REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2327/2005

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

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SIGNATURE **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] The plaintiffs and defendants entered into two interconnected agreements. The first agreement was for the sale of a business conducted in Carletonville Extension 2, situated at 91 Annan Road, operating under the name and style of "Sportsman Bar and Restaurant", which consisted of a restaurant, bar, hotel and a nightclub. The business was sold as a going concern.

[2] The second agreement was a declaration where the second defendant acknowledged receiving an R1.5 million cash deposit from the plaintiffs and confirmed a remaining balance of R2.3 million to be paid over 60 months without Interest. The agreements are meant to be interpreted as linked, and it is common cause that both documents must be read together as a whole.

[3] On 2 April 2003, the plaintiffs took over control and possession of the business, becoming entitled to its income and responsible for all expenses from that date onward. It was a term of the agreement that the defendants transfer the existing liquor license to the plaintiffs' names within a reasonable timeframe after signing the agreements. However, this transfer never happened. On 31 August 2004, the plaintiffs formally notified the defendants in writing that the liquor license had not been transferred as agreed upon in the 13 May 2003 agreement, leading to the agreement lapsing. As a result, the plaintiffs returned the business to the second defendant and requested reimbursement for the portion of the purchase price already paid to the second defendant.

[4] Upon receiving the letter on 31 August 2004, the defendants notified the plaintiffs on 3 September 2004 that the plaintiffs had not paid the entire purchase price as required by the postdated cheque payment schedule. Consequently, the defendants cancelled the agreement through written notice, citing the *lex commissoria* clause in the sale agreement. The defendants failed to repay the plaintiffs the deposit of R1 500 000.00 and the submitted postdated cheques in the sum of R630 000.00.

[5] The relief sought by the plaintiffs in the amended particulars of the claim reads as follows;

> "WHEREFORE the plaintiffs seek an order against the first and second defendants, the one paying the other to be absolved:
>
> a. payment in the amount of R1 500 000.00
> b. Interest on the amount of R1500 000.00 at a rate of 15,5% per annum from the date of the summons until the date of final payment;
> c. payment in the amount of R630 000.00 (or such lesser amount as the Honourable Court may find);
> d. Interest on the amount of R630 000.00 at a rate of 15,5 % per annum from date of the summons until the date of final payment.
> e. Costs of the suit.

[6] It is crucial to lay out some context before delving into the evidence supporting the plaintiff's case. This matter has a lengthy history, with the trial commencing on 15 March 2011. Following the second plaintiff's testimony, the plaintiffs sought to amend their particulars of claim to record that an amount of R1 500 000.00 had already being paid and that the outstanding balance of R2.3 million would be paid in 60 months with no interest. This resulted in a trial postponement. Mr Justice Mavundla granted the plaintiffs the right to amend in February 2022.

[7] The trial resumed on 16 September 2013, and the plaintiffs closed their case the following day, leading to a postponement sine die. In May 2016, following a court order, the defendants amended their plea to include a special plea of prescription alleging that the amended particulars of claim introduced a new cause of action which had prescribed. This matter was argued before Madam Justice Victor on 8 December 2021. The application was dismissed with an order to pay costs. Subsequently, on 19 April 2022, the defendants sought absolution from the instance, which was refused, again with an order to pay costs.

[8] Scheduling a suitable date for the trial's continuation was difficult due to the limited availability of those involved. This included the second defendant, who, due to poor health, was only available two days a week, as well as the availability of the advocates, attorneys, and the presiding judge. The trial was ultimately set down for hearing on 12,17 and 20 October 2023.

[9] At the reconvening of the trial, the second defendant disclosed to the court that the first defendant was deregistered because the second defendant, a sole member of the first defendant, had failed to file financial statements with the CIPC. The defendants brought an application to reopen the plaintiffs' case. The evidence sought to be examined with the second respondent related to the events leading up to the conclusion of the Memorandum of Agreement of Sale dated 13 May 2003 and the Declaration of Sale dated 31 March 2003. It encompasses issues such as the purported delay in the liquor license application, the alterations made to the premises, the defendant's explanation for the delay in the liquor license application, and why the defendants argue the Memorandum of Agreement of Sale did not lapse. Additionally, it covers whether the second plaintiff benefited from running the business after taking possession and the calculation of the amount claimed. The second defendant also intended to call Mr Steenkamp, a liquor license consult, to give evidence regarding the procedures and time limits involved with a liquor license application. Mr Steenkamp has since passed away.

[10] The relevant question raised by the application is whether, on the whole, it is in the interests of justice that leave be granted for the defendants to reopen their case. The court has the discretion to permit the reopening of a party's case, a decision influenced by principles of fairness and justice. In my view, for a party to justify reopening their case, they must prove that the proposed new evidence or examination is genuinely new and was not accessible during the initial trial. Simply stating that they did not adequately address certain matters is typically insufficient. The new evidence must also be material and likely to carry significant weight - not just an attempt to re-argue points already made or bolster one's original case. The court must

balance the potential harm to the opposing party, should they need to contest settled issues again, against the injustice of excluding the new evidence.

[11] The defendants have not shown that the evidence they intend to present with the cross-examination of the second plaintiff qualifies as new evidence that was not available or could not have been reasonably discovered earlier. There is no indication of an unintentional error or misunderstanding of the facts or law. The second plaintiff was thoroughly cross-examined regarding the calculation of the claimed amount, which led to the plaintiffs amending their Particulars of Claim to reflect his testimony. The circumstances leading to the conclusion of the contracts and whether the plaintiffs profited are not part of the defendants' case and are therefore irrelevant to the defendants' argument that they cancelled the agreement because the plaintiffs defaulted on their July and August instalment payments. The defendants have failed to explain the relevance to their defence of the quantum calculation. The overriding principle is whether, considering all the evidence, the interests of justice favour granting leave to reopen the plaintiffs' case. The court is satisfied that in the present case, it does not, and therefore, refused to grant leave to reopen the plaintiffs' case.

[12] The substantive defenses set up by the defendants were, in essence, the following:

a. There is no basis for the plaintiffs to claim from the second defendant and any claim the plaintiff may have lies against the first defendant.
b. The second defendant denies that the first respondent failed to transfer the liquor license within a reasonable period as it took active steps to ensure the liquor license transfer in consultations with the plaintiffs.
c. By the time the issue pertaining to the liquor license was raised, the plaintiffs were already in arrears with their monthly payments for July and August 2004 owing to the arrears. On 20 October 2004, the first respondent placed the plaintiffs on terms. The plaintiffs failed to rectify the breach, and on 24 November 2004, the sale agreement was cancelled.

d. The first defendant denies that it accepted the tender of the business and states that it was entitled to reclaim possession of the business in terms of the agreement of sale and owing to valid cancellation of the agreement.

[13] The second defendant argues that the plaintiffs have no grounds to make a claim against him, as he was either acting as an agent for the first defendant or was duly authorized to act on the first defendant's behalf. The second defendant personally benefited from the agreement. The plaintiffs paid R1,500,000 in cash to the second defendant on 31 March 2003; when he signed for the receipt of the money, he never indicated that he was signing in his representative capacity. The second defendant was a beneficiary of the cheques in exchange for which he received R630,000.00 in cash from the plaintiffs. There is no evidence that the first defendant received any of these monies.

[14] The defendants, relying on the forfeiture clause in the agreement, assert that as the agreement has been cancelled, the plaintiffs would have to return the business forthwith to the first defendant, and all the amounts already paid in terms of the agreement is forfeited to the first respondent as liquidated damages. Clause 14 of the 13 May 2003 agreement provides:

> "In the event of the 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."

[15] This clause constitutes a penalty clause as contemplated in section 2 of the Conventional Penalty Act, act 15 of 1962. The defendant cannot recover both the penalty and damages. The penalty is markedly disproportionate to the prejudice suffered by the defendants. In an earlier interlocutory application, I found that as the defendants had failed to prove any loss, the penalty stood to be reduced to zero.

[16] In Barkhuizen,[1] the Constitutional Court stated that all laws, including common contract law, are now under constitutional scrutiny. The validity of any law is contingent upon its alignment with the Constitution's provisions and underlying values. Consequently, even the pacta sunt servanda principle is subject to constitutional review. In Botha v Rich[2], the court declined to permit the termination of a contract for buying immovable property in instalments in circumstances where the purchaser had paid nearly 80% of the purchase price but defaulted on payment. The court reasoned that cancelling the contract would be an excessive penalty for the breach.

[17] In Beadica[3] the Constitutional Court recognized the significance of incorporating constitutional values and ubuntu into contract law. It encouraged the courts to strive for substantive justice, which stems from the core principles of the Constitution. Given the context of this case, even if my finding that the agreements expired is incorrect, enforcing the penalty clause would be inequitable due to its disproportionate nature and unfairness, especially considering that the business has been returned to the defendants and a substantial amount has already been paid towards the purchase price.

[18] For all the above reasons I find that the plaintiffs have proven their case on the balance of probabilities and that judgment should be granted in their favor.

In the result the following order is made

The first and second defendants, the one paying the other to be absolved are ordered to make the following payments to the plaintiffs:

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[1] Barkhuizen v Napier 2007 (5) SA 323 at para 11

[2] Botha and Another v Rich N.O. and Others (CCT 89/13) [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC) (17 April 2014)

[3] Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020)

a. payment in the amount of R1 500 000.00
b. Interest on the amount of R1500 000.00 at a rate of 15,5% per annum from the date of the summons until the date of final payment;
c. payment in the amount of R630 000.00 (or such lesser amount as the Honourable Court may find);
d. Interest on the amount of R630 000.00 at a rate of 15,5 % per annum from date of the summons until the date of final payment.
e. Costs of the suit.

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KE MATOJANE
JUDGE OF THE HIGH COURT

Appearances

For the plaintiffs	Mr Botha
Instructed by	Du Plessis De Heus & Van Wyk C/O Gildenhuys Malatji inc Harlequins Office Park Groenkkloof
For the first and second defendants	Mr Silver David Kotzen Attorneys c/o ANDREA RAE ATTORNEYS