comparison that if an owner of a fixed property were to lease it for a period of 60 months and the agreement was cancelled after 9 months, the lessor would undoubtedly have a duty to attempt to mitigate its damages by leasing the property to a new tenant during the remaining 51 months.

33. It would seem to me that the starting point when a court is called upon to decide whether to reduce a penalty should be the principle *pacta sunt servanda*. That much is evident from section 1 of the Act which proceeds on the premise that penalties and pre-estimates of liquidated damages are enforceable. In determining the question of proportionality it is not only the relationship of the penalty to the prejudice which is weighed and

considered, but, as discussed, also other non-pecuniary and other rightful interests which may be affected by the act or omission. When a financier, as in this case, puts up finance to enable a debtor to acquire goods from a third party and includes within its agreement with the debtor, as a protective measure, a clearly stipulated penalty as a pre-estimate of liquidated damages, and the debtor enters into the contract on an equal basis with the creditor, without any unusual inequality in bargaining power or position, the court should pause before imposing on the creditor a requirement to mitigate its losses compelling it to engage in the business of marketing and selling or leasing equipment on what might prove to be an economically unviable basis. A financier normally should not be expected to become a dealer in second hand equipment.

34. However, that said, the fact remains that the equipment has a residual value and remains in possession of the plaintiff. Unfortunately, there is no evidence as to the present value of the equipment and thus it cannot be said that the defendant has discharged its onus to establish the extent of the abatement of the penalty he seeks. While the equipment, consisting of computers, computer equipment and a photocopier, obviously will have some monetary value, it is not clear whether it has any practical or functional value to the plaintiff. Unlike immovable property, office equipment is by nature a depreciating asset. Moreover, from the clauses of the contract it is evident that had there been proper performance the plaintiff would have received the 60 months rental and that at the end of the period the goods in any event would have been returned to it.

Accordingly, as I see it, the extent of the creditors prejudice equates with the extent of non-performance under the contract. I can only conclude that the extent of the plaintiff's prejudice is in the amount of the monthly rentals of R2018,94 which it would have received over the entire period of the contract.

35. Additionally, the manner in which the defendant behaved, causing as he did considerable inconvenience to the plaintiff by simply abandoning the goods with a third party, is a significant relevant consideration. From the limited evidence available it appears to me that the defendant made little or no attempt whatsoever to reduce the plaintiff's damage by taking responsibility for the goods or by acting effectively to novate the original contract with one that assisted in diminishing the plaintiff's damages. I do not consider in such circumstances that the penalty is out of proportion to the prejudice suffered by the plaintiff. There was accordingly no duty on the plaintiff to mitigate its damages to an amount lower than the penalty.

36. In the result, therefore, the plaintiff should be entitled to succeed in the claim. In the particulars of claim the plaintiff seeks interest from the date of the conclusion of the contract. However, in argument the plaintiff conceded that interest is payable at the agreed rate from the date of summons to the date of payment. In terms of clause 17.2 of the agreement, the plaintiff is entitled to its costs on an attorney and own client basis. There is no submission or evidence justifying any departure from that contractual term.

37. In the premises, the following orders are issued:

1. The defendant is ordered to pay the plaintiff the amount of R113 732, 51 together with interest on that amount at the rate of prime plus 6% per annum from the date of summons to the date of final payment.

2. The defendant is ordered to pay the costs of suit on an attorney and own client basis.

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 3 & 4 September 2008
For the Plaintiff: Adv JJ Durandt, Johannesburg
Instructed By: JAY Mothobi Inc. c/o Surita Marais Attorneys, Pretoria
For the Defendant: Adv APJ Els, Pretoria
Instructed By: CP Vermaas & Cronje c/o Paul du Plessis Attorneys, Pretoria