

Deals fall apart*♦

A suspensive condition suspends the operation of certain provisions of an agreement until the happening of a future uncertain event. The prevalence of suspensive conditions in agreements demonstrates their potency in transaction structuring. If the process of fulfilment of suspensive conditions is not managed meticulously, suspensive conditions may become a major transaction risk which may, if it materialises, cause searing embarrassments and financial losses.

In this note, a recent decision in *Africast (Pty) Ltd v Pangbourne Properties Ltd*¹ (*Africast* case) is used to demonstrate that it is always important that a person drafting an agreement with suspensive conditions has clarity of purpose for which such conditions are required, dexterity in drafting the wording for the conditions and wisdom to follow through by closely managing the timeous fulfilment of conditions until a transaction is implemented.

***Africast* case - the facts**

On April 11 2007, Pangbourne Properties Ltd and Africast (Pty) Ltd entered into a sale and development agreement (Development Agreement) in terms of which Africast was to acquire land and erect an office park. The agreement was that Africast would, after completing the office park, transfer the property to Pangbourne against payment of the purchase price of about R66m. Some 18 months after signing the Development Agreement, Africast completed the office park and tendered the property to Pangbourne. Pangbourne refused to pay the purchase price. It argued that the Development Agreement had lapsed because the suspensive condition was not fulfilled timeously. Africast regarded Pangbourne's stance as repudiation of the Development Agreement. It consequently cancelled the Development Agreement and pursued Pangbourne for damages for breach of contract.

The suspensive condition in the Development Agreement provided as follows:

*"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 seven days (excluding Saturday, 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..."*² [Emphasis added]

* With apologies to the late inimitable Professor Chinualumogu Achebe, the author of the novel *Things Fall Apart* (1958).

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¹ *Africast (Pty) Ltd v Pangbourne Properties Ltd*, Case No. 359/13, SCA, 28 March 2014 (Unreported at the time of writing).

² Sourced from the *Africast* case, Paragraph [28].

As already indicated, the Development Agreement was signed on April 11 2007. On April 20 2007, the board of directors of Pangbourne approved the transactions contemplated in the Development Agreement. This resolution of the board of directors of Pangbourne was required in terms of the suspensive condition in the Development Agreement. The Pangbourne Board Resolution was sent to Africast on April 25 2007 by e-mail. The vexed question was whether or not the delivery of the Pangbourne Board Resolution on April 25 2007 was timeous (that is, within seven business days after the date on which the Development Agreement was concluded).

On the one hand, Africast argued that the Development Agreement was concluded (as that word is used in clause 16.1 of the Development Agreement) on April 20 2007. It argued further that, since Pangbourne signatories could only bind Pangbourne in regard to transactions amounting to a maximum of R50m, although the Development Agreement was signed on April 11 2007, it was not binding on Pangbourne (because it involved an amount in excess of R50m) and became binding on April 20 2007 when the board of directors of Pangbourne approved the transactions contemplated in the Development Agreement. It then followed, so it was argued, that the delivery of the Pangbourne Board Resolution on April 25 2007 was timeous.³ On the other hand, Pangbourne argued that the Development Agreement was concluded when it was signed by both parties on April 11 2007. On this argument, the Pangbourne Board Resolution ought to have been delivered on April 20 2007 (the seventh day after the conclusion of the Development Agreement). Its delivery on April 25 2007 was, therefore, belated.

In the judgement of the South Gauteng High Court, Johannesburg, a decision which preceded the *Africast* case⁴, Sutherland J decided in favour of Pangbourne. He said the Development Agreement lapsed on April 20 2007 due to non-fulfilment of the suspensive condition on time. Africast appealed to the Supreme Court of Appeal (SCA).

***Africast* case – the majority decision**

Theron JA (writing for the majority) decided that evidence adduced proved that Pangbourne signatories were duly authorised to sign the Development Agreement. She then confirmed the decision of Sutherland J in the high court judgement that the Development Agreement was concluded on April 11 2007 and lapsed, and became of no effect on April 20 2007 due to non-fulfilment of the suspensive condition. The following two paragraphs appositely summarise hallowed principles relating to suspensive conditions and the reasoning for the decision of Theron JA:

"[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..."

³ On Africast's argument, the delivery of the Pangbourne Board Resolution on April 25 2007 was timeous since the Development Agreement was only concluded on April 20 2007.

⁴ *Africast (Pty) Ltd v Pangbourne Properties Ltd* [2013] 2 All SA 574 (GSJ).

[38]...

[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. In the event that the suspensive condition was not fulfilled, neither party would be bound to the agreement."⁵ [Emphasis added]

In normal commercial arrangements, it is accepted that when duly authorised signatories sign on behalf of legal entities an agreement which is subject to fulfilment of suspensive conditions, that agreement becomes binding as at the date on which it is signed. Further, it is trite that if the implementation of transactions contemplated in a duly signed agreement require approval of the board of directors or shareholders of a company (as a suspensive condition), the implementation of transactions in that agreement is deferred pending fulfilment of a suspensive condition. The agreement, however, remains binding. The decision of Theron JA affirms this distinct practical logic in relation to suspensive conditions.

Africast case – the dissent

Having regard to the general use of suspensive conditions, it is surprising that Lewis JA disagreed with the judgement of Theron JA and wrote a dissenting judgement.⁶ She agreed with Theron JA that Pangbourne signatories were duly authorised to sign the Development Agreement. However, she decided that:

- although Pangbourne signatories had authority to sign the Development Agreement on behalf of Pangbourne, they could not bind Pangbourne to that agreement without a board of directors' resolution since the value of transactions in the Development Agreement exceeded R50m;⁷
- notwithstanding that the Development Agreement was signed on April 11 2007, it was actually concluded (and therefore became binding) on April 20 2007 when it was approved by the Pangbourne board of directors;⁸ and
- the suspensive condition in the Development Agreement was fulfilled on April 25 2007 when the written notification of the Pangbourne Board Resolution was delivered to Africast.⁹

In an agreement containing a suspensive condition requiring approval of a transaction by the board of directors or shareholders, the intention of the parties is ordinarily to avoid delays normally attendant in procuring resolutions. Signing the agreement is a

⁵ Africast case, Paragraphs [37] to [39], footnotes omitted.

⁶ Dissenting judgements in the SCA are rare. Although there are no statistics on the frequency of dissents, the writer established that in 2013, out of 208 judgements of the SCA, there were only 5 dissents (including a partly dissenting and partly concurring decision).

⁷ Africast case, at Paragraphs [18] and [23]. At Paragraph [23] Lewis JA said: "*The contract was concluded only on board approval even though it had been signed before then*".

⁸ Africast case, at Paragraph [22] where Lewis JA said: "*The contract was concluded only when the Pangbourne board approved it on 20 April 2007, and on 25 April [2007], when written notification of the approval was given to Africast, it ceased being unconditional*."

⁹ Africast case, at Paragraph [22].

modus of ensuring the deal is kept alive between the parties whilst they get relevant authorisations. On this reasoning, it follows that when duly authorised signatories sign agreements subject to suspensive conditions this has legal consequences. Although certain provisions of such agreements are suspended pending the happening of an uncertain future event, the parties normally have an obligation to secure timeous fulfillment of suspensive conditions. This means the agreement is binding when it is signed. The main problem with the judgement of Lewis JA is that by holding that the Development Agreement was (notwithstanding that Pangbourne signatories were duly authorised to sign it) concluded not when it was signed but when it was approved by the Pangbourne board of directors, she makes the important act of signing the Development Agreement almost meaningless. This reasoning defeats the rationale for, and logic behind, suspensive conditions as already explained.

Chief Justice Hughes once wrote (in 1936) that "*a dissent in a Court of last resort is an appeal...to the intelligence of a future day when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed*".¹⁰ However, dissents also have an unfortunate effect of introducing legal uncertainty in the resolution of commercial disputes. The conclusion by Lewis JA that duly authorised signatories may, in circumstances similar to the *Africast* case, sign an agreement subject to a suspensive condition without necessarily binding entities on whose behalf they are signing and that such an agreement becomes binding only upon fulfilment of a suspensive condition introduces uncertainty. Further, this reasoning is adversative to the traditional use of suspensive conditions in transaction structuring.

The lessons

The first lesson from the *Africast* case relates to choice of words when drafting. The timeframes for fulfilment of the suspensive condition in the Development Agreement had to be calculated from the date on which the Development Agreement was concluded. Therefore, the meaning of "*conclusion*" of the Development Agreement became central to the interpretation by the courts. If the suspensive condition clause was worded such that the seven days within which it had to be fulfilled was calculated from the date on which the Development Agreement was signed by the last of the parties (traditionally defined in agreements as the Signature Date), the difficulty arising from the Lewis JA dissent would have been avoided. Indeed, reference to "*conclusion of an agreement*" in the context of suspensive conditions must be avoided since that phrase now has two possible meanings.¹¹

The second lesson from the *Africast* case relates to the importance of ensuring certainty in regard to the date for fulfilment of suspensive conditions. It is recommended that to the extent practicable the date and time by which a condition must be fulfilled is inserted in the agreement (for example on or before 17h00 on Friday, August 15 2014). As

¹⁰ Ginsburg, Ruth Bader. "The Role of Dissenting Opinions." *Minn. L. Rev.* 95 (2010): 1, at 5.

¹¹ Instead of drafting that the agreement is subject to a suspensive condition that : "*the Loan Agreement is concluded and becomes unconditional in accordance with its terms...*", it may be advisable to draft as follows: "*the Loan Agreement is signed by all of the parties to it and becomes unconditional in accordance with its terms...*".

demonstrated in the *Africast* case, if the period for fulfilment has to be calculated from a certain event (for example within seven days after the date on which the agreement is concluded or within seven days after the Signature Date), the determination of the period requires interpretation. This is fertile ground for uncertainty since the interpretation of the period may differ between the contracting parties.

The third and final lesson is that when an agreement has been signed by all parties, it is still critical that legal advisers closely manage the process leading to fulfilment of suspensive conditions.¹² By managing this process closely, legal advisers are able to, where relevant, initiate the process of extension of the date for fulfillment of suspensive conditions before the transaction may lapse. In the *Africast* case, the court confirmed the lapsing of the Development Agreement notwithstanding that the parties co-operated for 18 months as if the suspensive condition was fulfilled timeously. During this period, the transaction was submitted to the Competition Commission and a R40m bond was approved by a financial institution. This indicates that courts will not be swayed by extraneous factors where an agreement lapses due to failure to procure timeous fulfilment of suspensive conditions. Further, once it is conceded that an agreement has lapsed due to non-fulfilment of a suspensive condition, courts are reluctant to infuse life into a lapsed agreement based on estoppel by representation.¹³

Through legal drafting, legal advisers use their expertise to avoid uncertainty by creating a legal framework for implementation of transactions and regulation of the relationship between contracting parties within the ambit of the law, including case law. Therefore, the drafting of agreements must always respond to legal developments and circumvent uncertainty. The *Africast* case reminds legal advisers to draft suspensive conditions clauses carefully and to manage their timeous fulfilment cautiously.

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¹² In transactions where there are many suspensive conditions, such conditions are extracted from the agreement into a shorter suspensive conditions matrix. For ease of reference, the matrix (instead of the agreement) is utilised to keep track of fulfilment of conditions.

¹³ Estoppel was considered and rejected by Sutherland J in the high court judgement (Paragraphs [37] to [47]. See also *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd*, Case No. 381/10, SCA, March 17 2011. On the meaning of estoppel it has been said that: "[T]he essence of the doctrine of estoppel by representation is that a person is precluded, ie estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice..." *Aris Enterprises (Finance) v Protea Assurance* 1981 (3) SA 274 (AD) at 291D-E.