THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 359/2013

In the matter between:

AFRICAST (PTY) LIMITED **APPELLANT**

and

PANGBOURNE PROPERTIES LIMITED **RESPONDENT**

Neutral citation: *Africast v Pangbourne Properties* (359/13) [2014] ZASCA 33 (28 March 2014)

Coram: Lewis, Mhlantla, Bosielo and Theron JJA and Mathopo AJA

Heard: **18 February 2014**

Delivered: **28 March 2014**

Summary: Where a suspensive condition is not fulfilled timeously it lapses and the parties are not bound by it even though one has performed fully.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Sutherland J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Lewis JA (**dissenting**):

[1] The respondent, Pangbourne Properties Ltd (Pangbourne), is a public company listed on the Johannesburg Stock Exchange. Its principal business is the acquisition and letting of commercial and industrial premises. The appellant, Africast (Pty) Ltd (Africast), is a company within a group that undertakes property investment and development. In late 2006 and for the first two months of 2007 the parties negotiated about the development of commercial property in Sunninghill, Johannesburg, which they designated 'The District'. Their representatives agreed on the terms of a contract for the building of commercial premises by Africast; for the letting of those premises to tenants and for the cession of the rights under the leases to Pangbourne, which was obliged to pay the purchase price for the improved properties to Africast only on transfer of the properties and cession of the leases.

[2] At issue in this appeal is the question whether the contract lapsed because of the non-fulfilment of a suspensive condition. The condition was that Pangbourne give written notice of the approval by its board of directors, within seven working days of the conclusion of the contract. The question in turn depends on the construction of the provision embodying the suspensive condition.

[3] It is common cause that Pangbourne, some 18 months after the signing of the agreement, decided that the condition had not been fulfilled within the stipulated period, and that it was accordingly not bound by the contract. It refused to furnish bank guarantees in respect of the fulfilment of its payment obligation to Africast. At that stage the buildings had been constructed in accordance with the contract. And Pangbourne's employees had been involved on a regular basis with the whole development.

[4] Africast regarded Pangbourne's decision as a repudiation of the contract: it accordingly cancelled and sued for damages for breach of contract. The South Gauteng High Court (Sutherland J) held that the condition had not been fulfilled timeously; that Pangbourne was not bound by the contract and that Africast was accordingly not entitled to damages. The question of damages was not traversed in the high court since it had ordered, at the request of the parties (and in terms of Rule 33(4) of the Uniform Rules of Court), that the question of the enforceability of the contract, and the measure of damages be determined separately from the quantification of damages. However, it declined to deal with the appropriate measure of damages, quite understandably in view of its finding that Pangbourne was not bound by the contract in the first place. Africast appeals to this court with the leave of the high court.

[5] Some factual background is necessary before the provision in question, and the high court's finding, are discussed. The negotiations between the parties culminated in a written document signed on 5 March 2007 by Pangbourne's group company secretary, Mr J J Groenewald, and a director, Mr Kennedy. They also signed an addendum to the contract, including, inter alia, further suspensive conditions (all of which were fulfilled), on 11 April 2007. Mr J Weaver, Africast's representative, signed both the agreement and the addendum on 11 April. Groenewald and Kennedy did not actually have the authority to bind Pangbourne to any contract, a fact not in dispute. For the conclusion of any contract in respect of which a sum in excess of R50 million was payable, Pangbourne board approval was necessary. And for a contract sum that was less than R50 million, only the chief executive officer of Pangbourne had authority to bind the company, and then only with the approval of the investment committee.

[6] The provision at issue, clause 16.1, of the signed document read:

'This agreement is subject to the suspensive condition (stipulated for the benefit of Pangbourne Company and which may be waived by written notice given by Pangbourne Company to the Seller Company [Africast] on or before the date for fulfillment of this condition) that within 7 days (excluding Saturday, Sundays and public holidays) after the date on which this agreement *is concluded* (or such other period/s as the parties may agree to in writing from time to time) Pangbourne Company gives Seller Company written notice that its board of directors has approved the purchase of the property by Pangbourne Company in terms of this agreement. This condition is not capable of fictional fulfillment.' (My emphasis.)

[7] On Friday 20 April 2007 Pangbourne's board of directors signed a written resolution approving the acquisition of the property from Africast and an agreement with Africast to construct an office park, the total 'purchase consideration' being some R66 698 792, payable on completion of the development. The resolution also authorized any two directors or a director and the company secretary to sign the 'Property Sale Agreement, which includes the Development Agreement'.

[8] Thus seven business days after the signing of the agreement the Pangbourne board approved the contract that had been signed by Groenewald and Kennedy on its behalf. The following Monday, 23 April, a firm of attorneys acting for Pangbourne lodged an intermediate business merger notice relating to the development with the Competition Commission.

[9] On the same day, 23 April 2007, Mr B Logan, a partner of Africast in the development of The District, sent an email to an employee of Pangbourne, Mr A Joannides, about another matter, but asked: 'How is your board approval looking for The District?' Joannides replied: 'Although I don't have confirmation, I believe it was approved.' And on 25 April 2007, another employee of Pangbourne, Mr R de Villiers, sent an email with the board resolution attached to it to Logan, stating 'Herewith Pangbourne Board approval as requested'.

[10] The question that arises is whether the communication of the fact of board approval – the condition that had to be fulfilled – was timeous: did it occur within seven business days of the conclusion of the contract? Africast argued both in the high court and on appeal that the contract was concluded only when the Pangbourne

board approved the contract on 20 April 2007. The condition was thus fulfilled within seven business days when De Villiers advised Africast on 25 April that the board had approved the contract and sent a copy of the board resolution to it.

[11] Pangbourne argued, on the other hand, that the contract was concluded on 11 April 2007 when the contract was signed by representatives of Pangbourne and Africast. Accordingly, it contended, the condition had not been fulfilled timeously and the contract had lapsed before 25 April when written notification of the board approval was sent to Africast.

[12] Sutherland J in the high court found that 'conclude' in clause 16.1 bore its ordinary meaning – to reach finality – and that the contract was thus concluded when the parties' representatives had agreed on the terms and signed it on 11 April 2007. The learned judge considered that this was not only the intrinsic meaning of the word, but that, if read in the context of the provision as a whole, any other meaning would be illogical: how can one suspend an agreement that 'has yet to be concluded?' he asked.

[13] The high court accordingly found that the contract had lapsed by the time that Pangbourne notified Africast that its board had approved the conclusion of the contract. It also rejected Africast's arguments that Pangbourne had waived the right to fulfillment of the condition, or that Pangbourne was estopped from asserting that it was not relying on the non-fulfillment of the condition. Africast's claim for damages for breach of contract was thus dismissed.

[14] Africast's principal argument on appeal is that the high court's interpretation of clause 16.1 of the agreement was wrong. It argues in the alternative that Pangbourne is estopped from asserting that the contract is not binding because, by its conduct over a lengthy period, it misrepresented that it regarded the contract as having been concluded on 20 April, when the board approved the resolution. An alternative argument on estoppel is that Pangbourne's conduct amounted to a representation that it would not rely on non-fulfillment of the suspensive condition.

[15] I shall deal first with the interpretation of the meaning of the word 'conclude' in clause 16.1 and the construction of the provision as a whole since I consider these dispositive of the appeal. It is trite that in interpreting a provision of a contract a court

must have regard to the contract as a whole, starting with the words used. But a court must also examine those words in the context in which they were used, taking into account the factual matrix. (See *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39, followed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).)

[16] Much evidence was led by Africast in an attempt to shed light on what the parties had intended when agreeing on the wording of clause 16.1. The chief witnesses for Africast were Groenewald and Hutchison, formerly the company secretary and a director and chief executive officer of Pangbourne respectively. It transpired during the course of their evidence that the management of the company had changed during 2008 and that was when Pangbourne had decided to treat the contract as having lapsed. Groenewald and Hutchison had left the company when the new management stepped in. So had all the directors who had been in office in April 2007. Logan and Weaver from Africast testified as well. Of course all of their views of what the contract meant were inadmissible and irrelevant. But significantly all agreed that from the date when the board had approved the contract until well into 2008, they had worked on the assumption that the contract was binding. And the objective evidence bears that out. I shall not traverse it since it was clear from both parties' conduct that the obligations under the contract were performed until guarantees for payment of the price by Pangbourne were required by Africast.

[17] The high court held that the contract became binding – but subject to the suspensive condition – when it was signed by the representatives of the parties. One cannot speak of a contract subject to a suspensive condition as becoming binding only on the fulfillment of the condition, said the court. Africast's argument on appeal is, however, that the condition – the happening of an uncertain future event – was not the approval of Pangbourne's board itself. It was instead the giving of written notice of the fact of the approval. Until the board did approve the contract it was not concluded: it had not reached finality. The signature of the document by Groenewald and Kennedy did not give rise to a binding agreement. It could not because they had no authority to bind Pangbourne. Only the board had that authority.

[18] The uncontradicted evidence of Groenewald was that he had authority to sign documents on behalf of Pangbourne, but not to bind it to any contract. Only its board

could bind Pangbourne to a contract the cost of which exceeded R50 million. The same was true of Kennedy. They could thus not have concluded the contract – brought it to finality – on behalf of Pangbourne. Accordingly, neither Africast nor Pangbourne was bound by the contract until there was board approval. If the board did not approve the contract, or before it did, either party could have refused to comply with it. The board approval on 20 April 2007 resulted, therefore, in the conclusion of the contract.

[19] What, then, does one make of the condition? Africast argued that the fulfillment of the condition occurred when written notice of the board approval was sent by Pangbourne to Africast on 25 April, well within the seven business days of the conclusion of the contract. And from then on, both parties treated the contract as binding. That was why, on 23 April (the same day as Joannides of Pangbourne wrote to Logan stating that he thought the board approval had been given), Pangbourne's then attorneys filed a notice of merger with the Competition Commission.

[20] Pangbourne argued that this case was the same as that in *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd* [2011] ZASCA 20 where Pangbourne escaped a contract that was conditional on the approval of its board of directors. The difference between these cases, however, is that in *Basinview* the Pangbourne board did not in fact approve the contract. There was no fulfillment of the condition.

[21] Pangbourne argued also that the word 'concluded' in clause 16.1 of the contract had been carefully chosen: the draftsman intended that the conclusion would be the moment when negotiations between the parties were closed. Negotiations, it said, are not concluded when a board authorizes a contract. They are concluded when the parties have reached agreement on the terms of the contract. The relevant question, however, is when the contract became binding, subject to the suspensive condition. The high court found, as I have said, that it was on the signature of the document. But since neither party was bound until there had been Pangbourne board approval, it would be stretching the ordinary meaning of the words used to find that all that was intended was that negotiations were concluded, although the contract would not be binding.

[22] Accordingly I consider that the high court erred in its interpretation of the provision at issue. The contract was concluded only when the Pangbourne board

approved it on 20 April 2007, and on 25 April, when written notification of the approval was given to Africast, it ceased to be conditional. This interpretation is consonant with the contract as a whole and with the conduct of the parties for a considerable period after conclusion. Africast was thus entitled to cancel the contract on the basis of Pangbourne's repudiation, and to claim damages for breach of contract. The alternative arguments of Africast based on waiver and estoppel thus fall away.

[23] I have had the benefit of reading the judgment of my learned colleague Theron JA. I agree with her that from a reading of the pleadings what seemed to be in dispute was the authority of Groenewald and Kenndey to sign the agreement. But that was certainly not in dispute at the time of the trial and it was not argued before us. Neither party submitted in heads of argument or at the hearing that the authority to sign the contract was an issue. It was clear that they had authority to *sign* a contract on behalf of Pangbourne. They even warranted in the agreement that they had that authority, as Theron JA has said. The real question was whether they could *bind* Pangbourne prior to board approval. The high court did not address this issue. As it saw the matter, the question for decision was whether the reference to concluding the contract was a reference to signing on behalf of Pangbourne or binding it, subject to the condition that board approval be given. It held that the acts of signature amounted to conclusion of the contract. As I have said, the high court erred. It was not possible for Groenewald and Kennedy to bind Pangbourne, and therefore to conclude the contract. The contract was concluded only on board approval even though it had been signed before then.

[24] The high court declined to deal with the measure of damages given, as I have said, its finding that Pangbourne was not bound by the contract. While the question of damages was traversed to some extent in the pleadings and the evidence, and some argument was addressed to this court on whether Africast was entitled only to the value of The District, or to loss of profit as well, it seems to me that a finding as to the appropriate measure of damages is inappropriate without also having evidence as to quantum – a matter that the parties left over for later decision in the event of Africast being successful in its claim. I consider that since the matter must be remitted to the high court in any event to determine the quantum of damages, it is appropriate for it also to consider the measure by which they are to be calculated.

[25] I would have made the following order:

1 The appeal is upheld with costs, including those of senior counsel, and the matter is remitted to the high court to determine the measure and quantum of damages to which the appellant is entitled.

2 The order of the high court is replaced with:

'(a) The contract between the parties is binding.

(b) The defendant repudiated the contract and the plaintiff was entitled to cancel it and claim damages for breach of contract.

(c) The defendant is liable for the costs of the hearing during February 2012, including those of senior counsel.'

C H Lewis

Judge of Appeal

Theron JA (Mhlantla and Bosielo JJA and Mathopo AJA concurring)

[26] I have read the judgment of Lewis JA and regret, for the reasons set forth below, that I am unable to agree therewith.

[27] The facts of this matter are largely common cause. On 5 March 2007, Mr Groenewald, Pangbourne's group company secretary, and Mr Kennedy, one of its directors (the signatories), signed a written property agreement (the agreement) in terms of which the property forming the subject matter of the agreement was sold to Pangbourne. On 11 April 2007 they signed an addendum to the agreement. The representative of Africast, Mr John Weaver, signed the agreement and the addendum on 11 April 2007.

[28] The agreement contained the following suspensive condition:

‘16.1 This agreement is subject to the suspensive condition (stipulated for the benefit of PANGBOURNE COMPANY and which may be waived by written notice given by PANGBOURNE COMPANY to SELLER COMPANY on or before the date for fulfilment of this condition) *that within 7 days* (excluding Saturdays, Sundays and public holidays*) after the date on which this agreement is concluded … PANGBOURNE COMPANY gives SELLER COMPANY written notice that its board of directors has approved the purchase of the property* by PANGBOURNE COMPANY in terms of this agreement,… (Emphasis added.)

16.2 If this condition is not fulfilled or waived, then this agreement will terminate and neither party will have a claim against the other as a result thereof.’

It is important to note that the suspensive condition would be fulfilled not when Pangbourne’s board of directors approved the agreement, but when Pangbourne gave Africast written notice that its board had approved the purchase of the property.

[29] On Friday, 20 April 2007, Pangbourne’s board approved the acquisition of the property, the entering into of a development agreement with a total purchase consideration of R66 698 792 and authorised two directors or a director and the company secretary to sign the property sale agreement which included the development agreement. On 25 April 2007, Pangbourne gave Africast written notice of the board’s approval.

[30] It was common cause that from 25 April 2007 onwards, the date on which notification of the board’s approval was sent to Africast, the parties acted on the basis that the agreement was valid and binding. During 2008, virtually the whole of Pangbourne’s management was replaced. The new board of directors decided not to proceed with the agreement and adopted the view that there was no contractual obligation on it to do so in that the suspensive condition had not been fulfilled.

[31] Africast contended that the contract was concluded on 20 April 2007 when it was approved by Pangbourne’s board and the notice given on 25 April 2007 was within the seven day period. Pangbourne, on the other hand, argued that the agreement was concluded on 11 April 2007 and the suspensive condition ought to have been fulfilled by 20 April 2007.

[32] It is appropriate to have regard to the pleadings filed by the parties. Africast, in its particulars of claim, allege that:

'6A.1 … Although Mr Kennedy and Mr Groenewald signed the agreement and addendum before 20 April 2007, they were not authorised to do so until the defendant's board of directors had resolved to proceed with the acquisition of the property. This was only done on 20 April 2007 when the defendant's board of directors accepted the recommendation of the investment committee and resolved to proceed with the acquisition of the property, to enter into a development agreement with the plaintiff and to authorise persons to sign the property sale agreement.

6A.2 Messrs Kennedy and Groenewald were only authorised to sign the property sale agreement which includes the development agreement … on 20 April 2007.'

[33] Pangbourne, in its plea, alleged that it had authorised the signatories to sign the agreement for and on behalf of the company and that the signatories had warranted, in writing, that they were duly authorised to sign the agreement. It further recorded that:

'3A.1 The defendant denies that Messrs Groenewald and Kennedy were not authorised to sign the said contract and addendum before 20 April 2007.

3A.2 The said persons were duly authorised to sign contracts on behalf of the defendant by the defendant's ordinary administrative practices, procedures and customs.

3A.3 The said persons signed the contract and addendum subject thereto that the defendant's board of directors would authorise the transaction reflected in the contract and addendum.'

[34] It is clear from the pleadings that the dispute between the parties was whether the signatories were authorised to sign the agreement. The witnesses who testified on the question of authority were Groenewald and Hutchison, Pangbourne's former chief executive officer. According to Groenewald, he and Kennedy were authorised to sign the agreement on behalf of Pangbourne.

[35] Groenewald explained that in respect of transactions exceeding R50 million, approval of the board of directors would usually be sought via a round robin of emails or faxes, which, if approved, would be converted to a resolution at the next board of directors' meeting. This evidence was confirmed by Hutchison who went further and said that Pangbourne's board had, prior to 20 April 2007, and in terms of a round robin resolution, approved the agreement. It is clear from Hutchison's evidence that Groenewald and Kennedy had authority to sign an agreement in respect of which the contract value exceeded R50 million, provided it contained a suspensive condition such as the one encapsulated in clause 16.1 of the agreement.

[36] The agreement itself points towards the authority of the signatories. In the agreement and immediately below the signatures of both Groenewald and Kennedy, the following appears:

'for PANGBOURNE COMPANY, the signatory warranting that he is duly authorised hereto'

[37] A contract containing a suspensive condition is enforceable immediately upon its conclusion but some of the obligations are postponed pending fulfilment of the suspensive condition. If the condition is fulfilled the contract is deemed to have existed *ex tunc*. If the condition is not fulfilled, then no contract came into existence.[1] Once the condition is fulfilled,

'[T]he contract and the mutual rights of the parties relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of the fulfilment of the condition, ie *ex tunc*.'[2]

[38] The case as pleaded by Africast, that the signatories were not authorised to sign the agreement, does not accord with the evidence of Groenewald and Hutchison. Based on their evidence, there is no doubt in my mind that the signatories had authority to sign the agreement in terms of Pangbourne's internal arrangements. I agree with the finding of the high court that 'the notion that Kennedy and Groenewald acted without authority on 11 April when they signed the contract was not established by the facts adduced in evidence'.

[39] A distinction must be drawn between the authority of the signatories to sign the agreement and their authority to bind Pangbourne to the agreement. Upon signature of the agreement an inchoate agreement came into being, pending the fulfilment of the suspensive condition.[3] In the event that the suspensive condition was not fulfilled, neither party would be bound to the agreement.[4]

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[1] See generally, R H Christie and G B Bradford *The Law of Contract in South Africa* 6th ed (2011) at 151-153; S W J Van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe *Contract General Principles* 4th ed at 253 and the authorities cited there at footnote 276.

[2] *ABSA Bank Ltd v Sweet & others* 1993 (1) SA 318 (C) at 323A-B.

[3] *Joseph v Halkett* (1902) 19 SC 289 at 293. More recently, see the summary of the law undertaken by Tebbutt J in *ABSA Bank Ltd v Sweet & others* 1993 (1) SA 318 (C) at 323.

[4] The terms of clause 16.2, quoted in para 27 above, accords with the legal position in this regard.

[40] In my view, the agreement was concluded upon signature thereof on 11 April 2007. The terms of the suspensive condition were not met. It follows that the contractual relationship between the parties lapsed due to non-fulfilment of the suspensive condition.

[41] Africast, in its pleadings, appears to suggest that the lack of authority on the part of the signatories was ratified on 20 April 2007, when they were 'authorised to sign the property sale agreement'.[5] If the decision taken by Pangbourne's board on 20 April 2007 constituted ex post ratification of what the signatories had done, then the contract would have been enforceable from the time of signature on 11 April 2007. Ratification operates *ex tunc* and not *nunc*. Upon ratification of an act, the obligation incurred by the act is dated at the time of the conclusion of the act not at the time of the ratification.[6] The effect of a valid ratification would be that the unauthorised act, namely the signature, would be assumed to have been authorised when it was performed.[7] In the light of my finding that the signatories had the requisite authority to sign the agreement, it is not necessary to make a determination relating to whether Pangbourne's board had ratified their conduct.

[42] In the result the appeal is dismissed with costs.

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L V Theron

Judge of Appeal

[5] Paragraph 3 of the resolution of Pangbourne's board dated 20 April 2007, relating to the agreement and the authority of the directors reads:
'THAT any two Directors or a Director and the Company Secretary be, as they hereby are, authorised to sign the Property Sale Agreement which includes the Development Agreement, and that a Director or the Company Secretary be, as they hereby are, authorised to sign all the necessary documentation to give effect to the resolution including, but not limited to, conveyancing documents, power of attorney to transfer, bond registration documents, and all other relevant documentation to finalise the transaction.'

[6] *Reid & others v Warner* 1907 TS 961 (the judgment by Innes CJ and Wessels J at 976).

[7] *Breytenbach v Frankel & another* 1913 AD 390 at 401.

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