



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**University of Johannesburg v Auckland Park Theological Seminary and Another**

**CCT 70/20**

**Date of hearing: 5 November 2020**

**Date of judgment: 11 June 2021**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Friday, 11 June 2021 at 10h00, the Constitutional Court handed down judgment in an appeal against the judgment and order of the Supreme Court of Appeal, which overturned the decisions of the High Court and Full Court. The central question before the Constitutional Court was whether the cession of rights in a long-term lease agreement between the University of Johannesburg (UJ) and Auckland Park Theological Seminary (ATS) was permissible. Central to this determination was whether or not the rights under the lease are personal to ATS and therefore incapable of cession, and whether evidence of the context of the lease could be adduced in answering this question.

In 1993, UJ and ATS, both being providers of higher education, entered into a co-operation agreement. In 1995, and during the course of this agreement, they entered into negotiations regarding ATS's acquisition of property for a theological college. The negotiations culminated in UJ obtaining permission from the Minister of Education, as it was required to do in terms of the Rand Afrikaans University Act 61 of 1955, to lease certain immovable property to ATS. In seeking this permission, UJ specifically mentioned ATS by name and outlined the purposes for which ATS required the property. The Minister granted permission, and the parties concluded a written long-term lease agreement which was registered against the title deed of the premises. The lease was to endure for 30 years, renewable with six months' written notice by ATS prior to the expiry of the period. ATS paid UJ a once-off rental of R700 000. ATS did not establish a theological college on the premises, and instead ceded its rights under the lease agreement to Wamjay Holdings Investments (Pty) Limited (Wamjay) by way of a notarial deed of cession. Wamjay paid ATS R6 500 000 for the rights, because it wished to establish a religious-based school for primary and high school education on the leased premises.

UJ was not informed of the cession at the time and, upon learning about it, took the view that the rights in the lease agreement were personal to ATS, and that ATS had accordingly repudiated the lease agreement. UJ purported to accept ATS's repudiation, and cancelled the lease agreement. ATS and Wamjay disputed UJ's right to cancel the lease agreement, which ultimately led to UJ approaching the High Court for orders evicting ATS and Wamjay from the leased premises, and cancelling the notarial lease against the title deed.

The High Court interpreted the lease agreement in light of evidence of context, and found in favour of UJ on the basis that the evidence was consistent and uncontroverted in relation to the personal nature of the relationship between UJ and ATS. It ordered ATS and Wamjay to vacate the leased premises, and the Registrar of Deeds was ordered to cancel the registration of the notarial long-term lease agreement against the title deed. ATS and Wamjay appealed this decision to the Full Court, which dismissed the application with costs. The Full Court agreed with the High Court's finding that all relevant factors and considerations pointed towards the rights in the lease agreement being personal to ATS. ATS and Wamjay then approached the Supreme Court of Appeal.

The Supreme Court of Appeal disagreed with the findings of the High Court and Full Court, and upheld ATS's and Wamjay's appeal with costs. It held that all contractual rights can be transmitted unless they are either of such a personal nature that the identity of the contracting party matters and is instrumental to the contract (*delectus personae*), or it can be shown that the contract conveys an intention that the rights not be transferred. It held that existing jurisprudence indicates that, in a long lease, the lessor does not expect that the obligations of the lease will be carried out personally by the lessee throughout the whole term and that there is therefore no *delectus personae* in long-term lease agreements. Additionally, the Supreme Court of Appeal held that there was no evidence in the lease agreement which indicated that the rights were *delectus personae*. It further held that UJ was not permitted to adduce evidence as to the parties' intentions and the surrounding circumstances of the lease agreement. It formed this conclusion on the basis of the whole agreement clause in the lease agreement, which stipulates that the written agreement constitutes the entire agreement and cannot be varied by extrinsic evidence. Thus, the Supreme Court of Appeal held that the parol evidence rule rendered UJ's contextual evidence inadmissible, and that an objective interpretation of the lease agreement indicates that the rights were not *delectus personae*, and could be ceded to Wamjay. The Supreme Court of Appeal accordingly replaced the order of the High Court with an order dismissing UJ's claim.

As the basis of its appeal in the Constitutional Court, UJ made two main arguments. Firstly, it argued that the Supreme Court of Appeal erred by conflating the two mechanisms by which a creditor may be prohibited from ceding a contractual right without the debtor's consent. These two distinct mechanisms are: first, where there is a term in the contract stipulating the prohibition (*a pactum de non cedendo*); and second, where the right is so personal to the creditor that it is incapable of being ceded to another without the consent of the debtor (*delectus personae*). UJ contended that the Supreme Court of Appeal's conclusion that the rights were cedable in the absence of an express term in the lease

agreement prohibiting the cession flowed from it approaching the inquiry incorrectly, and without due regard to the distinction between a *pactum de non cedendo* and *delectus personae*. Secondly, UJ argued that the Supreme Court of Appeal's failure to consider the context of the lease agreement was inconsistent with its established jurisprudence on the general principles relating to the interpretation of contracts, which has been endorsed by the Constitutional Court. Moreover, UJ submitted that, had the Supreme Court of Appeal followed the correct contextual approach to the interpretation of the lease agreement, it would have concluded that the rights were personal to ATS, because the cession of the rights to Wamjay clearly defeated the purpose of the lease agreement.

ATS and Wamjay argued that the nature of the right in issue is easily capable of determination from a plain reading of the lease agreement. They contended that once the right is determined from the plain reading of the agreement, the only question is whether the right, by its nature, is capable of cession. They accordingly argued that the right in question is clearly capable of cession, because it makes no difference to UJ whether the obligations in the lease agreement are performed by ATS or another party. This is so because the characteristics of the performance owed to UJ are not altered by virtue of ATS ceding the rights to Wamjay. They accordingly submitted that the Supreme Court of Appeal was correct to exclude the contextual evidence, and argued that UJ's interpretation of the lease agreement is at odds with the express wording of the lease agreement. Alternatively, ATS and Wamjay argued that, even if the rights are to be interpreted as being personal in nature, ATS's conduct fell short of repudiation and, in addition, raised the defences of waiver and estoppel against UJ's claim.

The Constitutional Court, in a unanimous judgment penned by Khampepe J (Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Tshiqi J concurring), held that this matter raises arguable points of law of general public importance that ought to be considered by this Court, and that it was in the interests of justice for leave to appeal to be granted.

The Court considered the principles surrounding the concept of *delectus personae*, together with the general principles of contractual interpretation as espoused in its own jurisprudence, as well as that of the Supreme Court of Appeal. This analysis led the Court to confirm that a court interpreting a contract has to, from the onset, 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. The Court clarified that, although this does not mean that extrinsic evidence is always admissible, there will be times where contextual evidence will be necessary for interpretive purposes. The Court accordingly held that, to the extent that the Supreme Court of Appeal purported to revert to a position where contextual evidence may only be adduced when a contract or its terms are ambiguous, it erred. Context must be considered when interpreting any contractual provision and it must be considered from the outset as part of the unitary exercise of interpretation. The Court held that the position is no different when the interpretive exercise involves the *delectus personae* inquiry, and rejected ATS's and Wamjay's contention that no contextual evidence is necessary to determine the nature of the rights in question. The Court held that the correct approach to the inquiry involves

taking the firmly established contextual approach to interpreting the contract in question, and determining the nature of the rights and obligations that flow from it.

In the light of the general legal principles for determining *delectus personae*, the Court held that contextual evidence ought to have been admitted in this case to determine whether the rights in question were personal to ATS. It held that contextual evidence in this sense is not precluded by the parol evidence rule as it does not seek to add to, vary, modify or contradict the terms of the lease agreement. Rather, it gives context and background to the lease agreement, which can be used by a court in its interpretation of that agreement and when seeking to ascertain whether the circumstances give rise to an intention of the parties (at the time of the conclusion of the agreement) that the rights were personal to ATS. In adopting this interpretive approach, the Court held that the High Court's findings could not be faulted: the rights were clearly personal to ATS. Further, given the nature of the rights, the Court held that ATS's cession of the rights to Wamjay effectively rendered the contract inoperative and led UJ to reasonably conclude that ATS had repudiated the lease agreement. UJ was accordingly entitled to cancel the agreement. Lastly, the Court rejected ATS's and Wamjay's attempts to rely on estoppel and waiver, because they had failed to meet the necessary legal requirements to successfully raise these defences.

The Constitutional Court accordingly upheld UJ's appeal, confirmed the findings of the High Court, and replaced the order of the Supreme Court of Appeal with an order dismissing ATS's and Wamjay's application for leave to appeal with costs.