IS WAIVER OF A CONTRACTUAL RIGHT PROHIBITED BY A NON-VARIATION CLAUSE?

***Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (3 July 2024)**

In this matter, the Supreme Court of Appeal considered whether a lender-benefactor's right to waive its claim to repayment of a loan is trumped by a non-variation clause in the loan agreement. The related enquiry – whether abandonment of the right to claim payment is akin to a variation of the terms of the loan and within the reach of a non-variation clause – was also explored. Balancing the rules of interpretation of agreements in order to reach answers, the court highlighted the instances when extraneous evidence may be used to give context to the terms of a contract, despite our law's rule that a written document must be respected as constituting the parties' agreement on the terms of their engagement.

View the judgment and summary here.

FACTS

During 1994, the Lubavitch Foundation of South Africa ('Lubavitch') started experiencing financial difficulties and struggled to service its mortgage loan with Nedbank. When its position further deteriorated and it faced foreclosure, the Krok brothers, owners of Golden Hands Property Holdings Pty Ltd ('Golden Hands') and benefactors of Lubavitch, came to the rescue.

Golden Hands, via the Krok brothers:

- Incorporated a third party company, Phoenix Salt Industries (Pty) Ltd ('Phoenix Salt'), which took over the Nedbank loan (for an amount of approximately R5,2 million) and obtained cession of Nedbank's rights against Lubavitch under the mortgage. Both the Krok brothers were directors of this entity.
- Arranged that Phoenix Salt and Lubavitch enter into a loan agreement for R5 million. The agreement provided that the loan would be repayable 24 months after Phoenix Salt demanded payment of the outstanding balance; that Lubavitch would sell certain of its properties to Golden Hands for R5 million; that Golden Hands would establish cluster housing developments on these properties and then sell it off, the proceeds to be paid to Phoenix Salt in repayment of the loan. (At the time of these proceedings, some R 2,5 million was paid by Golden Hands to Phoenix Salt, the former never making a payment to Lubavitch in respect of the acquisition of the properties.).
- Bound itself as a surety and co-principal debtor to Phoenix Salt for the due and punctual performance of Lubavitch's obligations arising from the loan agreement.

Over the years, no effort was made by Phoenix Salt to enforce the terms of the loan agreement. At all times, the Krok brothers assured Lubavitch that it would never be required to settle the debt, as the proceeds from the cluster development would be used for that purpose.

In July 2017, 23 years from the date of the loan, Phoenix Salt demanded repayment of the balance of the loan. By this time there had been changes in control of the various entities. Phoenix Salt contended that the agreement was a straightforward loan agreement with Lubavitch. It found support for that assertion from its financial statements for the period 1995 to 2003 which reflected the transaction as a loan between Phoenix Salt and Lubavitch. In addition to the entries in the financial statements there were loan certificates from the auditors of Phoenix Salt for the period covering 1995 to 1998. That, according to Phoenix Salt, was an indication that the transaction was a straightforward loan agreement.

Lubavitch proffered a different account. Rabbi Lipskar, for Lubavitch together with one of the Krok brothers (the only persons still around who had personal and direct knowledge of the circumstances when the agreement was entered into in 1994), advised that Golden Hands (its owners the Krok brothers) sought to assist Lubavitch in settling the debt in its entirety. They therefore devised a scheme through which they would advance the funds to Lubavitch through Phoenix Salt, of which they were directors, to enable Lubavitch to settle the Nedbank debt. The scheme included a deal through which Golden Hands would purchase four properties from Lubavitch and on which it would establish cluster housing developments. The proceeds hereof would be paid to Phoenix Salt in settlement of the debt owed to it by Lubavitch.

Lubavitch therefore defended the claim brought by Phoenix Salt arguing that the latter had waived its right to call up the loan and to enforce the strict terms of the agreement. It contended that it was not open to Lubavitch to argue waiver, as the agreement contained a non-variation clause and in any event, that the evidence did not establish waiver. The relevant clause provided as follows:

"9.1 This agreement…constitutes the sole record of the agreement between the parties...

9.2 Neither party shall be bound by any representation, express or implied term, warranty, promise or the like not recorded herein or reduced to writing and signed by the parties….

9.3 No addition to, variation or agreed cancellation of this agreement or the annexure thereto shall be of any force and effect unless in writing and signed by or on behalf of the parties.

9.4 No indulgence which either party may grant to the other shall constitute a waiver of any of the rights of the former."

Phoenix Salt further argued that any assurance by the Krok brothers that the loan would be repaid by Golden Hands rather than Lubavitch, amounted to a variation or addition to the agreement which was precluded by the plain language of the non-variation clauses.

The Gauteng High Court, Johannesburg dismissed the claim and found that Phoenix Salt had waived its rights to enforce payment. Aggrieved by the high court's findings, Phoenix Salt appealed to the Supreme Court of Appeal.

HELD

- The issue in this appeal is whether Phoenix Salt (through the Krok Brothers) waived its right to claim the remaining loan amount from Lubavitch and, if so, whether such a waiver is competent in the face of the non-variation clause.
- A waiver denotes a voluntary abandonment of a known existing right, benefit or privilege which, if it were not for such waiver, the party would have enjoyed it. It should be a deliberate abandonment either expressly or by conduct plainly inconsistent with an intention to enforce such right. The principle that a person may denounce any right or privilege available to him, provided such a waiver is not prohibited by law or does not offend public policy, is well established in our law.
- The existence of a waiver can be traced from the conduct of the parties. Whether there was a waiver or not, is therefore a matter of evidence.
- The Supreme Court of Appeal in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* established the principle that once parties to a written agreement agree that their agreement cannot be altered unless certain conditions are met, no amendment will be valid unless the prescribed condition has been met. The principle simply reinforces the rights of individuals to freely contract and be held to contracts they so concluded.
- *Shifren* did not, however, determine whether the non-variation clause precludes a waiver and also did not create a 'strait jacket' and courts may in certain circumstances, soften the impact thereof.

Do the facts as set out by Lubavitch support a waiver and were the Krok Brothers precluded by the non-variation clauses to waive their rights?

- The non-variation clause in the loan agreement expressly refer to additions, variations, and cancellations of the agreement – but not to waivers. Accordingly, the non-variation clauses in this agreement did not prevent the Krok brothers, acting for Phoenix Salt, from orally waiving the right to claim repayment from Lubavitch: A party can validly waive a right orally if it is a right which exclusively belongs to that party under the contract.

Can it then be argued that the waiver is a variation and disallowed for that reason?

- The waiver is not a variation of the loan terms requiring it to be in writing and signed by the parties, but rather an abandonment of Phoenix Salt's unilateral right to enforce repayment.
- In making this distinction, one must not lose sight of the purpose and context in which the loan agreement was entered into. That is that Golden Hands was represented by the Krok Brothers when the loan agreement was signed. It entered into an agreement of sale with Lubavitch to purchase certain properties for development, for the same amount of the loan advanced by Phoenix Salt to Lubavitch. It ceded its rights to receive proceeds from the sale of cluster houses to Phoenix Salt and authorised the latter to apply the same to reduce Lubavitch's indebtedness to it. The purchase price was not paid on the date of transfer of the properties to Golden Hands as stipulated in the contract. Lubavitch did not call for payment of the outstanding amount from Golden Hands. Golden Hands has, up to date, not paid the purchase price in full. Golden Hands stands to benefit from the waiver in that the abandonment of the right to claim the outstanding purchase price from Lubavitch would result in the extinction of the Golden Hands' obligation to pay the outstanding purchase price and the cession would fall away.
- Furthermore, the relationship between the contracting parties is of great significance in this matter. Phoenix Salt, through the Krok Brothers, was at all times Lubavitch's benefactor. The Krok Brothers had always intended to pay Lubavitch's debt in full. They facilitated this through a scheme that they understood as contracting parties, and when the time was right, the Krok Brothers exercised their right to abandon their claim. This is evident from the absence of accounting records after 2003, when the loan was still extant.
- Phoenix Salt's contention that the non-variation clause precludes the pleaded oral waiver by the Krok brothers conflates the distinct legal concepts of variation and waiver. Each of the two doctrines in the law of contract exists to fulfil different purposes. A waiver is an abandonment or relinquishment of a right or privilege in a contract which is expressed through an explicit statement or conduct that indicates a voluntary decision to give up that right or privilege, without modifying the contract's terms. On the other hand, a variation involves making changes to the terms of a contract, either through mutual agreement between the parties or through unilateral action by one party with the consent of the other. A party exercising a waiver chooses to walk away from a privilege that might have been derived from the contract while the contract remains extant. Whereas, a variation alters or amends the terms of a contract.

Interpretation of the agreement's terms

- Some 114 years ago, the court in *Mutual Life and Citizens Assurance Co of New York v Ingle* concluded that it is difficult to find the intention of contracting parties exclusively in the written words of a contract. This trite principle has been accepted over the years as the correct exposition of the law. The judgment (cited with approval in numerous cases and authorities), still remains correct. Recently and expanding on the principle, this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* pronounced that 'proper interpretation of a contract requires the whole contract to be read, and grammatical meaning to be attached to the words used in consideration of the surrounding circumstances only known to the parties. This is the law prevailing on interpretation of contracts, agreements and even legislations.
- In *University of Johannesburg v Auckland Park Theological Seminary and Another* the Constitutional Court remarked as follows on the use of extrinsic evidence in the interpretation process: 'Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly,

interpretation is a matter for the court and not for witnesses". It is also true that "to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible". I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. What the preceding discussion clearly shows is that, to the extent that the Supreme Court of Appeal in the current matter purported to revert to a position where contextual evidence may only be adduced when a contract or its terms are ambiguous, it erred. Context must be considered when interpreting any contractual provision and it must be considered from the outset as part of the unitary exercise of interpretation'.

- What the Constitutional Court confirmed thus, is that the process of interpretation should not be divorced from the circumstances surrounding the contract. The relationship between the contracting parties and their conduct during the subsistence of a contract have a significant relevance in the process of interpretation. While surrounding circumstances should not be elevated over words of the contract, consideration of such evidence helps the decision maker to acquire an enhanced insight into the intention and the purpose of the contract.
- The uncontroverted evidence clearly shows is that the Krok Brothers conducted themselves in a way that demonstrates that they waived their right to enforce the terms of the loan agreement against Lubavitch.

CONCLUSION

The high court's finding that Phoenix Salt waived its right to call up the loan and to enforce payment is correct. In the circumstances the appeal ought to fail.