THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 330/2023

In the matter between:

PHOENIX SALT INDUSTRIES (PTY) LTD **APPELLANT**

and

THE LUBAVITCH FOUNDATION OF SOUTHERN AFRICA **RESPONDENT**

Neutral citation: *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (03 July 2024)

Coram: MOCUMIE ADP and MATOJANE and MOLEFE JJA and SEEGOBIN and MBHELE AJJA

Heard: 06 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 03 July 2024

Summary: Loan agreement – variation clause – waiver – whether variation clause precludes waiver – waiver is not variation – interpretation of a loan agreement– surrounding circumstances and evidence demonstrates a waiver.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Swanepoel J, sitting as court of first instance):
The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Mbhele AJA (Mocumie ADP and Matojane and Molefe JJA and Seegobin AJA concurring):

[1] This is an appeal against the judgment and order of the Gauteng Division of the High Court, Johannesburg (the high court), dismissing the application for payment of monies paid to Phoenix Salt by the respondent in terms of a loan agreement between the parties. The appeal is with leave of the high court.

[2] The appellant, Phoenix Salt Industries (Pty) Ltd (Phoenix Salt), unsuccessfully sought payment of the sum of R2 886 005.20 plus interest and costs from the respondent, the Lubavitch Foundation of South Africa (Lubavitch). The claim has its genesis in a written loan agreement entered into between Phoenix Salt and Lubavitch on 12 August 1994. Golden Hands Property Holdings (Pty) Ltd (Golden Hands), a company owned by the Krok family, was, at the time, controlled and represented by Messrs Abraham Krok and Solomon Krok (the Krok Brothers). Golden Hands, signed as a surety and co-principal debtor *in solidum* with Lubavitch for its obligations in terms of the agreement. Mr Abraham Krok passed away on 20 January 2013.

[3] Lubavitch is a voluntary organisation aimed at enriching the lives of South Africans of Jewish extraction with a special focus on promoting and protecting their social and economic interests. To that end, it runs a property management school for Jewish scholars on the property that is sought to be attached and declared specially executable by Phoenix Salt. Around 1994, Lubavitch experienced financial difficulties and struggled to service its mortgage loan with Nedbank. It faced foreclosure by Nedbank, which had funded it to acquire the Orchards and Klipfontein properties.

[4] The Krok Brothers redeemed the situation by taking over the Nedbank loan through Phoenix Salt, a shelf company which they controlled. Phoenix Salt and Lubavitch entered into a loan agreement in which Phoenix Salt would settle the Nedbank indebtedness of R5.2 million. On 29 August 1994, Phoenix Salt took cession of Nedbank's claims and rights in and to the mortgage bonds in consideration for R5 000 000 plus interest calculated from 1 April 1994 until the date of payment. The agreement provided that the loan would be repayable 24 months after Phoenix Salt had demanded repayment of the outstanding balance. In the same agreement, Golden Hands bound itself as a surety and co-principal debtor to Lubavitch for the due and punctual performance of Lubavitch's obligations arising from the loan agreement.

[5] The essential terms of the loan agreement were that the loan by Phoenix Salt was advanced to Lubavitch on the basis that Lubavitch sold to Golden Hands stands 141, 142, 143 and 260 of Orchards property at exactly the same price as the loan amount of R5.2 million. This resulted in Lubavitch and Golden Hands entering into a separate written agreement (the sale agreement) in terms of which Lubavitch sold the aforementioned immovable properties to Golden Hands at a purchase price of R5.2 million. The purchase price was, in terms of the written sale agreement, at least, payable on transfer.

[6] Golden Hands intended to erect cluster houses on the four properties. In terms of the loan agreement Golden Hands ceded its right to receive the proceeds from the sale of the cluster houses to Phoenix Salt, in order to reduce Lubavitch's indebtedness. Golden Hands never paid Lubavitch the purchase price for the properties.

[7] Central to the determination of the core issue, lies clause 9 of the loan agreement, which *inter alia*, contains the following terms:

'9.1 This agreement, together with the annexure thereto, constitutes the sole record of the agreement between the parties in regard to the subject matter thereof.

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 or their representatives.

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.'

The above sub clauses require the attention of this Court to come to its conclusion.

[8] On 25 July 2017, almost two decades and a half from the date of the loan, Phoenix Salt demanded repayment of the balance of the loan, making the debt due and payable on or before 26 July 2019. It contended that the agreement was a straightforward loan agreement. Phoenix Salt finds support for this 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.

[9] Lubavitch, represented by Rabbi Menachem Lipskar (Rabbi Lipskar), who together with Mr Solomon Krok, are the only persons with personal and direct knowledge of the events which unfolded in August 1994, proffered a completely different account. Rabbi Lipskar narrates that the Krok Brothers undertook 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 together with Mr Arthur Aaron, to enable Lubavitch to settle the Nedbank debt.

[10] According to Rabbi Lipskar, the scheme included a deal through which Golden Hands would utilise the profits from the sale of the cluster development at Orchards

property to settle Lubavitch's debt to Phoenix Salt. At that stage Mr Joseph Rabin was the sole director and shareholder in Golden Hands which was, during that period controlled and represented by the Krok Brothers during negotiations and at the time of signature of the agreement. Golden Hands paid R2 429 440 to Phoenix Salt from the proceeds of the sale in part-payment of Lubavitch's debt. Rabbi Lipskar says that he had assurance from the Krok Brothers, on numerous occasions that Lubavitch would never be required to settle the debt, as the proceeds from the cluster development would be used for that purpose. Mr Solomon Krok confirms this version in a confirmatory affidavit to Lubavitch's answering affidavit. Lubavitch's version is that Phoenix Salt waived its right to call up the loan and to enforce the strict terms of the agreement.

[11] In November 2003,the Krok Brothers resigned as directors of Phoenix Salt and were replaced by Messrs Martin and Maxim Krok. During the tenure of the Krok Brothers no attempt was made to enforce the agreement. There is no indication that the loans were reflected or accounted for anywhere between 2003 and 2014, when correspondence was sent to Lubavitch on behalf of Phoenix Salt enquiring about the loans nor were there any loan certificates issued by Phoenix Salt's auditors to reflect the loan balance thereafter. There is no explanation for this gap in accounting.

[12] Lubavitch's version cannot be gainsaid. First, because its witnesses are the only ones who have first-hand and personal knowledge of the circumstances surrounding the agreement. Second, because Golden Hands has not paid the money it owes Lubavitch for the four properties in full and that it stood surety for Lubavitch's debt to Phoenix Salt. And, third, it later paid R2 429 440 out of the proceeds of sales of Klipfontein and Orchards properties to Phoenix Salt as part payment of Lubavitch's debt. This supports the version that the parties to the loan agreement in dispute, envisaged that Golden Hands would repay the loan, as it bound itself as surety and co-principal debtor to Phoenix Salt.

[13] While Lubavitch submits that the Krok Brothers, acting on behalf of Phoenix Salt, exercised a waiver to enforce its right of recovery against Lubavitch, Phoenix Salt contends that the available evidence does not establish a waiver and that it is ousted

by the non-variation clauses of the agreement. The relevant non-variation clauses are 9.2 and 9.3 which stipulate:

'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 or their representatives.

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

[14] The *Plascon-Evans*[1] rule finds application in this case. The rule requires that the matter be decided on the respondent's version together with the admitted facts in the appellant's founding affidavit which provide the factual basis for the determination unless the dispute is not real or genuine and the version of the respondent is untenable and farfetched. Lubavitch's version is neither untenable nor farfetched. Thus, I am unable to reject the version proffered by Lubavitch and consequently, its version should stand.

[15] The issue, therefore, in this appeal is whether Phoenix Salt through the Krok Brothers waived its right to claim the remaining loan amount from Lubavitch, 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.[2] 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.[3] The existence of a waiver can be traced

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[1] *Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), as re-affirmed in *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] ZACC 7; [2022] 6 BLLR 487 (CC); 2022 (7) BCLR 787 (CC); 2022 (5) SA 18 (CC).

[2] R H Christie *Çhristie's The Law of Contract in South Africa* 8 ed (2022) at 532. See also: *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 323-324.

[3] *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A) 49G-H; *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 719 at 734-735 where the court held:

'The maxim of the Civil Law (C.2, 3, 29), that every man is able to renounce a right conferred by law for his own benefit was fully recognised by the law of Holland. But it was subject to certain exceptions, of which one was that no one could renounce a right contrary to law, or a right introduced not only for his own benefit but in the interests of the public as well. (*Grot*., 3, 24, 6; n. 16; *Schorer*, n. 423; *Schrassert*, 1, c. 1, n. 3, etc.). And the English law on this point is precisely to the same effect.'

from the conduct of the parties. Whether there was a waiver or not is a matter of evidence.

[16] This Court in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*[4] (*Shifren*) laid down a principle governing the non-variation clauses in agreements. In terms of this principle, once parties to a written agreement agree that an agreement cannot be altered unless certain conditions are met, no amendment will be valid unless the prescribed condition has been met. The principle was reaffirmed in *Brisley v Drotsky*,[5] where this Court held that the purpose of non-variation clause was to curtail disputes and protect both parties to the contract. The *Shifren* principle did not create a 'strait jacket', which impact, courts should attempt to soften as a few cases demonstrated. The principle in its simplest interpretation, simply reinforced the rights of individuals to freely contract and be held to contracts they freely concluded. Importantly, for purposes of this appeal, *Shifren* did not determine whether the non-variation clause precludes a waiver.

[17] 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 clauses in the loan agreement expressly refer to additions, variations, and cancellations of the agreement – but not waivers. Clause 9.2 precludes reliance on external terms and representations, while clause 9.3 requires written signature for alterations to the agreement itself. Neither of the clauses address unilateral waiver of contractual rights. 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. 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.

[18] As this Court in *Impala Distributors v Taunus Chemical Manufacturing*[6] recognized, a party can validly waive a right orally if it is a right which exclusively

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[4] *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 4 All SA 520 (A); 1964 (4) SA 760 (A) at 765.
[5] *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[6] *Impala Distributors v Taunus Chemical Manufacturing* 1975 (3) SA 273 (T).

belongs to that party under the contract. The non-variation clauses do not override this principle, as they are silent on waiver. The court remarked as follows:

'When a contract stipulates that its dissolution can only take place in writing, such a restriction can be revoked by verbal agreement of will. When the contract contains a further provision that no provision of the contract can be amended other than in writing, this entrenches the restriction against revocation and oral dissolution is no longer possible. Waiver can validly be made verbally, but only by a party in respect of a right that belongs exclusively to himself by virtue of the contract. An already arising right of action from breach of contract can also be waived orally.'[7]

[19] Phoenix Salt contends that an assurance by the Krok brothers that the loan would be repaid by Golden Hands rather than Lubavitch amounts to a variation or addition to the agreement which is precluded by the plain language of the non-variation clauses. It submits further, that the alleged assurances by the Krok Brothers that Phoenix Salt would not enforce its rights of recovery against Lubavitch falls short of another requirement of a unilateral waiver – that the right must have been conferred for the exclusive benefit of the waiving party. Phoenix Salt argues that, there was a third party to the loan, Golden Hands which, as a cedent, surety and co-principal debtor had a material interest in the Lubavitch's repayment of the loan. Golden Hands was however not called upon to make payment as a surety.

[20] Phoenix Salt loses 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 the Orchard Properties 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 be developed on the Orchard properties to Phoenix Salt

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[7] Ibid at 278A-B. 'Wanneer 'n kontrak bepaal dat ontbinding daarvan alleen skriftelik kan geskied, kan so 'n beperking by mondelinge wilsooreenstemming herroep word. Wanneer die kontrak 'n verdere bepaling bevat dat geen bepaling van die kontrak gewysig kan word anders as op skrif nie, verskans dit die beperking teen herroeping en is mondelinge ontbinding nie meer moontlik nie. Afstanddoening kan geldiglik mondeling geskied, maar alleen deur 'n party ten opsigte van 'n reg wat uitsluitend aan homself toekom uit hoofde van die kontrak. Van 'n reeds ontstane vorderingsreg uit kontrakbreuk kan ook mondeling afstand gedoen word.'

and authorised Phoenix Salt 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.

[21] 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. Rabbi Lipskar and Mr Solomon Krok made it very clear that 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. It is further supported by the non-payment of the outstanding amount on the sale of the Orchards Properties by Golden Hands. Of interest is that Golden Hands did not intervene in these proceedings, although it is an interested party.

[22] Phoenix Salt's contention that the non-variation clauses preclude 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. In *HNR Properties CC v Standard Bank of SA (Ltd*),[8] this Court remarked as follows:

'No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the *Shifren* principle, eg where it amounts to a *pactum de non petendo* or an indulgence in relation to previous imperfect performance…'

[23] A waiver is the renunciation of a right, and when the intention to renounce is expressly communicated to the affected party, such person is entitled to act upon it. When the renunciation is evidenced by conduct inconsistent with the enforcement of the right or clearly showing the intention to surrender that right, the intention can be acted upon and the right perishes.[9]

[24] Some hundred and fourteen 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*[10] 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.

[25] In *University of Johannesburg v Auckland Park Theological Seminary and Another*[11] 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

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[8] *HNR Properties CC and Another v Standard Bank of SA Ltd* [2003] ZASCA 135; [2004] 1 All SA 486 (SCA); 2004 (4) SA 471 (SCA) para 20.
[9] *Mutual Life and Citizens Assurance Co of New York v Ingle* 1910 TS 540 at 550.
[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.
[11] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) paras 68-69. (*University of Johannesburg*)

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.'

[26] 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.

[27] What 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.[12] 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. In so far as the costs are concerned, there is no reason to depart from the general rule that costs should follow the result.

[28] In the result, the following order is made.

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[12] *Trans-Natal Steenkoolkorporasie Bpk v Lombaard en 'n Ander* 1988 (3) SA 625 (A) at 640; See also *Palmer v Poulter* 1983 (4) SA 11 (T) at 20D. It was held:
'If the appellant with full knowledge of the facts, so conducted herself that a reasonable person would conclude that she had waived her accrued right to cancel the agreement or affirmed the agreement, a mental reservation to the contrary will not avail her.'

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

N M MBHELE

ACTING JUDGE OF APPEAL

Appearances

For the appellant:	R Pearse SC and N Badat
Instructed by:	Cliffe Decker Hofmeyr Inc., Johannesburg
	Webbers Attorneys, Bloemfontein.
For the respondent:	S Symon SC and J L Kaplan
Instructed by:	Ian Levitt Attorneys, Johannesburg
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