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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2023-066739

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

DATE: 18 November 2025

SIGNATURE:

In the matter between:

GREGORY JOHN VON HOLDT

Applicant

and

HILL INC.

First Respondent

THE TRUSTEES FOR THE TIME BEING OF THE

DOLPHIN TRUST (IT 2128/00)

Second Respondent

PAM GOLDING PROPERTIES (PTY) LTD

Third Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 18 November 2025.

MAHON AJ:

INTRODUCTION

- [1] This application concerns a dispute arising from a written agreement for the sale of an immovable property situated at Erf 2[...] Kyalami Agricultural Holdings. The applicant, Mr Gregory John von Holdt, was the seller. The second respondent, the trustees for the time being of the Dolphin Trust, was the purchaser. The purchase price was R17 250 000, of which a deposit of R1 725 000 was payable into the first respondent's trust account shortly after the parties concluded the agreement.
- [2] The purchaser paid a total amount of R1 750 000 into the first respondent's trust account and the conveyancer expressly allocated that sum as constituting compliance with the contractual deposit obligation. The additional R25 000 was a voluntary overpayment that would, had the transaction proceeded, have been applied to transfer-related charges. No contractual entitlement to this excess amount was asserted by the applicant, and it does not form part of the deposit that is the subject of the present dispute as it has been repaid. The dispute, therefore, only pertains to the amount of R1 725 000.
- [3] The agreement required the purchaser, when called upon to do so, to furnish a bank guarantee securing the balance of the purchase price. It is common

cause that the guarantee was not furnished within the 14-day period stipulated in the demand delivered on 2 November 2022, nor within the further five business days afforded in the subsequent notice to remedy delivered on 28 November 2022. The applicant cancelled the agreement on 6 December 2022. Relying on clause 15.2 of the agreement, he now seeks an order declaring that he is entitled to retain the deposit as a cancellation penalty, together with the interest accrued thereon.

[4] The second respondent opposes the application and, itself seeks payment of this amount from the first respondent by way of counter-application. It advances two broad lines of defence. First, it contends that on a proper interpretation of the agreement, the purchaser was obliged to remedy any breach “timeously”, which it submits means within a reasonable time and not strictly within the five-day period contemplated in clause 15.1. On this footing, it argues that it was in a position to furnish the guarantee within a short additional period, that it tendered to do so, and that the cancellation was premature. Secondly, and in the alternative, the second respondent invokes section 3 of the Conventional Penalties Act 15 of 1962, submitting that even if the applicant is entitled to rely on the penalty stipulation, the forfeiture of the full deposit is disproportionate to the prejudice suffered and ought to be equitably reduced.

[5] After the cancellation, the parties engaged in further discussions concerning a possible fresh transaction, and the property was later withdrawn from and subsequently reintroduced to the market. In 2025 the property was sold for R15.5 million. The parties differ materially on the extent to which this later

sale, together with the intervening period, bears upon the question of prejudice.

[6] In the course of preparing for the hearing, the second respondent sought to place before the court a supplementary answering affidavit containing facts arising after the exchange of the principal affidavits. The applicant delivered a supplementary affidavit in response. At the hearing the parties accepted that these supplementary affidavits formed part of the record, and argument proceeded on that basis.

[7] The matter therefore requires the court to determine three principal issues: whether the applicant validly cancelled the agreement; if so, whether the penalty clause has been triggered; and if it has, whether the penalty should be reduced under section 3 of the Act in the light of the prejudice established on the papers. The allied question of the fate of the deposit held in trust by the first respondent turns on the resolution of these issues.

FACTUAL BACKGROUND

[8] The agreement of sale was concluded on 6 September 2022. The purchaser paid the agreed deposit of R1 725 000 into the first respondent's trust account on 19 September 2022. In terms of the agreement, the balance of the purchase price was to be secured by a bank guarantee when requested.

[9] On 2 November 2022 the seller's conveyancers delivered a written request calling for the guarantee within 14 days, expiring on 16 November 2022. No guarantee was furnished within that period. On 28 November 2022 a further written notice was issued recording the purchaser's failure to comply and

calling for the breach to be remedied within five business days. The guarantee was again not delivered within the period stipulated in that notice. On 6 December 2022 the applicant notified the purchaser in writing that the agreement was cancelled.

[10] Thereafter, and once the applicant returned from travel in early 2023, the parties engaged in renewed discussions concerning the possibility of concluding a fresh agreement. Those engagements included exchanges between the purchaser, the estate agents and the applicant relating to the purchaser's request for a professional inspection of the property and access for that purpose. Despite these exchanges, no further agreement eventuated.

[11] In June 2023 the property was withdrawn from the market. It was placed back on the market in March 2024 at an asking price of R17 million, later reduced to R16 495 000 in August 2024. The property was ultimately sold in early 2025 for R15.5 million.

[12] During this intervening period the purchaser made various overtures aimed at resolving the dispute over the deposit, including without-prejudice tenders. In June 2025 it sought leave to place additional facts before the court by way of a supplementary answering affidavit, principally relating to developments in the marketing and sale of the property. The applicant filed a supplementary affidavit in reply.

[13] These events form the factual background against which the present dispute falls to be determined.

[14] For completeness, it is convenient to record that, although the second respondent raised a range of additional defences and complaints on the papers, these were not persisted in at the hearing. In its answering affidavit the second respondent advanced various *in limine* points (including objections based on alleged procedural non-compliance and attacks on the adequacy of the founding papers), as well as allegations concerning supposed impropriety or irregularity in the manner in which the first respondent held and dealt with the funds in its trust account. It also made allegations that the applicant had suffered no prejudice at all, that he had sought to enrich himself at the expense of the second respondent, that he had acted *mala fide*, and that enforcement of clause 15.2 would be *contra bonos mores*, coupled with a prayer for punitive costs and a counter-application for repayment of the deposit.

[15] In the second respondent's heads of argument, however, it is expressly recorded that "the second respondent's *in limine* defences and the issues concerning the alleged impropriety/irregularity in respect of the first respondent's trust account are no longer persisted with", with specific reference to the paragraphs of the answering affidavit in which those matters were raised. The heads of argument further state that they are confined to two remaining defences, namely (i) the contention that on a proper construction of clauses 15.1 and 15.2 of the agreement the cancellation penalty did not become due because the purchaser was not afforded a reasonable time to provide the guarantee, and (ii) the alternative contention that, if the penalty was otherwise enforceable, it falls to be reduced under section 3 of the Conventional Penalties Act.

[16] That narrowing of the issues was maintained at the hearing. Counsel for the second respondent indicated that he would not traverse the full range of arguments contained in the answering affidavit and that his submissions would be directed to the proper interpretation of clauses 15.1 and 15.2 and to the proportionality enquiry under the Conventional Penalties Act, drawing on the allegations of absence of prejudice and alleged *mala fides* only as part of that section 3 enquiry rather than as freestanding defences. The dispute that falls for determination in this judgment is accordingly confined to those two issues.

ANALYSIS

The operation of clauses 15.1 and 15.2

[17] The central point of departure is the proper construction of the contractual mechanism governing breach and its consequences. Clause 15.1 provides that if any party breaches the agreement and fails to remedy that breach within five business days of written demand, the innocent party may elect either to claim specific performance or to cancel the agreement and claim damages. Clause 15.2 concerns the treatment of the deposit where the purchaser is the defaulting party. It provides that, subject to applicable law and the estate agent's prior rights, the seller is entitled to retain the deposit "where the purchaser is the defaulting party and fails to remedy the breach timeously".

[18] The purchaser submitted that the use of the word "timeously" in clause 15.2 reflects a remedial period distinct from the five-day period stipulated in clause 15.1. It argued that "timeously" should be understood to mean within a

reasonable time, and that, on the facts, it could have furnished the guarantee within a short additional period had it been permitted to do so. The applicant submitted that the two clauses must be read together; that “timeously” cannot be divorced from the explicit remedial period provided in clause 15.1; and that the structure of the agreement contemplates a single remedial mechanism, with the consequences of default differing depending on the identity of the defaulting party, but not on the time allowed for remedy.

- [19] The wording and structure of the agreement support the applicant’s interpretation. Clause 15.1 is the operative remedial provision and expressly fixes the period within which a breach must be cured. Clause 15.2 does not purport to introduce a separate or extended period; it simply describes the circumstances in which the seller’s entitlement to the deposit as a cancellation penalty arises. The term “timeously” must therefore be construed contextually as referring back to the period provided for in clause 15.1. To interpret it as introducing a distinct and undefined period would undermine the commercial certainty that the contract plainly sought to achieve, particularly in a transaction in which the purchaser’s ability to secure financing is fundamental. This approach accords with the now well-established principles of interpretation which require the language, context and purpose of a provision to be considered together rather than in isolation, as explained in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and affirmed in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA).

[20] On this construction, the purchaser was required to furnish the guarantee within the period stipulated in the demand made on 28 November 2022. It did not do so. Its explanation for the delay, and its contention that it could have furnished the guarantee shortly thereafter, do not alter the fact that the contractual time for remedy expired without compliance. The applicant's cancellation was therefore contractually competent.

The effect of the purchaser's alternative contentions

[21] The purchaser advanced further contentions suggesting that the applicant's conduct contributed to the delay, that the breach was not material, and that the applicant's cancellation amounted to a repudiation. These contentions are not borne out on the papers. The obligation to furnish the guarantee arose directly from the purchaser's acceptance of the offer and the terms of the written agreement. The purchaser does not dispute that the guarantee was required, nor that it was capable of requesting the necessary documentation and initiating the process to procure it. The cause of the delay therefore lies squarely with the purchaser, and nothing in the papers convincingly suggests conduct on the part of the seller or conveyancers that could have impeded compliance within the contractual timeframes.

[22] As for materiality, clause 15.1 does not condition the seller's election on a material breach; it applies to "any" breach not timeously remedied. The question of materiality would only arise in the absence of such a *lex commissoria*. Where parties have, in clear terms, stipulated the consequence of non-compliance, a court ordinarily gives effect to that allocation of risk without importing a free-standing requirement of materiality, unless the clause

is itself open to a different interpretation. The purchaser's reliance on general principles of materiality is inconsistent with the express terms of the agreement.

[23] The repudiation argument is equally unsustainable. The cancellation was a direct invocation of the contractually stipulated remedy following non-compliance with a valid notice to remedy. There is no conduct in the correspondence of 6 December 2022 that could reasonably be construed as evincing an intention not to be bound by the agreement; rather, it reflects the exercise of a contractual right. The test for repudiation is whether the innocent party would reasonably conclude that the other party does not intend to be bound by the contract, judged objectively: *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA). On the facts of this matter, that threshold is not remotely met.

[24] On any rational reading of the agreement, therefore, the right to cancel had accrued, and the applicant was entitled to exercise it.

The Conventional Penalties Act

Whether the second respondent was entitled to rely on the Conventional Penalties Act in the absence of a concession of breach

[25] The applicant submitted that the second respondent was not entitled to invoke section 3 of the Conventional Penalties Act because it had not admitted that it was in breach of the agreement. The submission relied on the line of authority, including *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A), which describes as a “quaint state of affairs” the fact that a debtor who wishes to rely

on the Act must assert the very breach that triggers the penalty. The applicant's counsel contended that the purchaser's simultaneous denial of breach and reliance on the Act rendered its position impermissibly contradictory, particularly in motion proceedings.

[26] The argument cannot be sustained. The principle on which the applicant relied is directed at factual versions that are mutually destructive. It is trite that a party cannot, on affidavit, advance competing factual narratives of such a nature that the truth of one necessarily entails the falsity of the other. The rule, however, does not prevent a litigant from advancing a coherent legal contention that is explicitly conditional upon a court's rejection of its primary factual or interpretative case. A litigant is entitled to say: "I did not breach the agreement; but if it is found that I did, then a particular legal consequence follows". That is a familiar and unobjectionable form of alternative argument.

[27] There is nothing in *Sun Packaging* or in any of the authorities governing motion proceedings that compels a debtor formally to concede breach as a precondition to relying on the Act. What the Act requires, as explained in *Sun Packaging*, is that the liability to pay under the impugned clause must derive from "an act or omission in conflict with a contractual obligation", that is, from breach. The existence of a breach may be established as a matter of legal conclusion rather than factual concession. The debtor may therefore dispute that it was in breach but, in the same breath, take the position that if the court concludes that a breach occurred, and if the penalty is enforceable, then the court must go on to consider whether the penalty is disproportionate.

[28] That is precisely how the second respondent framed its case. Its primary argument was that, properly construed, the agreement afforded it a longer period within which to furnish the guarantee, and that no breach occurred. Its alternative argument, premised on the court rejecting that construction, was that the penalty should nevertheless be reduced. These positions are not mutually destructive: one is grounded in the parties' differing interpretations of their written contract, and the other is a distinct statutory defence that arises only if the applicant's interpretation prevails.

[29] The applicant's contention that such an approach is impermissible in motion proceedings therefore rests on a misapplication of the principle. The principle does not prevent a party from raising a legal defence in the alternative to its primary case; it merely prohibits a party from attempting to establish two mutually incompatible factual versions. The respondent advanced a single factual narrative. Its alternative reliance on the Act is a legal contention whose premise comes into existence only upon a judicial finding that differs from its own. It was therefore properly advanced and falls to be considered on its merits.

[30] I therefore turn, now, to this question.

The Application of the Conventional Penalties Act

[31] Once it is accepted that the cancellation was valid and that the contractual entitlement to retain the deposit was triggered, the remaining question is whether the forfeiture of the full deposit should be moderated under section 3 of the Conventional Penalties Act 15 of 1962. That section empowers a court to reduce a penalty to the extent that it is out of proportion to the prejudice

suffered by the creditor, and requires the court to evaluate not only the creditor's proprietary interests but "every other rightful interest" affected by the breach. The enquiry is an equitable one, directed at the circumstances as they stand at the date of the hearing. This two-stage enquiry – whether the penalty is out of proportion to the prejudice, and, if so, to what extent it should be reduced – is well established: see *Sun Packaging (Pty) Ltd v Vreulink* and the discussion there of section 3, as well as the analysis in later decisions considering the scope of "prejudice" and "rightful interests".

[32] In its heads of argument the second respondent articulated two alternative contentions: (i) that the penalty was "commensurate with the prejudice suffered" by the applicant, or (ii) that it was out of proportion and therefore liable to reduction. Embedded within these submissions were several propositions requiring consideration.

[33] A principal theme of the second respondent's argument was that the applicant suffered little or no cognisable prejudice. Emphasis was placed on the fact that the property was eventually sold for R15.5 million, and the suggestion was made that, when the forfeited deposit is added to that amount, the applicant's financial position approximates what it would have been under the original agreement. This overlooks the fact that section 3 is not confined to arithmetic loss. The applicant placed substantial, largely undisputed evidence before the court concerning the consequences of the failed transaction: the collapse of his planned onward purchase, the loss of a firm offer of R17 million that pre-dated the respondent's offer, extended maintenance and municipal costs on a substantial rural property, the need to obtain bridging finance, and

the progressive deterioration in the property's marketability in the period after the breach. These consequences form part of the "rightful interests" that section 3 requires the court to consider, consistently with the broad conception of prejudice and legitimate interest recognised in the authorities and in the standard texts, such as Christie's *Law of Contract in South Africa* (which was also referred to in *Sun Packaging*). The second respondent's analysis also ignores the question of interest.

[34] The respondent also submitted that its breach was easily remediable, and that its failure to provide the guarantee timeously did not materially prejudice the applicant. Even if one accepts that the guarantee could have been furnished shortly after the expiry of the contractual period, that does not alter the fact of breach nor its consequences, which unfolded over a protracted period. The Act does not empower a court to rewrite the parties' agreed timeframes in order to reflect what a party now says it could have done. The prejudice assessment begins with the breach as established; it does not permit the debtor to recast the contractual matrix *ex post facto*.

[35] A further contention was that the applicant had contributed to or exacerbated his own prejudice, particularly by withdrawing the property from the market for a period in 2023. The respondent offered no evidence demonstrating that the temporary withdrawal affected the ultimate sale price or the level of buyer interest. The applicant's explanation for the withdrawal appears congruent with the broader factual context, including fluctuating demand and limited interest from prospective buyers. In any event, the Act requires the court to assess the prejudice caused by the breach; it does not render the creditor's

position vulnerable to every tactical or commercial decision taken subsequently unless those decisions break the chain of causation, which the respondent has not shown.

[36] The submission that the applicant's eventual sale price, when combined notionally with the deposit, places him in a roughly equivalent position also fails to withstand scrutiny. The shortfall between the original contract price of R17.25 million and the eventual sale price, even before considering the extended holding costs, is significant. Moreover, the applicant's legitimate interests include timely realisation, the avoidance of substantial holding costs, and the preservation of opportunities lost when the original transaction failed. On the evidence, the overall prejudice exceeds the amount of the penalty. The penalty cannot therefore be said to bear no reasonable relationship to the prejudice suffered.

[37] These considerations collectively demonstrate that the prejudice suffered by the applicant was substantial, multi-faceted, and directly connected to the respondent's breach. The respondent failed to establish any basis upon which the penalty could be characterised as excessive or inequitable. This is not a case where the operation of the penalty clause results in an outcome that is harsh or unconscionable in the sense contemplated by section 3. The statutory jurisdiction to reduce the penalty is therefore not engaged.

CONCLUSION

[38] The dispute between the parties turns on the proper application of a clear contractual regime and a statutory discretion that is engaged only in limited circumstances. The contractual notices issued on 2 and 28 November 2022

complied with the terms of the agreement. The purchaser did not furnish the guarantee within the stipulated period. On a proper interpretation of clauses 15.1 and 15.2, the seller's right to cancel accordingly accrued. The applicant's cancellation on 6 December 2022 was a lawful exercise of that right.

[39] Once cancellation is held to be valid, the contractual entitlement to retain the deposit likewise follows. The second respondent advanced no remaining defence that undermines this conclusion. Its alternative reliance on section 3 of the Conventional Penalties Act, although competently raised, does not justify any reduction of the penalty. The evidence demonstrates that the applicant suffered real, significant and wide-ranging prejudice as a result of the purchaser's breach, and that the amount of the forfeited deposit bears a reasonable relationship to that prejudice. The statutory jurisdiction to interfere is therefore not triggered.

[40] The applicant has thus established his entitlement to the relief sought, and the application must succeed. The inevitable consequence for the counter-application, is that it must be dismissed. In my view, the complexity of the matter warrants an order for costs on scale C.

[41] In the circumstances, the following order is made:

1. The first respondent is ordered to pay to the applicant the deposit amount retained in its trust account totaling R1 725 000.00, together with all the interest that has accrued on this amount.
2. The counter-application is dismissed.

3. The second respondent shall pay the applicant's costs of the application and the counter-application, on scale C.

D MAHON

Acting Judge of the High Court
Johannesburg

Date of hearing: 14 August 2025

Date of judgment: 18 November 2025

APPEARANCES:

For the Applicant: Adv P Cirone

Instructed by: Carvalho Inc

For the 1st Respondent: No appearance

For the 2nd Respondent: Adv H J Fischer

Instructed by: Berndt & La Vita Inc

For the 3rd Respondent: No appearance