WHEN ARE PERSONAL RIGHTS TOO PERSONAL TO BE CEDED?

University of Johannesburg v Auckland Park Theological Seminary 2021 JDR 1151 (CC)

1 Introduction

Context in law is everything, or so says the aphorism (*R v Secretary of the State for the Home Department, ex parte Daly* [2001] UKHL 26 par 28; *Aktiebolaget Hassle v Triomed (Pty) Ltd* [2002] 4 All SA 138 (SCA) par 1; *Minister of Home Affairs v Scalabrini Centre* 2013 (6) SA 421 (SCA) par 89). That said, to what extent should courts consider the surrounding context of a contract when interpreting and construing it and its provisions? Does the parol evidence rule preclude a court from taking into account contextual evidence or circumstances in interpreting contractual provisions? Or is the court restricted to the contractual provisions and nothing beyond the four corners of the contract? These are some of the central issues that were considered in *University of Johannesburg v Auckland Park Theological Seminary* (2021 JDR 1151 (CC)) (*UJ CC*). The Supreme Court of Appeal (*Auckland Park Theological Seminary v University of Johannesburg* 2020 JDR 0494 (SCA) (*UJ SCA*)) and the Constitutional Court had divergent views on the matter. This case note provides a critical analysis of both judgments, ultimately preferring the decision of the Constitutional Court.

In the law of contract, it is trite that, generally, all personal rights may be freely transferred or ceded to a third party without requiring the consent or knowledge of the other contracting party, who has a correlative duty. This is known as cession (Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract: General Principles* 4ed (2012) 386; Nicol "The Legal Effect of Amalgamations and Mergers Upon Third-Party Contracts Containing Anti-Transfer Provisions" 2013 25 *South African Mercantile Law Journal* 30 35–36; *Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A)). An example is necessary. Consider A's deposit of R10 000 into B Bank where B Bank is contractually obliged to return the deposit on A's demand. A then transfers his right to claim (or demand) his deposit to C. There is no requirement that A procures B Bank's consent to cede his right to claim. For the sake of completeness, cession is a bilateral juristic act aimed at transferring a personal right from a cedent/creditor to another legal person (cessionary). The cessionary then wears the shoes of a creditor in the cedent's place (Scott *The Law of Cession* 2ed (1991); Nienaber "Cession" in Joubert (founding ed) *The Law of South Africa* 2ed (2003); *Brayton Carlswald (Pty) Ltd v Brews* 2017 (5) SA 498 (SCA)). Cession can be differentiated from delegation (which concerns the substitution of a debtor, as opposed to a creditor) and assignment (which refers to a combination of

cession and delegation) (Latsky "The Fundamental Transactions Under the Companies Act: A Report Back From Practice After the First Few Years" 2014 *Stellenbosch Law Review* 361; *Froman v Robertson* 1971 (1) SA 115 (A); *Securicor (SA) (Pty) Ltd v Lotter* 2005 (5) SA 540 (E); Christie *The Law of Contract in South Africa* 4ed (2001)).

However, the general rule of cession is subject to limitations. There are two crucial limitations in this regard. First, a right cannot be ceded where it is the subject of a *pactum de non cedendo*, which can generally be defined as an agreement to not cede. Accordingly, a contract may contain a provision that prevents a creditor from ceding a right without the debtor's consent. An example of a *pactum de non cedendo* is where a tenant, in a lease agreement, is not permitted to cede her rights of occupation and possession unless there is prior written consent by the landlord. Secondly, there may be certain rights that are so personal in nature that they cannot be ceded. Such rights cannot be ceded because the identity of the creditor is paramount to the debtor and there is an expectation that the party initially contracted with will fulfil the obligations. Claims for pain and suffering in delict, and claims for maintenance, are traditional examples of such rights. These rights are classified as *delectus personae* (see generally *Eastern Rand Exploration Co Ltd v AJT Nel, JL Nel, SM Nel, MME Nel's Guardian and DJ Sim* 1903 TS 42 53; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 31G–H; *Boshoff v Theron* 1940 TPD 299 304; *Frielander v De Aar Municipality* 1944 AD 79 93; *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019 (2) SA 221 (SCA) par 17; LAWSA "Cession" 3ed par 165; Scott *The Law of Cession* 202; Scott "Can a Banker Cede His Claims Against His Customers" 1989 1 *South African Mercantile Law Journal* 248; Scott "Sasfin (Pty) Ltd v HJS Beukes (Saak Nos: 7132/86 EN 10849/86) Ongerapporteerd 1987-01-22 (W)" 1987 20 *De Jure* 355).

In light of that general background, the author turns to consider the case of *University of Johannesburg v Auckland Park Theological Seminary* (*supra*) with a particular focus on the judgments of the Supreme Court of Appeal and the Constitutional Court. To this end, this case note is structured as follows. First, the pertinent facts of the case are canvassed; secondly, the decision of the Supreme Court of Appeal is examined; thirdly, the findings of the Constitutional Court are analysed; and lastly, the author provides a critical evaluation of the judgments, and endorses the reasoning furnished by the Constitutional Court.

2 Background facts of the case

The pertinent facts of the case as outlined by the Constitutional Court can be summarised as follows. The applicant, the University of Johannesburg (UJ), entered into a cooperation agreement in 1993 with the first respondent, Auckland Park Theological Seminary (ATS). In terms of the agreement, the two parties were to collaborate in offering students certain higher education degrees (*UJ CC* par 6). During the subsistence of this agreement, the parties began negotiating ATS's acquisition of property for the purposes of operating a theological college (*UJ CC* par 7). Ultimately, as a result of these negotiations, UJ proceeded to obtain permission, in accordance with the

Rand Afrikaans University Act 61 of 1955, from the Minister of Education to enter into a lease agreement with ATS over certain immovable property located in Auckland Park to construct a campus (*UJ CC* par 7). In securing permission for the lease agreement, UJ specifically named ATS in its application to the Minister of Education and specified the purposes for which ATS would use the property (*UJ CC* par 7).

In 1996, the ministerial permission was granted and subsequently UJ and ATS entered into a written notarial long-term lease concerning the property in Auckland Park. In the same year, the lease was duly registered against the title deed of the property. The lease was for a period of 30 years, and was renewable on six months' written notice given before the 30-year period lapsed. ATS paid a once-off rental amount of R700 000 to UJ (*UJ CC* par 7). Instead of establishing a theological college on the property, ATS entered into a notarial deed of cession with the second respondent, Wamjay Holdings Investments (Pty) Ltd (Wamjay), and ceded its rights contained in the lease agreement to Wamjay (*UJ CC* par 8). ATS was paid a once-off R6 500 000 for these rights by Wamjay, which intended to establish a religious school for primary and high school education on the property (*UJ CC* par 8).

UJ had no knowledge of the cession of the rights at the time and when it later found out about the cession, it believed that the rights in the lease agreement were personal to ATS (that is, *delectus personae*) (*UJ CC* par 9). UJ was then of the view that ATS was in breach of the lease agreement in the form of repudiation (*UJ CC* par 9). UJ elected to cancel the lease agreement. Wamjay and ATS disagreed with UJ's right to cancel the lease agreement (*UJ* CC par 9–10). UJ approached the High Court seeking orders to cancel the notarial lease against the title deed of the property and to evict ATS and Wamjay from the property (*UJ CC* par 10). UJ purported to cancel the lease on the basis that, on a proper construction of the lease agreement, the rights contained therein were not capable of being ceded as they were *delectus personae* and thus personal to ATS. UJ argued that by ceding the rights to Wamjay, ATS had repudiated the lease, and that UJ had now accepted the perceived repudiation.

The author interposes here to set out the findings of the Gauteng Local Division of the High Court (*University of Johannesburg v Auckland Park Theological Seminary (Pty) Ltd* 2017 JDR 1991 (GJ) (*UJ HC*)). The High Court, per Victor J, agreed with UJ and found in its favour. The court concluded that the rights in the lease were *delectus personae* (*UJ HC* par 54–58). Victor J reasoned that, on the uncontested evidence, it was clear that the lease between UJ and ATS was of a personal nature, particularly when considering clause 8 of the agreement (*UJ HC* par 46–47). Clause 8 related to the use of the property and provided that the property will be used for educational, religious, and related purposes, construction of a campus for education, teaching, research, training, offices, and student facilities (*UJ HC* par 33.8).

ATS and Wamjay appealed to the Full Court of the High Court (*Auckland Park Theological Seminary v University of Johannesburg* 2018 JDR 1631 (GJ) (*UJ FC*)). The majority of the Full Court, per van Oosten J (Carelse J

concurring), dismissed the appeal with costs and held that the reasoning and findings of Victor J in relation to the interpretation of the lease agreement could not be faulted (*UJ FC* par 11). The majority concluded that the lease agreement, interpreted in light of the other factors, indicated that UJ and ATS's goals were aligned and intertwined (*UJ FC* par 13). The rights in the lease were thus of a personal nature. Wamjay's intention to build a high school and primary school were at odds with the goals recorded by UJ and ATS in their agreement and could not be reconciled. Interestingly, the Full Court remarked that the cession would result in an absurdity in that Wamjay would be a right-holder under the lease, but ATS would be contractually bound to discharge the obligations under the lease (*UJ FC* par 14–15).

The concurring judgment, per Wright J, agreed with the outcome but employed a different approach (*UJ FC* par 9–10). ATS and Wamjay were aggrieved by this decision and appealed to the Supreme Court of Appeal.

3 The decision of the Supreme Court of Appeal

On appeal, the Supreme Court of Appeal disagreed with the High Court and the Full Court and overturned their decisions. In upholding the appeal, Dlodlo JA, writing unanimously for the court, held that all contractual rights can be transferred, provided that they are not of a personal nature (referring to *delectus personae*) and that the parties did not intend to restrict the transfer of the rights (*UJ SCA* par 8). The court reasoned, citing *Sasfin (Pty) Ltd v Beukes* (*supra* 31G–H) and *Goodwin Stable Trust v Duchex* (*Pty) Ltd* (1998 (4) SA 606 (C) 617I–J), that the primary mischief that the principle of *delectus personae* seeks to cure is that the cession should not disadvantage the debtor (*UJ SCA* par 8). Relying on *Boshoff v Theron* (*supra* 304), the Supreme Court of Appeal held that it is trite that generally the lessor does not expect the lessee personally to perform the obligations contained in the lease agreement (*UJ SCA* par 9). It opined that generally there is no *delectus personae* in long-term lease agreements. In the court's view, there was no evidence in this case to demonstrate that the rights in the lease agreement were *delectus personae* (*UJ SCA* par 10).

Moreover, the court held that UJ should prove the intention of the parties by relying only on the lease agreement and nothing external to the agreement (*UJ SCA* par 10). To this end, the court held that UJ could not adduce external evidence to prove the surrounding circumstances that underpinned the contract and the parties' intention. The parol evidence rule, the court held, prevented UJ from producing and relying on contextual evidence – that is, contextual evidence was held to be inadmissible. The court posited that the written agreement was the entire agreement, and that it could not be varied by extrinsic evidence. The court held that where there is a written contract, such a contract will be the memorial of the transaction and no extrinsic evidence that contradicts, alters, adds, or varies the written contract (*UJ SCA* par 7) may be adduced. The court concluded that the contextual evidence provided by UJ was in fact evidence that had the effect of adding to, varying and contradicting the general, objective words of the lease (*UJ SCA* par 10).

The court further held that the parties agreed that they could not rely on any warranties or representations that were not explicitly mentioned in the lease agreement. Accordingly, the written lease agreement served as the only memorial of the agreement between the parties (*UJ SCA* par 11). The court found that there were no express or implied provisions in the written lease agreement to indicate that the contractual rights therein were personal to ATS (*UJ SCA* par 11). A court is constrained by the words used in the contract. To this end, the terms of the lease agreement were unequivocal and not open to doubt (*UJ SCA* par 11). On an objective interpretation of the lease agreement, so the court held, it was clear that the rights were not *delectus personae*. All things considered; the court concluded that the rights could be ceded to Wamjay. The court found that clause 8, which the High Court relied on to reach the conclusion that the rights could not be ceded, had no significant indicators that would support a finding that the rights were personal to ATS and could not be ceded to Wamjay or any other third party (*UJ SCA* par 11).

On this basis, the Supreme Court of Appeal overturned the decisions of the High Court and the Full Court. UJ then knocked on the doors of the Constitutional Court.

For completeness, the decision of the Supreme Court of Appeal is summarised as follows. First, all contractual rights are capable of being ceded unless the parties have indicated that they did not intend for the rights to be ceded or if the rights are *delectus personae*. Secondly, rights contained in long-term lease agreements are generally not *delectus personae* because there is generally no expectation for a lessee to perform the obligations ensconced in the lease agreement. Thirdly, the parol evidence rule serves to ensure that a written contract is the sole memorial and embodiment of the transaction. No extrinsic evidence may contradict, vary, alter, add, or modify the written contract. The intention of the parties must be deduced from the written contract and the contractual provisions. Contextual evidence is similarly excluded by the parol evidence rule.

4 The decision of the Constitutional Court

The Constitutional Court, per Khampepe J, unanimously overturned the decision of the Supreme Court of Appeal. Khampepe J reiterated that generally all rights may be freely and voluntarily ceded to a third party without the knowledge or consent of the other contracting party (*UJ CC* par 55). However, this transferability of rights is subject to *delectus personae* and *pactum de non cedendo* (*UJ CC* par 55–56 and 59]. Moreover, the court cited *Eastern Rand Exploration Co Ltd v A J T Nel* (*supra*) in outlining the general principle that rights are capable of being freely transferred (*UJ CC* par 58). These were the only legal issues at stake in this case on which the Constitutional Court and the Supreme Court of Appeal agreed.

Khampepe J held that the Supreme Court of Appeal was incorrect in holding that contextual evidence is irrelevant and immaterial if the intention of the parties and the nature of the rights can be, and is, determined on the ordinary, grammatical meaning of the words in a written agreement. The

court argued that determining whether the rights in question are *delectus personae* is an exercise of contractual interpretation. As such, the oft-cited *dictum* in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA) par 18) is instructive. In *Endumeni*, the court made it clear that consideration of the language and context of contractual provisions is pertinent to contractual interpretation. Neither context nor language should take precedence over the other in the exercise (*UJ CC* par 65). Contractual interpretation is a unitary exercise, which must be done holistically, and requires that the text, purpose, and context of the contract be considered contemporaneously when interpreting a contract (*UJ CC* par 65).

The import of this is that parties will have to, at some point, adduce evidence pertaining to the context and purpose of the contract and some of the bespoke contractual provisions. Such evidence can relate to the pre-contractual deliberations and discussions that resulted in the conclusion of the written contract as well as evidence pertaining to the context evincing the circumstances under which the contract is concluded. In determining the intention of the contracting parties, a court must consider all the relevant contextual circumstances that underpin the contract (*UJ CC* par 67, citing the Supreme Court of Appeal in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) par 27–28). The overall thrust of the court's argument in relation to the admissibility of contextual evidence when interpreting a written contract is that context must always be taken into account when interpreting contractual provisions and it must be considered at the beginning as part and parcel of the unitary exercise of interpretation (*UJ CC* par 69).

In relation to determining the nature of a right and whether it is *delectus personae,* Khampepe J opined that the same principle applies. Courts cannot determine the nature of a right in the abstract. It is incumbent on courts to consider and take into account the context and purpose of the contract to construct properly the nature of the right (*UJ CC* par 70). It was emphasised that an inquiry into the nature of the right and whether such a right is *delectus personae* is subject to the same interpretation principles as any other contractual provision (*UJ CC* par 70). The primary question in a *delectus personae* inquiry is whether the contract is so personal in nature that it would either make a substantial or reasonable difference to the other party whether the cedent or the cessionary is entitled to enforce it. This test was enunciated by *Eastern Rand Exploration Co Ltd v AJT Nel* (*supra* 53).

The court explained that, in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* (1991 (1) SA 100 (A)), Botha JA merely clarified that, in determining whether the creditor is *delectus personae*, what is important is the nature of the debtor's obligations and whether the identity of the creditor is paramount for the sake of the obligation. The court remarked that Botha AJ endorsed the *dictum* set out by Innes CJ in *Eastern Rand Exploration Co Ltd v AJT Nel* (*supra*) and did not contradict or amend the test set out in that judgment (*UJ CC* par 72). The key point is that Botha JA articulates a different formulation for asking the same question (*UJ CC* par 74).

Turning to the facts of this case, the court held that it was not enough merely to allege that the rights in the lease agreement are not *delectus*

personae because UJ's obligation was only to provide beneficial occupation and that this obligation is the same regardless of whether it is being provided to ATS or Wamjay (*UJ CC* par 75). Although an underlying obligation (and the correlative right) may be general in nature, as in the case of beneficial occupation, this does not necessarily and axiomatically mean that the right is not personal and *delectus personae* (*UJ CC* par 75). The court emphasised that the important inquiry is whether the rights and obligations arising from beneficial occupation in a particular lease are *delectus personae*. This is because courts cannot in abstract adjudicate the question of the nature of the rights created in a particular contract without having due regard to the text, purpose, and context of the contract (*UJ CC* par 75). If courts were to interpret contracts in abstract, it would render the principle of *delectus personae* nugatory because nearly all rights are "at a level of abstraction, capable of being construed impersonally" (*UJ CC* par 75). Accordingly, courts have a duty not just to question whether generally certain rights are of a personal nature, but rather courts have a duty when interpreting a contract to question whether the specific rights contained in a specific contract are of so personal a nature as to be *delectus personae* (*UJ CC* par 78).

In relation to whether lease rights can be *delectus personae*, the court clarified Greenberg JP's judgment in *Boshoff v Theron* (*supra*). The court remarked that Greenberg JP's statement that rights arising from lease agreements will rarely be *delectus personae* was made in the context of long-term lease agreements where the core of the issue before him pertained to the position of the lessor and not a lessee. The court emphasised that this statement, which was obiter, merely provided that, generally, the longer the lease, the more unlikely it was that the rights were so personal that they could not be ceded (*UJ CC* par 83). Greenberg JP did not assert that the long-lease rights could *never* be *delectus personae* (*UJ CC* par 85). Khampepe J noted that this could be understood as a presumption that could be rebutted where parties were able to demonstrate and prove that they intended to transact with each other personally and that no other third party could take over the rights and obligations (*UJ CC* par 84). The inquiry of the nature of a right is specific to the agreement, and will inevitably be sensitive to context, purpose, and text. The court held that the fact that the agreement before it was a lease, without more, was neither here nor there in relation to the determination of the nature of the rights. A court must probe further (*UJ CC* par 86).

Khampepe J proceeded to consider the role of the parol evidence rule. The court cited, with approval, the *dictum* in *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* (1941 AD 43 47), where the Appellate Division (per Watermeyer JA) held that generally where the parties have reduced their agreement to writing, such a contract serves as the sole memorial of the transaction. Where there is a contractual dispute, no extrinsic evidence may be adduced to prove the terms of the contract or its content and no provisions of the contract can be altered, contradicted, varied, or added by extrinsic (parol) evidence (*UJ CC* par 88). The court further noted that the parol evidence rule serves two functions, namely an interpretational function and integrational function. The latter refers to the role of parol evidence in setting the limits of a contract, whereas the former

refers to how the parol evidence rule governs the use and reliance of extrinsic evidence where a contract has been reduced to writing (*UJ CC* par 89). The court held that the parol evidence rule does not preclude contextual evidence from being produced and relied upon, where the context is relevant for purposes of properly interpreting a contract. The rule is relevant and apposite when the evidence adduced seeks to contradict, vary, add, or alter the terms of the written agreement. It is not relevant when the evidence is adduced to assist a court to interpret a contract (*UJ CC* par 92). The court remarked that, for instance, if UJ attempted to adduce evidence that would illustrate that the parties had intended to include a *pactum de non cedendo* but had omitted to do so for some reason or other, then the parol evidence would be properly invoked, and it would prevent UJ from adducing such evidence (*UJ CC* par 92).

The court agreed with the High Court and held that clause 8 of the lease agreement made it abundantly clear that the agreement between UJ and ATS was of a personal nature and was not capable of being ceded. It held that this clause had to be interpreted in light of the ministerial request for lease approval and permission. The terms of the request were unambiguous and identify the relationship between UJ and ATS and the purpose of the lease arrangement (*UJ CC* par 95). Khampepe J noted that during the negotiations there was reference to a "partnership" between UJ and ATS and reference to the relationship between the two entities under the cooperation agreement (*UJ CC* par 96). The court also opined that the statutory framework (that is, the Universities Act 61 of 1955 and the Rand Afrikaans University Act 51 of 1966) that governed the lease agreement also indicated that the rights were personal to ATS, and thus ATS could not transfer these rights to another party for a profit (*UJ CC* par 97).

The respondents had argued that the cession should be left to stand because UJ would not suffer any prejudice and thus the rights were not *delectus personae* (*UJ CC* par 100). Khampepe J decidedly rejected this contention and held that there is no authority that suggests that prejudice is a factor or element when determining whether rights are *delectus personae*. She reiterated that the *dicta* in S*asfin (Pty) Ltd v Beukes* (*supra* 31G–H) and *Goodwin Stable Trust v Duohex (Pty) Ltd* (1998 (4) SA 606 (C) 617H–I) should not be misunderstood as setting down a rule that prejudice is an independent consideration. Rather, those cases must be understood as setting out the aim of *delectus personae*, which is protecting the debtor from any disadvantage arising from a cession. The relevant test is not whether the debtor is prejudiced or disadvantaged, but it is whether the rights in question are so personal that it matters to the debtor who the creditor is, in light of the contract, understood within its context and purpose (*UJ CC* par 100).

However, the court noted that the Supreme Court of Appeal in *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* (*supra* par 36) remarked that while actual prejudice is not a requirement, the debtor may demonstrate that a particular cession will impose greater burdens on it. In any event, the court found that UJ would be prejudiced by the cession to Wamjay because it meant that ATS was no longer able to

discharge its obligations of building the theological college in terms of the lease agreement. Accordingly, the cession imposed additional burdens on the debtor because it rendered the cedent (ATS) unable to discharge its obligations under the agreement (*UJ CC* par 101). The court held that ATS could not build a theological college because of the cession, and this was clearly prejudicial to UJ, as it had not contemplated having to provide the premises for any other purpose (*UJ CC* par 102). Accordingly, ATS should have obtained consent from UJ prior to ceding its rights to Wamjay.

Khampepe J found that the High Court's and the Full Court's conclusions were correct. The court agreed with the High Court's finding that the rights were personal to ATS (*UJ CC* par 94). Khampepe J believed that clause 8 of the lease agreement, which must be interpreted with regard to the request for ministerial approval and the subsequent permission, demonstrated that the parties intended that the leased premises would be used by ATS (*UJ CC* par 95). The court also held that the result of the purported cession between ATS and Wamjay was to render the contract nugatory and incapable of being performed (*UJ CC* par 101–103). The court embraced the definition of repudiation provided by *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* (2001 (2) SA 284 (SCA) par 16), which defined repudiation as a situation where a contracting party objectively and manifestly demonstrates an intention to be no longer bound by the agreement and no longer discharge its obligations under the agreement (*UJ CC* par 104). It was thus reasonable for UJ to conclude that ATS had repudiated the lease agreement and that the repudiation was of a serious nature (*UJ CC* par 111). The court then concluded that it was appropriate for UJ to cancel the contract.

Although not relevant for purposes of this note, the court rejected the respondents' contention that UJ had waived its right to rely on the personal nature of the lease agreement (*UJ CC* par 113–115). The court also rejected the respondents' reliance on the defence of estoppel (*UJ CC* par 116–120). Ultimately, the court ruled in favour of UJ, and upheld the appeal with costs (*UJ CC* par 121–122).

5 Critical evaluation of the decisions

5 1 *Parol evidence rule and the role of context*

From the outset, the decision of the Supreme Court of Appeal was narrow and rigid. First, the Supreme Court of Appeal did not fully appreciate the role of the parol evidence rule considering the interpretational approach set out in *Endumeni*. Unterhalter AJA, writing for a unanimous Supreme Court of Appeal, has recently highlighted that there is an apparent tension between the parol evidence rule, which is a crucial doctrine in contract law, and the interpretational principles set out in *Endumeni* (*Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99 par 38). Specifically, in *Endumeni*, the Supreme Court of Appeal emphasised that when interpreting a contract, it is important that a court considers the language used, understood in the context and purpose of the contract and

the provisions therein, as part of a unitary exercise of interpretation (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 18).

Of note, the *Endumeni* approach overturns the previous position, which was that context could only be resorted to if there was ambiguity or lack of clarity in the text (see *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) 767E–768E). While it is evident from *Endumeni* that the context and purpose of a contract are to be taken into account from the outset, the Supreme Court of Appeal has found it necessary to explicitly point this out in subsequent cases and to make it plain that context and purpose will be taken into account as a matter of course, whether or not the words used in the contract are ambiguous or lack clarity (for e.g., see, *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd supra* par 28; *Unica Iron and Steel (Pty) Ltd v Mirchandani* 2016 (2) SA 307 (SCA) par 21; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA) par 24). This means that a court interpreting a contract must, from the outset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract. Accordingly, *Endumeni* sets out a triad of factors to consider – that is, language, context, and purpose. However, the purported issue is the parol evidence rule, which provides that where the parties have intended to reduce an agreement to writing, and intended that the agreement should be the sole memorial of the transaction, then extrinsic evidence that contradicts, adds to, modifies or varies the contract is inadmissible (*KPMG Chartered Accountants (SA) v Securefin Limited* 2009 (4) SA 399 (SCA) par 39; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) par 64–77). The question then becomes: how do you reconcile the parol evidence rule and the *Endumeni* interpretation principles?

Unterhalter AJA endorsed the decision of the Constitutional Court in the *UJ* case and remarked that an expansive approach should be preferred when deciding the admissibility of extrinsic evidence relating to context and purpose to determine what the contracting parties intended (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 39). Therefore, evidence that relates to the purpose and context of a particular contract should be admitted because context is everything (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 40). Importantly, Unterhalter AJA, citing Corbin (*Corbin on Contracts* (1960) 108–110) with approval, noted:

> "The parol evidence rule simply reflects the agreement between the parties that the written document constitutes their exclusive agreement. It supersedes earlier agreements, whether written or oral, and excludes evidence of such agreements. The parol evidence rule is not a rule as to the admission of evidence for the purpose of interpretating the meaning of the written agreement that constitutes the parties' exclusive agreement." (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 44)

Accordingly, the Supreme Court of Appeal in the *UJ* matter erred in giving primacy to the text of the contract to the exclusion of contextual evidence. Words, without context, mean nothing (*Capitec Bank Holdings Limited v Coral Lagoon Investments supra* par 46). Understood in this light, it means

that the parol evidence rule and the *Endumeni* principles may coexist. The decision of the Constitutional Court in *UJ* must not be understood as judicial licence for courts to accept every claim of contextual evidence where such evidence is unmoored in the text and structure of a contract. Context and purpose must be used to clarify the language and structure of a contract.

The parol evidence rule cannot be used as a mechanism for affirming the primacy of the written terms of contract. The parol evidence rule cannot be used to give priority to the text to the exclusion of evidence relating to context and purpose. This was reaffirmed in *Capitec Bank Holdings Limited v Coral Lagoon Investments* (*supra* par 40–45).

It bears reiterating that the parol evidence rule has two components: namely, the interpretation rule and the integration rule (*Johnston v Leal* 1980 (3) SA 927 (A) 943A–B; *Delmas Milling Co. Ltd. v Du Plessis* 1955 (3) SA 447 (AD) 453–455). In terms of the interpretation rule, the court must endeavour to ascertain and determine the meaning of the terms contained in a contract. To this end, as articulated in *KPMG Chartered Accountants (SA) (supra)* par 39, interpretation is not a matter of fact, but rather a matter of law. Accordingly, it is a question for the court to determine and not for witnesses. In terms of the integration rule, a written agreement is the sole and exclusive memorial of the transaction between the parties (*Union Government v Vianini Ferro-Concrete supra* 47). This means that a court may not admit extrinsic evidence relating to the parties' intention where such evidence would have the effect of altering the terms of the contract to which the parties have, in writing, clearly agreed (*Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC* 2013 (3) SA 426 (SCA); Wigmore "A Brief History of the Parol Evidence Rule" 1904 4 *Columbia Law Review* 338; Marston "The Parol Evidence Rule: The Law Commission Speaks" 1986 45 *The Cambridge Law Journal* 192; Posner "Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation" 1997 146 *University of Pennsylvania Law Review* 533; Iyer "The Parol Evidence Rule: Insurance/Contract Law" 2016 16(9) *Without Prejudice*; Ross and Trannen "The Modern Parol Evidence Rule and Its Implications for New Textualist Statutory Interpretation" 1995 87 *Georgetown Law Journal* 195; Klass "Parol Evidence Rules and the Mechanics of Choice" 2019 20 *Theoretical Inquiries in Law* 457; Burnham "The Parol Evidence: Don't Be Afraid of the Dark" 1994 55 *Montana Law Review* 98).

That said, the import of the Constitutional Court's decision is that the parol evidence rule will most probably become a residual rule that identifies the written agreement from which meaning must be attributed. This was recognised and affirmed in *Capitec Bank Holdings Limited v Coral Lagoon Investments* (*supra* par 47). A court will only be able to determine whether the extrinsic evidence sought to be introduced has the effect of contradicting, adding, varying or altering a contract once a court has concluded what the meaning of the contract is. In light of the *Endumeni* injunction in relation to contractual interpretation, the parol evidence rule cannot be used to exclude extrinsic evidence that speaks to the context and purpose of the contract. Evidence will most likely be excluded where it is irrelevant to ascertaining the meaning of the contract.

5 2 *The test to determine whether rights are* delectus personae

Courts have held that rights and obligations espoused in lease contracts are not ordinarily *delectus personae*, particularly where the lease is for a long term. For example, in *Boshoff v Theron* (*supra*), Greenberg JP in an *obiter dictum* held that in a long-term lease agreement a lessor does not expect the obligations to be discharged personally by the lessee throughout the whole lifetime of the contract. The Supreme Court of Appeal relied on this decision as authority for the proposition that rights and obligations in long-term lease agreements, in particular, are not *delectus personae*. The Supreme Court of Appeal erred in two respects. First, the statement was obiter. It cannot therefore be held to be authority for this proposition without a court substantiating its reliance on the decision. Furthermore, on a proper construction of *Boshoff v Theron* (*supra*), Greenberg JP did not hold that provisions in long-term lease agreements are never *delectus personae*. What Greenberg JP observed was that provisions in such agreements are generally not *delectus personae* but there may be instances where they are. This was confirmed by the Constitutional Court (*UJ CC* par 85). The enquiry is not into the nature of the contract – whether it is a long-term lease or some other type of contract. Instead, the inquiry is whether the rights in the contract are so personal that they cannot be ceded because the identity of the creditor makes a substantial or reasonable difference to the debtor. There may be instances where the specific identify of the lessee is of substantial and reasonable importance and relevance to the lessor. This would be in line with the classical statement by Innes CJ in *Eastern Rand Exploration Co Ltd v AJT Nel* (*supra*).

The fact that the contract pertains to a long-term lease does not denude a court of its duty to enquire whether the rights in such a contract are *delectus personae*. If one were to consider the test from the perspective of the debtor, the test has been eloquently outlined in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* (*supra* 112A–D). In that case, Botha JA stated:

> "The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent's obligation vis-à-vis the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation vis-à-vis the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party without the servant's consent because of the nature of the latter's obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them." (author's emphasis)

In short, the test is whether it makes a difference to the debtor whether it is the cedent or the cessionary who is entitled to enforce the contract. The question is not about the type of contract. It is respectfully submitted that the

Supreme Court of Appeal erred in concluding that the contract could be ceded merely because the contract in question concerned a lease. What is essential is this: if the identity of the creditor makes a difference to the debtor, then the rights are *delectus personae*.

Moreover, it appears that the Supreme Court of Appeal conflated two different principles. The Supreme Court of Appeal noted that the lease agreement did not have any express or implied provisions in the contract that barred ATS from ceding the rights contained, and therefore concluded that the rights were not at all *delectus personae* (*UJ SCA* par 11). The Supreme Court of Appeal clearly conflated the question of whether rights were *delectus personae* with a question relating to the existence of a *pactum de non cedendo*, which as described above generally refers to an agreement not to cede. However, the absence of such an agreement does not then mean that the rights are not *delectus personae*. These are two separate enquiries. The Supreme Court of Appeal asked the wrong question, and unsurprisingly, it got the wrong answer.

6 Conclusion

The Constitutional Court's decision in *UJ* is an important decision for two reasons. First, it reconciles the apparent tension between the *Endumeni* triad rules of interpretation and the parol evidence rule, which is still important doctrine in our law. Importantly, it reminds us that contextual evidence should not be excluded merely because it is external to the written contract. The language and text of a contract no longer enjoy primacy. Secondly, the court clarified the test for whether rights are *delectus personae* and the statement of Greenberg JP in *Boshoff v Theron* (*supra*). It is a progressive decision and a step in the right direction in clarifying two key principles of contract law.

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