

REAL ESTATE

AFRICAST (PTY) LIMITED V PANGBOURNE PROPERTIES LIMITED [2014] ZASCA

In *Africast (Pty) Ltd v Pangbourne Properties Ltd*, the Supreme Court of Appeal (SCA) had occasion to consider the law of contract, specifically the legal consequences emanating from a contract containing a suspensive condition.

On 11 April 2007, an agreement relating to a property development was entered into between Pangbourne Properties Ltd (Pangbourne) and Africast (Pty) Ltd (Africast). The agreement between Pangbourne and Africast was subject to a suspensive condition, namely that Pangbourne provide Africast with written notice that its board of directors had approved the purchase of the property. This written notice had to be provided within seven working days after conclusion of the agreement by the parties.

Representatives of both parties signed the agreement on 11 April, which was approved by Pangbourne's board of directors on 20 April 2007. Pangbourne provided Africast with written notice that Pangbourne's board approved the agreement on 25 April 2007. From this date onwards, the parties acted on the basis that the agreement was valid and binding.

However, during 2008, some 18 months after signing of the agreement, and after buildings had been constructed in accordance with the contract, Pangbourne asserted that the suspensive condition in the agreement had not been fulfilled. As such, Pangbourne refused to provide Africast with bank guarantees in respect of the fulfilment of its payment obligations under the contract. Africast considered Pangbourne's new stance as repudiation and, as a result, cancelled the contract and claimed damages for breach of contract. This claim was dismissed by the South Gauteng High Court.

Pangbourne's view was that the agreement had been concluded on 11 April 2007. As such, the suspensive condition had to be fulfilled by 20 April 2007, which had not occurred. Africast maintained that the agreement had only been concluded on 20 April 2007, when it was formally approved by the board of Pangbourne, and that the written notice sent to it by Pangbourne on 25 April fulfilled the suspensive condition. According to Africast, Pangbourne's signatories did not have the authority to conclude the agreement on 11 April 2007, but only became authorised to do so by the board resolution of 20 April 2007. Pangbourne countered that the signatories did have authority to conclude the agreement prior to 20 April 2007, and that this authority was derived from Pangbourne's 'ordinary administrative practices, procedures and customs'.

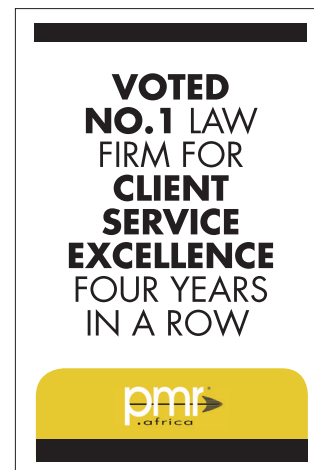
The SCA found that, based on the evidence presented, "there is no doubt that... the signatories had authority to sign the agreement in terms of Pangbourne's internal arrangements". Thus, according to the Court, as the agreement was concluded on 11 April 2007, the suspensive condition had not been fulfilled as the written notice of 25 April was sent more than 7 working days after the contract had been concluded.

The Court explained that upon conclusion of a contract containing a suspensive condition, the contract itself is enforceable, but some of its obligations are postponed pending fulfilment of the suspensive condition. If the suspensive condition is eventually fulfilled, the contract is deemed to have existed *ex tunc*, ie from the date when the contract was initially concluded, as opposed to the date on which the condition was fulfilled. If the condition is not fulfilled, then the contract is deemed not to have come into being.

The Court confirmed that the suspensive condition had not been fulfilled and the contract never came into operation. Accordingly, the Court found in Pangbourne's favour, dismissing the appeal with costs.

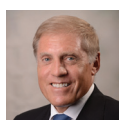
The judgement of the Supreme Court of Appeal illustrates the importance of ensuring total and timeous compliance with a suspensive condition in a contract. As held by the Court, non-compliance with a suspensive condition vitiates a contractual agreement by rendering the contract void *ab initio*. As illustrated by the present case, this is the legal position even where one or both of the parties have already delivered performance in terms of the contract.

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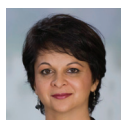
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