REPORTABLE

REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: I 1188/2007

In the matter between:

NAMIBIA DEVELOPMENT CORPORATION	**PLAINTIFF**
and	
UNIVERSAL WOOD INDUSTRIES (PTY) LTD	**FIRST DEFENDANT**
BEN SITWALA SIYAMBANGO	**SECOND DEFENDANT**
ROSEMARY SIYAMBANGO	**THIRD DEFENDANT**

Neutral citation: *Namibia Development Corporation v Universal Wood Industries (Pty) Ltd* (I 1188-07) [2014] NAHCMD 48 (14 February 2014)

Coram: VAN NIEKERK J

Heard: 1 March 2010

Delivered: 14 February 2014

Flynote: **Practice** – Pleadings – Exception – Suspensive condition in contract of purchase and sale – Assuming that condition for exclusive benefit of plaintiff – May be unilaterally waived by plaintiff - Party relying on its own waiver of a suspensive condition - Must allege and prove all elements of valid waiver in order to sustain claim that contract has come into existence despite non-fulfilment of condition - This includes allegations that party had full knowledge of right it waived and that it communicated abandonment of right to other party - In *casu* such allegations lacking – Exception upheld

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ORDER

The result is that the exception is upheld with costs. The plaintiff is given leave to further amend, such further amended particulars of claim to be filed within 21 days from the date hereof.

JUDGMENT

VAN NIEKERK J:

[1] The plaintiff is a statutory body which instituted action against the three defendants. The relevant parts of the amended particulars of claim read as follows:

> '5. First defendant is indebted to the Plaintiff in the amount of N$2 151 377.75 being the outstanding balance of the purchase price of a going concern in terms of a sale of business agreement concluded between

Plaintiff and First Defendant on the 7th of March 2003, a copy of which is attached hereto marked as annexure “A” and which is to be read as if specifically pleaded and incorporated herein, and which amount;

5.1 Is secured by the registration of a **Notarial General Bond No. BN 4242/2002**, a copy of which is attached hereto marked Annexure :B”, over all the First Defendant’s moveable property; and

5.2 Is secured by the registration of a **Surety Bond No. B 2124/2003**, a copy of which is attached hereto marked Annexure “C”, over the property known as

CERTAIN : Erf No. 1917 (a Portion of Erf 461) Klein Windhoek,

SITUATE : in the Municipality of Windhoek,

Registration Division “K”,

MEASURING : 1426 (One Four Two Six) square metres

and which is held by the Second Defendant in terms of **Deed of Transfer No. T3253/1994**;

5.3 is now due and payable;

5.4 was properly demanded;

5.5 the first Defendant either fails or refuses to pay to the Plaintiff.

6. With regards to the suspensive conditions set out in clause 3.1 of annexure “A”, plaintiff avers as follows:

6.1 The suspensive conditions set out in clauses 3.1.1, 3.1.3 and 3.1.4 thereof, have been duly fulfilled as contemplated by annexure “A”;

6.2 With regards to the suspensive condition set out in clause 3.1.2 thereof, plaintiff has duly waived such suspensive condition in writing and with effect 1 September 2007 being the date determined by plaintiff in writing for such waiver as contemplated by clause 3.3 of annexure "A" and in due compliance with the said clause 3.3.

7. On the 31st of January 2002 and at Windhoek the Second and Third Defendants bound themselves as sureties *in solidum* for and as co-principal debtors jointly and severally with the First Defendant for the due payment of all such sums of money which may at any time be or become owing by or claimable from the First Defendant to Plaintiff, from whatsoever cause and howsoever arising.
.....
.....

WHEREFORE Plaintiff claims against the First, Second and Third Defendants, jointly and severally, for:-

1. Payment of the amount of **N$2 151 377.75**;

2. Interest on the amount of **N$2 151 377.75** *a tempore morae* at the rate of 20% per annum until date of full payment;

3. An order to perfect all the Plaintiff's rights in terms of **Notarial General Bond No. BN 4242/2002;**

4. An order to declare .... [the property described in paragraph 5.2 above] and held in terms of **Deed of Transfer No. T3253/1994**, executable in terms of **Surety Bond No. B 2124/2003;**

5. Costs of suit on a scale as between attorney and client as agreed in terms of annexure "A";

6. Further and/or alternative relief.'

[2] The plaintiff as seller and the first defendant as purchaser, represented by the second defendant in his capacity as director of the first defendant, entered into the sale of business agreement ("the agreement") on 7 March 2002. In the agreement certain expression are used which are defined in clause 1. They are:

1. "the Previous Agreement", which means "the agreement signed between the Seller and Zambezi Enterprises (Pty) Ltd on the 1st day of December 2000";
2. "The Effective date", which means "the 1st of December 2000, notwithstanding the date of signature hereof"; and
3. "The Signature Date", which means "the date of signature of this Agreement by the party last signing".

[3] Clause 2 and 3 of the agreement read as follows:

> '2. INTRODUCTION:
>
> 2.1 The Seller carries on the Business as a supplier and manufacturer of timber and timber products.
>
> 2.2 The Seller and Zambezi Enterprises (Pty) Limited entered into the Previous Agreement, which agreement the parties hereby agree to cancel retrospectively to the effective date, Mr Siyambango warranting that he has authority on behalf of Zambezi Enterprises (Pty) Limited to agree to such cancellation on the terms herein set out.
>
> 2.3 Notwithstanding the cancellation of the Previous Agreement effect shall be given to certain of its terms and conditions, as will be more fully set out herein.
>
> 2.4 The parties wish to enter into this Agreement to provide for the sale and transfer of the Business and incidental matters.
>
> 3. SUSPENSIVE CONDITIONS

This Agreement is subject to the suspensive conditions that:-

3.1

3.1.1 the Previous Agreement is legally cancelled on the Signature Date, subject to the prevailing conditions thereof, as set out in this agreement;

3.1.2 the Purchaser enters into an agreement of lease with the Seller in respect of the Premises and will pay all outstanding rental due in terms of the previous agreement;

3.1.3 Ben Sitwala Siyambango in his personal capacity accepts the responsibility of the Purchaser towards the Seller as is set out in this agreement and as contained in annexure “B” hereto;

3.1.4 Ben Sitwala Siyambango agrees to the registration of:

3.1.4.1 a general notarial bond over his movable assets including the assets of the business hereby sold, and

3.1.4.2 mortgage bonds over the immovable property held [by] him as set out in annexure “E” hereto.

3.2 The parties shall use their reasonable endeavours to procure the due fulfilment of the suspensive conditions set out in clause 3.1.

3.3 This Agreement, as well as the Previous Agreement, shall be of no force and effect should the suspensvie conditions in clause 3.1 not be duly waived or fulfilled within 30 days from the signature date or such later date as may be determined by the Seller in writing.

3.4 Should this Agreement become of no force or effect by reason of clause 3.3, then

3.4.1 the parties agree that the Previous Agreement is then cancelled as at the 1st of October 2011 and the Seller is free to take whatever steps it deems fit in terms of that agreement and for this purpose the parties recognise the validity of this Agreement;

3.4.2 no party shall have any claim against the other as a result of the failure of the suspensive conditions in clause 3.1, other than the cancellation of the previous Agreement.'

[4] It is important to note that clause 21 of the agreement provides *inter alia* that '[n]o waiver of any terms and conditions of this Agreement will be binding for any purpose, unless expressed in writing and signed by the party giving same and any such waiver will be effective only in the specific instance and for the purpose given.'

[5] The defendants raise an exception to the plaintiff's amended particulars of claim as being bad in law and not disclosing a cause of action. The grounds for the exception are set out as follows with reference to the suspensive conditions contained in clause 3.1:

'1.2 The Agreement was signed on 7 March 2002, 30 (thirty) days thereafter for the fulfilment of the conditions being at the latest 7 April 2002. However, the conditions in paragraph 3.1.3 and 3.1.4 were not fulfilled within the 30 (thirty) day period as appears from the dates of signature of the relevant annexures to the particulars of claim; and neither is it pleaded that the conditions were waived before the end of the 30 (thirty) day period. The conditions were only fulfilled [by]:

1.2.1 The signing of the ..... [notarial] bond of 14 June 2002.

1.2.2 The signing of the suretyship on 31 January 2003.

1.2.3 The registration of a bond on 11 April 2003.

1.3 The condition in paragraph 3.1.2 relating to the Lease Agreement is to the benefit of the 1st Defendant and cannot be waived by the Plaintiff as alleged.

1.4 The conditions were thus not fulfilled within the 30 (thirty) day period, nor were the conditions waived by the Plaintiff or Defendant nor was another date set by the Seller in writing prior to the expiry of the 30 (thirty) day period.

2. **NOTARIAL BOND**

2.1 The condition in paragraph 3.1.4 of the agreement requires that Ben Sitwala Siyambango agree to the registration of the notarial bond over *"...his assets, including the assets of the Business hereby sold,...".*

2.2 Annexure A shows that the plaintiff sold *"the Business"* to the first defendant. Ben Sitwala Siyambango, the second defendant, is not and never was the owner of the *"...assets of the Business hereby sold..."* and can accordingly not fulfil such an agreement.

2.3 The condition is thus not capable of being fulfilled.

3. **CLAUSE 3 OF AGREEMENT**

3.1 Clause 3.3 of the agreement provides that the agreement shall be of no force or effect should these conditions quoted above not be fulfilled within 30 days from the signature date, namely 7 March 2002. Paragraph 3.3 is quoted as follows:

"3.3 This Agreement as well as the Previous Agreement, shall be of no force and effect should ... [the]

suspensive conditions in clause 3.1 not be duly waived or fulfilled within 30 days from the Signature Date or such later date as may be determined by the Seller in writing."

3.2 Clause 3.4.2 of the Agreement provides that in the event of the Agreement becoming of no force or effect no party shall have any claim against the other. Paragraph 3.4.2 is quoted as follows:

"3.4 Should this Agreement become of no force or effect by reason of clause 3.3, then

3.4.1 ...

3.4.2 No party shall have any claim against the other as a result of the failure of the suspensive conditions in clause 3.1, other than the cancellation of the previous Agreement."

[3.3] In the premises the Agreement is *"...of no force and effect..."* and *"...no party shall have any claim against the other..."* and cannot sustain a contractual claim for payment of the purchase price.'

[6] In argument before me counsel were in agreement that the cause of action on which the plaintiff relies presupposes the existence of a valid contract in terms of which valid obligations arose and with which the defendants now have to comply. The effect of the suspensive conditions contained in clause 3 of the agreement is set out in clause 3.3, namely that the agreement shall be of no force and effect should the suspensive conditions not be fulfilled or duly waived within a period of 30 days from the date that the agreement was signed. i.e. by 7 April 2002. There is an exception to this and this is that the plaintiff as the seller may extend the date in writing.

[7] To my mind most of the points made in the heads of argument filed on the defendants' behalf by Mr *Barnard* and included in the argument presented by him during the hearing are not covered by the express terms of the exception. However, Mr *Mouton*, who appeared on behalf of the plaintiff raised no objection to the argument presented. In the premises I shall consider the matter on the basis of the arguments presented.

[8] Mr *Barnard* concentrated on the issue of the plaintiff's alleged waiver of the condition contained in clause 3.2.1. In summary his main argument amounts to this: even if it is accepted that the condition contained in this clause is considered to be to the exclusive benefit of the plaintiff, which the defendants deny, the waiver was not properly pleaded. The plaintiff should have alleged and proved all the elements of a valid waiver, i.e. that the plaintiff had full knowledge of the rights which it waived, that it expressly and in writing, in compliance with the provisions of clause 21 of the agreement, waived its rights and that it communicated the waiver to the defendants, who had to accept it.

[9] I agree with defendants' counsel that the plaintiff can unilaterally waive compliance with the condition only if it is to the exclusive benefit of the plaintiff. If it is not clear whether the condition is to the exclusive benefit of the plaintiff, waiver by the plaintiff is not binding on the defendant. (Christie, *The Law of Contract in South Africa*, 5th ed, p146. *Mudge v Ulrich NO and Others* 2007 (2) NR 567 (HC) at 581F.) I did not understand Mr *Mouton* to submit otherwise, but his stance is that the suspensive conditions are all for the exclusive benefit of the plaintiff as is further evidenced by the fact that it is the plaintiff as the seller who may in terms of clause 3.3 extend the date for fulfilment or waiver. It is not necessary to decide this matter for purposes of the exception, as the defendants' submission is not dependent on a decision on this issue. I shall therefore for purposes of the exception assume, without deciding, that Mr *Mouton's* stance is correct.

[10] In *Hill v Hildebrandt* 1994 NR 84 (HC) at 95D-F Muller AJ (as he then was) held as follows after surveying several decisions on the matter:

> 'I find myself in respectful agreement with the decisions following the line of authority since *Phillips* namely that where a suspensive condition is inserted in the contract for the sole benefit of one party, namely the purchaser, he has the right to waive that protection unilaterally, but if that condition contains a time limit he must do so before the expiry of the time limit and communicate such waiver to the other party within that period. It further seems to me that if such a purchaser elects not to rely on the suspensive condition for fulfilling it and fails to waive and communicate such waiver before the expiry of the time limit the very nature of that legal provision has the effect that no contract came into existence and that it should be regarded as null and void *ab initio*. See *Ming-Chieh Shen v Meyer* (*supra* at 499D), *Badenhorst v Van Rensburg* 1986 (3) SA 769 (A).'

[11] This view of the legal position was approved by Hannah J in *Van Deventer v Engelbrecht* 1995 NR 257 (HC) at 262F-G and applied in *Mudge v Ulrich NO and Others* 2007 (2) NR 567 (HC) at 581F.

[12] In *Hill v Hildebrandt (supra)* Muller AJ further held (see 99C) that such a waiver must comply with the strict requirements of a waiver as contemplated in *Borstlap v Spangenberg en Andere* 1974 (3) SA 695 (A) at 704G, where Corbett AJA (as he then was) said:

> 'It has been repeatedly emphasized by our Courts that clear proof of an alleged waiver is required, especially where a tacit waiver is relied upon. It must be clear that the particular party acted with full knowledge of his rights and that his action was contrary to the continued existence of such rights or the intention to enforce them.'

(See also *Mudge v Ulrich NO (supra)* at 582C-D).

[13] In *Oppermann v President of the Professional Hunting Assoc of Namibia* 2000 NR 238 (SC) O'Linn AJA said at 252B-D (the underlining and the insertion in square brackets are mine):

> 'To succeed in such a defense [i.e. of waiver] the respondents had to allege and prove that, when the alleged waiver took place, the first applicant had full knowledge of the right which he decided to abandon; that the first applicant either expressly or by necessary implication abandoned that right and that he conveyed his decision to that effect to the first respondent. See *Netlon Ltd and Another v Pacnet (Pty) Ltd* 1977 (3) SA 840 (A) at 873; *Hepner v Roodepoort-Maraisburg Town Council (supra)*; *Traub v Barclays National Bank Ltd; Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634; *Grobbelaar and Another v Council of the Municipality of Walvis Bay and Another* 1997 NR 259 (HC) at 262.'

[14] *Oppermann's* case and the cases referred to in the above-mentioned quotation all deal with the situation where one party relied on a waiver by the other party. In *casu* the plaintiff is relying on its own waiver. However, in *Hill v Hildebrandt (supra)* Muller AJ specifically dealt with such a situation in which the applicant as purchaser relied on his own waiver of a suspensive condition to claim that a certain contract came in to existence. The learned judge said the following (at 97G-98A) in response to a submission (at 97B-C) that 'waiver' in this sense should not be regarded as a 'waiver' in the sense meant in *Borstlap v Spangenberg*.

> 'We have seen that when there was no 'waiver' of the benefit for the purchaser contained in such a suspensive condition in the contract within the time limit the contract is void *ab initio*. It is therefore important that the party for whose benefit such a suspensive condition has been inserted and who does not intend to fulfil it, should clearly and unambiguously communicate this intention to the other party before expiry of the time limit. This conveying of his intention of not adhering to the suspensive condition inserted in the clause for his sole benefit is nothing else but a waiver of a right that he has in terms of the contract and, in my opinion, should comply with the strict requirements

> of *Borstlap v Spangenberg* and the cases confirming that view subsequently. I cannot therefore find any fault with the use of the word 'waiver' in the sense that it was used in the cases referred to in respect of communicating an intention not to comply with provisions of a suspensive condition. I also agree, as mentioned before, with the line of authority following the *Phillips v Townsend* case, namely that where the suspensive condition contains a time limit such waiver must be made and communicated to the other party before the expiry of that time limit.'

[15] It seems to me therefore, that the combined effect of what was stated in *Hill v Hildebrandt* and *Oppermann* is that even where a party is relying on its own waiver of a suspensive condition, it must allege and prove all the elements of a valid waiver in order to sustain a claim that the contract has come into existence despite the non-fulfilment of the condition. This includes therefore, the allegations that the party had full knowledge of the right it waived and that it communicated the abandonment of the right to the other party.

[16] Counsel did not refer me to any authority, nor have I been able to find any, which requires that it be specifically alleged that the right of waiver was exercised within any time limit imposed by a suspensive condition. In my view it would be prudent to include such an allegation with mention of the specific date on which the right was waived. Likewise, if there had been an extension of the time limit, it would be prudent to include an appropriate allegation that the time limit was extended on such and such a date. However, I am hesitant to hold that a claim is excipiable for lack of such allegations as long as the general allegation is made that the suspensive condition was say, 'duly waived' with full knowledge of the right concerned and that this was communicated to the other party. I find support for this approach in cases to which counsel did not refer and which state the rule that a party relying on a contract that is subject to a condition must plead and prove the condition and its fulfilment (*Pillay v Krishna and Another* 1946 AD 946 at 952; *Badat v Essak* 1955 (3) SA 371 (D) at 373A-B; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G-H); *Rohroff v Nothling* 1971 (1) SA 14 (E);

Vorster v Snyman 1974 (4) SA 450 (C) *Kate's Hope Game Farm (Pty) Ltd v Terblanchehoek Game Farm (Pty) Ltd 1998 (1) SA 235 (SCA)* at 241C-D) These cases do not, however, appear to require more than the mere allegation that the suspensive condition was fulfilled.

[17] I also do not agree with the submission made on behalf of the defendants that there should be an allegation that the plaintiff's waiver was accepted by the defendants. Where the condition is inserted for the sole benefit of the plaintiff it may unilaterally waive the condition (*Hill v Hildebrandt (supra)* at 95E).

[18] Mr *Barnard* further submitted that the plaintiff could not attempt to waive compliance with the condition contained in clause 3.1.2 on 1 September 2007 as this date is after the 30 day period had lapsed. However, it seems to me that paragraph 6.2 of the amended particulars of claim, although not elegantly drafted, is capable of the interpretation that the 30 day period had been extended to a cut-off date of 7 September 2007 and that the condition had been waived within this extended period. This I also understand to be Mr *Mouton's* submission on the subject. In the circumstances paragraph 6.2 does pass muster.

[19] However, the fact remains that the plaintiff's amended particulars of claim do not allege that the plaintiff had full knowledge of the right it waived and that it communicated the abandonment of the right to the defendants. The pleading is therefore excipiable on this ground. In the light of this finding it is not necessary to deal with the other arguments presented.

[20] The result is that the exception is upheld with costs. The plaintiff is given leave to further amend, such further amended particulars of claim to be filed within 21 days from the date hereof.

_____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the plaintiff: Adv C J Mouton

Instr. by Koep & Partners

For the defendants: Adv P Barnard

Instr by Metclafe Legal Practitioners