



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 28 June 2024

Status: Immediate

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

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs including the costs of two counsel, an appeal against the decision of the Gauteng Division of the High Court, Johannesburg.

Around 1994, the respondent, Lubavitch Foundation of South Africa (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. The appellant, Phoenix Salt Industries (Pty) Ltd (Phoenix Salt), through its owners Abraham Krok and Solomon Krok (the Krok brothers), redeemed the situation by taking over the Nedbank loan. Phoenix Salt and Lubavitch then 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 (five million) 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. The Krok Brothers resigned as directors of Phoenix Salt in November 2003 and were replaced by Martin and Maxim Krok. During the tenure of the senior Krok Brothers no attempt was made to enforce the agreement.

On 25 July 2017, 23 years from the date of the loan, Phoenix Salt under new directorship, 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 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 pure loan agreement payable in terms of that agreement. Lubavitch, represented by Rabbi Menachem Lipskar (Rabbi Lipskar) proffered a completely different account. Rabbi Lipskar narrated that the Krok Brothers wished 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. 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. Golden Hands paid R2 429 440.00 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 confirmed this version in a confirmatory affidavit to Lubavitch's answering affidavit. Lubavitch's version was that the appellant waived its right to call up the

loan and to enforce the strict terms of the agreement. While Lubavitch submitted that the Krok Brothers, acting on behalf of Phoenix Salt, exercised a waiver to enforce its right of recovery against Lubavitch, which was not ousted by the non-variation clauses in the agreement, Phoenix Salt contended that the available evidence did not establish waiver and that it was not permitted by clauses 9.2 and 9.3 of the loan agreement.

To enforce the agreement, Phoenix Salt instituted an application in the Gauteng Division of the High Court, Johannesburg (the high court) to claim payment of the sum of R2 886 005.20 plus interest and costs from Lubavitch. The high court, dismissing the application and found that Phoenix Salt had waived their rights to enforce payment. Aggrieved by the high court's findings, Phoenix Salt appealed, with leave of the high court to this Court.

Before this Court, the issue was whether Phoenix Salt through the Krok Brothers waived its right to claim the remaining loan amount from Lubavitch, if so, whether such a waiver was competent in the face of the non-variation clause.

In its findings, the SCA held 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. It further held that 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 SCA also held that the words and actions of the Krok Brothers and Rabbi Lipskar, as contracting parties, before the signing and during the subsistence of the contract demonstrated that there was no intention on the Krok Brothers as the seniors of the Krok family to demand payment of the loan directly from Lubavitch. They conducted themselves in a way that clearly showed that they abandoned their right to enforce the terms of the contract against Lubavitch. According to the SCA, the high court's finding that Phoenix Salt waived its right to call up the loan and to enforce payment was correct. Thus, in the circumstances the appeal was dismissed.

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