

The Reduction of Penalty Levies Previously Imposed by a Body Corporate When Selling Property

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Murcia Lands CC v Erinvale Country Estate Home Owners Association [2004] 4 All SA 656 (C)

INTRODUCTION

Section 3 of the Conventional Penalties Act 15 of 1962 (**"the Act"**), which governs the reduction of excessive penalties, states:

*"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."*¹

The question before the Court in *Murcia Lands CC v Erinvale Country Estate Home Owners Association*² was whether the penalty levies previously imposed by the defendant (a body corporate) could be reduced in terms of section 3 of the Act when the plaintiff elected to sell its property. The penalty levies amounted to ten times the ordinary levy per erf in respect of each of the two erven the plaintiff had bought, thus resulting in a total penalty of twenty times the ordinary levy for the two erven when the plaintiff breached the agreement to commence construction by a specified date.

THE COURT'S ANALYSIS

The Court separated its analysis under section 3 of the Act into three questions:

- Is the penalty out of proportion to the prejudice suffered by the defendant by reason of the plaintiff's breach of contract? If so,
- would it be equitable for the court to reduce the penalty? If so,
- to what extent?

In assessing the first question, the Court noted that prejudice may still be suffered due to breach of contractual provisions which are intended as a penalty deterrent, rather than those provisions which provide compensation for default.

Further, in instances where the type of prejudice is not monetary, the Court is required *"to make a value judgment to decide whether the penalty is 'unduly severe to an extent that it offends against one's sense of justice and equity.'"*³ In *casu*, the type of prejudice suffered by the defendant was prejudice to its right to enforce concerted action for the common good, and to its interest in obtaining concerted action.

The Court further broke down the first part of the test for section 3 and noted that the proportionality of the prejudice suffered can be assessed in three ways:

- by looking at comparable situations where the desired result was achieved;
- by looking at the size of this penalty and the penalties in general in relation to the income and expenditure of the defendant; and,
- by exercising one's sense of fairness and justice.

The Court noted that in determining the equitable exception to the general rule that parties are bound to the terms of their contractual undertakings, it is fair that the court should make use of the best information available to it at the time when it hears the matter, rather than restricting itself to the circumstances at the time of the breach.

CONCLUSION

Ultimately, on the facts and evidence placed before Court, taken together with the Judge's sense of justice and equity, it was held that the penalty imposed upon the plaintiff was out of proportion to the prejudice suffered by the defendant, and the penalty was reduced to eight times the standard levy in respect of the consolidated erf, resulting in a reduction of approximately 60%.

The Court's step-by-step deconstruction and application of section 3 of the Act, and its interpretation and expansion of the proportionality and prejudice test is valuable when considering section 3 of the Act, as well as the evidence required to prove that the respective penalty should be reduced in accordance with The Conventional Penalties Act.

¹ Section 3 of The Conventional Penalties Act 15 of 1962.

² [2004] 4 All SA 656 (C).

³ Ibid para 27.



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