

**IN THE LAND CLAIMS COURT FOR THE REPUBLIC OF SOUTH AFRICA  
HELD AT RANDBURG**

**CASE NO: LCC 158/2010**

**In the matter between:**

**GAZEBO RANCH (PTY) LTD**

**APPLICANT**

**and**

**THE MINISTER OF LAND AFFAIRS**

**1<sup>st</sup> RESPONDENT**

**THE REGIONAL LAND CLAIMS  
COMMISSIONER MPUMULANGA**

**2<sup>nd</sup> RESPONDENT**

**THE CHIEF LAND CLAIMS COMMISSIONER**

**3<sup>rd</sup> RESPONDENT**

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**JUDGMENT**

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**LOOTS AJ**

1. On 10<sup>th</sup> December 2010 an application was made before me in the unopposed motion court for an order that the first respondent should pay to the applicant interest on the amount of R3 873 794,50 at the rate of 15,5% per annum from 11<sup>th</sup> June 2009 to 9<sup>th</sup> March 2010.
2. The cause of action set out in the founding affidavit is that the amount of R3 873 794,50 is the deposit which was payable by the National Department of Land Affairs to the applicant in respect of the purchase of land which had been subject to a claim in terms of the Restitution of Land Rights Act 22 of 1994. It is alleged that the deposit should have been paid by 11<sup>th</sup> June 2009, but was only paid on 9<sup>th</sup> March 2010.

3. In terms of paragraph 3.2 of the agreement of sale the deposit was payable into the applicant's conveyancer's trust account within 30 days of the signing of the agreement of sale and would be deposited by the conveyancer into an interest bearing account for the benefit of the purchaser in terms of section 70(2)(A) of the Attorneys Act No 53 of 1979. On the date of transfer the transferring attorneys would pay the capital to the seller and the interest to the purchaser.
4. The applicant relies upon paragraph 6 of the agreement of sale which provides:

*'Should any part of the purchase price not be paid by the Purchaser to the Seller on the date on which it is due in terms of this agreement, the Purchaser shall be liable for payment of interest to the Seller on such amount outstanding at the rate of interest (presently 15,5% per annum) prescribed from time to time in terms of the Prescribed Interest Rates Act, No 55 of 1975 (as amended), which will be calculated from date of default to date of payment. Such interest shall be in addition to, and not in substitution for, the rights accorded to the Seller elsewhere in this agreement.'*
5. I raised with counsel the question whether charging interest in terms of paragraph 6 in respect of the late payment of the deposit did not amount to an unreasonable penalty,<sup>1</sup> in view of the fact that interest which would have accrued on the deposit money while it was invested pending transfer would have accrued to the purchaser in terms of paragraph 3.2. Counsel was not able to refer me to any authorities in this regard.

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<sup>1</sup> See *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) 391B; *Ephron Bros. Holdings (Pty) Ltd v Foutzitzoglou* 1968 (3) SA 226 (W) 230F—G; *Western Bank Ltd v Meyer*; *Western Bank Ltd v De Waal*; *Western Bank Ltd v Swart & Another* 1973 (4) SA 697 (T) 699D—F. Cf *Bank of Lisbon International Ltd v Venter en 'n Ander* 1990 (4) SA 463 (A) 474G.

6. Paragraph 18 of the agreement provides:

*In the event of any Party committing a breach of this Agreement or being otherwise in default of the terms and conditions hereof, and remaining in default after being given 14 days notice in writing within which to rectify such default, the aggrieved Party shall be entitled to enforce the terms and conditions of this Agreement and sue for specific performance and any damages suffered, or to cancel this Agreement, in either event, any action taken by the Parties shall be without prejudice to their rights to claim damages arising from such default, or to any other rights the Parties may have under the common law or otherwise.*

7. On 6<sup>th</sup> July 2009 the applicant's attorneys addressed and delivered a letter to the Chief Land Claims Commissioner advising that 'unless the deposit of R3 873 794-50 together with 15,5% interest thereon calculated from 11<sup>th</sup> June 2009 to date of payment is received within 14 (FOURTEEN) days after service of this notice' the seller intended to enforce clause 18 of the agreement of sale. Thereafter the seller took no action in terms of paragraph 18.
8. The applicant could have claimed specific performance in respect of payment of the deposit, but it chose not to do so. The deposit and the balance of the purchase price were eventually paid, transfer of the property was effected and the purchase price was paid to the seller on transfer. If the applicant suffered a loss as a result of the late payment of the deposit it would be able to claim damages. Instead the applicant has chosen to claim interest in terms of paragraph 6 of the agreement.
9. The liability for damages imposed by paragraph 6 clearly constitutes a penalty as envisaged by section 1 of the Conventional Penalties Act 16 of 1962 and is therefore enforceable, subject to the court's right in

terms of section 3 of the Act to reduce it if it appears to be excessive. Although the interest on the deposit was to accrue to the first respondent and not the applicant, the late payment of the deposit would have delayed the transfer, resulting in the applicant receiving payment later than it should have. I accordingly find that the penalty is not out of proportion to the prejudice likely to have been suffered by the applicant.<sup>2</sup>

10. The following order is accordingly granted:
- (a) The First Respondent is ordered to pay to the Applicant interest on the amount of R3 873 794,50 at the rate of 15,5% per annum from 11 June 2009 to 9<sup>th</sup> March 2010.
  - (b) The First Respondent is to pay the costs of this application.

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**C E LOOTS**  
**ACTING JUDGE**  
**LAND CLAIMS COURT**  
**21<sup>st</sup> December 2010**

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<sup>2</sup> *Western Credit Bank Ltd v Kajee* 1967 (4) SA 386 (N) 391B—D; *Western Bank Ltd v Meyer*; *Western Bank Ltd v De Waal*; *Western Bank Ltd v Swart & Another* 1973 (4) SA 697 (T) 699G—700B.