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Waive Goodbye to Uncertainty: Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa

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This article discusses the judgement of *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa* and provides interesting insights into the concepts of waiver and variation of contracts, and how these concepts are relevant to parties to a commercial agreement. In particular, parties to M&A and private equity transactions will find this article to be of interest in how they conduct their contractual relationships.

INTRODUCTION

You will be hard-pressed to find a commercial contract that lacks a non-variation clause – and for good reason. A non-variation clause provides that any amendments made to the contract by the parties will only be effective once the formalities prescribed in such clause for effecting such amendments have been complied with.[1] The formalities usually prescribed in a non-variation clause will be that any amendment to the contract must be (i) reduced to writing and (ii) signed by the contracting parties. The importance of including non-variation clauses in contracts is to prevent unnecessary disputes over whether or not an amendment was agreed by imposing specific formalities, which will provide certainty as to the whether any amendments have been agreed by the parties and as to the contents of such amendments.[2]

An important concept in our law is that of waiver, whereby a party who stands to benefit from a right granted to it can voluntarily choose to abandon such right which the party would have enjoyed had it not elected to waive such right, provided that such waiver is not contrary to public policy or illegal.[3] A waiver can be made expressly (i.e., recorded in writing and signed by the party waiving the right or orally communicated by the party waiving the right to the party who had granted such right) or the occurrence of a waiver may be evidenced through subsequent conduct which is inconsistent with the intention of a party to enforce the relevant right.[4] A right belonging exclusively to one party can be validly waived by that party by verbal communication to the party who had granted such right.[5] However, it is generally accepted that parties go to great lengths to acquire rights and therefore a factual presumption against waiver exists.[6]

This article considers the recent case of *Phoenix Salt Industries (Pty) Ltd v The Lubavitch Foundation of Southern Africa*[7] *("**Phoenix Salt**")* which judgment by the Supreme Court of Appeal ("**the Court**") offers a response to the legal question: where does variation of a contract end and where does waiver of a right in a contract begin? The distinction is of critical importance for parties to a commercial contract as the manner in which each may be effected and the legal principles applicable to each differ.

FACTS

On 12 August 1994, Phoenix Salt Industries (Pty) Ltd ("**Phoenix**"), controlled by the Krok Brothers at the time, entered into a written loan agreement with the Lubavitch Foundation of Southern Africa ("**Lubavitch**") ("**the loan agreement**"). Golden

Hands Property Holdings (Pty) Ltd ("**Golden Hands**"), also controlled by the Krok Brothers, signed as surety and co-principal debtor *in solidum* in respect of Lubavitch's obligations arising from the loan agreement.

The loan agreement stipulated that the loan was provided by Phoenix to Lubavitch, on the basis that Lubavitch would sell certain properties to the surety i.e., Golden Hands with the purchase price for such properties being equal to the value of the loan amount advanced by Phoenix to Lubavitch. Furthermore, Golden Hands ceded to Phoenix its right to receive the proceeds from Golden Hands' subsequent sales of cluster houses constructed by it on the properties acquired from Lubavitch, which would by agreement have the effect of decreasing Lubavitch's indebtedness under the loan agreement.

The loan agreement also *inter alia* contained the following clauses –

"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 rights of the former."

The loan agreement had also provided that the loan will become due two years after Phoenix demands payment of the outstanding amount.

More than twenty years after the conclusion of the loan agreement, Phoenix (which at the time was no longer under the control of the Krok Brothers) demanded repayment of the loan on 25 July 2017. However, Lubavitch contended that, during the time that the Krok Brothers had been in control of Phoenix, they had made oral representations to Lubavitch to the effect that Golden Hands would repay the loan to Phoenix and/or that Golden Hands ceded to Phoenix its right to receive the proceeds from the sale of cluster houses which Golden Hands had erected on the properties sold by Lubavitch to Golden Hands to reduce Lubavitch's indebtedness to Phoenix under the loan agreement. It was contended by Lubavitch that such representations constituted a waiver by Phoenix of its right to recover payment of the outstanding loan amount under the loan agreement. Furthermore, it was contended that while the Krok Brothers were serving as directors of Phoenix, no attempts were made to enforce the loan agreement. Moreover, from 2003 to 2014, it was contended that the loan was not reflected in the financial records of Phoenix. The surviving Krok brother confirmed Lubavitch's version as set out above.

In response, Phoenix contended that the representations made by the Krok Brothers did not amount to a waiver of Phoenix's right to recover the loan amount, but rather that such representations constituted an attempt by the parties to vary the terms of the loan agreement which Phoenix asserted was not a valid amendment of the loan agreement due to non-compliance with the formalities imposed by the non-variation provision in clause 9.3. Phoenix further contended that the representations constituting the alleged waiver fell foul of the requirement that, for a unilateral waiver, the right in question is required to have been bestowed for the exclusive benefit of the waiving party however it was contended by Phoenix that in this instance, Golden Hands (in its capacity as surety) had a material interest in Lubavitch repaying the loan amount to Phoenix.

ISSUE: DID THE REPRESENTATIONS BY THE KROK BROTHERS CONSTITUTE A VARIATION OR WAIVER?

The Court was accordingly tasked with determining two issues: (i) whether Phoenix (as represented by the Krok Brothers) had waived its right to claim the outstanding loan amount from Lubavitch in terms of the loan agreement and (ii) if so, whether the existence of the non-variation clause in the loan agreement nevertheless had the effect of rendering such waiver as being ineffectual in law.

APPLICATION OF THE LAW

The Court first considered the wording of the loan agreement noting that the non-variation clause did not reference the concept of waiver. While the Court notes the existence of clause 9.4, as part of the reasoning for its judgment it does not appear to deal in detail with the impact (if any) of that clause on the evidence and arguments put forward by Lubavitch in respect of the representations constituting the alleged waiver. Instead, it appears that the Court was satisfied that the evidence placed before it by Lubavitch established the existence of the waiver contended by Lubavitch.

The Court examined the extrinsic evidence (i.e., evidence outside of the contents of the agreement) put before it and placed reliance on the following in coming to its judgment: (i) the circumstances giving rise to the loan agreement, (ii) the relationship between the contracting parties and (iii) the representations by the Krok Brothers made pursuant to and during the subsistence of the loan agreement.[8] In this regard, the Court remarked that "*...the relationship between the contracting parties is of great significance. Phoenix Salt, through the Krok Brothers, was at all times Lubavitch's benefactor.*"[9]

Having regard to the evidence, the Court was satisfied that the waiver had been established and that such waiver had not been trumped or made void because of the existence of the non-variation clause in the loan agreement. Put differently, the Court held that the non-variation clause in the loan agreement did not preclude Phoenix (represented by the Krok Brothers) from orally waiving its right to demand payment of the outstanding amount under the loan agreement from Lubavitch. In this regard, the Court crisply stated the following –

"*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.*"[10]

"*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.*" **[11]**

(our emphasis)

Conclusion

The *Phoenix Salt* case reiterated that waiver and non-variation are distinct concepts in the law of contract. The decision of the Court may also raise concerns for commercial parties because some commercial parties in the position of Phoenix (in its capacity as lender) may have sought to place reliance on the non-waiver clause contained in clause 9.4 of the loan agreement and may have held the view that the existence of such a clause in an agreement would have precluded a counterparty from relying on the existence of a delay by the lender in exercising its right to claim repayment of the loan in question. The judgment also confirms that a non-variation clause in a contract does not preclude a party from relying on and proving the existence of an oral waiver. The above issues suggest that more careful consideration should be given to the so-called "boilerplate" clauses during the drafting of commercial contracts and it highlights the importance of engaging experienced legal advisors to ensure that a party's interests are adequately protected. For example, the decision of the Court may well have been different if a clause had been included in the loan agreement which imposed a formality that any waiver by a party of any right under the agreement will only be valid and effective if reduced to writing and signed by the party granting the waiver.

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[1] See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 4 All SA 520 (A).

[2] See *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Yarram Trading CC t/a Tijuana Spur v Absa Bank Ltd* 2007 (2) SA 570 (SCA).

[3] See *SA Eagle Insurance Co Ltd v Bavuma* 1985 (3) SA 42 (A).

[4] See *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T).

[5] *Impala Distributors v Taunus Chemical Manufacturing* 1975 (3) SA 273 (T). More information on waiver can be found at: GB Bradfield, R H Christie *Christie's The Law of Contract in South Africa* 8th ed (2022). LF van Huyssteen, GF Lubbe et al *Contract: General Principles* 6th ed (2020).

[6] GB Bradfield, R H Christie *Christie's The Law of Contract in South Africa* 8th ed (2022) at 533 – 534.

[7] (330/2023) [2024] ZASCA 107 (03 July 2024).

[8] See *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) in regard to consideration of extrinsic evidence.

[9] Paragraph 21.

[10] Paragraph 17.

[11] Paragraph 22.



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