Short Notes on:

SETTLEMENT AGREEMENTS – WHEN ALL IS NOT NECESSARILY DONE AND DUSTED

Introduction

Settlements are valuable mechanisms to deal with issues, but what happens if your situation changes, and you do not perform? Or something does not exactly go as planned.

In the case of Tetra Pak SA (Pty) Limited v Blakey Investments (Pty) Limited and another [2021] JOL 49900 (KZD) ("Tetra Pak"), the Applicants (the defendants in the action) approach court for an order declaring that they have complied fully with their obligations under a settlement agreement, and, in the alternative, an order reducing to nil, or setting aside, a penalty of R15 million provided for in the settlement agreement.

The Case

The background of the matter is as follows. In May 2019, an action between Tetra Pak S.A. (Pty) Limited, as plaintiff, and Blakey Investments (Pty) Limited and Suman Panday, as defendants, came up for trial. The cause of action was fraud, and the claim substantial. The defendants complained about the plaintiff's discovery and threatened to ask for an adjournment. This led to settlement discussions, and on 17 May 2019, a written settlement agreement was concluded. It provided an undertaking to pay the plaintiff the sum of R25 million and to execute a consent to judgment in that amount. It provided further that the debt amount was compromised on the basis that the defendants would pay to the plaintiff the sum of R10 million in instalments. The balance of the R25 million would only be payable if any of the instalments were not paid timeously. Moreover, interest would be paid simultaneously with the last instalment on 31 January 2020.

In January 2020, the plaintiff notified the defendants that the instalment that was due at the end of December had not been paid. This was rectified on Mr Panday's return, and payment was made by electronic fund transfer. The plaintiff, however, adopted the stance that as a result of the late payment, the amount of R25 million had automatically become due and payable. It applied for judgment on the confession to judgment, which the Registrar granted.

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The main issues before the court were whether the instalment in question was paid timeously and, if it was not, whether the provision relating to the payment of R25 million was a penalty as defined in the Conventional Penalties Act 15 of 1962 (the "Act").

Findings

Section 1(1) of the Act provides as follows:

'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.'

Section 3 of the Act provides that:

'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...'

Furtherore, in Parekh v Shah Jehan Cinemas (Pty) Ltd & others 1982 (3) SA 618 (D), it was contended that an acceleration clause in a settlement agreement constituted a penalty.

In Massey-Ferguson (South Africa) Ltd v Ermelo Motors (Pty) Ltd & others 1973 (4) SA 206 (T), the approach was the same. The plaintiff had instituted an action in which it claimed payment of two amounts, totalling R84 570, with interest and costs. The Court held that on settlement a transaction was effected, and the original debt was wiped out. Moreober, held that the stipulation to pay, on the breach, the total amount of the claim in the summons constituted, in so far as that amount exceeded the amount agreed upon in the settlement, a penalty in terms of the Act.

Also in De Pinto & another v Rensea Investments (Pty) Ltd 1977 (2) SA 1000 (A) is an example of a case where a clause in a lease agreement was held not to be a penalty. De Villiers JA said the test was whether the parties intended the clause to operate in terrorem, i.e. as a penalty in the

common law sense. He held that it did not and provided a discount on the rentals on the basis that the lease would be maintained. If it were not, the defendant would be liable for the rentals it had agreed to pay in terms of the original lease.

In the Tetra Pak case, the court found that the provision relating to the payment of R25 million was, therefore, a penalty stipulation. The plaintiff did not contend that it was prejudiced as a result of the late payment. It was also common cause that it earned interest. It will therefore be equitable to reduce the penalty to nil.

Conclusion

Although the presence of a common law penalty is not an obsolete requirement, the intention of the parties and prejudice suffered play a vital role in determining the enforceability of penalty clauses in settlement agreements. Therefore, it is critical to professionally construct settlement agreements and reductions bearing in mind intent, penalties and equity. Contact an expert at SchoemanLaw today.

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