

CHAPTER 8:04
CONTRACTUAL PENALTIES ACT

Act 13/1992.

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AN ACT to provide for the enforcement of penalty clauses in contracts; to regulate the rights and obligations of parties to contracts for the sale of land by instalments; and to provide for matters connected with or incidental to the foregoing.

[Date of commencement: 23rd October, 1992.]

PART I

PRELIMINARY

1 Short title

This Act may be cited as the Contractual Penalties Act [*Chapter 8:04*].

2 Interpretation

In this Act—

“creditor” means a person who is entitled or may become entitled to any money, right, benefit or thing under a penalty stipulation;

“debtor” means a person who is or may become liable to pay any money, to do or perform anything or to forfeit any money, right, benefit or thing under a penalty stipulation;

“instalment sale of land” means a contract for the sale of land whereby payment is required to be made—

(a) in three or more instalments; or

(b) by way of a deposit and two or more instalments;

and ownership of the land is not transferred until payment is completed;

“land” includes—

(a) any improvements on land; and

(b) an undivided share in any land which is coupled with an exclusive right of occupation such as is referred to in section 27 of the Deeds Registries Act [*Chapter 20:05*];

“Minister” means the Minister of Justice, Legal and Parliamentary Affairs or any other Minister to whom the President may, from time to time, assign the administration of this Act;

“penalty” means—

- (a) any money which a person is liable to pay; or
- (b) anything which a person is liable to do or perform; or
- (c) any money, right, benefit or thing which a person is liable to forfeit;

under a penalty stipulation;

“penalty stipulation” means a contract or provision in a contract under which a person is liable—

- (a) to pay any money; or
- (b) to do or perform anything; or
- (c) to forfeit any money, right, benefit or thing;

as a result or in respect of—

- (i) an act or omission in conflict with a contractual obligation; or
- (ii) the withdrawal of any person from a contract;

whether the liability is expressed to be by way of penalty, liquidated damages or otherwise.

3 Application of Act

(1) This Act shall apply in respect of—

- (a) all penalty stipulations; and
- (b) all instalment sales of land;

entered into on or after the 9th November, 1973.

(2) This Act shall not apply to any contract to which the Hire-Purchase Act [*Chapter 14:09*] applies, to the extent that provisions of this Act are inconsistent with that Act.

PART II

PENALTY STIPULATIONS

4 Penalty stipulations enforceable

(1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.

(2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may—

- (a) reduce the penalty to such extent as the court considers equitable under the circumstances; and
- (b) grant such other relief as the court considers will be fair and just to the parties.

(3) Without derogation from its powers in terms of subsection (2), a court may—

- (a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or
- (b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.

(4) In determining the extent of any prejudice for the purposes of subsection (2), a court shall take into consideration not only the creditor’s proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question.

5 Restriction on entitlement to damages

A creditor shall not be entitled, under a penalty stipulation, to both the penalty and damages or, except where the contract expressly so provides, to damages in lieu of the penalty.

6 Restriction on entitlement to penalty for defects or delay

A person who accepts or is obliged to accept defective or delayed performance under a contract shall not be entitled to a penalty in respect of that defect or delay, unless the penalty was expressly provided for in respect of that defect or delay.

PART III

INSTALMENT SALES OF LAND

7 Instalment sales of land to be in writing

Every instalment sale of land shall be reduced to writing:

Provided that, where any such contract or any term or condition thereof has not been reduced to writing, the onus of proving the existence of that contract, term or condition, as the case may be, shall rest on the person alleging its existence.

8 Restriction of sellers’ rights

(1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser—

- (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or

- (b) terminate the contract; or
- (c) institute any proceedings for damages;

unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

(2) Notice for the purposes of subsection (1) shall—

- (a) be given in writing to the purchaser; and
- (b) advise the purchaser of the breach concerned; and
- (c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than—
 - (i) the period fixed for the purpose in the instalment sale of the land concerned; or
 - (ii) thirty days;whichever is the longer period.

(3) Without derogation from section 40 of the Interpretation act [*Chapter 1:01*], a notice shall be regarded as having been duly given to the purchaser for the purposes of subsection (1)—

- (a) if it has been delivered to the purchaser personally or to an agent chosen by the purchaser for the purpose of receiving such notices; or
- (b) if it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land concerned or, in the absence thereof, to the purchaser's usual or last known place of residence or business.

9 Court may grant relief

(1) Where upon the cancellation or termination of an instalment sale of land the purchaser is required, in terms of the contract, to forfeit—

- (a) the whole or any part of any instalment or deposit which he has paid to the seller; or
- (b) any claim for any expenditure he has incurred—
 - (i) whether with or without the seller's consent, in protecting or preserving the land or in paying rates or taxes relating to the land; or
 - (ii) with the seller's consent, where the expenditure has enhanced the value of the land;

and it appears to a competent court that such forfeiture is out of proportion to the prejudice suffered by the seller, the court may grant such relief as it considers will be fair and just to the parties.

(2) Without limitation on its powers in terms of subsection (1), a court may—

- (a) order the seller to refund to the purchaser the whole or part of any instalment or deposit which the purchaser has paid; or
- (b) order the seller to reimburse the purchaser by an amount equal to the whole or part of any expenditure referred to in paragraph (b) of subsection (1) which the purchaser has incurred; or
- (c) order that any claim for damages by the seller shall be reduced by an amount equal to any refund or reimbursement which could be ordered in terms of paragraph (a) or (b).

(3) In assessing any relief that may be given in terms of this section, the court shall have regard to all the circumstances of the case and in particular to—

- (a) the amount of any instalments or deposit paid by the purchaser; and
- (b) any expenditure referred to in paragraph (b) of subsection (1) which has been incurred by the purchaser in respect of the land concerned; and
- (c) the nature of any breach of contract on the part of the purchaser and the circumstances in which it was committed; and
- (d) the extent to which the purchaser has complied with his obligations during the currency of the instalment sale of land concerned;

and shall balance those amounts against the value of any use or occupation of the land concerned which was enjoyed by the purchaser, together with any commission or costs which the seller has been required to pay in connection with the instalment sale of land concerned.

10 This Part not to derogate from Part II

This Part shall not limit the application of Part II to any instalment sale of land.

PART IV

GENERAL

11 Waiver of rights under Act invalid

No waiver of any right or benefit conferred by this Act shall be of any force or effect.