THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable
CASE NO 157/2005

In the matter between

COLIN STEINBERG — Appellant

and

TERENCE LAZARD

Respondent

Coram: Howie P, Brand, Nugent, Van Heerden and Jafta JJA
Heard: 6 March 2006
Delivered: 31 March 2006

Summary: Penalty stipulation – s 3 of the Conventional Penalties Act 15 of 1962 – reduction of the penalty – onus on the debtor to prove that the penalty is out of proportion to the prejudice suffered – no need for the creditor to allege prejudice in claiming penalty.

Neutral citation: This judgment may be referred to as *Steinberg v Lazard* [2006] SCA 53 (RSA)

JUDGMENT

JAFTA JA

[1] On 6 June 2001 the parties entered into a written agreement of sale in terms of which the appellant sold to the respondent his members' interest in a close corporation called Portion 1/8 Erf 11 Sandhurst CC for the sum of R1 365 000. This corporation owned a portion of Erf 11, Sandhurst, Sandton. Some other portion belonged to another close corporation. That corporation, in which the appellant held the members' interest, was called Portion 5/8 Erf 11 Sandhurst CC.

[2] The agreement contained a penalty clause in the following terms:

'The purchaser agrees and undertakes to procure that [Portion 1/8 Erf 11 Sandhurst CC] completes the erection of a dwelling house on [its portion] by not later than 30 June 2002 by which date the seller agrees and undertakes to complete a dwelling house on the land at 158 Empire Place, Sandhurst, Sandton which is owned by Portion 5/8 Erf 11 Sandhurst CC . . . . Should either party fail to comply with the aforesaid undertaking he shall be obliged and hereby agrees to pay the other a penalty of R50 000-00 (fifty thousand rand) per month, or part thereof, for the period of the delay in completing the erection of the dwelling house.'

[3] Both parties failed to meet the deadline. The respondent completed the house on 30 September 2002 and the appellant on 15 June 2004. The respondent then sued the appellant in the Johannesburg High Court for payment of the penalty calculated from 1 October 2002, ie the month after the former had completed the house. His claim for the first three months was extinguished through set off by the appellant's claim against him. He also waived half of the penalty for June 2004. The court *a quo* (Willis J) ordered the appellant to pay the amount claimed by the respondent which was R1 075 000, with interest. The appeal against that order is with the leave of the High Court.

[4] By agreement between the parties the High Court was asked to determine whether the penalty claimed was payable at all and, if so, whether the amount should be reduced. It was asked to decide these issues on the basis of agreed

facts in the form of a stated case. It decided both issues against the appellant. It held that the penalty was payable and refused to reduce it on the basis that the appellant had failed to prove that the penalty was out of proportion to the prejudice suffered by the respondent.

[5] The agreed facts were the following:

'1. The parties entered into the agreement annexed hereto as Annexure "A" on 6 June 2001, which agreement still subsists.

2. The Defendant [the appellant] admits that he breached the agreement in that he did not complete the dwelling house at 158 Empire Place, Sandhurst, Sandton, by 30 June 2002 as stipulated for in clause 9.1 of the agreement, but only completed the dwelling house by 15 June 2004.

3. The Plaintiff [the respondent] only completed the dwelling house on the property by 30 September 2002.

4. Clause 9.1 of the agreement stipulates that should either party fail to comply with the undertaking to complete the erection of a dwelling house on the respective properties by 30 June 2002 the defaulting party shall be obliged to pay to the other a penalty of R50 000,00 per month or part thereof for the period of the delay in completing the erection of the dwelling house.

5. The penalty stipulation in clause 9.1 of the agreement is a penalty as defined in the Conventional Penalties Act 15 of 1962.

6. The Plaintiff afforded the Defendant due notice in terms of the agreement to remedy his breach.

7.1 The Plaintiff's claim for the period 1 July 2002 to 30 September 2002 is extinguished by set-off against the Defendant's entitlement under the penalty clause for the corresponding period.

7.2 The Plaintiff waives one half of his claim in respect of the month of June 2004;

7.3 The Plaintiff's claim is therefore for payment of the sum of R1 075 000.00 and interest at 15.5% per annum *a tempore morae* to date of final payment.'

[6] Since it is common cause that the appellant has breached the undertaking, the respondent is entitled to the full penalty amount unless it is reduced in terms of s 3 of the Conventional Penalties Act 15 of 1962. This section 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 creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.'

[7] The legislature provided protection to a debtor against an excessive penalty. In terms of the section, as construed by this court, the debtor bears the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent (see S*mit v Bester* 1977 (4) SA 937 (A) at 942 D-G).

[8] It was submitted on behalf of the appellant that, although the onus lies upon a debtor to establish the absence of prejudice, some prejudice is nonetheless an essential allegation to be made by a creditor who seeks enforcement of a penalty. That submission has no merit. There is absolutely no need for the creditor to allege prejudice in claiming a penalty. The onus being on the debtor it is for the debtor to allege and prove its absence, albeit that that might call for only prima facie evidence initially. Counsel for the appellant also submitted that, in any event, since the property on which the respondent undertook to build the house belonged to a close corporation, it was only the close corporation, and not the respondent, that could possibly suffer prejudice as a result of the appellant's breach. This submission overlooks the fact that the parties acted in their personal capacities in concluding the agreement. Moreover, the inference sought to be drawn is not the most probable inference to be drawn from the relevant facts. The reciprocal undertaking and the substantial penalty for its breach lead ineluctably to the conclusion that the parties intended to protect themselves against some form of prejudice in the event of a breach. The appellant has adduced no evidence to establish, even prima facie, that the respondent suffered no prejudice.

[9] It was also submitted on the appellant's behalf that in a case such as the present, where the claim is based on prejudice in the wider sense, the creditor bears a duty to show some prima facie prejudice. The appellant's counsel laid much emphasis on the fact that the respondent disavowed any reliance on patrimonial loss or damages. For

this submission reliance was placed on the following statement in *Western Credit Bank v Kajee* 1967 (4) SA 386 (N) at 394E:

'If the plaintiff contends for any prejudice in a wider sense than damages suffered by it, it will be for it to produce evidence to establish this.'

[10] The above submission cannot be sustained. First, the creditor does not have to prove any prejudice because the penalty clause he seeks to enforce is in his favour. Secondly, in *Kajee* the court sought to distinguish between damages and prejudice in determining where the onus lay. That case was, however, decided before this court pronounced that the onus of proving the actual prejudice suffered by the creditor, for purposes of reducing a penalty, rests on the debtor (see *National Sorghum Breweries v International Liquor Distributors* 2001 (2) SA 232 (SCA) para 8 and the authorities collected there). To the extent that the statement in *Kajee* places the onus on the creditor, it is incompatible with decisions of this court and as a result it must be regarded as having been overruled.

[11] 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 (see *South Cape Corporation (Pty) Ltd v Management Services (Pty) Ltd* 1977 (3) SA 534(A) at 548).

[12] The question of costs remains. Each party asked for costs of two counsel in the event of being successful. In the light of this implied acceptance that the winner should have the costs of two counsel there was no issue on this aspect.

[13] The appeal is dismissed with costs, including the costs of two counsel.

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C N JAFTA

JUDGE OF APPEAL

CONCUR:) HOWIE P
) BRAND JA
) NUGENT JA
) VAN HEERDEN JA