

Rouwkoop Under the Conventional Penalties Act 15 of 1962

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INTRODUCTION

In *Von Holdt v Hill Inc and Others*¹ the court was required to address the second respondent's alternative defence, which sought to invoke the power of reduction contained in Section 3 of the Conventional Penalties Act 15 of 1962.

BACKGROUND TO THE DISPUTE

The dispute centred around a failed agreement for the sale of an immovable property located at Erf 2[...] Kyalami Agricultural Holdings. The applicant, Mr Gregory John von Holdt, was the seller, and the second respondent, the trustees for the time being of the Dolphin Trust, was the purchaser. The agreed purchase price for the property was R17 250 000, and the purchaser paid a deposit of R1 725 000 into the first respondent's trust account. The agreement required the purchaser to furnish a bank guarantee to secure the balance of the purchase price when requested.

It was 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 subsequent five business days afforded in the notice to remedy delivered on 28 November 2022. Due to this failure to comply with the contractual timelines, the applicant cancelled the agreement on 6 December 2022. Following the cancellation, the applicant sought an order declaring that he was entitled to retain the full deposit of R1 725 000 as a cancellation penalty under clause 15.2 of the agreement. The second respondent opposed this application and advanced a counter-application seeking repayment of the deposit.

THE CONVENTIONAL PENALTIES ACT AND ROUWKOOP

The core issue to be decided by the court, apart from the validity of the cancellation, was the second respondent's defence under Section 3 of the Conventional Penalties Act 15 of 1962. The purchaser argued that even if the penalty stipulation was enforceable, the forfeiture of the full deposit was disproportionate to the prejudice suffered by the seller and should be equitably reduced as provided for in the Conventional Penalties Act.

Rouwkoop is a penalty stipulation often found in offer to purchase contracts, in terms of which if the sale collapses due to breach by the purchaser, the seller gets to keep the whole of the amounts already paid by the purchaser as damages. This is a widespread practice, but often the amount available to the seller exceeds the actual damages suffered by the seller and the purchaser challenges the fairness of the provision in terms of the Conventional Penalties Act.

THE PROPORTIONALITY ENQUIRY AND SCOPE OF PREJUDICE

The enquiry under Section 3 requires a court to determine if the penalty (in this case, the forfeiture clause) is "out of proportion" to the prejudice suffered by the creditor. This equitable assessment must consider the creditor's proprietary interests as well as "every other rightful interest" affected by the breach. The second respondent argued that the applicant suffered minimal prejudice because the property was eventually sold in early 2025 for R15.5 million. The court dismissed this narrow focus on arithmetic loss, emphasizing that Section 3 is not confined to proprietary losses.

The applicant provided substantial, largely undisputed evidence of wide-ranging prejudice, including the collapse of a planned onward purchase, the loss of a firm offer of R17 million that existed prior to the respondent's offer, the need to obtain bridging finance, and the burden of extended maintenance and municipal costs on the substantial rural property. These consequences fell squarely within the "rightful interests" category mandated by the Act.

The court concluded that the shortfall between the original contract price of R17.25 million and the eventual sale price of R15.5 million, when combined with extended holding costs and lost opportunities, meant that the overall prejudice suffered by the applicant exceeded the amount of the penalty. Consequently, the penalty was not characterized as excessive or inequitable, meaning the statutory jurisdiction to reduce the penalty was not engaged. The court therefore dismissed the second respondent's counter-application for repayment of the deposit.

In short, the court held that the seller was permitted to keep the whole of the amount claimed as damages, on the basis that this was equitable in terms of the Conventional Penalties Act.

WHAT ARE THE REQUIREMENTS AND PRECONDITIONS FOR RELYING ON THE CONVENTIONAL PENALTIES ACT AS A DEFENCE, SPECIFICALLY TO SEEK A REDUCTION OF A PENALTY UNDER SECTION 3?

1. Liability Must Derive from Breach

The Act applies only where the liability to pay the penalty derives from “an act or omission in conflict with a contractual obligation,” which means the penalty must be triggered by a breach of the contract. The existence of the breach is a fundamental prerequisite for the Act to be applicable.

2. No Need for Factual Concession of Breach (Conditional Reliance)

Although previous jurisprudence suggested that a debtor relying on the Act must assert the very breach that triggers the penalty, the court clarified that a formal factual concession of breach is not required. The requirement is directed at barring mutually destructive factual narratives on affidavit, not conditional legal arguments.

A litigant is entitled to advance a coherent legal contention that is explicitly conditional upon the court’s rejection of its primary factual or interpretative case. This means the debtor can state: “I did not breach the agreement; but if it is found that I did, then a particular legal consequence follows”. The existence of the breach may be established as a matter of legal conclusion by the court, rather than requiring a factual concession by the debtor.

3. The Penalty Must be Disproportionate to the Prejudice Suffered

Once the penalty is established and enforced, the core requirement for the Act to provide relief is demonstrating that the penalty is “out of proportion to the prejudice suffered by the creditor”. This determination involves an equitable, two-stage enquiry:

- Stage 1: Whether the penalty is out of proportion to the prejudice.
- Stage 2: If it is out of proportion, to what extent it should be reduced.

4. Definition of Prejudice

In determining proportionality, the court must evaluate the creditor’s:

- Proprietary interests.
- “Every other rightful interest” affected by the breach.

ANCILLARY ISSUE: ADVANCING MUTUALLY DESTRUCTIVE ARGUMENTS

The applicant initially contested the second respondent’s right to invoke section 3, arguing that the purchaser could not rely on the Act without admitting the breach that triggered the penalty, citing the principle established in *Sun Packaging (Pty) Ltd v Vreulink*.²

The court rejected this procedural argument, holding that while mutually destructive factual narratives are impermissible in motion proceedings, the rule does not prevent a litigant from advancing a coherent legal contention that is explicitly conditional upon the court rejecting its primary interpretation or factual case. The court confirmed that a litigant is entitled to argue: “I did not breach the agreement; but if it is found that I did, then a particular legal consequence follows”.

CONCLUSION

The court determined that the seller’s cancellation of the agreement was lawful due to the purchaser’s failure to furnish the required bank guarantee, thereby triggering the seller’s contractual right to retain the whole of the R1,725,000 deposit as a cancellation penalty. The purchaser’s defence relying on the Conventional Penalties Act to reduce the penalty was unsuccessful, as the court found the overall prejudice suffered by the seller exceeded the amount of the penalty, meaning the statutory jurisdiction to reduce the penalty was not triggered.

¹ [2023/066739] [2025] ZAGPJHC 1165.

² 1996 (4) SA 176 (A).



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