THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1160/2018

In the matter between:

AUCKLAND PARK THEOLOGICAL SEMINARY	**FIRST APPELLANT**
WAMJAY HOLDINGS INVESTMENTS (PTY) LTD	**SECOND APPELLANT**

and

UNIVERSITY OF JOHANNESBURG	**RESPONDENT**

Neutral citation: *Auckland Park Theological Seminary v University of Johannesburg* (1160/2018) [2019] ZASCA 24 (25 March 2020)

Coram: PONNAN, VAN DER MERWE, MOLEMELA, DLODLO JJA and LEDWABA AJA

Heard: 24 February 2020

Delivered: 25 March 2020

Summary: Contract – terms agreed in writing – were rights and obligations therein delectus personae – personal to appellant? Parol evidence rule applied.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Van Oosten, Carelse Wright JJ sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced by:

'a. The appeal succeeds with costs.

b. The order of court below is set aside and substituted with:

"The plaintiff's claim is dismissed with costs."'

JUDGMENT

Dlodlo JA (Ponnan, Van der Merwe, Molemela JJA and Ledwaba AJA concurring):

[1] The respondent, the University of Johannesburg (UJ), is the registered owner of Portion 1 of Erf 809 Auckland Park Township, situated at 51 Richmond Avenue, Auckland Park, Johannesburg (the property). On 25 April 1996 the predecessor in title to UJ, the Rand Afrikaans University (RAU), applied to the Minister of Education in terms of s 4(2) of the Rand Afrikaans University Act 51 of 1996 for consent to let, inter alia, the property. The Minister granted his approval in these terms:

'I hereby grant permission for the Rand Afrikaans University to let certain specified property, detailed drawings B1 to E1 for a period of thirty years for the purposes of developing theses properties'.

[2] On 6 December 1996 UJ and the first appellant, the Auckland Theological Seminary (ATS), concluded a written notarial long lease in respect of the property (the lease). The lease was registered against the title deed of the property on 20 December 1996 under reference number K4963/1996. On 28 March 2011 ATS and the second appellant, Wamjay Holding Investments (Pty) Ltd (Wamjay) concluded a written

agreement of cession (the cession) in terms of which the former ceded its rights (but not its obligations) in the lease to the latter. The cession was registered by Wamjay against the title deed of the property on 13 April 2012 and it thereafter took occupation of the property.

[3] During June 2012 Wamjay submitted detailed architectural plans to the local authority for approval for the purposes of constructing a pre-primary, primary and high school with an Islamic ethos on the property. On 3 September 2012 Wamjay furnished UJ with the drawings and artists' impressions of the proposed school. On 5 October 2012 UJ purported to cancel the lease inter alia on the basis that on a proper interpretation of the lease the rights in the lease were *delectus personae* and personal to the ATS and therefore incapable of cession. ATS, in ceding the rights had accordingly, so the contention proceeded, repudiated the lease, which repudiation had been accepted by UJ.

[4] UJ issued summons out of the Gauteng Division of the High Court, Johannesburg for: (a) the eviction of ATS and Wamjay and all persons occupying the property through them and (b) the cancellation of the notarial long lease against the title deed of the property. The matter proceeded to trial before Victor J, who concluded that 'the lease was one of delectus persona'. The learned judge accordingly issued, inter alia, the following order:

'The first and second defendants and all persons occupying through or under them are evicted from Portion 1 of Earth 809 Auckland Park Township registration division IR Province of Gauteng held under title deed T9764/2009 situated at 51 Richmond Avenue Auckland Park Johannesburg, and they shall vacate the property by 30 November 2016. That the third defendant is ordered to cancel the registration of the notarial long term lease agreement with registered reference number K4963/1996 registered against the title deed of Portion 1 of Earth 809 Auckland Park Township registration division IR Province of Gauteng held under title deed T9764/2009 situated at 51Richmond Avenue Auckland Park Johannesburg'.

[5] With the leave of Victor J, ATS and Wamjay appealed to the full court of that division. Although the Judges, who heard the appeal disagreed in their approach, all three - Van Oosten J (with Carelse J concurring) and Wright J - were in agreement that the appeal should fail. It was accordingly dismissed with costs. ATS and Wamjay now appeal with the special leave of this court.

[6] Although there was agreement before Victor J that the matter turned on the proper interpretation of the lease, the parties generated a record in excess of 800 pages. In all six witnesses testified; three for each side. Almost all of the evidence was plainly inadmissible, because as Harms DP observed in *KPMG v Securefin*:[1]

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question . . .'.

[7] In general, when a contract has been reduced to writing, the writing is regarded as the exclusive embodiment or memorial of the transaction and no extrinsic evidence may be given of other utterances or jural acts by the parties which would have the effect of contradicting, altering adding to or varying the written contract.[2] In *National Board,*[3] this court referred with approval to the statement of Wigmore, Evidence (1940) 3 ed 2425:

'. . . In other words: when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.'

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[1] *KPMG Charted Accountants* (SA) *v Securefin Ltd and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39.
[2] *Johnson v Leal* 1980 (3) SA 927 (A) at 938.
[3] *National Board (Pretoria) (Pty) Ltd and Another v Estate Swanepoel* 1975 (3) SA 16 (A) at 26.

[8] Prima facie, all contractual rights can be transmitted unless their nature involves a *delectus personae* or the contract itself shows that they were not intended to be ceded.[4] The restriction on cession imposed by the *delectus personae* concept is simply a manifestation of the general principle that the cession should not disadvantage the debtor.[5] Indeed, as Innes CJ stated in *Eastern Rand Exploration Co v Nel*:[6]

'Now, speaking 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'.

[9] As Greenberg JP explained in *Boshoff v Theron*:[7]

'The position under leases *in longum tempus* is not irrelevant to the present question. Under such leases the lessee can free himself from his obligations to the lessor by transferring the lease. In Wessels on *Contract* (sec. 1739), it is stated that in a long lease, e.g. for 99 years, 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*. . . .'

This is true of an urban tenement. 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.[8]

[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.

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[4] *Frielander v De Aar Municipality* 1944 AD 79 at 93.
[5] *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 31G-H; *Goodwin Stable Trust v Duchex (Pty) Ltd and Another* 1998 (4) SA 606 (C) at 617I-J.
[6] *Eastern Rand Exploration Co Ltd v AJT Nel, JL Nel, SM Nel, MME Nel's Guardian and DJ Sim* 1903 TS 42 at 53.
[7] *Boshoff v Theron* 1940 TPD 299 at 304.
[8] Lawsa (3ed) Vol 3 para 165.

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 by Victor J. As the basis of UJ's claim cannot be supported, the judgment in its favour by Victor J cannot be sustained.

[11] The parties expressly agreed that no party may rely on any warranties or representations not expressly included in the lease agreement. They agreed that the written lease is intended to be the sole memorial of the agreement between themselves.[9] The lease agreement contained no express or implied provisions to the effect that rights therein contained are personal to ATS. On a proper interpretation, the rights on the lease were not at all delectus personae and personal to ATS and thus incapable of cession. The terms of the lease agreement are unambiguous. In deciding the meaning of a contract, the court must have regard to the words used. The words must be construed objectively.[10] There is nothing in clause 8 of the lease agreement to justify an assertion by UJ that the rights in the lease were personal to ATS and therefore incapable of cession.

[12] In the result:

1 The appeal is upheld with costs.

2 The order of the full court is set aside and replaced by:

'a. The appeal succeeds with costs.

b. The order of court below is set aside and substituted with:

"The plaintiff's claim is dismissed with costs.'"

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JUDGE OF APPEAL

[9] See lease agreement clause 15.1 record page 46-47 vol 1.

[10] *Novaritis SA v Maphil Trading* [2015] ZASCA 111; 2016 (1) 518; *KPMG Chartered* para 39; *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 CC (A) para 8.

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