

REPUBLIC OF SOUTH AFRICA



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

CASE NO:2327/2005

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:
NO
(3) REVISED.

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SIGNATURE

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DATE

In the matter between:

DE ABREU, JOSE ELADIO

FIRST PLAINTIFF

FERNANDES, JOAO AIRES

SECOND PLAINTIFF

And

PESTANA FAMILY MEAT AND CHICKEN CC

FIRST DEFENDANT

PESTANA, RICHARD VICTOR

SECOND DEFENDANT

JUDGMENT

MATOJANE J

[1] At the end of the plaintiffs' case, counsel for the defendant applied for absolution from the instance and the plaintiffs opposed. By agreement, written heads of argument have been placed before me, and I have been requested to decide the application on the heads of argument so as to save time and costs.

[2] The trite test for absolution from the instance to be applied at the end of the Plaintiff's case is not whether the evidence led by the Plaintiff established what would finally be required to be established but whether there is evidence upon which a court, applying its mind reasonably to such evidence could or might (not should or ought to) find for the Plaintiff¹. It follows that Absolution from the instance should only be granted in circumstances where the Plaintiff's case is so weak that no reasonable court could find for the Plaintiff.

[3] The Court does not have to weigh up different possible inferences but merely determine if one of the reasonable inferences is in favour of the Plaintiff. In *Gordon Lloyd*, the Court stated:

"This implies that a plaintiff has to make out a prima face case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence, no court could find for the Plaintiff: ... The inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one...."

[4] With the aforesaid in mind, I now turn to consider the facts in this matter. It is not in dispute that the plaintiffs and the defendants concluded two agreements for the sale of premises known as Sportsman's Bar and Restaurant, which consisted of a restaurant, bar, hotel and nightclub.

¹ See *Claude Neon Lights v Daniel* 1976 4 SA 403 (A) at 409G-H.

[5] The plaintiffs' course of action is set out in paragraph 7 of the amended particulars of claim as follows:

7. On 31 March 2003, the Plaintiffs and the Second Defendant acting in person alternatively duly representing the First Defendant entered into a written agreement attached hereto as Annexure "C" in terms of which:

7.1 The plaintiffs paid deposit to the Second Defendant in the amount of R1 500 000.00 on 31 March 2003;

7.2 The plaintiffs provided Second Defendant with a series of post dated cheques over a period of 60 months aggregating to the amount of R3 800 000.00

[6] In paragraph 15 of the amended particulars claim, the plaintiffs alleged that:

15. Despite the agreement having lapsed due to the Defendants failure transfer the existing liquor licence into the name of the Plaintiffs and despite due demand, the Defendants refuse or neglect to effect payment to the Plaintiffs in the amount of R1 500 000.00 (the deposit) or R630 000.00 (exchanged cheques)

[7] The defendants have not denied receipts of the payments, which the plaintiffs are claiming repayment of and the liquor licence was never transferred.

[8] On 13 October 2004, the first defendant's attorneys by letter, gave notice to the plaintiffs that the agreement would be cancelled with effect from 31 August 2004 if the plaintiffs did not remedy the breach for non-payment of R40 000.00

[9] The defendants rely on clause 14.1.3 of the 13 May agreement, which provides:

"In the event of cancellation of clause 14.1.2 above the purchasers shall forthwith return the business to the seller, and all amounts already paid in terms of the agreement shall be forfeited to the seller as liquidated damages."

[10] This clause constitutes a penalty clause as contemplated in sections 1-3 of the Conventional Penalty Act, Act 15 of 1962, which provide as follows:

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) Any sum of money for the payment of which or anything for the delivery or performance of which a person may so become liable, is in this Act referred to as a penalty.

2. Prohibition on cumulation of remedies and limitation on recovery of penalties in respect of defects or delay.

(1) A creditor shall not be entitled to recover in respect of an act or omission which is the subject of a penalty stipulation, both the penalty and damages, or, except where the relevant contract expressly so provides, to recover damages in lieu of the penalty.

(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 penalty.

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 creditor's proprietary interest, but every other rightful interest which may be affected by the Act or *omission in question*."

[11] In *Western Credit Bank Ltd v Kajee* a Full Bench of the Natal Provincial Division, held

"If the penalty is out of proportion to the prejudice, the Court will reduce the penalty to such extent as it may consider equitable in the circumstances. 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, it seems to me, 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 penalty, the amount of the penalty approximates that of the prejudice, the penalty should be awarded."

[12] As argued by the Plaintiffs, the defendants have not pleaded any loss, nor have they, during cross-examination, confronted the plaintiffs with any allegation of loss they suffered as a result of the alleged breach of the agreement. In the absence of the defendants proving any real loss, the amount of the penalty stands to be reduced to zero.

[13] I find that the plaintiffs have *prima facie* proven the existence of a valid contract, its material terms and its breach. Accordingly, the application falls to be dismissed.

[14] In the premises I make the following order:

1. The application for absolution from the instance is refused
2. The defendants are ordered to pay the Plaintiff's costs of suit

**KE MATOJANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Heard: 19 April 2022

Judgment: 11 July 2022

For the Plaintiffs:

Adv A Botha

Instructed by Du Plessis De Heus & Van Wyk

For the Defendants:

Adv N Jagga

Instructed by David Kotzen Attorneys