

**MATTHEWS V PRETORIUS  
[1984] 4 ALL SA 224 (W)**

**Division:**  
**Judgment Date:**  
**Case No:** Witwatersrand Local Division  
**Before:** 13 April 1984  
**Parallel Citation:** [1984 \(3\) SA 547](#) (W)  
. [Keywords](#) . [Cases referred to](#) . [Judgment](#) .

**Keywords**

*Contract - Penalty - Forfeiture clause*

**Cases referred to:**

*Da Mata v Otto NO* [1972 \(3\) SA 858](#) (AD) - Applied

*Durban City Council v Gray* [1951 \(3\) SA 568](#) (AD) - Followed

*Van Staden v Central South African Lands and Mines* [1969 \(4\) SA 349](#) (W) - Considered

*Western Bank Limited v Meyer; Western Bank Limited v De Waal; Western Bank Limited v Swart and Another* [1973 \(4\) SA 697](#) (T) - Applied

[View Parallel Citation](#)

**Judgment**

VAN DER WALT J: Defendant has excepted to plaintiff's particulars of claim on the basis that it does not disclose a cause of action.

On 31 October 1981, in terms of a written deed of sale, defendant sold stand 945, Glen Marais, Kempton Park, to plaintiff.

R13 000 of the purchase price of R65 000 was paid as deposit by plaintiff, the balance being payable against transfer.

[View Parallel Citation](#)

Plaintiff took occupation on 28 December 1981 and paid interest of R662 per month to defendant for the right to occupy the property.

This amount was paid until April 1982 when plaintiff vacated the property.

The plaintiff was financially unable to pay the balance of the purchase price and consequently to take transfer of the property, whereupon defendant cancelled the sale and repossessed the property.

The agreement provided the following in the event of cancellation:

"5. Should the purchaser fail to comply with any of the terms and conditions of this agreement and remain in default for a period of seven days after despatch per registered post of written notice, requiring such default to be remedied, the seller shall be entitled (without prejudice to any other rights available at law) to cancel this agreement forthwith and receive/retain as *rouwkoop* or as a genuine pre-estimate of damages or on account of and pending determination by a Court of law of the actual damages suffered by the seller in consequence of such a breach, the monies paid by the purchaser after deduction of agent's commission payable in terms of clause 12 hereof, or enforce performance of the terms of this agreement."

Plaintiff's particulars of claim, read with further particulars furnished, continued:

- "10. Agent's commission was payable in terms of the agreement, in terms of the tariff of the Institute of Estate Agents of South Africa (Southern Transvaal Branch), which amounted to R2 575.
11. The defendant has retained the amount of R13 000 and despite demand failed or refused to pay the said amount to the plaintiff or any portion thereof.
12. The forfeiture by the plaintiff of the amount of R13 000 constitutes a penalty in terms of [ss 3 and 4](#) of the Conventional Penalties Act [15 of 1962](#).
13. The said penalty is out of proportion to the prejudice suffered by the defendant by reason of the plaintiff's failure to pay the balance of the purchase price and is consequently subject to a reduction by the above honourable Court to such an extent as may be considered equitable.
14. In the premises the defendant is liable to the plaintiff in an amount of R10 425, alternatively to such lesser amount by which the penalty is reduced by the above honourable Court."

The particulars requested by defendant in respect of para 13 were as follows:

"7. *Ad* para 13:

- (a) What prejudice is it alleged that defendant has suffered?
- (b) On what basis is it alleged that the penalty is disproportionate to the prejudice suffered by the defendant and to what degree is it disproportionate?
- (c) (i) Is it alleged that the provisions of [s 3](#) of the Conventional Penalties Act [15 of 1962](#) are applicable and, if so, on what basis?  
(ii) Does the plaintiff allege that this action constitutes a claim for a penalty as provided for in [s 3](#) of the said Act?"

To this request plaintiff replied as follows:

"7. *Ad* para 13

- (a) Having become liable to agent's commission in an amount of R2 575;

[View Parallel Citation](#)

- (b) the defendant suffered no other prejudice than having become liable to the commission as aforesaid since the subsequent letting and sale of the property mitigated all the defendant's damages;
- (c) (i) yes, the plaintiff claims restitution of the proportional amount of the deposit having regard to the provisions of [ss 3](#) and [4](#) of the Conventional Penalties Act;  
(ii) the forfeiture constitutes a penalty by virtue of [s 4](#) of the said Act, is as such reclaimable but subject to the reduction as provided for by [s 3](#) of the said Act."

Defendant's exception is based on the following grounds:

"6. [Section 4](#) of the Act does not provide for the restitution of any amount retained as a penalty. The section merely provides that a stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto, shall forfeit the right to claim restitution of anything performed by him in terms of the agreement shall have the effect of a penalty stipulation.

7. [Section 1](#) of the Act provides that penalty stipulations shall, subject to the provisions of the Act, be capable of being enforced in any competent Court.

8. [Section 3](#) of the Act provides for the reduction of a penalty by a Court *upon the hearing of a claim for a penalty*.

9. It is submitted that the hearing by this Court of the plaintiff's claim in due course will not constitute 'the hearing of a claim for a penalty' and accordingly the plaintiff will not be entitled to avail himself of the relief offered by the provisions of [s 3](#) of the Act.

10. It is submitted that the provisions of Act [15 of 1962](#) do not afford to a party who has paid to another party a sum of money pursuant to the provisions of an agreement between them the right to claim repayment of such money, notwithstanding that the right of retention thereof by the other party may arise from a penalty stipulation."

The issue is therefore: can a party to a cancelled contract who has *forfeited* a sum of money already paid to the other contracting party in terms of a penalty stipulation in the contract, claim repayment of that sum in view of the provisions of the Conventional Penalties Act [15 of 1962](#)?

In his judgment in *Van Staden v Central South African Lands and*

*Mines* [1969 \(4\) SA 349](#) (W) SNYMAN J considered a similar claim for repayment of an amount forfeited, but found that the penalty was not out of proportion to the prejudice suffered by the defendant company.

"Having come to this conclusion, it is not necessary for me to consider the other two issues raised. In coming to my decision I have assumed that the plaintiff is entitled to relief under the Act. I wish to record, however, that I have not applied my mind to this vaguely raised contention that only creditors and not debtors can bring a claim under the Act." (*Per* SNYMAN J at 355 - 356).

Counsel have been unable to refer me to any other judgment directly in point, nor have I been able to find one.

In academic circles the remark by SNYMAN J has been commented upon: cf "The Conventional Penalties Act 1962" - an article by

[View Parallel Citation](#)

B R Bamford 89 *SALJ* (May 1972) 229 at 231, which merely echoes the remarks of SNYMAN J.

In *De Wet and Yeats Kontraktereg en Handelsreg* 4th ed in footnote 253 at 224 the following is said:

"In *Van Staden v Central South African Lands and Mines* [1969 \(4\) SA 349](#) (W) , skyn die Hof daaraan te twyfel of iemand, by wyse van tempering van wat hy deur betaling verbeur het, as eiser terugbetaling van die bedrag waarmee die verbeuring oormatig is, kan vorder. Dit is nie mooi duidelik waaruit hierdie twyfel gebore is nie. Die strafskuldenaar, wat te veel verbeur het, is tog seker vir die oorskot 'n skuldeiser, of is hy maar net 'n man met 'n hand vol vere!"

Save in so far as a doubt is incorrectly ascribed to the Court in *Van Staden's* case - the Court merely states that it

has not applied its mind to this vaguely raised contention - the comment seems to be fully justified.

The Conventional Penalties Act [15 of 1962](#) contains only four sections which are relevant and they read 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 of 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.

**Page 227 of [1984] 4 ALL SA 224 (W)**

(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.

4. Provisions as to penalty stipulations also apply in respect of forfeiture stipulations.

A stipulation whereby it is provided that upon withdrawal from an agreement by a party thereto under circumstances specified therein, any other party thereto shall forfeit the right to claim restitution of anything performed by him in terms of the agreement, or shall, notwithstanding the withdrawal, remain liable for the performance of anything thereunder, shall have effect, to the extent and subject to the conditions prescribed in [ss 1 to 3](#) inclusive, as if it were a penalty stipulation."

As stated in *De Wet and Yeats (supra at 217)*:

"In Wet 51 van 1962, die Wet op Strafbedinge, het die Wetgewer gepoog om 'n meer ordelike en konsekwente reëling, as wat voorheen bestaan het,

**[View Parallel Citation](#)**

neer te lê met betrekking tot strafbedinge, vooruitberamings van skade en verbeuringsbedinge. Die Wet is kort en bondig. Dit lê net grondbeginsels neer, en probeer nie vooraf 'n antwoord gee op elke besondere probleem wat kan opduik nie. Dit gee die raamwerk waarbinne teorie en praktyk met verloop van tyd die besonderhede kan uitwerk. Die Wet moet dan ook gesien en toegepas word teen die algemene beginsels van die kontraktereg."

One of the general principles of our law of contract is that on rescission of a contract each party to it is obliged to restore to the other whatever has been delivered in terms of the contract.

It is against this principle that the Conventional Penalties Act [15 of 1962](#) must be viewed and interpreted.

Read in isolation, [s 3](#) of the Act appears to say what the defendant in this case, as excipient, contends for, ie that only when a party to a contract approaches the court for enforcement of that penalty is the penalty liable to be reduced by the court.

However this loses sight of the fact that [s 4](#) states that a forfeiture clause, ie where a party to a contract has already performed in terms of the contract and is in terms of a clause precluded from claiming the return of what has been delivered in terms of the

**Page 228 of [1984] 4 ALL SA 224 (W)**

contract, is a *penalty* stipulation subject to equitable reduction in terms of [s 3](#).

But is that not exactly the case under consideration?

The clause in the agreement provides that the defendant (seller) shall be entitled to cancel and to retain the monies paid by the plaintiff (purchaser) - a clear forfeiture clause, in other words a penalty stipulation in terms of the Act.

If the defendant's contentions were to be well-founded, the right to equitable reduction given to plaintiff will be incapable of enforcement because the only party that can *claim* a penalty in this case will be the defendant who already has the monies paid and forfeited, in his possession, and who has no further need to *claim* its payment by way of action.

The very purpose of the Act - an equitable reduction of a penalty - is therefore frustrated by such an approach and

interpretation.

As was stated in *Da Mata v Otto* NO [1972 \(3\) SA 858](#) (A) at 870F:

"Even if the stipulation is to be construed as a forfeiture stipulation it will be enforceable subject to the same provisions; [s 4](#) provides - as the marginal note indicates - that the provisions as to penalty stipulations shall apply *mutatis mutandis* in respect of forfeiture stipulations. This is how [s 4](#) is understood."

In so far as [s 3](#) of the Act in its wording - "If upon the hearing of a claim for a penalty,..." - is unclear whether a claim for restitution of what has been forfeited under a contract on rescission is also included, the Court must endeavour to interpret [s 3](#) in such a manner as to give effect to the intention of the Legislature as expressed in the whole of the Act and more specifically in [s 4](#) of the Act.

It must also be borne in mind in interpreting [s 3](#) that the Legislature is presumed not to have intended an inequitable, unreasonable or unjust result.

If these precepts are heeded then the words in [s 3](#) - "If upon the hearing of a claim for a penalty, it appears to the court..." - should be interpreted to mean "if in the course of a hearing before a court a party seeks to enforce a claim for a penalty". An alternative manner in arriving at a similar interpretation would be if the particular phrase

[View Parallel Citation](#)

in [s 3](#) is read as follows: "If upon the hearing of a claim for a penalty or the return of a penalty." This interpretation would give full effect to the intention of the Legislature as expressed in the Act and specifically in [s 4](#).

As was stated in *Durban City Council v Gray* [1951 \(3\) SA 568](#) (A) at 580B *per* SCHREINER JA:

"... it is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the Legislature's intention".

#### **Page 229 of [1984] 4 ALL SA 224 (W)**

Once a penalty stipulation is raised before a Court, the Court will *mero motu* consider an equitable reduction of the penalty. *Western Bank Ltd v Meyer*; *Western Bank Ltd v De Waal*; *Western Bank Ltd v Swart and Another* [1973 \(4\) SA 697](#) (T) at 699C - 700A.

In effect, in spite of the wording of plaintiff's particulars of claim in this case, plaintiff is claiming restitution of what he has paid under the rescinded contract having already redelivered the property concerned to defendant.

In anticipation of defendant's plea plaintiff has raised [s 3](#) of the Act and indicated what an equitable penalty would be.

If defendant pleads, as he must, his reliance on an enforceable penalty clause in the agreement, subject to equitable reduction, there in fact will be a *hearing of a claim for a penalty* before the Court, making [s 3](#) of the Act applicable.

In my view plaintiff's particulars of claim disclose a cause of action and defendant's exception is dismissed with costs.

#### **Appearances**

*CDA Loxton* - Advocate/s for the Defendant/s

*AM Potgieter* - Advocate/s for the Plaintiff/s (Respondent/s)

*I Kramer and Wesemann, Benoni; Handelsman, Gibson and Rosendorff, Johannesburg* - Attorney/s for the Excipient/s (Defendant/s)

*Damant, Bostock and Company, Johannesburg* - Attorney/s for the Respondent/s (Plaintiff/s)