



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Appeal case no: A77/2025

Court *a quo* case no: 7722/2020

In the matter between:

GRIMMS CC

t/a ATLANTIC COMMERCIAL DIESEL SERVICES

Appellant

and

STOCKLOG CC

Respondent

Coram: Nuku J et Miller AJ
Heard: 29 August 2025
Delivered: 15 December 2025

ORDER

1. Paragraph 1 of the order in the court *a quo* is replaced with the following:

“1. *The defendant is liable to pay the plaintiff the sum of R200 081.41.*”

2. The appellant is liable for 75% of the costs of this appeal, such costs to include the costs of counsel on scale A.

JUDGMENT

Miller AJ (Nuku J concurring):

Introduction

[1] The respondent is a supplier of maritime parts. The appellant was the respondent's customer.

[2] The respondent, as plaintiff in the court *a quo*, instituted an action against the appellant, as defendant, for payment of R457 945.60 plus interest at 2% per month *a tempore morae* until the date of payment.

[3] The respondent's claim was based on an agreement that the respondent alleges was concluded between it and the appellant on 8 November 2019 (*"the agreement"*).

[4] The agreement was for the purchase of two DN40 angle valves (and associated export license) and other marine parts (*"the other marine parts"*) for the total purchase price of R1 017 656.89 (inclusive of VAT).

[5] Clause 5.8 of the agreement provided that a "... 45% *cancellation fee will be imposed once the order is confirmed*" (*"the penalty clause"*).

[6] The appellant denied the agreement. The respondent claimed that this constituted a repudiation of the agreement, cancelled it and claimed 45% of the total purchase price in terms of the penalty clause.

[7] In the court *a quo* the appellant denied the agreement and, in the alternative, claimed that the penalty fell to be reduced in terms of the Conventional Penalties Act, 15 of 1962 (*"the CPA"*) on the basis that it was out of proportion to the prejudice suffered by the respondent.

[8] The court *a quo* granted judgment in favour of the respondent. In essence, the court *a quo* upheld the agreement; found that a penalty of 45% of the purchase price in respect of the two DN40 valves (and export license) was not out of proportion and therefore did not fall to be reduced in terms of the CPA; and that the penalty of 45% of the purchase price in respect of the other marine parts fell to be reduced in terms of the CPA to an amount equal to "...*work done as given in evidence but not on the purchase price*".

[9] The court *a quo* did not quantify the penalty in respect of the other marine parts.

[10] The appellant now appeals against the whole of the judgment of the court *a quo* on two main grounds: first, that the court *a quo* erred in finding that

the parties concluded the agreement and second, in the alternative, that court *a quo* erred in failing to reduce the penalty in terms of the CPA.

[11] The appeal was out of time. The appellant applied for condonation. The application was not opposed. There was good cause for the delay in noting the appeal. We condoned the late filing of the appeal.

[12] We deal with each of the grounds of appeal in turn.

The agreement

The facts

[13] The relevant facts pertaining to the agreement upon which the respondent relies for its cause of action are simply stated. They are as follows:

13.1 Under cover of an email of 7 November 2019, the respondent sent the appellant four quotations and the respondent's terms and conditions.

13.2 In an email of 7 November 2019, the appellant accepted one of the abovementioned quotations and told the respondent that the appellant would get back to the respondent by the end of the day regarding the remaining three quotations.

13.3 In an email of 8 November 2019, the appellant, represented this time by Mr Dillan Carelse ("*Mr Carelse*"), accepted the three remaining quotations.

13.4 Under cover of an email of 14 November 2019, the respondent sent the appellant its tax invoices and order confirmations.

13.5 The abovementioned exchange of emails, including the quotations and the acceptance thereof, contain all the essential terms of the parties' agreement.

13.6 In an email of 6 December 2019, the respondent demanded payment from the appellant.

13.7 In a letter attached to an email of 9 December 2019, the appellant asked the respondent to revisit the amounts in its quotations.

13.8 In an email of 13 January 2020, the respondent told the appellant that it could not give the appellant better pricing. The exchange of emails on 9 December 2019 and 13 January 2020 regarding the price has no legal relevance given that the agreement was concluded at an earlier date.

13.9 The appellant subsequently repudiated the agreement and the respondent cancelled it for such repudiation.

The pleadings

[14] The respondent pleaded, *inter alia*, that Mr Carelse represented the appellant in concluding the agreement. This necessarily implies that Mr Carelse had the necessary authority to conclude the agreement on the appellant's behalf.

[15] The appellant denied the agreement on the basis that Mr Carelse lacked the necessary authority to conclude the agreement on behalf of the appellant and that it did not intend to conclude the agreement.

[16] In its replication, the respondent pleaded that the appellant was estopped from denying Mr Carelse's authority to conclude the agreement on the appellant's behalf.

Did the agreement come into existence?

[17] It is clear from the contents of the emails referred to above that the appellant evidenced an outward intention to conclude the agreement.

[18] In cases where a contracting party subsequently denies that it had the requisite intention to conclude a contract, the test in *Sonap Petroleum* must be applied to determine whether a contract came into existence.¹

[19] As the SCA held, the decisive question is this: "*did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention.*"²

[20] The SCA also held that to answer this question, a three-fold enquiry is usually necessary, namely, first, was there a misrepresentation as to one party's intention; secondly, who made that misrepresentation; and thirdly, was the other party misled thereby?³

[21] The appellant's evidence at the trial was that it did not intend to conclude the agreement. It follows that on the appellant's version, it misrepresented its intention to conclude the agreement when Mr Carelse accepted the quotations. This answers the first two questions in abovementioned enquiry.

¹ *Sonap Petroleum (SA) Pty Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A).

² At p239I.

³ At p239J-240B.

[22] Given the unambiguous acceptance of the quotations by Mr Carelse, there is no doubt that the respondent, as a reasonable person, was misled by the appellant into thinking that the appellant was accepting the quotations and thereby concluding the agreement.

[23] The application of the abovementioned test, which constitutes the reasonable reliance theory for upholding a contract, is a sufficient and valid basis to uphold the agreement.

[24] It is common cause that Mr Carelse previously accepted quotations from the respondent on behalf of the appellant. As per the signature to his email, Mr Carelse is described as the “*Administrative Clerk: Order Administration to Marine Spares Division*”. It was not unreasonable for the respondent to assume, particularly given the history of its dealings with Mr Carelse, that he had the necessary authority to bind the appellant. Furthermore, exchange of emails regarding the agreement were copied to the principals of the appellant. They did not, at the time, raise any concern about the conclusion of the agreement or ask the respondent’s representatives to ignore Mr Carelse’s acceptance of the quotations as he lacked the necessary authority to conclude the agreement.

[25] In our view, these facts evidence that the appellant held out that Mr Carelse had the necessary authority to conclude the agreement. As a result, Mr Carelse had the apparent or ostensible authority to conclude the agreement on behalf of the appellant.

[26] Since *Makate*, apparent or ostensible authority is a form of implied actual authority rather than what used to be known as agency by estoppel.⁴

[27] Two conclusions flow from what we have set out above.

⁴ *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 45.

[28] First, the respondent has discharged its onus of establishing that the agreement came into existence based upon its reasonable reliance of the outward expression of the appellant's contractual intention and Mr Carelse's actual authority to represent the appellant in concluding the agreement.

[29] The court *a quo* was therefore correct to conclude that the agreement came into existence.

[30] It follows that the respondent was entitled to rely on the penalty clause.

[31] Second, the issues on the pleadings between the parties and the submissions to this court relating to estoppel are not legally relevant to determining the question whether the respondent was entitled to rely on the agreement and therefore the penalty clause.

[32] In the circumstances, the first ground of appeal must fail.

The CPA

[33] The appellant's alternate ground of appeal was that the court *a quo* erred in failing to reduce the penalty in terms of section 3 of the CPA on the basis that it was out of proportion to the prejudice suffered by the respondent.

[34] After setting out the governing legal principles, we deal separately with the two DN40 valves (and associated export license) and the other marine parts.

The legal principles

[35] The debtor (i.e. the appellant) bears the onus of proving that the penalty is disproportionate to the prejudice suffered and the extent thereof.⁵

⁵ *Steinberg v Lazard* 2006 (5) SA 42 (SCA) at para 7.

[36] If the debtor succeeds in proving *prima facie* that the penalty ought to be reduced, there is an evidentiary burden on the creditor (i.e. the respondent) to rebut if it is possible for him to do so.⁶

[37] In order for a court to exercise its discretion to reduce a penalty it is not necessary for the penalty to be outrageously excessive in relation to the prejudice. 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.*”⁷

[38] Whilst in most cases the monetary aspect will play an important role, indeed the paramount role in deciding whether to reduce a penalty, legally cognisable prejudice in terms of section 3 of the CPA is wider than pecuniary loss or damage.⁸ The court will take into account everything that can reasonably be considered to be harm or hurt, or be calculated to harm or hurt a creditor or his property, his person, his activities, his convenience or in any way interferes with his rightful interests as a result of the debtor’s act or omission.⁹

The DN40 valves (and associated export license)

[39] As stated above, the court *a quo*, in the exercise of its discretion, upheld the penalty provision in so far as it applied to the two DN40 valves.

[40] The total purchase price for the two DN40 valves (and associated export license) as per the agreement was R511 319.16 (R444 625.36 + VAT of R66 693.80).

⁶ *Smit v Bester* 1977 (4) SA 937 (A) at 942D-F.

⁷ *Western Credit Bank v Kajee* 1967 (4) SA 386 (N) at 391B-D

⁸ *Miele et Cie GmbH & Co v Euro Electrical (Pty) Ltd* 1988 (2) SA 583 (A) at 587I.

⁹ *Van Staden v Central South African Lands and Mines* 1969 (4) SA 349 (W) at 352G-353A.

[41] The court *a quo* therefore found (albeit that it does not expressly state as much) the appellant liable to pay the respondent the sum of R230 093.62, being a penalty of 45% of the R511 319.16.

[42] The precise reasons for the court *a quo*'s decision are, unfortunately, not clearly set out.

[43] Counsel for the appellant conceded in argument before us that the following factors, based on the evidence led at the trial, are relevant to the question whether the penalty fell to be reduced in terms of section 3 of the CPA:

43.1 The DN40 valves were purchased from overseas and specifically made for vessels in South Africa. As there is a limited market for such goods, there is a risk that the valves may not be sold in future.

43.2 In any event, the respondent will now have to hold the valves in stock. This will negatively impact on the respondent's cash flow. They will have to be warehoused, which comes at a cost to the respondent.

43.3 The angle valves have a shelf-life because the rubber components do not last for longer than 5 years.

43.4 The appellant has to incur additional costs to service and maintain the angle valves.

43.4 Given that the appellant has previously cancelled an order from the respondent, the penalty served the legitimate purpose of deterring the appellant from doing so with impunity in respect of the agreement.

[44] Subject to the qualification referred to below, these factors justify the court *a quo*'s decision to refuse to reduce the penalty in terms of its equitable discretion to do so in terms of section 3 of the CPA.

[45] The qualification is this. Whilst the respondent was clearly required to levy VAT on the supply of the DN40 valves and export license in terms of the agreement, the receipt of the penalty from the appellant does not involve the "*supply*" by the respondent of any goods or services in terms of section 7(1) of the Value-Added Tax Act, 89 of 1991.

[46] If the respondent had received the purchase price in terms of the agreement, it would have had to account to SARS for the "*output tax*" of R66 693.80. As there is no "*supply*" in term of section 7(1) in respect of the receipt of the penalty, the respondent would not need to account to SARS for the R30 012.21 (being 45% of R66 693.80).

[47] It follows that R30 012.21 of the penalty bears no relation to the prejudice the respondent has suffered as a result of the appellant's repudiation of the agreement. It also follows that the court *a quo* ought to have reduced the penalty by the sum of R30 012.21 in terms of section 3 of the CPA.

[48] In the circumstances, the appeal succeeds and the penalty in respect of DN40 valves (and export license relating thereto) falls to be reduced by R30 012.21 to R200 081.41.

Other marine parts

[49] As stated above, the court *a quo* reduced the penalty in respect of the other marine parts to the costs of the work done by the respondent to date in respect of these other marine parts. The court *a quo* did not quantify the reduction in the penalty.

[50] The import of the court *a quo*'s finding was that the appellant had discharged its onus of establishing that the penalty fell to be reduced in terms of section 3 of the CPA.

[51] The evidential burden then fell on the respondent to establish the facts necessary to determine the extent of the work it had expended on the other marine parts. The respondent did not do so.

[52] As the respondent did not cross-appeal, it accepted this finding.

[53] At the hearing of this appeal, the respondent's counsel asked this court to find that the appropriate penalty in respect of the other marine parts is 10% of the purchase price thereof. There is no precise basis put up for this reduction.

[54] We asked counsel for further submissions on whether this court had the power to make such a finding in the absence of a cross-appeal by the respondent.

[55] There is clear authority that a respondent seeking a variation of an order on appeal is required to cross-appeal (save perhaps in exceptional circumstances where there is no prejudice to the appellant).¹⁰

[56] In substance, finding that the penalty should be reduced to 10% of the purchase price appears to amount to a variation of the order granted by the court *a quo*.

[57] It is not, however, necessary for us to determine this issue as there is no cogent evidence on the record to support a finding that it is appropriate to reduce the penalty to 10% of the purchase price of the other marine parts in terms of section 3 of the CPA.

¹⁰ *Gent v Du Plessis* 2020 JDR 2865 (SCA) at para 16.

[58] In the alternative to a finding that the penalty in respect of the other marine parts falls to be reduced to 10% of the purchase price, the respondent requested us to remit the case back to the court *a quo* for clarification of her order.

[59] Whilst we have the power to remit the case back to the court *a quo* in terms of section 19(c) of the Superior Courts Act, 10 of 2013, our view is that it is not in the interests of justice to do so.

[60] This is for two reasons.

[61] First, it is highly unlikely that the respondent will be able to lead any cogent evidence of unrecoverable direct costs that it has spent on other marine parts that enables a court to meaningfully assess the appropriate reduction in the penalty.

[62] Second, doing so will take up scarce judicial resources and increase costs that are out of proportion to the quantum of a penalty of 10% of the purchase price of the other marine parts, which is in the region of R50 000.00.

[63] In the absence of any cogent basis to determine the extent of the reduction in the penalty, we are left with little choice but to reduce the penalty to zero.

Interest

[64] In his heads of argument, the appellant's counsel appears to suggest that interest at the 2% per month as per the agreement forms part of the penalty.

[65] This is not correct. The agreement contains an independent clause that provides that the appellant was liable for interest at 2% per month from due date until date of final payment. This applies to all amounts that would

otherwise have been due in terms of the agreement. It is not limited to the payment of the penalty.

[66] The obligation to pay interest on overdue payments is not a “*penalty*” in terms of section 1 of the CPA.

[67] We therefore have no basis to interfere with the order of the court *a quo* regarding interest. On its proper construction, paragraph 2 of the order in the court *a quo* obviously applies to the amount set out in paragraph 1 thereof (as amended by this judgment).

Conclusion, costs and order

[68] For the reasons set out above, we have come to the following conclusions:

68.1 The first ground of appeal fails.

68.2 The second ground of appeal succeeds to the extent that the penalty in respect of the two DN40 valves (and export license) falls to be reduced by an amount of R30 012.21 to R200 081.41 and the penalty in respect of the other marine parts falls to be reduced to zero.

[69] The appeal has failed in part and has succeeded in part. In monetary terms, the appellant’s success is limited in the context of the quantum of the respondent’s overall claim. In the circumstances, our view is that it is appropriate for the appellant to be liable for 75% of the costs of this appeal.

[70] In the circumstances, we make the following Order:

70.1 Paragraph 1 of the order in the court *a quo* is replaced with the following:

“1. The defendant is liable to pay the plaintiff the sum of R200 081.41.”

70.2 The appellant is liable for 75% of the costs of this appeal, such costs to include the costs of counsel on scale A.

MILLER AJ

Acting Judge of the High Court, Cape Town

APPEARANCES

Counsel for the Appellant: Adv. R de Wet

Instructed by: Dunsters Attorneys Inc.

Counsel for the Repondent: Adv. B Hansen

Instructed by: West & Roussouw Attorneys