Endumeni and the Parol Evidence Rule: Do They Coexist?

M Wallis*

Online ISSN
1727-3781

P·E·R
Pioneer in peer-reviewed, open access online law publications

Author

Malcolm Wallis

Affiliation

Honorary Professor, University of KwaZulu-Natal, South Africa

Email

mjdwallis@gmail.com

Date Submitted

6 March 2022

Date Revised

21 August 2023

Date Accepted

21 August 2023

Date Published

2 October 2023

Editor Prof G Viljoen

How to cite this article

Wallis M "*Endumeni* and the Parol Evidence Rule: Do They Coexist?" *PER / PELJ* 2023(26) - DOI http://dx.doi.org/10.17159/1727-3781/2023/v26i0a13383

DOI
http://dx.doi.org/10.17159/1727-3781/2023/v26i0a13383

Abstract

A recent judgment of the SCA in *Capitec Bank Holdings v Coral Lagoon Investments* suggested that the parol evidence rule is likely to become a residual rule of little practical importance in view of the expansive approach to interpretation flowing from the judgment in *Endumeni* and applied by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary*. The article analyses the court's concern in the light of the two judgments and suggests that it is misplaced. The parol evidence rule is still of full force and effect and evidence inadmissible under the rule is not admissible as context in interpreting contracts.

Keywords

Parol evidence; inadmissible; interpretation; *Endumeni*; context; inadmissible parol evidence; not admissible as context; long lease; *delectus personae*.

.....

1 Introduction

In *Capitec Bank Holdings v Coral Lagoon Investments (Capitec)*[1] the Supreme Court of Appeal (SCA) warned that the "parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined." Its concern arose from the "expansive approach" to admitting extrinsic evidence in *University of Johannesburg v Auckland Park Theological Seminary (UJ)*.[2] It thought the latter would lead to irrelevant evidence, inadmissible under the parol evidence rule, being admitted as the context in which to construe the contract. Irrelevant evidence is frequently tendered on the pretext of providing context. Although the SCA has deprecated this,[3] it occurs with depressing – at least for the judiciary – frequency. But this is not always easy to prevent, and admissibility is only in part concerned with preventing unnecessary evidence from being led. Its more important function is to determine whether evidence should be considered in formulating the judgment.

If the SCA's concern were correct, evidence inadmissible because it altered, contradicted, added to or varied the written contract would nonetheless be admissible to interpret the agreement in the very way that the evidence had sought to alter, contradict, add to or vary it. The law does not usually countenance such inconsistency. I suggest that the concern expressed in *Capitec* is unjustified and that the parol evidence rule remains fully operative in its traditional role of excluding evidence that contradicts, alters, adds to or varies a contract that the parties have reduced to writing. However, recent developments in the contextual interpretation of contracts[4] justify reflection

---

* Malcolm Wallis. B Com LLB (Natal) Ph D (UKZN). Senior Counsel and Retired Judge of the Supreme Court of Appeal, Honorary Professor of Law in the University of KwaZulu-Natal. I am extremely grateful to Alfred Cockrell SC and Justice Peter Olsen for their incisive comments on the first draft of this article, which led to some significant revisions, as did the comments of the two anonymous reviewers. Paul Wallis SC drew my attention to the possible issue with para 67 of the Constitutional Court judgment in *University of Johannesburg v Auckland Park Theological Seminary* 2021 6 SA 1 (CC). Any continuing deficiencies are my own responsibility. Email: mjdwallis@gmail.com. ORCiD: https://orcid.org/0000-0003-2917-3274

1 *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* 2022 1 SA 100 (SCA) (hereafter *Capitec*) para 47. An application for leave to appeal was dismissed by the Constitutional Court on the grounds that its jurisdiction was not engaged.

2 *University of Johannesburg v Auckland Park Theological Seminary* 2021 6 SA 1 (CC) (hereafter *UJ*).

3 *KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 4 SA 399 (SCA) (hereafter *KPMG*) paras 38-39; *Van Aardt v Galway* 2012 2 SA 312 (SCA) paras 9-10; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 3 SA 398 (SCA) (hereafter *Blair Atholl*) paras 61-69.

4 For comment on *Capitec*, see Oosthuizen and Hutchison 2021 https://www.inceconnect.co.za/article/thorts-interpreting-contracts-what-has-happened-to-the-parol-evidence-rule--2021-11-19 and Moosajee 2021 published at

on the role of the parol evidence rule. But first, an indication of how the issue arose.

2 The issue in *Capitec*

In December 2006, in an attempt to improve its black economic empowerment (BEE) status, Capitec Bank Holdings Ltd issued 10 million shares to Coral Lagoon Investments 194 (Pty) Ltd (Coral) and Coral agreed to issue and allot its entire share capital to Ash Brook Investments 16 (Pty) Ltd (Ash Brook), an entity controlled by Regiments Capital (Pty) Ltd (Regiments) and two minority shareholders. In 2019 Regiments entered into a settlement agreement obliging it to pay R500 million to the Transnet Second Defined Benefit Fund (the Fund). The payment would be funded by selling 810 230 Capitec shares. Capitec refused to consent to the sale.

That refusal spawned litigation. Regiments alleged that Capitec's refusal of consent constituted a breach of the subscription agreement and Capitec's duty of good faith under that agreement. It sought an order compelling Capitec to consent. The Fund was joined as a respondent and counter-claimed for a declaration that consent to the sale was not required. Capitec conceded the point and settled with the Fund. Nonetheless Regiments proceeded with its claim. The high court granted an order compelling Capitec to give consent. The SCA had to decide whether Coral required Capitec's consent to sell Capitec shares.

The relevant clause was clause 8.3, which, together with clarificatory insertions by the court, read:

> Save for the provisions of the Facility Letter, should [Coral] sell, alienate, donate, exchange, encumber, or in any manner endeavour to dispose ("sold") any of the [Capitec] Holdings Shares to any entity or person who, in [Capitec] Holdings' opinion, does not comply with the BEE Act and Codes, [Capitec Holdings] will determine the number of [Capitec] Holdings Shares sold and [Coral] will within 30 days after requested thereto by [Capitec] Holdings acquire an equal number of [Capitec] Holdings shares and cause same to be registered in [Coral's] name.

The SCA correctly said that clause 8.3 did not require Coral to obtain Capitec's consent to its selling the shares. If Capitec regarded the sale as one to an entity or person not complying with the *BEE Act*[5] and Codes, it was entitled to request Coral to acquire and register in its name an equal number of shares to those sold. Contextually clause 8.3 stood in contradistinction to other provisions in the same clause that prohibited sales

https://iclg.com/briefing/16757-new-judgment-highlights-importance-of-text-context-and-purpose-in-interpreting-contracts-south-africa#:~:text=The%20parol%20evidence%20rule%20provides,such%20as%20fraud%20or%20duress.

5 The *Broad-Based Black Economic Empowerment Act* 53 of 2003.

of shares in Ash Brook, or sales by Ash Brook of shares in Coral, without Capitec's consent. Neither on its language nor in the context of the agreement as a whole could clause 8.3 be construed as requiring Capitec to consent to a sale of shares by Coral.

Up to this point the SCA followed well-trodden ground in its approach to the interpretation of clause 8.3 on the basis of the judgment in *Endumeni*.[6] It criticised the high court for not making the language of the clause and the provisions of the subscription agreement the starting point in the process of interpretation.[7] The difficulty arose because on previous occasions the parties had acted as if consent was a requirement under the contract and Coral claimed this was relevant to the proper construction of clause 8.3. By adducing and seeking to rely on this evidence Coral sought to add a requirement of prior consent to a sale to the provisions of clause 8.3.

That was plainly in conflict with the parol evidence rule. Despite reservations the SCA admitted the evidence on the basis that *UJ* mandated it to do so, but held that it did not displace the clear meaning derived from the text and the agreement's purpose of increasing Capitec's black shareholding in line with its obligations under the *BEE Act* and Codes.[8]

The court engaged with the judgment in *UJ* and its approach to the admissibility of evidence for the purpose of interpreting contracts and statutes. It expressed concern that evidence inadmissible under the parol evidence rule would be admitted as providing context and that this would lead to the parol evidence rule playing a much reduced role.[9] Whether that view is justified is the subject of this article and requires consideration of what was decided in *UJ*.

3 The issue in *UJ*

In 1993 the University of Johannesburg concluded a co-operation agreement with the Auckland Park Theological Seminary (ATS) to teach each other's students some courses towards theology degrees. This required the consent of the Minister of Education.[10] In 1995 the university

6 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) para 18 (hereafter *Endumeni*).

7 *Capitec* para 26. Echoing para 18 of *Endumeni* it said: "*Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."

8 *Capitec* paras 53 and 56.

9 *Capitec* para 47. Oosthuizen and Hutchison seem to take this at face value.

10 Section 10(B)(1) of the *Universities Act* 61 of 1955 provided that: "Notwithstanding anything to the contrary in any Law contained in relation to the seat of the university, a council may with the consent of the Minister … enter into agreements in connection

obtained permission from the Minister of Education to conclude a thirty-year lease of land with ATS to enable ATS to construct a theological college. No college was built. In 2011, without obtaining the consent of the university, ATS ceded its rights under the lease in favour of a third party that wished to use the property to construct a religious-based school for primary and high school learners. The university treated this as a repudiation of the lease, cancelled it and sought repossession.

The lease was the sole memorial of the parties' agreement, but was silent about ATS ceding its rights. The university relied on the background to its conclusion to contend that the identity of the lessee was personal to it and that the lease involved a *delectus personae*, precluding ATS from ceding its rights. That contention was upheld in the high court,[11] on appeal to the full court,[12] and in the Constitutional Court. It was rejected by the SCA[13] on the basis that all the evidence relied on to establish this was irrelevant and inadmissible in terms of the parol evidence rule. What was the evidence relied on by other courts and held by the SCA to be inadmissible?

At first instance the court concentrated on clause 8.1 of the lease providing that:[14]

> The leased premises shall be used by the lessee for educational, religious and related purposes, the establishment of a campus for education, teaching, research, training, offices and student facilities.

It accepted that this meant that the premises could be used only for higher education purposes, that is, education at a tertiary level, which the cessionary did not intend to provide, but did not consider whether this invalidated the cession. Pivotal weight was attached to the relationship established by the co-operation agreement; the lengthy negotiations for the lease; the request for Ministerial consent saying that the university wished to lend a hand to the ATS in training pastors of the Apostolic Faith Mission; and to correspondence in which the representative of ATS described the relationship between UJ and ATS as an academic partnership.

---

with the training of students … with the council or governing body of an institution whose purpose is to provide a division of higher education."

11 *University of Johannesburg v Auckland Park Theological Seminary (Pty) Ltd* (39717/2012) [2017] ZAGPJHC 382 (10 March 2017).

12 *Auckland Park Theological Seminary v University of Johannesburg* (A5017/17) [2018] ZAGPJHC 490 (4 July 2018).

13 *Auckland Park Theological Seminary v University of Johannesburg* (1160/2018) [2020] ZASCA 24 (25 March 2020*)* (hereafter *UJSCA*).

14 The agreement was concluded in Afrikaans and read: "Die Huurterrein sal gebruik word deur die huurder vir opvoedkundige godsdienstige an aanverwante doeleindes, die oprigting van kampus vir onderwys, onderrig, navorsing, opleiding, kantore and studentefasiliteite." The translation is my own and differs slightly, but not materially from that in *UJ*.

On appeal to the full court the majority likewise stressed the terms of the request for ministerial consent and held that the cessionary's proposed use of the property was contrived and artificial in the light of the provisions of clause 8.1 of the lease. It concluded that the university and ATS were "operating in tandem and their functions and goals intertwined". Furthermore the consequence of the cession would be that the cessionary enjoyed the rights under the lease, while ATS remained bound by the obligations, which it regarded as insupportable. The rent for the entire period, including any extension, had been paid upfront in a lump sum. However, as the facts of the case demonstrated, separating the obligations under the use clause from the entitlement to use and occupation of the property was problematic.

The Constitutional Court largely adopted this reasoning.[15] It started with clause 8.1 of the lease and, in the light of the request for ministerial approval and the attendant permission, held that it meant that ATS would use the leased premises to establish an institution of higher learning. It stressed the statement that purpose of the lease was to extend a helping hand to enable ATS to build a theological college. Negotiations took place against the background of the co-operation agreement. The rental was paid in a single lump sum and no further rental was payable if ATS exercised its right to extend the lease. ATS was paid R6,5 million for ceding its rights. The court held that it was improbable that ATS would have been entitled to profit from the lease by ceding its rights to a third party.

The Constitutional Court said that admitting this evidence did not conflict with the parol evidence rule,[16] because it did not seek to add to, vary, modify or contradict the terms of the lease. The evidence gave context and background to the conclusion of the lease and was relevant to whether the rights conferred on ATS were personal to it. Its approach differed from that of the SCA, because the latter thought that the evidence was not a matter of context and background but was directed at amending the lease by inserting a clause prohibiting ATS from ceding its rights under the lease – a *pactum de non cedendo*. That necessitates an examination of the parol evidence rule.

4 The parol evidence rule

The parol evidence rule states that, when the parties have reduced their agreement to writing, the writing is the sole memorial of the agreement and

15 *UJ* paras 94-103.

16 *UJ* para 93: "The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement ...".

no evidence is admissible to contradict, alter, add to or vary its terms.[17] It applies where the writing, whether contained in one or more documents,[18] is intended by the parties to be the sole repository or memorial of their agreement. If there is a partial integration of the parties' agreement, so that it is constituted partly by a written agreement and partly by a prior or contemporaneous oral agreement, the rule applies to the written portion of the agreement to preclude evidence of any matter that would contradict, alter, add to or vary its terms.

Whether the parties have embodied their contract wholly or partially in writing is a threshold issue, because it determines whether and to what extent the rule applies. A written lease containing a clause accepting the buildings on the leased property in the condition they were in at the commencement of the lease and imposing substantial maintenance obligations, was accompanied by a letter stating that the maintenance clause would not apply until certain defects had been remedied. Proof of the letter was not excluded by the parol evidence rule.[19] Similarly the rule did not preclude proof of an agreement that an indeterminate power of attorney to administer a client's affairs while the latter was overseas would lapse on the client's return.[20] The oral agreement would have contradicted the power of attorney and been inadmissible only had the power said it was indefinite.

Contrary to the suggestion in *Capitec*,[21] the parol evidence rule does not serve to identify the parties' contract but states the consequences of embodying the contract in a document or documents. It renders the written contract immune to contradiction, alteration, addition or variation by reference to extrinsic evidence, even cogent evidence such as a recording of the parties' conversation agreeing to depart from the written agreement. Unless the evidence can be invoked to rectify the contract or to allege fraud or misrepresentation, it is legally irrelevant and must be excluded.[22]

The rule applies only once the agreement has been identified. Corbett JA in *Johnston v Leal*[23] said it served a twofold purpose that he described as the "integration" rule and the "interpretation" rule. Where the parties reduce their

17 *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 (hereafter *Vianini Pipes*) 47.

18 *Capital Building Society v De Jager; De Jager v Capital Building Society* 1963 3 SA 381 (T) 382B-383E.

19 *Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty Ltd* 1962 3 SA 143 (A).

20 *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A) 26D-27D.

21 *Capitec* para 47.

22 Strictly speaking it is not a rule of evidence.

23 *Johnston v Leal* 1980 3 SA 927 (A) 943A-B. On the "second" branch of the rule he cited Schreiner JA in *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) 453-455 on the circumstances in which extrinsic evidence was admissible in the process of interpreting a contract. However, Schreiner JA did not describe this as a branch of the parol evidence rule.

agreement to writing as the exclusive memorial of their transaction, the integration rule excludes extrinsic evidence contradicting, altering, adding to or varying the written agreement. The "interpretation" rule concerns the admissibility of extrinsic evidence to interpret the contract.[24] Our cases had not previously treated this as part of the parol evidence rule. Its origin appears to lie in American jurisprudence.[25] But even there it occasions conceptual difficulties. Wigmore appears to be the first to have used the word "integration" to describe the process of forming the agreement.[26] As long ago as 1899 he wrote that:

> [W]ithin the scope of the rule are usually treated two distinct bodies of doctrine, which do not properly touch each other, except in certain relations at certain points. One of these concerns the constitution of legal acts, the other concerns their interpretation; and the difficulties of principle and lines of precedents for these two subjects are as a whole entirely distinct, and cannot properly be subsumed under any single generalization or rule.

Prior to *Johnston v Leal* references to the "integration rule" identified it with the parol evidence rule articulated in *Vianini Pipes*.[27] So do subsequent cases,[28] and it has been said that one must not conflate and confuse three separate things, namely: "the integration (or parol evidence) rule; the rules relating to interpretation; and the *Shifren* rule".[29]

Johnston v Leal has been cited repeatedly for its exposition of the parol evidence rule in the narrow form of the integration rule and its approach to statutes requiring certain contracts to be in writing. The proposition that the rules of interpretation form a separate branch of the parol evidence rule has not been adopted in practice or in other judgments.[30] Treating the rules of

---

24 *Johnston v Leal* 1980 3 SA 927 (A) 943A-B. Oosthuizen and Hutchinson describe this as the traditional view of the rule, but I disagree for the reasons set out in the text.

25 Wigmore 1899 *ALR* 339; Wigmore 1904 *Colum L Rev* 338. Posner 1997 *U Pa L Rev* 534 treats the rule as concerned only with interpretation. The UK Law Commission *Working Paper No 70* on the Parol Evidence Rule published on 26 July 1976 (paras 4 and 5) treats it as a rule generally governing the use of extrinsic evidence, but confines its analysis to the traditional formulation of the rule as excluding evidence to contradict, vary, add to or subtract from the terms of a written contract.

26 Wigmore 1899 *ALR* 340-341, where he wrote: "This process of reducing the act's terms to a single memorial, whether by requirement of law, or by intention of the parties, may be, for convenience of discussion be termed Integration i.e. the constitution of the whole in a single memorial."

27 See for example *Venter v Bircholtz* 1972 1 SA 276 (A) 282B-H; *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 3 SA 16 (A) 25H-26F, where the "integration rule" is linked to the parol evidence rule as enunciated in *Vianini Pipes*.

28 *Philmatt (Pty) Ltd v Mosselbank Developments CC* 1996 2 SA 15 (A) 23A-B; *KPMG* para 39; and *Blair Atholl* para 65.

29 *Telcordia Technologies Inc v Telkom SA Ltd* 2007 3 SA 266 (SCA) para 115.

30 It is necessary to enter a *caveat* arising from *UJ* paras 88 to 91. These are confusing because on the one hand they say that the essence of the rule is captured in *Vianini Pipes* (para 88), but then say it has two sub-rules (paras 89-90), one of which has no relationship to what was said in *Vianini Pipes*. These appear to be dicta of a

interpretation as part of the parol evidence rule is as confusing now as it seemed to Wigmore and I suggest should not be pursued. While the integration and interpretation rules identified by Corbett JA both concerned the use of extrinsic evidence, their different purpose and the lack of any significant overlap between the two spheres in which such evidence may be tendered justifies treating them separately, with the parol evidence rule being confined to the exclusion of evidence directed at contradicting, altering, adding to or varying written agreements.[31]

5 The problem[32]

It is not easy to understand how the problem that concerned the court in *Capitec* arose. The judgment contrasted the "expansive approach to interpretation laid down in *Endumeni*" with the exclusionary effect of the parol evidence rule as a rule relating to the integration of the agreement.[33] It expressed concern that if evidence excluded under the parol evidence rule were admitted as relevant to context, under *Endumeni* as endorsed by the Constitutional Court in *UJ* – which it regarded as inevitable – then the role of the parol evidence rule has been significantly diminished. This article is addressed to that question and suggests that the concern is misplaced. But it is first necessary to note that it was not a problem confronting the court in *Capitec*.

On two prior occasions Coral sought and obtained Capitec's consent to its selling Capitec shares. On this occasion, when Coral sought consent to sell the shares, it was refused and Capitec said that Coral could not proceed. The Fund's counter-application led to a *volte face*. It is important to recognise that this was evidence of subsequent conduct by the parties, not evidence of context,[34] which is evidence of matters surrounding and

general nature rather than a considered endorsement of the distinction drawn by Corbett JA. Van der Merwe "Evidence" para 167 gives its traditional form, and does not mention it when dealing with the admissibility of extrinsic evidence in aid of interpretation in para 176. The discussion of the principles of interpretation of contract in Van Rensburg, Lotz and Van Rhijn "Contract" para 351 is not based on these being part of the parol evidence rule. Schmidt and Rademeyer *Law of Evidence* 1-9 para 1.2.4 refer to the parol evidence rule as a rule of substantive law, not evidence, governing the integration of the memorial of the parties' agreement. Schwikkard and Van der Merwe *Principles of Evidence* 37-41 refer to both the "integration" rule and the "interpretation" rule, but their only comment is to say that the latter does not form part of the law of evidence.

31 I doubt whether *Endumeni* abolished the "interpretation rule" as suggested in *Padayachee v Adhu Investments CC* 2016 2 All SA 555 (GJ) para 114. If it did, that was inadvertent.

32 The full discussion by the SCA is to be found in *Capitec* paras 38-52.

33 *Capitec* para 38. So was *UJ* – see paras 90-92. The reference in *UJ* para 90 to the "latter facet" is an error and should read "former facet". It cannot refer to the interpretation facet as the discussion that follows relates to the integration facet.

34 As to context, see Wallis 2019 *PELJ* 13-17.

relevant to the formation of the contract. Evidence of subsequent conduct in implementing an agreement may be admissible to assist in choosing among various meanings by showing how reasonable business people interpreted the contract. Coral relied on *Comwezi*[35] and the long-established rule that the conduct of the parties in implementing their agreement might be taken into account in resolving any ambiguity in meaning,[36] to argue that clause 8.3 required consent for a sale of shares by Coral.

In *Comwezi* it was contended that reliance on evidence of subsequent conduct was no longer permissible in the light of *Endumeni*. This was rejected on the basis that such evidence was relevant to how reasonable business people would construe the provision in question and hence relevant to the selection of the appropriate meaning from among those postulated by the parties. But the court warned:[37]

> That does not mean that, if the parties have implemented their agreement in a manner that is inconsistent with any possible meaning of the language used, the court can use their conduct to give that language an otherwise impermissible meaning.

The problem with Coral's argument was that there was no available construction of the language of clause 8.3 that would require Capitec's consent to a sale of shares. Coral's interpretation sought to insert such a qualification, but a provision permitting a sale without consent cannot be interpreted as prohibiting a sale without consent.

Two principles emerge from *Comwezi*. The first is that the manner of implementing the agreement may assist the court in selecting among different available meanings of the contract. The second, following inexorably from the first, is that such evidence is inadmissible and irrelevant if it is inconsistent with all available meanings of the language used. That is an application of the exclusionary effect of the parol evidence rule. In *Capitec* clause 8.3 was incapable of being interpreted as requiring consent from Capitec to a sale by Coral of its shares. The fact that the parties had conducted themselves on the basis that it did was neither relevant nor admissible in regard to its proper construction.

Although therefore strictly speaking the issue did not arise (and hence the entire discussion is *obiter dictum*), the SCA considered whether the exclusionary effect of the parol evidence rule was reconcilable with admitting evidence to identify the context and purpose of the contract under

---

35 *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* (759/2011) [2012] ZASCA 126 (21 September 2012) (*Comwezi*) para 15.

36 *Breed v Van den Berg* 1932 AD 283 292; *Shill v Milner* 1937 AD 101 110-111; *Shacklock v Shacklock* 1949 1 SA 91 (A) 101; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 3 SA 1 (A) 12F-H.

37 *Comwezi* para 15.

Endumeni. It saw difficulties in reconciling the two, although the Constitutional Court in *UJ* had not, saying:[38]

> "The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement…"

This passage prompted the SCA's reflections on the topic.[39]

The SCA decried the fact that *Endumeni* has "become a ritualised incantation … often used as an open-ended permission to pursue undisciplined and self-serving interpretations." It rightly said that *Endumeni* provided no warrant for this. Many contracts, especially commercial contracts, are carefully structured and drafted and interpretation must commence with that structure and text. Though context is fundamental it is not a "licence to contend for meanings unmoored in the text and the structure". Its role is to aid in elucidating the text.[40] It was concerned that the approach in *UJ* afforded no priority to the text of a provision, notwithstanding that *Endumeni* said this was the inevitable point of departure.

The court considered whether the subjective intentions of the parties or the objective manifestation of their consensus determines the contract's meaning. The value of objectivism provided the rationale for the parol evidence rule and it referred[41] to Corbin's view that the parol evidence rule reflects the parties' agreement that the written document constitutes their agreement but has nothing to do with the interpretation of that document. While it saw the force of the observation that the identification of the contract is distinct from its interpretation, its conclusion was that in practice evidence excluded under the parol evidence rule would be admissible to interpret the contract. and the role of the parol evidence rule would be significantly diminished. The reason it gave was that:[42]

> Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason.
>
> *It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract.* Since meaning is ascertained by recourse to a wide-

38 *UJ* para 92.
39 *Capitec* para 42.
40 *Capitec* paras 48-51.
41 *Capitec* para 44.
42 *Capitec* para 47.

> ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.[43]

6 Discussion

The problem lay in the perception that *UJ* necessarily results in evidence excluded by the parol evidence rule re-emerging and becoming admissible to provide context in the interpretation of the contract. While it is commonplace for evidence that is inadmissible for one purpose to be admissible for another and different purpose, the SCA's concern was that once the evidence was admitted as part of the context and taken into account in the process of interpretation, it would be otiose to hold it to be inadmissible under the parol evidence rule. One way or the other it would have played its role in determining the meaning of the provision in question. Was this justified?

The key proposition, emphasised in the passage quoted at the end of the previous section, is that the parol evidence rule cannot be considered and applied until the contract has been construed. But this is inconsistent with the stress the judgment placed upon the need for interpretation to start with the text and not with meanings "unmoored in the text".[44] It inverts the enquiry because our courts have repeatedly said that the language used must be capable of bearing the meaning contended for.[45] The necessary antecedent issue is to determine whether the relevant provision is capable of bearing the construction for which the party tendering that evidence contends. This must take into account other admissible extrinsic evidence, but exclude the disputed material. If the provision is incapable of bearing the meaning contended for, then the disputed evidence is an endeavour to add to, vary, modify or contradict the terms of the contract and is inadmissible under the parol evidence rule. The sequence of the legal analysis is fundamental. The first stage is whether the provision in question

---

43 Emphasis added.

44 *Capitec* paras 50 and 51.

45 Even in constitutional matters, where the approach to interpretation in favour of a constitutionally compliant construction is required to be generous, the provision must be "reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained." *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 24. The court has noted that "(l)imits must … be placed on the application of this principle". *Centre for Child Law v Director-General, Department of Home Affairs* 2022 2 SA 131 (CC) para 27. For an example of the court holding that an interpretation was not open on the language, see *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC) paras 28 and 29. "The purposive or contextual interpretation of legislation must, however, still remain faithful to the literal wording of the statute." *Chisuse v Director-General, Department of Home Affairs* 2020 6 SA 14 (CC) para 52.

is capable of bearing the construction contended for. If it is, then the evidence is admissible as evidence of context. If not, its only function would be to add to, vary, modify or contradict the terms of the contract. That would render it irrelevant and inadmissible.

The point is illustrated by the clause in issue in *Capitec*.[46] It dealt with any disposition of the Capitec shares by Coral to a third party, but did not say that Coral needed Capitec's consent to such disposal. If Capitec thought that the acquiring party did not "comply with the BEE Act and Codes", it was entitled to require Coral to replace the shares with a corresponding number of shares. An obligation to obtain Capitec's prior consent was inconsistent with this. Capitec's consent was expressly required for disposals by Ash Brook of shares in Coral and disposals of shares in Ash Brook itself. There was no equivalent provision governing the disposal of Capitec shares. The text was incapable of supporting the construction of clause 8.3 as requiring Capitec's consent to Coral's disposing of these shares.

That interpretation could not be circumvented by invoking context. After all, "interpretation is the process of attributing meaning to the words used in a document".[47] If the words in the document when read without the tendered material are incapable of bearing the suggested meaning, a process of interpretation cannot give them that meaning. The Constitutional Court has said that interpretation "is limited to what the text is reasonably capable of meaning."[48] In the colourful metaphor of Lord Bingham[49] a statute applicable to dogs can never be applied to cats.

This holds true even though constitutional norms dictate an expansive approach to interpretation. *Goedgelegen Fruits*[50] held that courts must pay attention to context "even when the ordinary meaning of the provision to be construed is clear and unambiguous", citing a statement in those terms in *University of Cape Town v Cape Bar Council*.[51] That concerned a statutory requirement that admission as an advocate required the applicant to have completed one course towards a bachelor's degree in each of the English, Afrikaans and Latin languages. Was this satisfied by whatever course a university chose to prescribe for a degree, or did it contemplate a university course at a post-matric level? Clear and unambiguous language imposed

46 *Endumeni* para 18: "The inevitable point of departure is the language of the provision itself."

47 *Endumeni* para 18.

48 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 24.

49 *R (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 All ER 113 (HL) para 9.

50 *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 6 SA 199 (CC) para 53.

51 *University of Cape Town v Cape Bar Council* 1986 4 SA 903 (A) 914D-E.

the requirement that the university prescribe the course for a bachelor's degree, but what did this require? The court turned to context for its conclusion that a post-matric course at university level was required, something that was plainly open on its language.

Once extrinsic evidence is excluded under the parol evidence rule because it contradicts, alters, adds to or varies the language of the document, it cannot re-emerge as context in the interpretation of the document. It is admissible if rectification is sought, but otherwise it is excluded not because it cannot prove the relevant facts but because a rule of substantive law says it is irrelevant and should be disregarded.[52] Permitting reliance on an inadmissible variation agreement as "context" for the written agreement in order to "interpret" the latter in accordance with the inadmissible agreement is insensible.[53]

The application of the parol evidence rule is usually straightforward, although there will always be marginal cases where opinions may legitimately differ. The extrinsic evidence is measured against the language of the contract and excluded if it is inconsistent with it. Thus, where an agreement stipulated for payment at a particular rate for the provision of labour broking services, proof of an alleged oral agreement to pay a higher rate was excluded by the parol evidence rule.[54] Evidence that the lessee of office equipment believed that ownership of the equipment would pass to it on expiry of the lease was inadmissible where the lease provided that the lessor remained the owner of the equipment and that the lessee was obliged to return it.[55] Proof of a warranty that buildings were free from damp was held inadmissible where the sale agreement contained a voetstoots clause.[56] The excluded evidence could have no bearing upon the interpretation of the written agreement.

Applying the rule is more complicated where it is sought to prove an agreement that is distinct from the written agreement and capable of standing with it,[57] as in *Du Plessis v Nel*.[58] Schreiner JA and Van den Heever JA proposed different tests to identify when proof of a collateral

52 Wigmore 1899 *ALR* 337-338; *Venter v Bircholtz* 1972 1 SA 276 (A) 282A-D. The view that the rule is a matter of substantive law is contrary to earlier authority (see *Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd* 1962 3 SA 399 (W) 403) but appears to be the prevailing view.

53 *Venter v Bircholtz* 1972 1 SA 276 (A) 286B-G in regard to an oral arrangement that the purchaser would have time to pay the balance of the purchase price.

54 *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 1 SA 196 (SCA) para 13.

55 *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid A House* 2013 3 SA 426 (SCA) paras 16-23.

56 *Le Marchand v Creeke* 1953 1 SA 186 (N) 188A-C.

57 Usually referred to as a collateral agreement.

58 *Du Plessis v Nel* 1952 1 SA 513 (A).

agreement was precluded by the parol evidence rule. Schreiner JA cited[59] the approach by Wigmore of enquiring whether the written agreement dealt at all with the particular element of the extrinsic agreement. If mentioned, covered or dealt with in the writing then, absent an explanation for its exclusion. the writing was presumed to embody the entire transaction. Van den Heever JA's approach was more stringent:[60]

> If you wish to prove that anything less or more than that which is promised in the written contract was promised in an oral contract prior to or simultaneously with the execution of the former, you seek to contradict, vary, add to or subtract from the terms of the instrument …

The majority held that a sale agreement providing for the ownership of the property to pass, without mentioning any encumbrance, was contradicted by an oral agreement that the purchaser would permit a right of access to the seller's shop across the boundary of his property.

The division of views in *Du Plessis v Nel* illustrates that proof of collateral agreements may occasion difficulties, but those difficulties are unrelated to a broad or narrow approach to the admissibility of evidence to provide context in interpretation. With collateral agreements the issue is primarily whether the performance of the collateral agreement would infringe upon the provisions of the written agreement. If it would, the parol evidence rule excludes proof of the collateral agreement. If it would not, the collateral agreement can be enforced on its own terms. The interplay between the two may influence the interpretation of one or both, but that hardly matters.[61]

The parol evidence rule permits proof of a collateral agreement that does not contradict, alter, add to or vary the written agreement, but not otherwise. It matters not whether the inadmissible agreement was concluded in the course of negotiations or separately. Unless a case of rectification can be advanced – and such cases are rare – then proof of the collateral agreement is precluded. Advancing the same agreement as evidence of context for the written agreement is equally impermissible. Its path is blocked by a rule of law that says it is legally irrelevant. As the facts of *Capitec* demonstrate, such evidence always aims to contradict, alter, add to or vary the contract, and that is impermissible.

The party seeking to lead such evidence is caught on the horns of a dilemma, where their lawyers must choose one of two inconsistent courses of action. If they claim that there was a collateral agreement on an issue *dehors* the document, it must be a collateral agreement that does not contradict, alter, add to or vary the written agreement. Like rectification,

---

59 *Du Plessis v Nel* 1952 1 SA 513 (A) 530.

60 *Du Plessis v Nel* 1952 1 SA 513 (A) 538.

61 As with two related written contracts. *Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd* 2005 5 SA 276 (SCA) paras 22 and 23.

such an agreement must be pleaded. Evidence will be admissible to prove it, but may ultimately be excluded under the parol evidence rule. There is no similar obligation to plead evidence of context for the purpose of interpretation, but then it may not be put forward based on an agreement, because that will fall foul of the parol evidence rule. An attempt to run both cases in the alternative is akin to a rider mounted on two horses heading in different directions. The evidence will not be credible, much less admissible, for either purpose. Courts cannot prevent attempts to do this, but that will not result in evidence excluded under the parol evidence rule becoming admissible to interpret the agreement. It will be inadmissible for both purposes. Where neither rectification nor a permissible collateral agreement is pleaded, evidence contradicting, altering, adding to or varying the written agreement should be excluded by the judge when tendered.

Whether viewed from the perspective of the parol evidence rule or from the approach to interpretation set out in *Endumeni* and repeatedly endorsed by both the SCA and the Constitutional Court,[62] the evidence of the parties' previous conduct when dealing with sales of Capitec shares by Coral was irrelevant and inadmissible because it was contrary to any possible meaning of the text of their agreement.[63] The SCA thought that *UJ* dictated the opposite result. It is submitted that this was incorrect and arose from a misperception of what was in issue in *UJ*.

7 The decision in *UJSCA*

Rights under a contract may be ceded subject to two exceptions, namely where the cedent is a *delectus personae* in relation to the other contracting party or where the parties stipulate otherwise in their contract. Innes CJ in *East Rand Exploration Co v Nel*,[64] said:

> … [S]peaking generally, the question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may, by our law, be freely ceded.

The same principle was stated in *Friedlander v De Aar Municipality,*[65] namely that:

> *Prima facie,* all contractual rights can be transmitted unless their nature involves a *delectus persona,* or the contract itself shows that they were not intended to be ceded.

62 *UJ* para 64.
63 *Comwezi* para 15.
64 *Eastern Rand Exploration Co Ltd v Nel* 1903 TS 42 53.
65 *Friedlander v De Aar Municipality* 1944 AD 79 93.

In *UJ* because the contract was silent on cession the only issue was whether the exception of *delectus personae* applied.

A party to a contract will be a *delectus personae* if the cession of its rights under the contract would make any reasonable or substantial difference to the other party by virtue of the personal nature of the relationship created by the contract. Whether a contract involves a *delectus personae* is said to be a matter of interpretation[66] in which "all the circumstances must be taken into account".[67] Generally speaking the focus is on the effect such a cession would have on the obligations of the debtor.[68] If whether the cedent or the cessionary is entitled to enforce performance of the debtor's obligations makes a difference to the debtor then the cedent is a *delectus personae*.[69] The nature of the difference will vary, but it may include the identity of the party to whom performance was owed, where circumstances show that the debtor intended performance to that person alone and no-one else.[70] More usually it arises from the performance becoming more onerous or from the separation of that performance from counter-performance due by the cedent.[71]

Neither the cases nor the commentators have endeavoured to place this rule with its exceptions in any particular juristic pigeonhole. There are obvious similarities with an implied term, that is, a term implied by law in all contracts, subject to the right of the parties to vary or exclude its operation.[72] That seems consistent with judgments saying that whether a contracting party is a *delectus personae* is a matter of interpretation of the contract. A tacit *pactum de non cedendo* may be implied in some instances of *delectus personae*,[73] but it is unnecessary to go that far or to satisfy the tests for a tacit term in order to hold that the contract involves a *delectus personae*. The difficulty with any tacit term is its indeterminate nature. If notionally inserted in a contract it would read:

---

66 *Dettmann v Goldfain* 1975 3 SA 385 (A) 394H-395G.

67 Per Schreiner JA in *Hersch v Nel* 1948 3 SA 686 (A) 693.

68 *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 1 SA 100 (A) 112E-I.

69 *UJ* para 100. *Propell Specialised Financial Services (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* 2019 2 SA 221 (SCA) (hereafter *Propell*) paras 36-38.

70 Such as the right of a former spouse to receive maintenance. That arises from the nature of the obligation and the fact that it was undertaken in respect of a specific person and no-one else. *Schierhout v Union Government* 1926 AD 286 291; *Williams v Carrick* 1938 TPD 147 156 and *Hodd v Hodd; D'Aubrey v D'Aubrey* 1942 NPD 198 207. The position is similar in the case of a personal servitude. *Willoughby's Consolidated Company Ltd v Copthall Stores Ltd* 1913 AD 267 282.

71 As in *Propell*.

72 An implied term arises by operation of law and a tacit term is based upon the actual or imputed intention of the parties. *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A) 531D-533B.

73 Lubbe "Cession" para 165.

> Party A may cede the rights conferred on it in terms of this agreement, unless it is a *delectus personae* in relation to Party B.

However, a clause saying that rights may or may not be ceded, depending on whether the cedent is a *delectus personae*, provides no answer to whether cession is permissible. An implied term serves to define the rights and obligations of the parties, not to leave them unclear. The analogy with an implied term is therefore unsatisfactory.

A preferable alternative is that this is simply a rule of law governing generally the cession of contractual rights and requiring a factual enquiry based on but not restricted to the interpretation of the contract. Sometimes the subject matter of the contract necessarily creates a *delectus personae*, as with a claim for maintenance or a personal servitude. Sometimes that possibility is excluded, as with a lease or an option concluded with a person and the person's "successors in title or assigns".[74] It may be a matter of inference from the contract, as where credit has been given for payment of the purchase price and performance is dependent on the creditworthiness of the other contracting party.[75] Ultimately it is a matter of the circumstances of the particular case. Wessels says that the longer the period of a lease "the greater is the presumption" that the parties intended the rights of the tenant to be transmissible, but added that this is where there is no *delectus personae*.[76] The presumption is sensible where the lessee is a natural person who may not survive for the period of the lease. Its force is greatly diminished with a juristic person.

The evidence establishing that a contracting party is a *delectus personae* may extend beyond what is admissible or relevant to the interpretation of the contract, that is, the meaning of the words used in the contract. Wessels illustrates that with two examples relating to contracts of work and labour.[77] The right to perform the work may be ceded if its performance does not require any special skill or knowledge.[78] However, a contractor selected because of their special skills, financial soundness or other personal attributes will be a *delectus personae* and may not cede the contract, even to someone equally competent. Proof of selection because of personal attributes will emerge from evidence *de hors* the contract. A Georgian family could choose between Reynolds and Gainsborough to paint a family

74 *Eastern Rand Exploration Co Ltd v Nel* 1903 TS 42 a contract with E and their "order, successors, heirs or assigns". *Hersch v Nel* 1948 3 SA 686 (A) 692 per Schreiner JA: "So if an offer is made by A to B and his assigns, A's intention is clear that B may pass the offer on to C, who may make a binding contract with A by notifying his acceptance to the latter."

75 *Hersch v Nel* 1948 3 SA 686 (A) 693.

76 Roberts *Wessels' Law of Contract* para 1739.

77 Roberts *Wessels' Law of Contract* para 1718.

78 *Henderson v Hanekom* (1903) 20 SC 513 524.

portrait, but having chosen Reynolds would have been alarmed if Gainsborough arrived for the sittings claiming a cession of the commission. Therefore, whether the contractor is or is not a *delectus personae* will often be capable of being established only by extrinsic evidence having little or no bearing on the proper construction of the contract. The admissible extrinsic evidence on this point will extend further than that which is admissible in terms of *Endumeni*. That explains why Schreiner JA in *Hersch v Nel* stressed the need for all the circumstances to be taken into account, in an era where extrinsic evidence was not easily admitted for the purpose of interpretation.

The statement in *UJ* that:[79] "evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract *and* evidence of the context in which a contract was concluded" is explained by the fact that the evidence admissible to identify whether the cedent is a *delectus personae* is not confined to that which would be admissible to interpret the contract. Nothing indicates that the court intended to abandon the rule that extrinsic evidence of the pre-contractual negotiations between the parties is inadmissible to interpret the contract.[80] It emphasised that the nature of the *delectus personae* enquiry is "whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it."[81] That is necessarily a broader enquiry and a different task from the exercise of interpreting a contract.

The Constitutional Court concluded that the evidence summarised above in part 3 meant that it would make a difference to the university whether ATS or the cessionary was entitled to enforce the right of use and occupation under the lease. ATS was accordingly a *delectus personae* and not entitled to cede its rights under the lease. Whether that conclusion was correct on the facts is neither here nor there for the present purposes. The SCA held that same evidence to be inadmissible by virtue of the parol evidence rule.[82] Its reasons for doing so are important.

The judgment in *UJSCA* is terse and contains the following unobjectionable propositions. The parol evidence rule (integration rule) remains part of our law. The rule excludes extrinsic evidence having the effect of contradicting, altering, adding to or varying a written contract constituting the sole

79 *UJ* para 67.

80 *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) 454G-H, reaffirmed in *KPMG* para 39; *Van Aardt v Galway* 2012 2 SA 312 (SCA) para 9; and *Blair Atholl* para 77.

81 *Eastern Rand Exploration Co Ltd v Nel* 1903 TS 42.

82 The Constitutional Court seemed confused over the basis upon which this evidence was excluded. In para 90 it said that the SCA relied on the interpretation facet of the parol evidence rule and in para 92 that it relied on the integration facet. It was plainly the latter, that is, the parol evidence rule.

memorial of an agreement. *Prima facie* all contractual rights can be transferred by cession, unless their nature involves a *delectus personae* or the contract itself shows that they were not intended to be ceded.[83]

The crux of the decision lies in the reference to a passage from *Boshoff v Theron*[84] where Greenberg JP said that under a long lease for 99 years it was not expected that the lessee would carry out its obligations for the entire period and that there is therefore no *delectus* personae. This led the SCA to conclude that:

> [9] … *A tenant under an urban tenement may accordingly cede the rights under a lease without the consent of the landlord, unless the terms of the lease forbids the tenant from doing so.*
>
> [10] Here, there was nothing in the lease itself that shows that ATS' rights under the lease rights were not intended to be ceded. UJ sought to meet that difficulty by adducing oral evidence, under the guise that such evidence was being introduced as to context. Properly construed, however, such evidence was introduced to add to, vary or contradict the general words of the lease. By virtue of the integration or parol evidence rule, such evidence was plainly inadmissible and should have been disallowed … .[85]

Relying on *Boshoff v Theron*, the SCA concluded as a matter of law that rights under long leases of urban tenements can be ceded, unless the lease specifically prohibits cession.[86] As the lease contained no such provision it followed that the lessee could cede its rights under the lease. Accordingly the evidence introduced for the purpose of showing that ATS was a *delectus personae* and that its rights could not be ceded contradicted the lease and was inadmissible under the parol evidence rule.

With respect, however, that statement of law went too far. The correct position is that rights under any contract including a lease can be ceded unless expressly prohibited *or* one or both parties is a *delectus personae*. If the SCA were correct, the entitlement to cede rights under a long lease would be different from the entitlement to cede other contractual rights. It would always exist unless expressly excluded by a clause prohibiting a cession or other disposal of the relevant party's rights. But authority has always recognised the possibility of a party to a long lease being a *delectus personae*. That will usually be the lessee, for as pointed out in *Boshoff v Theron*:[87]

> The personality of the lessee may be a material matter to the lessor and thus … there is no reason for a departure from the general rule that a debtor cannot substitute another without the consent of the creditor. But as regards the

---

83 *UJSCA* paras 6-8.

84 *Boshoff v Theron* 1940 TPD 299 305.

85 Emphasis added.

86 Such a rule of law would be an implied term properly so called, as opposed to a tacit term arising from the terms of the lease and the context of the agreement.

87 *Boshoff v Theron* 1940 TPD 299.

> lessor, there is *ordinarily* no *delectus personae*; the property itself generally affords the lessee sufficient security for the performance of the lessor's obligations. *The position may be different where the lease provides for an obligation on the lessor which calls for some special quality on his part, and different considerations may apply to such cases*.[88]

Boshoff leased a property to Theron under a lease requiring him to furnish Theron with a power of attorney authorising him to procure water for his farming operations from the relevant water authority. After he sold the property the water authority no longer recognised the power of attorney as it was not furnished by the owner of the property. The purchaser did not provide a corresponding power of attorney. Theron sued Boshoff for damages for a breach of his obligation to enable Theron to obtain water. The claim succeeded in the magistrates' court but failed on appeal. The court held that all the rights and obligations under the lease, including the obligation to enable Theron to obtain a supply of water, had been transferred to the purchaser by the operation of the maxim *huur gaat voor koop*.

The dictum from *Boshoff v Theron* relied on by the SCA supported the conclusion that *huur gaat voor koop* operates to release the lessor from both rights and obligations under the lease on the sale of the property. Greenberg JP fortified this by saying that in general lessees can divest themselves of their obligations under a long lease by assigning their rights to third parties. The reason was that given the length of the lease it would ordinarily be construed as one with the lessee or their assigns. The ability of lessees to divest themselves of their obligations was congruent with the lessors being able to divest themselves of their obligations by selling the properties.

Boshoff v Theron did not detract from the proposition that the personality of the lessee may in particular cases be material to the lessor and render it a *delectus personae*. That is apparent from the words following but omitted from the portion quoted by the SCA, which read: "… consequently the law will *presume* that the lease is with the lessee and his assigns".[89] A presumption is one thing. A rule of law is something else. In a long lease between individuals there is always the possibility of one of the parties dying before the lease expires. However, that may not be the case when one is dealing with juristic persons that are likely to remain in existence for very considerable periods.[90] The key issue is not the duration of the lease but whether the identity of the lessee is a material matter to the lessor.

Excluding the possibility of the lessee under a long lease being a *delectus personae* on the basis of the nature of the relationship constituted by the

88 Emphasis added.
89 Emphasis added.
90 ATS traces its origins to 1945 and the University of Johannesburg to 1967.

lease could produce startling effects. A long lease at a peppercorn rent concluded between a charitable trust and a children's charity in order to enable the charity to run a children's home would not create a *delectus personae*. Absent a prohibition, the charity would be free to cede its rights under the lease to a commercial organisation for the purpose of providing rented accommodation to university students, unless there was an express prohibition in the lease. Manifestly the identity of the lessee would be of considerable concern to the trust and on conventional principles would give rise to a *delectus personae*. The conclusion in para 9 of *UJSCA* that:

> A tenant under an urban tenement may accordingly cede the rights under a lease without the consent of the landlord, unless the terms of the lease forbids the tenant from doing so.:

was incorrect, because it excluded the possibility of the lease, by its nature and given all the background to its conclusion, creating a *delectus personae*.

Once that is recognised, whether the lessee is a *delectus personae* is not confined to what appears in the four corners of the lease. That would be inconsistent with the authoritative statements quoted at the beginning of this section that whether a *delectus personae* arises is a matter of interpretation of the contract taking all circumstances into account. Those authorities were accepted and applied by the Constitutional Court in UJ in the extended sense discussed earlier. With respect, the failure to appreciate the correct approach was the flaw in the judgment in *UJSCA.*

8 Conclusion

Superficially the Constitutional Court in *UJ* overruled the SCA in *UJSCA* because evidence excluded by the SCA under the parol evidence rule was admitted as extrinsic evidence to interpret the lease, but the conflict was more apparent than real. Had the SCA been correct in saying that the right of the lessee to cede its rights under a lease could be limited or excluded only by a provision of the written agreement, its application of the parol evidence rule would have been correct. But that is not the law and it was not the correct enquiry. The enquiry was whether the character of ATS as the lessee was so personal to the university that it would make a reasonable or substantial difference to it if the obligations of the lessee were enjoyed by somebody other than ATS. That enquiry did not involve any departure from the provisions of the lease, but required an interpretation of the lease in the light of all relevant extrinsic evidence.

Understood in this light the concern raised in *Capitec* about a diminished role for the parol evidence rule in dealing with contracts was unfounded. The rule remains of full force and effect as the Constitutional Court accepted. In the first instance it requires a determination of whether the

parties have embodied their agreement in a document or documents that constitute the sole memorial of the agreement. In most instances that is clear from a consideration of the documents, but as pointed out earlier it is always open to one party to dispute a claim that the document or documents tendered is or are the sole memorial of the agreement. The parol evidence rule does not exclude evidence directed at establishing that fact. Once the agreement has been integrated in one or more documents the next question is whether its language, considered separately from the disputed evidence, is capable of bearing the disputed meaning. A negative answer brings the parol evidence rule into operation to exclude the evidence because it contradicts, alters, adds to or varies the agreement so recorded. That is the role that the parol evidence rule in its traditional formulation has always played. The rule continues to co-exist without any dilution alongside the modern approach to the admissibility of extrinsic evidence articulated in *Endumeni.*

Bibliography

Literature

Lubbe "Cession"
Lubbe GF (original text by Nienaber PM) "Cession" in Joubert WA, Faris JA and Harms LTC (ed) *The Law of South Africa Vol 3* 3rd ed (LexisNexis Durban 2013) 89-151

Posner 1997 *U Pa L Rev*
Posner E "Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation" 1997 *U Pa L Rev* 533-578

Roberts *Wessels' Law of Contract*
Roberts AA *Wessels' Law of Contract in South Africa* 2nd ed (Hortors Johannesburg 1937)

Schmidt and Rademeyer *Law of Evidence*
Schmidt CWH and Rademeyer H *Law of Evidence* (LexisNexis Durban 2003-) May 2022 – SI 20

Schwikkard and Van der Merwe *Principles of Evidence*
Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 3rd ed (Juta Cape Town 2010)

UK Law Commission *Working Paper No 70*
United Kingdom Law Commission *Working Paper No 70. Law of Contract: The Parol Evidence Rule* (Her Majesty's Stationary Office London 1976)

Van der Merwe "Evidence"
Van der Merwe DP (original text by Schmidt CWH and Zeffert DT) "Evidence" in Joubert WA, Faris JA and Harms LTC (ed) *The Law of South Africa Vol 18* 3rd ed (LexisNexis Durban 2015) 91-256

Van Rensburg, Lotz and Van Rhijn "Contract"
Van Rensburg ADJ, Lotz JG and Van Rhijn TAR "Contract" (revised by Christie RH, updated by Sharrock RD) in Joubert WA, Faris JA and Harms LTC (ed) *The Law of South Africa Vol 9* 3rd ed (LexisNexis Durban 2014) 171-349

Wallis 2019 *PELJ*
Wallis M "Interpretation Before and After *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA)" 2019 *PELJ* 1-29

Wigmore 1899 *ALR*
Wigmore JH "A View of the Parol-Evidence Rule – Part I" 1899 *ALR* 337-354

Wigmore 1904 *Colum L Rev*
Wigmore JH "A Brief History of the Parol Evidence Rule" 1904 *Colum L Rev* 338-355

Case law

South Africa

ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid A House 2013 3 SA 426 (SCA)

Affirmative Portfolios CC v Transnet Ltd t/a Metrorail 2009 1 SA 196 (SCA)

Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 3 SA 506 (A)

Auckland Park Theological Seminary v University of Johannesburg (A5017/17) [2018] ZAGPJHC 490 (4 July 2018)

Auckland Park Theological Seminary v University of Johannesburg (1160/2018) [2020] ZASCA 24 (25 March 2020)

Boshoff v Theron 1940 TPD 299

Breed v Van den Berg 1932 AD 283

Capital Building Society v De Jager; De Jager v Capital Building Society 1963 3 SA 381 (T)

Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd 2022 1 SA 100 (SCA)

Centre for Child Law v Director-General, Department of Home Affairs 2022 2 SA 131 (CC)

Chisuse v Director-General, Department of Home Affairs 2020 6 SA 14 (CC)

Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd (759/2011) [2012] ZASCA 126 (21 September 2012)

Delmas Milling Co Ltd v Du Plessis 1955 3 SA 447 (A)

Densam (Pty) Ltd v Cywilnat (Pty) Ltd 1991 1 SA 100 (A)

Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd 2007 6 SA 199 (CC)

Dettmann v Goldfain 1975 3 SA 385 (A)

Du Plessis v Nel 1952 1 SA 513 (A)

Eastern Rand Exploration Co Ltd v Nel 1903 TS 42

Friedlander v De Aar Municipality 1944 AD 79

Harlin Properties (Pty) Ltd v Los Angeles Hotel (Pty Ltd 1962 3 SA 143 (A)

Henderson v Hanekom (1903) 20 SC 513

Hersch v Nel 1948 3 SA 686 (A)

Hodd v Hodd; D'Aubrey v D'Aubrey 1942 NPD 198

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit 2001 1 SA 545 (CC)

Johnston v Leal 1980 3 SA 927 (A)

KPMG Chartered Accountants (SA) v Securefin Ltd 2009 4 SA 399 (SCA)

Le Marchand v Creeke 1953 1 SA 186 (N)

MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd 1980 3 SA 1 (A)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA)

National Board (Pretoria) (Pty) Ltd v Estate Swanepoel 1975 3 SA 16 (A)

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 2 SA 1 (CC)

Padayachee v Adhu Investments CC 2016 2 All SA 555 (GJ)

Philmatt (Pty) Ltd v Mosselbank Developments CC 1996 2 SA 15 (A)

Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd 2005 5 SA 276 (SCA)

Propell Specialised Financial Services (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC 2019 2 SA 221 (SCA)

S v Bhulwana; S v Gwadiso 1996 1 SA 388 (CC)

Schierhout v Union Government 1926 AD 286

Shacklock v Shacklock 1949 1 SA 91 (A)

Shill v Milner 1937 AD 101

Telcordia Technologies Inc v Telkom SA Ltd 2007 3 SA 266 (SCA)

The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association 2019 3 SA 398 (SCA)

Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd 1941 AD 43

University of Cape Town v Cape Bar Council 1986 4 SA 903 (A)

University of Johannesburg v Auckland Park Theological Seminary (Pty) Ltd (39717/2012) [2017] ZAGPJHC 382 (10 March 2017)

University of Johannesburg v Auckland Park Theological Seminary 2021 6 SA 1 (CC)

Van Aardt v Galway 2012 2 SA 312 (SCA)

Venter v Bircholtz 1972 1 SA 276 (A)

Von Ziegler v Superior Furniture Manufacturers (Pty) Ltd 1962 3 SA 399 (W)

Williams v Carrick 1938 TPD 147

Willoughby's Consolidated Company Ltd v Copthall Stores Ltd 1913 AD 267

United Kingdom

R (on the Application of Quintavalle) v Secretary of State for Health [2003] 2 All ER 113 (HL)

Legislation

Broad-Based Black Economic Empowerment Act 53 of 2003

Universities Act 61 of 1955

Internet sources

Moosajee 2021 https://iclg.com/briefing/16757-new-judgment-highlights-importance-of-text-context-and-purpose-in-interpreting-contracts-south-africa#:~:text=The%20parol%20evidence%20rule%20provides,such%20as%20fraud%20or%20duress

Moosajee A 2021 *New Judgment Highlights Importance of Text, Context and Purpose in Interpreting Contracts in South Africa* https://iclg.com/briefing/16757-new-judgment-highlights-importance-of-text-context-and-purpose-in-interpreting-contracts-south-africa#:~:text=The%20parol%20evidence%20rule%20provides,such%20as%20fraud%20or%20duress accessed 27 February 2022

Oosthuizen and Hutchison 2021 https://www.inceconnect.co.za/article/thorts-interpreting-contracts-what-has-happened-to-the-parol-evidence-rule--2021-11-19

Oosthuizen J and Hutchison D 2021 *Thorts: Interpreting Contracts – What has Happened to the Parol Evidence Rule?* https://www.inceconnect.co.za/article/thorts-interpreting-contracts-what-has-happened-to-the-parol-evidence-rule--2021-11-19 accessed 27 February 2022

List of Abbreviations

ALR	American Law Register
ATS	Auckland Park Theological Seminary
BEE	black economic empowerment
Colum L Rev	Columbia Law Review
PELJ	Potchefstroom Electronic Law Journal
SCA	Supreme Court of Appeal
U Pa L Rev	University of Pennsylvania Law Review
UJ	University of Johannesburg (Constitutional Court judgment)
UJSCA	University of Johannesburg (Supreme Court of Appeal judgment)
UK	United Kingdom