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cancel the lease and attach the tenant's property at the first sign of trouble. Instead, as is the case with the Insolvency Act, a landlord should be confident that they will not be prejudiced by business rescue but will enjoy at least the same rights as under the Insolvency Act. Businesses have a far better chance of recovering if landlords act with restraint, which they will do only if their rights are guaranteed. The Insolvency Act achieves this delicate balance but currently chapter 6 of the Companies Act does not.

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FORMALITIES OF A CONTRACT: DO NON-VARIATION CLAUSES HAVE TO BE DRAFTED DIFFERENTLY?

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

OPSOMMING

Formaliteite van 'n kontrak: Moet nie-wysigingsklousules anders opgestel word?

Soms kan die partye spesifieke formaliteite in hul kontrak insluit, soos klousules vir nie-wysiging, nie-kansellasie, en nie-afstanddoening. Die doel van hierdie klousules is om die skriftelike aard van die kontrak te bewaar en om te verseker dat skriftelike bewys van die bepalings van die kontrak beskikbaar is. Die praktiese probleem is dat die optrede van die kontrakspartye dikwels teenstrydig is met die interne formaliteitsbepalings van die kontrak, wat 'n vlak van kunsmatigheid aan die skriftelike kontrak meebring. In *Phoenix Salt Industries (Pty) Ltd v Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (3 July 2024), was die hof gekonfronteer met 'n interne formaliteit in 'n leningsooreenkoms en moes bepaal of Phoenix Salt afstand gedoen het van hulle reg op die terugbetaling van 'n lening wat aan die Lubavitch Foundation voorgeskiet is. Die saak is verder gekompliseer deurdat die leningsooreenkoms 'n nie-wysigingsklousule bevat het. Die hof het bevind dat die afstanddoening van terugbetaling van die lening nie 'n wysiging van die ooreenkoms was nie. Die beslissing het daarop berus dat die afstanddoening van die terugbetaling van die lening eensydig van aard was. Die hof het dus 'n kontekstuele benadering tot interpretasie gebruik deur eksterne bewys toe te laat om te illustreer dat afstanddoening wel plaasgevind het. Hierdie vonnisbespreking voer aan dat die hof se benadering onoortuigend was en nie werklik die aard van die afstanddoening as 'n eensydige regshandeling vasgestel het nie, maar dat die afstanddoening eerder 'n bilaterale regshandeling was wat tot 'n wysiging van die kontrak sou lei. Selfs al was die hof reg in sy oorspronklike benadering aangaande die aard van die afstanddoening, het die hof versuim om die impak van die omringende klousules van die kontrak te oorweeg (of selfs te bespreek), veral klousule 9.4 wat aandui dat "[g]een toegewing wat enige party aan die ander kan verleen, sal 'n afstanddoening van enige van die regte van eersgenoemde uitmaak nie". Die beslissing kan onvoorsiene gevolge hê, insluitend die wyse waarop nie-wysigingsklousules in toekomstige kontrakte opgestel moet word.

1 Introduction

Although formalities are not a central feature when establishing the validity of a contract, there are exceptions to this general rule. One exception is when the contracting parties agree that certain formalities, which often require variation, cancellation, or release, should be in writing and signed. Common examples of such formalities include non-variation, non-cancellation, and non-waiver clauses. The purpose of these clauses is to preserve the written nature of the contract and to ensure that written proof is available on the terms of the contract (see McLennan "The demise of the non-variation clause in contract" 2001 *SALJ* 574 575, who notes that putting an agreement in writing limits disputes and ensures that the integrity of the written contract is maintained). The practical problem is that the subsequent conduct of the parties is often inconsistent with the internal formalities of the contract, which introduces a level of artificiality to the written contract. In extreme cases, such artificiality facilitates fraud, which has been countered with the application of the doctrine of estoppel or a finding that a clause offends public policy (see, generally, Hutchison "Non-variation clauses in contract: Any escape from the *Shifren* straitjacket?" 2001 *SALJ* 720–746).

In *Phoenix Salt Industries (Pty) Ltd v Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (3 July 2024), the court was faced with an internal formality in a loan agreement and had to determine whether the lender (Phoenix Salt) had waived their right to the repayment of a loan advanced to Lubavitch Foundation. The matter was further complicated in that the loan agreement contained a non-variation clause. The court held that the waiver did not constitute a variation of the agreement and based its argument on the unilateral nature of the waiver (paras 17, 19, 27). The court used a contextual interpretative approach and allowed external evidence to illustrate that a waiver had indeed occurred (paras 25–27; see further, *eg*, *University of Johannesburg v Auckland Park Theological Seminary* 2021 6 SA 1 (CC), which confirmed the contextual approach to the interpretation of contracts). The purpose of this note is to assess whether the court was correct in its understanding and application of the legal principles related to waiver and the interpretation of contracts. It considers the impact the judgment may have on the way non-variation clauses are drafted.

2 *Phoenix Salt* case

2.1 *Facts in brief*

Phoenix Salt claimed the repayment of an outstanding amount of R2 886 005.20 plus interest from Lubavitch Foundation for a loan concluded on 12 August 1994 (*Phoenix Salt* para 2). The Lubavitch Foundation is a voluntary organisation which promotes and protects the social and economic interests of Jewish South Africans by running a property management school for Jewish students. However, the property that housed these activities faced foreclosure by the bank (para 3). Phoenix Salt (controlled by the Krok brothers) intervened with a rather elaborate scheme to assist the Lubavitch Foundation. This scheme involved Phoenix Salt taking over the foundation's mortgage debt, which amounted to R5 200 000. At the same time, Phoenix Salt and the foundation concluded a loan agreement. One of the terms of the loan agreement stipulated that the loan would become repayable 24 months after a demand for repayment had been made (para 4). The loan agreement included the following terms (para 7):

> "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 loan agreement further required the Lubavitch Foundation to sell several stands (the "Orchards properties", the collective value of which amounted to R5 200 000) to another entity controlled by the Krok brothers – Golden Hands (para 5). In return, Golden Hands would stand surety for the foundation's loan from Phoenix Salt (para 2). The contract of sale between the foundation and Golden Hands required the purchase price to be paid on transfer of the properties (para 5). Golden Hands developed the Orchard properties and was supposed to pay the profits of the sale to settle the foundation's debt to Phoenix Salt (para 10). In terms of this scheme, Golden Hands had ceded to Phoenix Salt their rights to the proceeds of the sale with the intention of reducing the foundation's indebtedness (para 20). Golden Hands, however, paid only R2 429 440 to Phoenix Salt (para 10).

During all this time the Krok brothers were directors of Phoenix Salt and made no attempt to enforce the loan agreement. Actually, there was no reflection of the loan in the financial accounts of Phoenix Salt for some time (para 11). In November 2003, the Krok brothers resigned as directors of Phoenix Salt (para 11) and, on 25 July 2017 and under new management, Phoenix Salt demanded the repayment of the loan (paras 8, 10). The Lubavitch Foundation argued that the conduct of Phoenix Salt amounted to a waiver of the repayment of the loan. Apparently, the Krok brothers had given numerous assurances that the foundation would never be required to settle the debt in the loan agreement but rather that the proceeds from the sale of the properties would be used for that purpose (paras 10, 13). However, Phoenix Salt argued that this was a straightforward loan and contended that the alleged waiver was precluded by the non-variation clauses in the agreement (para 15). The court reasoned that a waiver and a variation are distinctly different legal doctrines (para 22), and, having considered the factual context, the court held that the Krok brothers had indeed waived their rights under the loan agreement, which waiver was not a variation of the loan agreement (para 27). The appeal failed on this basis (*ibid*).

2.2 *Nature of waiver*

The *Phoenix Salt* court described a waiver as follows:

> "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 [*sic*]. 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 a matter of evidence" (para 15).

Added to this, a person must have "full knowledge of the right" (Hutchison 723). A waiver "extinguishes rights and their concomitant obligations" (*Absa Bank Ltd v Master of the Supreme Court Natal Provincial Division* [1998] 3 All SA 189 (N) 202). As the waiver relates to the conduct of the parties, it becomes a question of fact whether the parties have waived their rights (Hutchison 723). However, according to Hutchison, the courts will not easily find that a contracting party had waived their rights. Perhaps more importantly, there is a presumption against a waiver (*ibid*).

As the matter related to whether a waiver constituted a variation, the court started with establishing the purpose of the non-variation clause in the loan agreement. With reference to *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* [1964] 4 All SA 520 (A) and *Brisley v Drotsky* 2002 4 SA 1 (SCA), the court highlighted that non-variation clauses were, generally, valid and reinforced the principle of the parties' freedom to contract (*Phoenix Salt* para 16). As such, the issue was not the validity of the non-variation clause but rather whether a waiver constituted a variation to the loan agreement. The court noted that *Shifren* had not indicated whether a non-variation clause precluded a waiver (para 16). The court added that the non-variation clause in the loan agreement used the words "additions, variations and cancellations", and that the word "waiver" was conspicuously absent (para 17). Against this background, the court reasoned that clauses 9.2 and 9.3 did not address the unilateral waiver of rights, and there were no internal formalities agreed by the parties to prevent Phoenix Salt from verbally waiving their right to reclaim the loan from the Lubavitch Foundation (*ibid*). It should, at this stage, perhaps be noted that the court did not consider clause 9.4 of the contract in their assessment of a waiver, which clearly sets out a general prohibition on a waiver. Still, the court referred to *Impala Distributors v Taunus Chemical Manufacturing* 1975 3 SA 273 (T) and noted that

> "a party can validly waive a right orally if it is a right which exclusively belongs to that party under the contract. The non-variation clauses do not override this principle, as they are silent on waiver" (*Phoenix Salt* para 18).

The court did not clearly set out whether the right to repayment of the loan exclusively belongs to Phoenix Salt (although the court certainly implied the unilateral nature of the repayment obligation). Rather, the court provided a general distinction between a waiver and a variation. It stated that "[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" (para 22). This means that one party relinquishes the privilege it had under the contract (*ibid*). Here it is worth adding that a waiver consists of two elements. The first is a "mental element (being the *animus relinquendi* which is the intention to abandon rights or 'to give them up for good')" (*Absa Bank* 202). The second is a "physical element which is the 'relevant words, spoken or written, or in the form of conduct, or in the form of a combination of words and conduct'" (*ibid*). However, the court noted that "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" (*Phoenix Salt* para 22). This effectively means that the terms of the contract are amended or changed (*ibid*). The court found that the conduct of the Krok brothers demonstrated that they had waived their rights and that such waiver was not a variation of the loan agreement (para 27).

The court's conclusion about the nature of the waiver and whether it constitutes a variation of the loan agreement requires further consideration.

There often is difficulty in distinguishing between a waiver and a variation in a contract (see *Bentel Associates International (Pty) Ltd v Bradford Corner (Pty) Ltd In re: Bradford Associates International (Pty) Ltd v Bentel Associates International (Pty) Ltd* (11/47695) [2013] ZAGPJHC 45 (15 March 2013) para 74). There are several forms of waiver, including (a) "the release of a debtor from an obligation to make a performance"; (b) a *pactum de non petendo* (being an agreement not to institute legal action or enforce a right); and (c) "an election by a creditor between alternative and inconsistent remedies" (Hutchison 723). However, the real distinction is found in the unilateral or bilateral nature of the juristic act. A person may, for example, waive a unilateral juristic act where a contractual right is in the exclusive favour of the person for whom such a right was created (Tager "The effect of non-variation clauses in contracts" 1976 *SALJ* 438). This would be in a situation where only one party could fail in their contractual performance, or, put differently, where only one party is at risk of breach for non-performance (Stoliar "The false distinction between bilateral and unilateral contracts" 1955 *Yale LJ* 517). Examples of unilateral agreements are gifts and donations; examples of unilateral obligations in contract clauses include the election to cancel the contract, waiver of a condition inserted for a party's sole benefit, and some types of release (Hutchison 729; Zimmermann *The law of obligations: Roman foundations of the civilian tradition* (1996) 480–481). A waiver in relation to the sole benefit of one party will not result in a variation of the contract (Tager 438). This is not the same when one deals with a bilateral juristic act (or agreement) where there are two enforceable promises (Stoliar 516). An example of a bilateral agreement would be an "agreement to vary or cancel the contract, payment, novation, acceptance of a substituted performance, release of the debtor" (Hutchison 729). As there are examples of a release being a unilateral or bilateral act, there may be ambiguity as to the nature of the juristic act. It appears, however, that the repayment of a loan is more likely to be a bilateral juristic act than a unilateral one, largely as a result of the reciprocal nature of a loan agreement. Two distinct obligations are dependent on one another, in that the lender provides a loan to the borrower, against the future promise of repayment. Put differently, a loan cannot occur without the element of repayment (if it purports to do so, then it is not a loan but a donation), and the repayment cannot occur without first having received the loan. As such the two obligations are both reciprocal and dependent on one another. Naturally, there may be exceptions to such reasoning, but it is a factor that the court did not consider in any level of detail in its judgment. Even if this assessment is unconvincing, the very nature of payment is a bilateral act, as payment requires both the act of payment from the debtor and the act of receiving payment from the creditor. Nevertheless, insofar as a bilateral juristic act occurs and a non-variation clause is present in a contract, then consent will be required from both contracting parties (*Bentel Associates* para 86; see also *Barnett v Van der Merwe* [1980] 4 All SA 284 (T); Hutchison 724–726; Tager 438). The reason for a consent requirement is that the waiver of a bilateral act would amount to a variation of the contract. Added to this, waivers (as bilateral juristic acts) include a form of agreement, which would require one party to communicate the waiver and the other party to accept such a waiver (Tager 437). It is further impossible

to waive a non-variation clause (*Van As v Du Preez* [1981] 4 All SA 402 (T) 405). The impact and effect of the non-variation clause cannot then be ignored.

The court relied on the factual circumstances shown through external evidence to contextualise the contract, including the structure of the scheme and the conduct of the Krok brothers, to justify its finding that the waiver of the repayment of the loan was, somehow, a unilateral juristic act (*Phoenix Salt* para 20–21). However, as illustrated above, the very nature of payment could be bilateral rather than unilateral. Nevertheless, the purpose and factual content of the loan agreement appeared to weigh heavily in the court's determination, and so the court attempted to use principles of the interpretatioin of contracts to support its finding (para 20).

2.3 *Rules and principles of interpretation*

The court referred to three cases to justify its use of evidence external to the written contract. This ultimately led to its decision to permit the waiver.

In the first instance, reference was made to *Mutual Life and Citizens Assurance Co of New York v Ingle* 1910 TS 540. The court endorsed the sentiment that "it is difficult to find the intention of contracting parties exclusively in the written words of a contract" (*Phoenix Salt* para 24). Although this is often true, this difficulty is found in the context of ambiguity in the language of the contract. There is nothing in *Phoenix Salt* to suggest that the loan agreement suffered from ambiguity.

Secondly, the court referred to *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) and noted that the 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" (*Phoenix Salt* para 24). Although this principle is sound, it is interesting to note that the court failed to apply it consistently in its examination of the terms in the loan agreement. Take, for example, the fact that the court did not address, discuss, or consider clause 9.4 of the loan agreement, which states that "[n]o indulgence which either party may grant to the other shall constitute a waiver of any of the rights of the former". Even if the court was correct in stating the waiver was a unilateral act and not capable of amending or varying the loan agreement, clause 9.4 clearly reflects the parties' intention that any deviation of the enforcement of rights (through an indulgence) would not constitute a waiver. In this context, clause 9.4 is protected by the non-variation clause (which would not allow the parties to verbally or tacitly amend it). It appears to me that clause 9.4 goes to the very heart of the issue and, together with the non-variation clause, prevents waiver when reading the "whole contract". Added to this, the presumption exists in the interpretation of contracts that "no person writes what he or she does not intend" (Cornelius *Principles of the interpretation of contracts in South Africa* (2002) 103). This provides the assurance that the document is what it seems to be until it has been proven otherwise (*idem* 104).

Furthermore, the court also did not address, discuss, or consider clause 9.1, which reads that "[t]his agreement, together with the annexure thereto, constitutes the sole record of the agreement between the parties in regard to the subject matter thereof". Clause 9.1 is called a "whole agreement" (or "sole agreement") clause and, as the parties intend for only the written contract to reflect their agreement, triggers the application of the parole evidence rule.

Johnston v Leal [1980] 2 All SA 366 (A) explains that this rule as follows: "… when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering, adding to or varying the written contract" (371).

In terms of the parole evidence rule, evidence that may contradict, alter, add, or vary the written contract is irrelevant (*Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] 3 All SA 647 (SCA) para 38). One of the exceptions to the rule is any "subsequent oral agreement contradicting, altering, adding to or varying a written contract" (*Johnston* 372). However, it is conceivable that this may be challenged insofar as the subsequent oral agreement is limited or precluded by a non-variation, non-cancellation, or non-waiver clause in the contract. It is also important to note that there are two parts to the parole evidence rule. The first part – the integration rule – sets out what evidence may be used to establish the scope of the contract (Hutchison & Pretorius *The law of contract in South Africa* 4 ed (2022) 288–289). This part of the rule attempts to limit the "evidence in question [that] seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement" (*University of Johannesburg* para 92). The second part – the interpretation rule – sets out what evidence may be used to establish the meaning of a particular word or language used in the contract (Hutchison & Pretorius 289–290). Put differently, the interpretation rule relates to the evidence produced to establish the meaning and interpretation of a particular word or language used in a contract.

Thirdly, in *Phoenix Salt* the court refers to *University of Johannesburg*, which, in context, relates to the application of the parole evidence rule, an issue the court did not address at all. Yet, the court concluded, with reference to *University of Johannesburg:*

> "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 decisionmaker to acquire an enhanced insight into the intention and the purpose of the contract" (*Phoenix Salt* para 26).

It is true that the *University of Johannesburg* decision changed the approach to the interpretion of contracts. However, the context was the Constitutional Court's approach to the strict application of the parole evidence rule – a contextual interpretative approach (*University of Johannesburg* para 93). Such an expansive approach allows for external evidence to be produced (whether or not the particular clause or wording of the clause is ambiguous) to establish the context and the purpose intended by the parties with that clause (*Capitec Bank Holdings* para 39). However, extrinsic evidence is not always admissible, and a court should use such evidence conservatively and in such a way "not to conflate the admissibility and weight" of such evidence (*University of Johannesburg* para 68). An important principle is that such external evidence should relate to evidence at the conclusion of the contract in order to establish what the contracting parties intended at the time of the conclusion of the contract. External evidence after the conclusion of the contract is not relevant and should not be allowed to establish the intention of the parties. The reason for this is that the interpretative exercise

is used to establish what the parties intended when they concluded the contract. The Supreme Court of Appeal supports this by stating that it

> "is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case [*University of Johannesburg*] made it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract" (*Capitec Bank Holdings* para 48).

In this regard, it would not have been justifiable under the contextual approach to use external evidence to show that payments were not made, or a failure to enforce the loan agreement to establish what the parties meant at the conclusion of the contract (see *Phoenix Salt* para 20, where the purpose for which the external evidence is used in the court's assessment is not clear). After all, there is a substantive legal presumption in the interpretation of contract which states that "the intention of the parties coincides with the words contained in the contract" (Cornelius 104). Although the external evidence certainly established that there was a waiver of rights, one cannot use extrinsic evidence of subsequent actions to establish the intention of the parties. Such evidence is limited to establish the parties' intentions at the conclusion of a contract. A deviation from this principle would bring into question the very nature and reliability of contractual transactions.

3 Conclusion

The *Phoenix Salt* decision rests upon three broad considerations.

In the first instance, the actual agreement between the parties was reflected in the written words of the loan agreement between them. A written contract is the representation of the agreement between the parties and there is a presumption that whatever words were used in the contract will have legal effect.

Secondly, there are the legal principles that apply to the agreement and the issue at hand. In this instance, the question before the court involved a consideration of whether a waiver could constitute a variation. If a waiver was a unilateral act, there would be no variation of the contractual terms; however, if it was a bilateral act, then it would constitute a variation. The court found that waiving a payment requirement was unilateral in the context of the surrounding conduct of the parties. This, however, is unconvincing when one considers that both a loan agreement and a payment obligation are bilateral in nature. The court also noted that while the non-variation clause did not expressly use the word "waiver", it failed to consider the prohibition of a waiver in the context of clause 9.4 which removes the possibility of an indulgence functioning as a waiver altogether (regardless of its juristic nature). This seems to imply that, regardless of other clauses in the contract, the court's decision may have been different if the word "waiver" had been included in the non-variation clause.

Thirdly, the interpretation of the contract. As the sole memorial of the agreement between the parties (reinforced by clause 9.1 in the loan agreement), the parole evidence rule applies. Although our courts have adopted an expanded approach to interpreting contracts in that "words without context mean nothing, and context is everything" *Capitec Bank Holdings* para 46), this does not mean that evidence can be used indiscriminately to change the written contract (or legal principles). *Capitec Bank Holdings* notes that

> "[m]ost contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They

> have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text" (para 51).

This implies that one must use the contextual evidence to give meaning to the written words in the contract. This arguably was not the focus of the extrinsic evidence in *Phoenix Salt*. In many respects the court's reasoning appeared to suggest that the parties never intended the loan to be repaid, and thus effect must be given to such intention (para 21). This is not supported by the written contract. However, if I am correct in my reading of the case, and if one were to accept that the parties never intended to have the loan repaid, then a new set of challenges emerge, as there may be an argument that the loan agreement was a simulated contract. This would be untenable, as there is a substantive presumption that "the parties intend to conclude a legally valid contract" (Cornelius 106). After all, one of the *essentialia* of a contract of loan is the undertaking to repay the loan amount. If the parties never intended the loan to be repaid from the onset (but only structured it as a loan to give effect to some elaborate scheme), then the contract was intended to be a donation and not a loan, as a result of the lack of an obligation to repay the amount advanced. In this case, the entire structure of, and all agreements flowing from, the loan agreement is then brought into question.

Ultimately, even if the court was correct in stating that the waiver of the repayment of the loan agreement was a unilateral act, it did not provide a proper contextual assessment of the written terms of the contract. Some factors that bring the court's contextual approach into question are the failure to assess the contractual terms (which were not ambiguous in nature), including that the loan agreement clearly established a due date for repayment of the loan; a "whole agreements" clause (clause 9.1) that established the loan agreement as the reflection of the parties' agreement; and clause 9.4 that prevented indulgences to function as a waiver. Unfortunately, none of these factors were assessed or addressed in the court's reasoning. This judgment raises questions as to how to avoid similar situations in the future. Despite clause 9.4 which prevented a party's indulgence in enforcing their rights to be considered a waiver (clearly stopping waiver of a party's rights), the court seemed to take issue with the fact that the word "waiver" did not appear in the non-variation clause. It appears that the judgment may have the unintended consequence of ensuring that non-variation clauses now, as a rule, should include the word "waiver" to avoid similar mishaps in future. This further complicates the internal formalities in a contract and introduces more complexities in the drafting of contracts.

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The following contribution met these requirements and was published in 2025:

- MM van Eck "Formalities of a contract: Do non-variation clauses have to be drafted differently? – *Phoenix Salt Industries (Pty) Ltd v Lubavitch Foundation of Southern Africa* (330/2023) [2024] ZASCA 107 (3 July 2024)" (2025) 88(3) *THRHR* 423–431

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