CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 70/20

In the matter between:

UNIVERSITY OF JOHANNESBURG Applicant

and

AUCKLAND PARK THEOLOGICAL SEMINARY First Respondent

WAMJAY HOLDINGS INVESTMENTS (PTY) LIMITED Second Respondent

Neutral citation:	*University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Tshiqi J
Judgments:	Khampepe J (unanimous)
Heard on:	5 November 2020
Decided on:	11 June 2021
Summary:	Contract — delectus personae — contractual interpretation — admissibility of contextual evidence — parol evidence rule — permissibility of cession — rights in a long lease can be personal in nature and incapable of cession

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "The appeal is dismissed with costs."
4. The respondents are ordered jointly and severally to pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J and Tshiqi J concurring):

"Poetry never stood a chance
of standing outside history
. . .
Suppose you want to write
of a woman braiding
another woman's hair—
straight down, or with beads and shells
in three-strand plaits or corn rows—
you had better know the thickness
the length the pattern
why she decides to braid her hair
how it is done to her

what country it happens in
what else happens in that country
You have to know these things
. . .
I am writing this in a time
when anything we write
can be used against those we love
where the context is never given
though we try to explain, over and over
For the sake of poetry at least
I need to know these things."[1]

Introduction

[1] I make bold to say that it is not just for the sake of poetry that the old adage, context is everything, holds true. In so many scenarios, words alone ring hollow. Context gives life and meaning to what is said or written. Is a court of law then entitled, or *required*, to take cognisance of context when interpreting a contract? That is the question that this Court is called upon to answer.

[2] At the core of this matter is a dispute over the permissibility of the cession of rights in a long-term lease agreement. The solution to the dispute lies in the answer to whether or not the rights in question are personal to the first respondent (*delectus personae*) and therefore incapable of cession.[2] This requires the Court to consider an antecedent question: can contextual evidence be brought, and used, to demonstrate the personal nature of rights in an agreement to support an argument that the rights therein may not be freely ceded? The judgment of the Supreme Court of Appeal answered this

[1] Adrienne Rich "North American Time" (1983).

[2] Roughly translated from Latin, *delectus personae* means "chosen person" or "choice of person". See Scott *The Law of Cession* 2 ed (Juta & Co Ltd, Cape Town 1991) at 202 which states:

> "*Delectus personae* becomes important where the parties to a juristic act intend to negotiate personally with each other to the exclusion of others. . . . In these circumstances the general principle that a person may dispose of his rights freely is restricted."

See also *Gowie v Provident Insurance Co Ltd* (1885) 4 SC 118 at 122, where it was held that "where two parties enter into a personal contract neither of them can compel the other to accept a third person as a substitute for the party with whom he has personally contracted".

in the negative and held that the contract was unambiguous and that the words should therefore be read objectively. Further, it held that the evidence the applicant sought to adduce to show that the rights in the contract were *delectus personae* was, in fact, brought to vary, add to or contradict the contract and was therefore inadmissible in terms of the parol evidence rule. This matter therefore requires this Court to consider the interplay, in the *delectus personae* setting, between the interpretative injunction on courts to interpret contracts within their context, having regard to relevant contextual evidence, and the accepted legal principles that form part of the parol evidence rule. In particular, it requires this Court to consider whether the Supreme Court of Appeal conflated the relevant legal principles and thus applied the incorrect principles to the determination before it. More on this later.

Parties

[3] The applicant is the University of Johannesburg (UJ), a public institution of higher education established in terms of section 23(1) of the Higher Education Act.[3] It is the successor of the Rand Afrikaans University, which was established in terms of the Rand Afrikaans University Act.[4] The Rand Afrikaans University and another institution of higher education, Technikon Witwatersrand, merged in 2005 to form UJ. Throughout this judgment, I refer to the applicant as UJ, for ease of reference, even when referring to the pre-2005 entity.

[4] The first respondent is Auckland Park Theological Seminary (ATS), an entity which provides theological training to students who wish to become pastors of the Apostolic Faith Mission of South Africa. The second respondent is Wamjay Holdings Investments (Pty) Limited (Wamjay), a company wishing to build a faith-based school on premises in Auckland Park owned by the applicant.

[3] 101 of 1997.

[4] 51 of 1966.

Background facts

[5] UJ is the owner of Portion 1 of Erf 809, Auckland Park Township, Registration Division I.R, Province of Gauteng (the leased premises), situated at 51 Richmond Avenue, Auckland Park. The leased premises were expropriated from the Johannesburg Country Club in order to afford UJ additional land to establish its campus.

[6] UJ and ATS concluded a co-operation agreement in 1993, authorised by section 10B(1) of the Universities Act,[5] which empowered the university to conclude agreements with other institutions involved in the provision of higher education (co-operation agreement). The co-operation agreement provided, among other things, that students who registered for theological degrees would be taught some courses by UJ and others by ATS.

[7] In 1995, during the course of the co-operation agreement, further negotiations between UJ and ATS were entered into for the purpose of ATS acquiring property for a theological college. In terms of section 4(2) of the Rand Afrikaans University Act, UJ was entitled to lease immovable property belonging to the university to others, but required the approval of the Minister of Education before its property could be let or alienated. UJ therefore applied to the Minister for the approval to lease parts of its land to different entities for various purposes. Part of this application included a request for permission from the Minister to allow UJ to let the leased premises to ATS. UJ specifically mentioned ATS by name in its application, and outlined that ATS required this particular property to build a theological college, a project with which UJ wished to assist by providing the property. Permission was granted by the Minister on 18 June 1996. Following this, in December 1996, UJ and ATS concluded a written long-term lease agreement, registered against the title deed of the property. 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.

[5] 61 of 1955.

[8] As it turns out, ATS did not end up establishing a theological college on the leased premises. Instead, on 28 March 2011, it ceded its rights under the lease agreement to Wamjay, by means of a written cession. A notarial deed of cession was subsequently concluded in October 2011. Wamjay paid ATS R6 500 000 for the rights under the lease agreement. It is common cause that Wamjay's intention was to establish a religious-based school for primary and high school education on the leased premises. Of particular relevance is that neither ATS nor Wamjay notified UJ of the cession, nor did they seek UJ's permission or ministerial approval to conclude the cession agreements.

[9] When UJ came to know of the cession between the respondents, it took the view that: the rights in the lease agreement were personal to ATS; ATS had therefore repudiated the lease agreement by purporting to cede to Wamjay rights that were incapable of cession; and ATS had divested itself of the ability to give effect to the agreed use of the property under the lease agreement. UJ thus purported to accept ATS's repudiation and cancelled the lease agreement.

[10] ATS and Wamjay, in turn, disputed UJ's right to cancel the lease agreement. This dispute led to an eviction application in the High Court by UJ for orders evicting ATS and Wamjay from the leased premises and cancelling the registration of the notarial lease against the title deed.

Litigation history

High Court

[11] The High Court found in favour of UJ.[6] It held that the evidence was consistent and uncontroverted in relation to the personal nature of the relationship between UJ and ATS. It undertook a contextual interpretative exercise of the lease agreement and

[6] *University of Johannesburg v Auckland Park Theological Seminary (Pty) Ltd* 2017 JDR 1991 (GJ).

clause 8[7] in particular, and held that UJ had made out the case that the lease was *delectus personae*. It was therefore entitled to the relief it sought. ATS and Wamjay were ordered to vacate the leased premises and the Registrar of Deeds was ordered to cancel the registration of the notarial long-term lease agreement registered against the title deed.

[12] ATS and Wamjay appealed to the Full Court.

Full Court

[13] The Full Court, per Van Oosten J with Carelse J concurring, dismissed the appeal with costs.[8] Although the minority judgment of Wright J differed in its approach, it too would have dismissed the appeal with costs. The majority of the Full Court held that the reasoning and findings of the High Court regarding the interpretation of the lease could not be faulted. It held that, in addition to those mentioned by the High Court, there were several additional factors that pointed to the personal nature of the rights in the lease. For example, it found that the functions and goals of UJ and ATS were intertwined and aligned. It held that the primary and high school facilities planned by Wamjay could not be reconciled with any of these goals. The Full Court further noted that the cession, if upheld, would lead to the absurdity that Wamjay would be the holder of the lease rights, but ATS would remain bound by the obligations under the lease agreement.

[7] Clause 8 of the lease agreement (translated from Afrikaans to English) reads as follows:

> "Use of Property
>
> 8.1 The Lease Premises shall be used by the Lessee for educational, religious and related purposes, construction of campus for education, teaching, research, training, offices and student facilities.
>
> 8.2 The lessee has the right to erect buildings, constructions, facilities, improvements and landscaping and structures for the use of the Lease Premises as defined in Clause 8.1 of this agreement and provided that the building, construction and other plans with respect to such buildings, constructions, facilities, improvements and landscaping and structures must first be submitted to the Registrar (Operations) of the Lessor for his comments and written approval. Said approval will not be refused unreasonably by the Lessor."

[8] *Auckland Park Theological Seminary v University of Johannesburg* 2018 JDR 1631 (GJ).

[14] The Full Court went further and raised the question whether perhaps all leases, by their inherent nature, ought to be considered personal. It noted that it may be time to reconsider the general statement in *Boshoff*[9] that, as regards a lessor, there is generally no *delectus personae*. However, the Full Court did not deem it necessary to go into this aspect in any further detail.

[15] The respondents appealed the finding of the Full Court to the Supreme Court of Appeal.

Supreme Court of Appeal

[16] The Supreme Court of Appeal upheld the appeal with costs and replaced the order of the High Court with an order dismissing UJ's claim.[10] It is necessary to go into the findings of the Supreme Court of Appeal's curt judgment in some detail.

[17] The Supreme Court of Appeal held that all contractual rights can be transmitted unless their nature involves a *delectus personae* or the contract shows that the rights were not intended to be ceded. It held that 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. It quoted with approval the statement from *Boshoff* 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*. The Supreme Court of Appeal held that this was true of an urban tenement and that a lessee can therefore cede its rights under a lease without the consent of a landlord, unless the terms of the lease forbid it from doing so.

[18] The Court held that, in this case, there was nothing in the lease itself that indicated that ATS's rights were not intended to be ceded. It noted that UJ sought to meet that difficulty by adducing oral evidence. According to the Court, however,

[9] *Boshoff v Theron* 1940 TPD 229.

[10] *Auckland Park Theological Seminary v University of Johannesburg* [2020] ZASCA 24; 2020 JDR 0494 (SCA) (Supreme Court of Appeal judgment).

"[a]lmost all of the evidence [adduced by UJ and taken into account by the High Court] was plainly inadmissible" on the basis of the parol evidence rule, which states that "[i]f a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning".[11] The Court stated that UJ's introduction of the evidence in this case was done "under the guise that such evidence was being introduced as to context, [but] [p]roperly construed, however, such evidence was introduced to add to, vary or contradict the general words of the lease".[12] The Court therefore held that, by virtue of the parol evidence rule, that evidence was plainly inadmissible and should not have been allowed by the High Court. As the basis of UJ's claim could not be supported, it concluded that the High Court's judgment could not be sustained.

[19] As a final point, the Supreme Court of Appeal considered that the lease agreement prohibited the parties from relying on any warranties or representations not expressly included in the lease agreement and that the lease agreement was intended to be the sole memorial of the agreement between the parties.[13] In addition, the lease agreement itself contained no express or implied provision to the effect that the rights therein were personal to ATS. Therefore, the Court concluded that, on a proper interpretation, the rights in the lease were not personal to ATS. Since the terms of the lease were unambiguous, the Supreme Court of Appeal held that the High Court ought only to have had regard to the words used, which should have been construed objectively. In this instance, the Supreme Court of Appeal held that there was nothing

[11] Id at para 6, referring to *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) (*KPMG*) at para 39.

[12] Supreme Court of Appeal judgment id at para 10.

[13] This is in terms of the whole agreement clause in clause 15 of the lease agreement, which reads as follows:

> "Whole agreement
>
> 15.1 This is the whole agreement between the parties.
>
> 15.2 On concluding this lease, neither of the parties relies on any guarantees, representations, disclosures or opinions that have not been included in this agreement as guarantees or undertakings.
>
> 15.3 A change to or agreed cancellation of this lease will have no force or effect unless it is reduced to writing and signed by both parties and registered in notarial format in a Deeds Office as an addendum to this agreement."

in clause 8 which justified an assertion that the rights were personal to ATS and incapable of cession.

[20] UJ now applies to this Court for leave to appeal against the whole judgment and order of the Supreme Court of Appeal.

UJ's main arguments before this Court

[21] UJ maintains that: (a) the rights under the lease agreement are personal to ATS and are therefore incapable of being ceded; (b) ATS repudiated the lease by purporting to cede rights to Wamjay in circumstances where this incapacitated ATS from giving effect to the agreed use of the leased premises; (c) UJ accepted the repudiation and cancelled the lease agreement; and (d) UJ is therefore entitled to an order evicting ATS and Wamjay from the leased premises.

[22] UJ's appeal in this Court is based on two central arguments. First, that the Supreme Court of Appeal conflated two mechanisms by which a creditor may be prohibited from ceding a contractual right without the debtor's consent. The first prohibition is where there is a term in the contract to that effect; often referred to as a *pactum de non cedendo* (agreement not to cede), which is not applicable here. The other arises out of the nature of the right in the contract in question; 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*).

[23] According to UJ, the Supreme Court of Appeal conflated these two concepts by holding that, since there was no express clause in the lease that prohibited cession, it followed that the rights in the lease were not *delectus personae* and were therefore capable of cession. UJ is of the view that this reasoning is a *non sequitur* (a conclusion that does not logically follow from the previous argument) as the fact that the lease agreement does not contain a *pactum de non cedendo* does not justify the conclusion that the rights are not personal. The Supreme Court of Appeal therefore asked the wrong question in determining whether the rights were capable of being ceded.

[24] Second, UJ submits that the Supreme Court of Appeal erred by failing to have regard to the context of the lease agreement. Since the Court was required to consider whether the rights were personal, it needed to interpret the lease agreement in accordance with the general principles relating to the interpretation of contracts. According to UJ, the Supreme Court of Appeal's approach was inconsistent with its prior case law on the interpretation of contracts and represented a departure from the contextual approach set out in *Endumeni*,[14] which has been endorsed by this Court. UJ submits that the evidence it led was admissible to shed light on the nature of the rights in order to show that they are personal and to show that it makes a difference to UJ whether the rights under the lease agreement are vested in ATS or someone else. In UJ's view, the effect of the Supreme Court of Appeal's approach is that the doctrine of *delectus personae* will never again find application, as courts will not be able to consider context when assessing whether rights are personal.

[25] According to UJ, if the Supreme Court of Appeal had chosen to have regard to the evidence of context, it would have reached the same conclusion as the High Court and the Full Court: namely, that the rights were personal to ATS. All the evidence indicates that it makes a significant difference to UJ whether the person in whom the rights are vested under the lease agreement is ATS (as a provider of higher education) or Wamjay (an entity not involved in higher education). According to UJ, the cession of rights to Wamjay defeats the purpose of the lease agreement. It could never have been intended by the parties, when concluding the lease, that the land could go to an entity not involved in higher education.

[26] Since a cession agreement cedes the rights but does not also assign ATS's obligations to Wamjay, UJ contends that this would mean that, if Wamjay occupies the leased premises, ATS – by virtue of no longer having the right to occupy the leased premises – would not be able to fulfil its positive obligations to use the land for the

[14] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*).

purposes of higher education in terms of clause 8.[15] This leads to a prejudicial outcome for UJ. As the restriction on cession imposed by the *delectus personae* is simply a manifestation of the general principle that the cession should not disadvantage the debtor, UJ contends that this is another reason that the rights are not cedable.

[27] Finally, UJ submits that because the rights are not capable of cession, ATS repudiated the lease agreement by purporting to cede them. By ceding its rights, so UJ argues, ATS purported to divest itself of the ability to give effect to the agreed use of the leased premises, and objectively communicated to UJ that it no longer held itself bound to the terms of the lease agreement. This entitled UJ to cancel the agreement. As a result, ATS and Wamjay have no right to occupy the premises.

[28] UJ therefore submits that the finding and order of the High Court was correct, as was that of the Full Court. UJ requests that this Court upholds the appeal with costs.

Respondents' main arguments before this Court

[29] The respondents are of the view that UJ, and not the Supreme Court of Appeal, conflated the concept of *pactum de non cedendo* with *delectus personae* by seeking to interpret the rights and obligations in the lease agreement to establish whether they were personal to ATS. This is because *delectus personae* does not require a contractual term to establish it, but is established by an analysis of the nature of the right itself. Therefore, the extent of contractual interpretation required, according to the respondents, is to determine the nature of the right. Contextual evidence for this purpose is only necessary insofar as one is unable to determine the nature of the right on the ordinary grammatical meaning of the words of the contract.

[30] The respondents contend that the nature of the right in issue is easily capable of determination from a plain reading of the lease agreement. The nature of the right is

[15] UJ contends that the words in clause 8, "shall be used . . . for . . . construction of campus for education . . . and student facilities", impose a positive obligation on ATS to use the land for purposes of higher education.

simply the "beneficial occupation of [the] premises [by a tenant] and the rights that flow [therefrom]". Once the nature of the right conferred by the contract is determined, the question for determination is whether this right is *by its nature* incapable of cession and there is nothing further to interpret in order to determine whether the right is *delectus personae*.

[31] The respondents rely on the Law of South Africa (LAWSA), which states that "a tenant under an urban tenement may accordingly cede the rights under a lease without the consent of the landlord" as there is ordinarily no *delectus personae* for lessors.[16] The respondents note that, according to LAWSA, "in the absence of an express or implied provision, the lessee may without the lessor's consent cede his or her rights under a lease of urban property".[17]

[32] They submit that the concept of *delectus personae* states that a right cannot be ceded without the consent of the debtor if the performance the debtor is to render to the proposed cessionary would differ in character from the current performance. Here, the respondents submit, the performance due by the debtor does not change: the right to beneficial occupation does not alter the characteristics of the performance owed by UJ merely because the creditor changed from ATS to Wamjay. This means that the rights cannot be *delectus personae* and are freely capable of cession. In addition, there is no prejudice to UJ's obligations as a result of the cession of ATS's rights to Wamjay.

[33] Since the right in issue is not by its very nature *delectus personae*, the respondents submit that it is freely transmissible and ATS could only be precluded from ceding its rights if it was contractually prevented from doing so. In this case, there was no such term, express or tacit. The respondents further submit that clause 8 cannot be a factor in determining whether the right is *delectus personae*. As, for example, if Wamjay intended to use the land for higher education, that would not contravene

[16] Lubbe "Cession" in *LAWSA* 3 ed (2013) vol 3 at para 165.

[17] Bradfield "Lease" in *LAWSA* 3 ed (2020) vol 26(1) at para 111.

clause 8. Yet, if the right was actually *delectus personae*, it would preclude cession to any party, including to one that may fall within the description of the intended use of the property.

[34] The respondents are of the view that the Supreme Court of Appeal was correct in finding that the contextual evidence was inadmissible, as there was no term in the contract that required interpretation. They say that the difficulty with UJ's contention that, in the context of the circumstances in which the lease was concluded, the parties intended the rights to be *delectus personae*, is that it militates against the express terms of the lease. Those terms, the respondents aver, do not prohibit cession, and it cannot be said that there is an implied term prohibiting cession. Importantly, contextual evidence cannot be used to alter, modify or vary the express wording of the lease.

[35] In the event that the Court finds that the contextual evidence was admissible and relevant, then the respondents submit that the evidence in any event did not establish that the rights were *delectus personae*. Since the nature of the right per se does not establish a *delectus personae*, the respondents submit that it can only be established that the right was intended by the parties to be *delectus personae* if that was the common intention of the parties and if that intention appears from the admissible documents. According to the respondents, there is nothing in the contextual evidence to suggest that both parties intended that the rights in the lease could only be exercised by ATS.

[36] Further, the respondents submit that even if UJ succeeds in proving that the rights were personal, ATS cannot be held to have repudiated the lease by ceding the rights. That is so because ATS's conduct falls far short of an intention not to be bound by the lease. Even if the conduct constituted a breach of the lease by ATS, this breach was remediable and UJ ought to have put ATS in *mora* (breach) as required by clause 11 of the lease. ATS avers that since repudiation is not lightly presumed, it cannot be that a party's minor breaches can constitute an intention not to be bound by the lease. The cession itself could not be said to be a repudiation of the lease as UJ could have simply asked ATS to remedy its breach and cancel the cession. The respondents submit further

that, in any event, ATS retained its obligations in terms of the lease and did not divest itself of those obligations by ceding its rights. As a result, the respondents submit that UJ did not prove an unequivocal and deliberate intention not to be bound by the lease on the part of ATS.

[37] Finally, the respondents raise the defences of waiver and estoppel against UJ's claim that ATS repudiated the lease. In relation to waiver, they say that UJ's conduct in selling the property temporarily during the lease, and cancelling the co-operation agreement, is indicative of an intention to waive any reliance on the *delectus personae* of ATS's rights in the lease. The respondents say that ATS accepted the waiver by its conduct when it did not object to the sale despite having knowledge of the sale. As to estoppel, the respondents argue that UJ's temporary sale of the property and cancellation of the co-operation agreement represented to ATS that UJ no longer relied on the contention that the lease was for the purposes of giving practical effect to the co-operation agreement after its cancellation. This representation induced ATS to believe that UJ did not regard the right as being personal to ATS, which in turn induced it to conclude the cession. Wamjay paid ATS R6 500 000 for the rights in the lease. The respondents submit that Wamjay would reclaim this amount if it were to be found that the rights were incapable of cession, and this would prejudice ATS. Therefore, even if this Court finds the rights to have been personal to ATS, UJ should be estopped from relying on this.

[38] For all those reasons, the respondents submit that the appeal ought to be dismissed.

Issues for determination

[39] The main issues for determination are as follows. First, does this matter engage this Court's jurisdiction and is it in the interests of justice for this Court to grant leave and determine the matter? If UJ overcomes these hurdles, the first question on the merits is whether the Supreme Court of Appeal erred in how it approached the question of *delectus personae*. Connected to this is whether that Court adopted the incorrect

approach to contractual interpretation. This raises the question, if it did err: what is the correct approach to interpreting contracts when determining whether rights are *delectus personae*? And is the lease agreement in this matter personal to ATS? Following this, this Court will need to determine whether ATS was entitled to cede the rights under the lease agreement to Wamjay and whether or not this constituted a repudiation of the lease agreement. Even if all of the above is decided in favour of UJ, consideration will still need to be had to the defences of waiver and estoppel that the respondents have raised against UJ's claims.

Leave to appeal

Jurisdiction

[40] Although the Constitutional Court acts as a final appellate court that affords litigants the opportunity of a "super appeal", this is not merely for the taking and this Court has made it clear that "not all litigants who knock on this Court's door" will be granted leave to appeal.[18] For leave to be granted, the matter must engage this Court's jurisdiction under section 167(3)(b) of the Constitution and, further, it must be in the interests of justice for leave to be granted.

[41] Section 167(3)(b) provides that this Court may decide—

> "(i) constitutional matters; and
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[42] UJ tries to pin jurisdiction on both legs of section 167(3)(b). I begin my analysis on jurisdiction with the second leg: UJ submits that the application raises arguable points of law of general public importance that ought to be considered by this Court. In *Paulsen*, this Court held that:

[18] *Economic Freedom Fighters v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 30.

> "Reduced to bare essentials, [section 167(3)(b)(ii)] provides for this Court to grant leave if—
>
> (a) the matter raises an arguable point of law;
>
> (b) that point is one of general public importance; and
>
> (c) the point ought to be considered by this Court."[19]

[43] Regarding the first element, which requires that the matter must raise an arguable point of law, the Court held that this is a bifurcated requirement: the point must be one of law and it must be arguable.[20] According to UJ, the important points of law arising from the Supreme Court of Appeal judgment are as follows:

> "[W]hether and to what extent a party is entitled to adduce evidence of facts pertaining to the context within which an agreement has been concluded [and] to what extent a court is entitled to take cognisance of and rely on evidence of context in the process of interpretation."

It is quite clear that the points raised by UJ are questions of law.

[44] It is also clear that the determination of this matter raises other points of law related to those explicitly pointed out by UJ. The first arises out of the Supreme Court of Appeal's apparent finding that because the parties had "expressly agreed that no party may rely on any warranties or representations not expressly included in the lease agreement", then contextual evidence could not be led to show that the rights in the lease agreement were *delectus personae*.[21] This requires us to decide whether, and the extent to which, a whole agreement clause ousts a court's entitlement to have regard to contextual evidence in the interpretation of a contract. We are also required to decide the extent to which the parol evidence rule, on which the Supreme Court of Appeal

[19] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at para 16.

[20] Id at para 20.

[21] Supreme Court of Appeal judgment above n 10 at paras 10-1.

relied, prevents contextual evidence from being adduced to show that rights in a contract are *delectus personae*.

[45] The other related point of law stems from the Supreme Court of Appeal's finding, relying on *Boshoff*, 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 forbid the tenant from doing so*".[22] This seems to imply that rights under a lease can never be *delectus personae* and that the only possible restriction on cession in this context is if there is a term in the lease forbidding cession. Axiomatically then, this matter requires us to decide the contours of *Boshoff*, and to pronounce on whether rights under a lease are capable of being *delectus personae*. These are evidently questions of law.

[46] During the hearing, argument centred on the second part of the bifurcated requirement: that is, are the points of law raised arguable? In my view, the answer must be in the affirmative. In *Paulsen*, Madlanga J construed the expression "arguable point of law" and determined what makes a legal point arguable. He stated:

> "Surely, a point of law which, upon scrutiny, is totally unmeritorious cannot be said to be arguable. . . . The notion that a point of law is arguable entails some degree of merit in the argument. Although the argument need not, of necessity, be convincing at this stage, it must have a measure of plausibility."[23]

[47] In simple terms, then, the test is that the point of law must have reasonable prospects of success.[24] In my view, the points of law raised by this matter are undoubtedly arguable. As I explain more fully later, there is merit to UJ's contention that the Supreme Court of Appeal's approach that since the terms of the lease were unambiguous, the lease had to be interpreted "objectively" and without resort to

[22] Id at para 9.

[23] *Paulsen* above n 19 at para 21.

[24] Id at para 22.

contextual evidence, conflicts with that Court's previous decisions on the proper approach to the interpretation of contracts, which have been endorsed by this Court. Not only is the Supreme Court of Appeal's approach in this regard seemingly in conflict with its own jurisprudence and that of this Court, but it also appears to set our law back by a few decades to the bygone era where contextual evidence (then known as "evidence of surrounding circumstances") was only admissible if the language of the contract under interpretation was ambiguous.[25] This is no longer our law. There are therefore prospects that this Court may reverse the Supreme Court of Appeal's decision to exclude the contextual evidence introduced by UJ and accepted by the High Court and the Full Court, and deem that evidence relevant to the question of whether the rights in the impugned lease are *delectus personae*.

[48] Moreover, and as I show in the exposition of the merits, it was not correct for the Supreme Court of Appeal to rely on *Boshoff* for the apparent contention that rights in a lease can never be *delectus personae*, and its consequent conclusion that the only possible restriction on the cession of rights under a lease is a term forbidding cession was thus also incorrect. There are therefore reasonable prospects of success that this Court will find that the Supreme Court of Appeal erred both in its exposition of the law relating to the admissibility of contextual evidence for contractual interpretation and to the concept of *delectus personae*, and in the conclusion that this led to. That makes the points raised arguable.

[49] Lastly, there was some time dedicated at the hearing to whether the points of law raised by UJ were arguable given that the contextual approach to contractual interpretation is mostly settled in our law. It was argued that this case merely involves a misapplication of established principles by the Supreme Court of Appeal and therefore does not engage this Court's jurisdiction. This argument must fail. While it is trite that a wrong decision in the application of the law raises neither a constitutional issue[26] nor

[25] *Rane Investments Trust v Commissioner, South African Revenue Service* [2003] ZASCA 60; 2003 (6) SA 332 (SCA) at para 26 and *Coopers & Lybrand v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) (*Coopers*) at 768C-E.

[26] The point that the misapplication of established legal principles does not raise a constitutional issue has been made in a number of cases. See *S v Jacobs* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC)

an arguable point of law of general public importance,[27] we are not concerned with an alleged misapplication of settled legal principles in this matter. What is alleged is that the Supreme Court of Appeal got the law wrong, and applied the *incorrect* legal principles when considering the lease agreement and determining whether the rights under the agreement were *delectus personae*.

[50] In any event, if a point of law is raised under circumstances where it is alleged that a decision of the Supreme Court of Appeal on that point of law conflicts with that Court's own jurisprudence, or that of this Court, and on assessment by this Court the argument is not unmeritorious and has prospects of success, the conclusion should generally be that the point of law raised is arguable. That the matter, when adjudicated, would require the application of the trite principles departed from by the Supreme Court of Appeal should have no bearing on whether the point raised is arguable. The departure by the Supreme Court of Appeal from settled law establishes the arguability of the point. In this case, I have already said that the approach taken by the Supreme Court of Appeal appears to depart from its own settled jurisprudence and that of this Court. The points of law raised are thus evidently arguable.

[51] Turning briefly to the final requirements for an arguable point of law to engage this Court's jurisdiction: it must be a point of general public importance that ought to be considered by this Court. A point is of general public importance if its resolution transcends the interests of the parties to a particular litigation. In other words, its resolution must benefit the general public. There is no doubt in my mind that it is of general public importance that this Court, amongst other things, clarifies the correct approach to contractual interpretation, particularly where the contract being interpreted contains a whole agreement clause. Such clauses are common in contracts, and it is of public importance that we clarify whether they prevent a court from taking into account

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at paras 38-9; *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at paras 50-3; and *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC).

[27] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; (2019) JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 59.

contextual evidence. It is also of public importance for this Court to clarify whether rights under a lease are capable of being *delectus personae*, and to shed light on whether *Boshoff* can still be relied on for the proposition that they are not so capable. It also follows that the points of law raised ought to be decided by this Court. Ultimately, this is an interests of justice consideration[28] and, as I have already noted, and as my ensuing discussion on the merits indicates, the points of law raised have reasonable prospects of success.

[52] Given that this Court's jurisdiction has been engaged on the basis that the matter raises arguable points of law of general public importance that this Court ought to consider, I do not think it necessary to consider UJ's alternative basis for jurisdiction, which is that the matter raises constitutional issues under section 167(3)(b)(i) of the Constitution. I turn instead to consider the second leg of the leave to appeal inquiry, which is whether it is in the interests of justice for this Court to determine the matter.

Interests of justice

[53] The final hurdle under the rubric of leave to appeal is the question of interests of justice. As mentioned, the issues raised here have reasonable prospects of succeeding and, in my view, that decisively compels the granting of leave. In *Bruce*, this Court said:

> "In dealing with applications for leave to appeal against the decision of the Supreme Court of Appeal this Court has held that the prospects of success are of fundamental importance. Such an appeal is the only remedy left to the applicant and if there are reasonable prospects that the appeal will succeed there are compelling reasons for granting the leave that is necessary."[29]

[54] The good prospects of success here warrant the granting of leave. Therefore, leave to appeal should be granted.

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[28] *Paulsen* above n 19 at para 30.

[29] *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 6.

Merits

[55] Was ATS allowed to cede its rights in the lease agreement to Wamjay without UJ's consent? This is ultimately the question that this Court must determine. It is trite that, in general, rights may be freely ceded.[30] Thus, "any right arising out of a contract may be ceded by the party entitled thereto to a third party without the knowledge or consent of the party liable".[31] It is equally uncontroversial that an exception to this general position is that—

> "[a] right arising out of a contract cannot be ceded without the consent of the party liable, if the parties intended that the promisee alone should be entitled thereto. Such an intention is presumed, if the nature of the transaction involves personal confidence between the parties or is otherwise such that personal considerations are of the essence of the contract (*delectus personae*)."[32]

[56] It is this exception to the general transferability of rights – *delectus personae* – on which UJ seeks to rely in this case. Scott describes this exception as arising in two circumstances:

> "[This] restriction [on freely ceding rights] applies to cases where the nature of the contract is such that the rights flowing from it may not be ceded, and also where the contract itself is not of such a nature that the rights flowing from it are non-transferrable, but where special circumstances create a *delectus personae*, thereby rendering the rights flowing from the contract non-transferrable."[33]

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[30] Wessels *The Law of Contract in South Africa* (Hortors Limited, Johannesburg 1937) vol 1 at 543.

[31] Lee and Honoré *The South African Law of Obligations* (Butterworth & Co. (Africa) Limited, Durban 1950) at 55. See also Kerr *Principles of the Law of Contract* 3 ed (Butterworth & Co. (Africa) Limited, Durban 1980) at 286, where it is stated that "in general, contractual rights, present and future, may be freely transferred by cession without the knowledge or consent of the party against whom the right is held, i.e. the party obliged to perform".

[32] Lee and Honoré id. See also Kerr id at 286-7, which states that "[c]ertain exceptional cases fall out of the scope of the general rule [and] . . . these are, in the main, those where the personal element is of considerable importance, [for example] rights under contracts of personal service".

[33] Scott above n 2 at 202.

[57] So, do the rights in the lease agreement before us involve a *delectus personae*? Before answering this, I touch briefly on the principles surrounding this concept.

Delectus personae

[58] The *delectus personae* exception to the general principle that rights are freely transferrable was explicated over a century ago by Innes CJ as follows:

> "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."[34]

[59] More recently, in *Propell*, the Supreme Court of Appeal reiterated that "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".[35] That case queried whether the indemnification rights of an insured under a professional indemnity contract with an attorney's insurance fund were cedable. The Supreme Court of Appeal said that what needed to be determined was whether the nature of contractual rights flowing from the contract was such that it excludes the cession of the rights.

[60] In answering that question, the Supreme Court of Appeal held, it was "necessary to interpret the terms of the [contract] in accordance with the principles enunciated in the recent cases of [that] Court" [36] which included cases such as *KPMG*, *Endumeni*,

[34] *Eastern Rand Exploration Co Ltd v A J T Nel, J L Nel, S M Nel, M M E Nel's Guardian and D J Sim* 1903 TS 42 at 53 (*Eastern Rand Exploration*).

[35] *Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund NPC* [2018] ZASCA 142; 2019 (2) SA 221 (SCA) (*Propell*) at para 17. See also *Friedlander v De Aar Municipality* 1944 AD 79 at 93 where Greenberg JA held that, "*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".

[36] *Propell* id at para 20.

Bothma-Batho[37] and *Novartis*.[38] Having had regard to the nature of the debtor[39] and its primary purpose, the nature of its funding scheme, the objectives of the empowering legislation of the debtor and the various specific clauses in the contract, the Court concluded:

> "The preceding analysis makes it clear that the rights flowing from the [contract] are not cedable. The specific group or class of people for whose benefit the insurance was established is specifically defined in clause 2.5 of the [contract]. . . . Clause 6.8 is another clause which indicates that the [contract] applies to the restricted group of people. These factors viewed cumulatively show that the nature of the contractual rights under the [contract] indicate that the insured is a *delectus personae*."[40]

[61] The Court went on to say that "[f]rom the point of view of Attorneys Insurance, the identity of the insured matters to it".[41] It therefore concluded that that matter fell squarely within the ambit of *delectus personae* as outlined by Botha JA in *Densam*.[42]

[62] Before I determine whether the rights in the lease agreement in this matter are *delectus personae*, it is necessary to clarify whether contextual evidence is relevant to that determination. This is so because the approach taken by the Supreme Court of

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[37] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA).

[38] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) (*Novartis*).

[39] The terms "debtor" and "creditor" are used in this context to refer to the contract debtor and contract creditor of the specific contractual right under discussion. For example, the rights under consideration in the facts of the matter before us are the rights that ATS had in the contract, *inter alia*, to use and occupy the leased premises. A contract creditor is entitled to a particular right and the contract debtor owes to that creditor an obligation to ensure the enjoyment of that right. This means that ATS, as the party who has the right to be in beneficial possession of the leased premises, is the creditor and UJ, as lessor, is the contract debtor who has the corresponding obligation to give the right of occupation and beneficial possession to ATS.

[40] *Propell* above n 35 at para 30.

[41] Id at para 31.

[42] In *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* [1990] ZASCA 120; 1991 (1) SA 100 (A) (*Densam*), the Appellate Division explained that what matters, when determining whether the creditor is *delectus personae*, is the nature of the debtor's obligation and the question of whether the identity of the creditor matters to it. It held at 112A-D:

> "The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent's [creditor's] obligation *vis-à-vis* the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation *vis-à-vis* the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession."

Appeal in the current matter is markedly different to the approach that Court took in *Propell*, and may create confusion if the position is not clarified. According to UJ, the result of the Supreme Court of Appeal's decision here is that *delectus personae* will almost never be found to exist, because a court will be precluded from considering contextual evidence.

Relevance of contextual evidence to the delectus personae inquiry

[63] I must dispose upfront of the respondents' argument, seemingly endorsed by the Supreme Court of Appeal, that in a *delectus personae* inquiry, once the nature of the right can be determined on the ordinary grammatical meaning of the words of the contract, contextual evidence is irrelevant because there is nothing further to interpret. This is incorrect. It is perspicuous that when a court determines the nature of the parties' rights and obligations in a contract, it is involved in an exercise of contractual interpretation. It follows then, that the determination of whether rights in a contract are *delectus personae* is always a matter of contractual interpretation. That means that the inquiry must adhere to the strictures of the now settled approach to the interpretation of contracts. But what does that approach entail?

[64] The Supreme Court of Appeal famously set out the position in the following widely-quoted statement in its decision in *Endumeni*:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as

> reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."[43]

[65] This approach to interpretation requires that "from the outset one considers the context and the language together, with neither predominating over the other".[44] In *Chisuse,* although speaking in the context of statutory interpretation, this Court held that this "now settled" approach to interpretation, is a "unitary" exercise.[45] This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[66] The approach in *Endumeni* "updated" the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text.[46] The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous.[47] 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.[48]

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[43] *Endumeni* above n 14 at para 18.

[44] Id at para 19.

[45] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at para 52.

[46] *Coopers* above n 25 at 768C-E where the Court held that a court could "apply extrinsic evidence regarding the surrounding circumstances *when the language of the document is on the face of it ambiguous*, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document".

[47] *Novartis* above n 38 at para 28; *Unica Iron and Steel (Pty) Ltd v Mirchandani* [2015] ZASCA 150; 2016 (2) SA 307 (SCA) at para 21; and *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) at para 24.

[48] *Endumeni* above n 14 at para 18 and *KPMG* above n 11 at para 39.

[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That 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. As the Supreme Court of Appeal held in *Novartis*:

> "This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . . . A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."[49]

[68] Let me clarify that what I say here does not mean that extrinsic evidence is *always* admissible. It is true that a court's recourse to extrinsic evidence is not limitless because "interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses".[50] It is also true that "to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible".[51] I must, however, make it clear that this does not detract from the injunction on courts to consider evidence of context and purpose. Where, in a given case, reasonable people may disagree on the admissibility of the contextual evidence in question, the unitary approach to contractual interpretation enjoins a court to err on the side of admitting the evidence. There would, of course, still be sufficient checks against any undue reach of such evidence because the court dealing with the evidence could still disregard it on the basis that it lacks weight. When dealing with evidence in this context, it is important not to conflate admissibility and weight.

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[49] *Novartis* above n 38 at paras 27-8.

[50] *KPMG* above n 11 at para 39.

[51] Id.

[69] What the preceding discussion clearly shows is that, to the extent that the Supreme Court of Appeal in the current matter 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. But does this differ when the interpretive exercise is undertaken to establish whether rights are *delectus personae*? The respondents say yes. They argue that all the *delectus personae* inquiry involves is ascertaining the nature of the right, and asking whether it is personal. If, on a "plain reading" of the contract, the right conferred is *by its nature* not personal, there is no need to resort to contextual evidence. The respondents' contentions in this regard must be rejected for a number of reasons.

[70] First, I have already debunked the myth that the *delectus personae* inquiry is unique. It, too, is a form of contractual interpretation, and must thus follow the settled principles of interpretation enunciated by this Court and the Supreme Court of Appeal in numerous cases, as was done in *Propell*. It is not open to a court conducting a *delectus personae* inquiry simply to look at the right conferred in the contract in the abstract, without grounding the right in the context and purpose of the contract.

[71] Second, the respondents' argument ignores the nature of the *delectus personae* inquiry. As I see it, the true focus of the inquiry is reflected in the statement quoted above from Innes CJ's judgment in *Eastern Rand Exploration* more than 100 years ago, which has withstood the test of time. That is, that the principal question in each case 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".[52] Thus, in *Propell*, indemnification rights were said to be *delectus personae* because "[f]rom the point of view of Attorneys Insurance the identity of the insured matters to it".[53] Similarly in *Densam*, it was found that *delectus*

[52] See [58] above.

[53] *Propell* above n 35 at para 31.

personae had not been established because "it could make no difference at all to Densam whether it was the Bank or Cywilnat who exercised the right to enforce payment".[54] Those conclusions fell squarely within Innes CJ's formulation in *Eastern Rand Exploration*.

[72] The respondents rely on *Densam*, and implore us to pay heed to Botha JA's statement in that case that the focus of the *delectus personae* inquiry is the debtor's obligation (the debtor in this case being UJ). They say that since UJ's obligation is merely one of providing beneficial occupation, and the performance owed to ATS does not change whether it is ATS or Wamjay that is owed the obligation, the rights under the lease cannot be *delectus personae*, and no contextual evidence is required to reach, or can change, that conclusion. Let me make it clear that I do not understand Botha JA's judgment in *Densam* to have departed from, or added anything novel to, Innes CJ's age old framing of the inquiry into *delectus personae* in *Eastern Rand Exploration*. All I understand Botha JA to have done is to clarify that in conducting that inquiry, a court must focus on the debtor's obligation, and not on the creditor's. It will be recalled that Botha JA's clarification was in the context of his criticism of Stegmann J's judgment in *George Consultants*,[55] which in his view had (wrongly) exclusively focused on the obligations of the creditor and not those of the debtor. What Botha JA did not do, however, is alter the inquiry into *delectus personae* laid down by Innes CJ. To the contrary, he endorsed that inquiry.[56]

[73] The essence of my approach in this judgment is that the inquiry into *delectus personae* postulated by Innes CJ and affirmed in *Densam* and numerous other cases over the years, ought to be undertaken with due regard to contextual evidence, in line with this Court's jurisprudence and that of the Supreme Court of Appeal on the interpretation of contracts, which accords with the *Propell* approach to the inquiry, which I consider to be correct. That requires courts to determine the true nature of the

[54] *Densam* above n 42 at 112G-H.

[55] *G S George Consultants and Investments (Pty) Ltd v Datasys (Pty) Ltd* 1988 (3) SA 726 (W).

[56] *Densam* above n 42 at 112D-F.

rights flowing from the contract in question by undertaking the unitary exercise of interpreting the contract in the light of its 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.

[74] To my mind, the interpretive injunction on courts to take the contextual approach postulated above is the same whether one considers the principal question in Innes CJ's formulation (i.e. whether the rights are so personal that it makes a reasonable or substantial difference to the debtor whether the cedent or the cessionary is entitled to enforce them), or whether one considers the correlative question which Botha JA in *Densam* implores us to ask (i.e. whether the nature of the debtor's obligations, which are the counterpart of the cedent's rights, is such that it establishes that those rights are personal to the cedent). Botha JA's formulation is really just another way of asking the same question. The crisp point I make in this judgment is that the question falls to be answered by 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.

[75] It is that crisp point which compels me to reject the respondents' submission that UJ's obligation under the lease was merely that of providing beneficial occupation, and that because this does not change whether that beneficial occupation is provided to ATS or Wamjay, the rights under the lease cannot be *delectus personae*. It cannot be that the rights created by the lease in this case are not *delectus personae* merely because the general right (and correlative obligation) flowing from a lease is that of beneficial occupation, which is generally not personal. The critical question we must answer is whether the occupation rights and obligations created by *this* lease are *delectus personae*. One cannot assess the rights and obligations in question at a level of abstraction, divorced from the contract actually entered into by the parties. Otherwise the *delectus personae* principle would seldom ever find application, because most rights are, at a level of abstraction, capable of being construed impersonally.

[76] Indeed, on the approach propounded by the respondents, the simple question which the Supreme Court of Appeal in *Propell* would have had to have asked was whether the *ordinary* nature of indemnification rights is personal, instead of asking the question which that Court in fact asked, and answered, which was whether the nature of the *particular* indemnification rights before it was personal, given the context and purpose of the contract in question and the underlying statutory matrix. Similarly, the approach taken by the Appellate Division in various cases concerning the transferability of option agreements, which are not inherently personal, is instructive. In *Hersch*, Schreiner JA held:

> "[I]n the absence of circumstances or language in the offer showing that the intention of the grantor was that only the person to whom the option was addressed, [in other words] the grantee, should be entitled to accept it, the general assumption would be that the grantee may pass the right to accept on to other persons. All the circumstances would, of course, have to be taken into account. . . . [I]t would depend on the *proper interpretation of the option [agreement] in the light of the circumstances*."[57]

[77] In *Dettmann*, Corbett JA held that:

> "In the case of an option to buy for cash the right is, *prima facie*, cedable unless the terms of the contract or such *surrounding circumstances as are admissible in the interpretation of the contract indicated a different intention*."[58]

[78] What is clear from these cases is that the inquiry requires more than the kind of abstract determination advanced by the respondents. On the respondents' approach, the question before the Appellate Division in these cases would simply have been whether, *generally*, option rights are capable of being ceded. To the contrary, the question posed and answered by that Court in each case was whether, notwithstanding the fact that option rights are generally considered to be cedable, the *specific* option rights before it

[57] *Hersch v Nel* 1948 (3) SA 686 (A) at 693.

[58] *Dettmann v Goldfain* 1975 (3) SA 359 (A) at 399H-400A.

were incapable of cession on the proper interpretation of the *specific* option contract in question, in the light of its context and circumstances.

[79] The respondents' contention that rights under urban leases are generally not *delectus personae*, therefore, cannot simply be the end of the inquiry. Whilst certain rights may generally, or *prima facie*, be of a certain nature, the authorities show that the question of whether they are personal will always depend on the "proper interpretation of the contract in the light of the circumstances". That "proper interpretation" must now be in the form of the unitary approach set out in this judgment. The relevant question in the current matter, then, is whether, since the rights and obligations in a long-term lease are not inherently personal, the circumstances in the current case create a *delectus personae*, thereby rendering the rights non-transferable.

[80] In making that determination, this Court must interpret the lease agreement in the light of its context so as to ascertain the parties' intention regarding ATS's right of use of the property, and the correlative obligation on UJ to provide the property for that use, and whether it makes any reasonable or substantial difference to UJ whether ATS or Wamjay (or another party) is entitled to enforce the obligations of UJ under the lease. UJ is correct that contextual evidence is relevant to the inquiry. As I have already stated, determining the nature of the right of use of the property in this case and whether that right was *delectus personae* ought to follow the settled principles of interpretation as enunciated by this Court and the Supreme Court of Appeal. What is required here is a proper interpretation of the lease agreement in order to ascertain the intention of the parties and the interpretation of clause 8 in particular – which speaks to the right of use of the property – in order to establish whether there is *delectus personae*.

[81] There is one last thing which I must clarify. What I have said above about the need for a contextual approach to the *delectus personae* inquiry, and the relevance of contextual evidence to that inquiry, does not change whether or not the contract under interpretation contains a whole agreement clause. The obligation on courts to take a contextual approach to the interpretation of contracts is peremptory. It is not capable

of exclusion by agreement between the parties. To the extent that the Supreme Court of Appeal held otherwise, it erred. I repeat: context is *always* relevant to the interpretation of a contract, whatever its terms.

Can lease rights be delectus personae?

[82] Is it relevant that we are dealing with a lease agreement in this matter? Does any of what I have said above about the proper approach to *delectus personae* change when the agreement under interpretation is a lease? I think not. It is necessary, however, for me to address Greenberg JP's judgment in *Boshoff*, and the reliance on that judgment by the Supreme Court of Appeal (citing LAWSA) in its apparent conclusion that lease rights cannot be *delectus personae*, and that a lessee can therefore cede such rights freely and subject only to a term forbidding their cession. First, I must point out that *Boshoff* was concerned with the position of the lessor, and whether lease rights are *delectus personae* in the sense that their correlative obligations attach to the lessor even after the lessor has sold the property that is the subject of the lease to another who has stepped into her or his shoes. The lessee's position was not before Greenberg JP in that case, and his statements on that position are therefore obiter.

[83] Second, Greenberg JP's statement that a long-term lease is seldom *delectus personae* stems from the statement by Wessels that the longer the period of time, the less likely a lessor would intend for the same person to occupy the property for the whole period. But earlier in that same work, Wessels states that:

> "If we apply the [*delectus personae*] principle to the law of lease, then, whenever it will make a reasonable or substantial difference to the landlord whether the contract is to be performed by the lessee or by the lessee's substitute, a cession of the lease ought not be allowed. *The personal character of the lessee is often of the greatest importance in leases.*"[59]

[59] Wessels above n 30 at 552.

[84] Wessels then goes on to note that there was inconsistency in how the then Cape Colony and Transvaal each dealt with whether or not there is a presumption that rights in a lease are *delectus personae*. He concludes, to the extent that there is such a presumption in relation to long leases, that "the longer the period, the greater is the presumption that the parties intended the contract with all its obligations to be transmissible to the assigns of the lessee".[60] But like all presumptions, that presumption can be rebutted where it is shown that the parties contemplated that they would deal personally with each other and no one else.

[85] The proper reading of *Boshoff* is that it did not purport to lay down a rule that a lease can never be *delectus personae*, but merely adopted the position espoused by Wessels. That is, that long leases are ordinarily not *delectus personae* but can be so. To the extent that the statement in LAWSA relied upon by the Supreme Court of Appeal suggests that the import of *Boshoff* is that rights under a lease agreement are not subject to the *delectus personae* concept but are subject only to the existence of a term prohibiting cession, that statement is wrong. So is the Supreme Court of Appeal's reliance on it. Even if there is a general rule that rights in a long lease are not *delectus personae*, it does not follow that such rights can never be *delectus personae*.

[86] The inquiry in all cases, including in respect of a lease (long or otherwise), is the one postulated in Innes CJ's articulation of the inquiry into *delectus personae* quoted above. That is, whether the rights flowing from the contract in question are so personal in nature that it makes a reasonable or substantial difference to the debtor whether the cedent or the intended cessionary is entitled to enforce them. That applies to all contracts, including lease agreements. Whether or not rights under a particular lease agreement are *delectus personae* will always depend on the specific agreement between the parties; its factual matrix and purpose; the circumstances leading up to its conclusion; and the knowledge at the time of those who negotiated and produced the agreement. That approach is consistent with the one taken in *Propell*, and aligns with

[60] Id at 557.

the unitary approach to interpretation which the jurisprudence of this Court and the Supreme Court of Appeal has adopted. Clearly, then, the fact that we are concerned with a lease is of little relevance.

Effect of the parol evidence rule on this case

[87] As stated earlier, the Supreme Court of Appeal relied on the parol evidence rule in excluding the evidence adduced by UJ and admitted by the High Court. UJ submits that part of the reason the Supreme Court of Appeal failed to take the contextual evidence into account when interpreting the lease agreement was because it confused the two "legs" of the parol evidence rule, and incorrectly held that that rule precluded UJ from adducing extrinsic evidence in this matter. It is therefore necessary for me briefly to consider how the principles of contractual interpretation, which require context to be taken into account, interact with the parol evidence rule in the *delectus personae* context.

[88] In *KPMG* and *Swanepoel*, the Supreme Court of Appeal held that the parol evidence rule remains part of our law, and is one of the caveats to the principle that extrinsic contextual evidence may be admitted.[61] The essence of the rule was most aptly captured in the case of *Vianini Ferro-Concrete Pipes*, where it was stated:

> "Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parol evidence."[62]

[89] The rule consists of two sub-rules. This duality was outlined by Corbett JA in *Johnston*:

[61] *Standard Bank of South Africa Ltd v Swanepoel N.O.* [2015] ZASCA 71; 2015 (5) SA 77 (SCA) at para 19 and *KPMG* above n 11 at para 39.

[62] *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

> "As has been indicated, the parol evidence rule is not a single rule. It in fact branches into two independent rules or sets of rules: (1) the integration rule . . . which defines the limits of the contract, and (2) the [interpretation] rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract."[63]

[90] The parol evidence rule therefore has both an integration facet and an interpretation facet. It is the latter facet that was relied on by the Supreme Court of Appeal. That facet of the rule was explained by Corbett JA as follows:

> "In many instances recourse to evidence of an earlier or contemporaneous oral agreement would, in any event, be precluded by . . . that branch of the 'rule' which prescribes that, subject to certain qualifications, 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. The extrinsic evidence is excluded because it relates to matters which, by reason of the reduction of the contract to writing and its integration in a single memorial, have become legally immaterial or irrelevant."[64]

[91] He continued to say:

> "[I]t is clear to me that the aim and effect of [the integration] rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence."[65]

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[63] *Johnston v Leal* 1980 (3) SA 927 (A) at 942H-943A.

[64] Id at 938C-F.

[65] Id at 943B-C.

[92] 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. If UJ had sought to adduce evidence to show the Court that the parties had intended to include a *pactum de non cedendo*, but had failed to do so, this part of the parol evidence rule would have precluded UJ from seeking to add this term to the contract by means of extrinsic evidence. However, it is quite clear that UJ did not seek to adduce its evidence for that reason. My reading of its judgment is that the Supreme Court of Appeal's invocation of the parol evidence rule in this case was influenced by its broader view that the whole agreement clause in the lease prevented the High Court from having regard to the contextual evidence adduced by UJ. I have already found that view to have been incorrect. It follows that the parol evidence rule was not an obstacle to the evidence being admitted.

Should contextual evidence have been admitted in this case?

[93] Having outlined the boundaries of and interplay between the contextual interpretative approach and the parol evidence rule, and in the light of the general legal principles for determining *delectus personae*, in my view it is evident that contextual evidence in this case ought to have been permitted in order to undergo a proper contextual interpretation of the contract and, particularly, clause 8, so that the nature of the rights could be determined. 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. The approach to determining whether or not there was *delectus personae* thus ought to have mirrored the approach taken by the Supreme Court of Appeal just a year and a half earlier in *Propell*.

Did the evidence in this case establish that the rights accorded to ATS in the lease agreement were delectus personae?

[94] I cannot fault the finding of the High Court and Full Court that the rights were *delectus personae* based on the circumstances of this case. These Courts had due regard to the words of clause 8, interpreted in the light of the circumstances present at the conclusion of the lease agreement. These considerations included the existing relationship between the parties, the statutory framework and ministerial permission on which the conclusion of the lease relied.

[95] Clause 8 of the lease agreement,[66] interpreted in the light of the request for ministerial approval and the attendant permission, reveals that the parties intended that the leased premises would be used by ATS for its project of establishing an institute of higher learning. The request for ministerial permission by UJ to lease the property to ATS stated:

> "[ATS] urgently needs property, in the vicinity of our university, to build their Theological College. . . . They have identified property owned by our university as the most suitable site for erecting their Theological College. We would like to extend a helping hand to them by letting this property to them over a period of thirty years."

I agree with the courts a quo that this ought to inform the interpretation of the right to use of the leased premises in clause 8 and that it points towards the personal nature of the right.

[96] Alongside this, the High Court found that the evidence revealed that the considerable negotiations leading up to the conclusion of the lease emphasised the personality of ATS. Throughout the negotiations, references were made to the "partnership" between UJ and ATS, with repeated reference to their relationship under the co-operation agreement. The Full Court noted that UJ and ATS were "clearly

[66] See above n 7.

operating in tandem and their functions and goals [were] intertwined". I am in agreement with both of these courts that this, too, leans in favour of the personal nature of the rights in issue.

[97] I further agree with the High Court and Full Court that the statutory framework within which the lease agreement was concluded is also relevant. UJ entered into the co-operation agreement and lease agreement on the basis of the Universities Act and the Rand University Act respectively. It was in terms of section 10B(1) of the Universities Act that UJ entered into the co-operation agreement, which empowered it to contract with other institutions of higher education, including allowing it to contract with ATS initially. Subsequent to this, UJ then relied on section 4(2) of the Rand University Act to lease its immovable property to ATS. The application for permission from the Minister and the permission itself were personally directed at UJ leasing the premises to ATS in order to assist it in its project of providing tertiary education. On top of this, UJ agreed to a once-off payment by ATS in exchange for the lease of the property – even if the lease is renewed after 30 years. In my view, it could never have been intended by the parties at the time of conclusion of the lease agreement that ATS could simply cede its rights to use the property to another in exchange for profit.

[98] It is appropriate to note, in relation to Wessels' statement adopted in *Boshoff* that the longer the period of time, the less likely a lessor would intend for the same person to occupy property for the whole period, that the scenario in the circumstances before us – of two juristic persons, which do not have a limited lifespan in the same way that natural persons do – is entirely different to the scenario of two natural persons envisaged by Wessels.

[99] All of the above weighs in favour of a finding that it *did* matter to UJ that the lessee was ATS, which would use the land to provide tertiary education as was intended at the conclusion of the lease. "[H]aving regard to the context provided by reading [clause 8] in the light of the document as a whole and the circumstances attendant upon

its coming into existence,"[67] in my view, it would make a "reasonable or substantial difference"[68] to UJ that ATS, and not Wamjay, is entitled to enforce the right to use the property "for educational, religious and related [tertiary education] purposes" under the lease agreement. I am therefore of the view that, in the circumstances of this agreement, the right to use of the property, encapsulated in clause 8, was personal to ATS.

[100] I should say something about prejudice in the light of the respondents' argument that the rights in the lease cannot be *delectus personae* because there is no prejudice to UJ as a result of the cession. I could find no authority which indicates that prejudice is an independent element of the inquiry into *delectus personae*. All I could find is the often-quoted statement from the *Sasfin*[69] and *Goodwin Stable Trust*[70] cases that 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. What is clear from these cases is that all that statement was meant to achieve was to encapsulate the interest which the *delectus personae* concept is designed to protect rather than to lay down a rule that prejudice is a requirement thereof. I repeat that in all cases, the inquiry is simply whether on a proper interpretation of the contract, in the light of its context and purpose, the rights are personal in that it makes a difference to the debtor whether the cedent or the cessionary is entitled to enforce them.

[101] To the extent that it is a factor in the *delectus personae* inquiry, however, the proper approach to prejudice is the flexible one set out in *Propell*. In that case, the Supreme Court of Appeal explained that the debtor does not have to show that a cession will occasion the cessionary actual prejudice but merely that it will impose greater burdens.[71] UJ has explained that it is prejudiced by the cession in that ATS is no longer in a position to fulfil its obligation under the lease to build the agreed theological

[67] *Endumeni* above n 14 at para 18.

[68] *Eastern Rand Exploration* above n 34.

[69] *Sasfin (Pty) Ltd v Beukes* [1988] ZASCA 94; 1989 (1) SA 1 (A) at 31G-H.

[70] *Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) at 617H-I.

[71] *Propell* above n 35 at para 36.

college. Where the cession has the effect of rendering the cedent unable to meet its obligations under the contract, the cession evidently imposes burdens on the debtor which would otherwise not exist, and there can be no doubt that the debtor is prejudiced.

[102] Moreover, the cession in this case makes a difference to UJ's contemplated performance required under the lease, properly construed in its context and purpose. As explained earlier, UJ's obligation under the lease was not merely one of beneficial occupation in the abstract, as argued by the respondents, and has to be understood within the scope of the purpose of the agreement, which was to provide the premises as a helping hand to ATS to enable it to build a theological college. Indeed, UJ now has to provide the use of the premises for a purpose which could never have been conceived by the parties when they contracted. In the light of ATS's consequent inability to build the college as a result of the cession, this is evidently prejudicial to UJ, and buttresses the conclusion that the use rights under the lease were personal to ATS.

[103] As ATS's rights under the lease agreement were *delectus personae*, ATS was not entitled to cede them to Wamjay without first obtaining UJ's consent. The next question to answer is therefore the following: did ATS's cession to Wamjay, without the permission of UJ, amount to a repudiation of the lease agreement?

Did the cession by ATS amount to a repudiation of the lease agreement?

[104] A party to a contract commits the breach of repudiation when, through words or conduct, that party manifests an unequivocal intention to no longer be bound by the contract or by the obligations forming part of the contract.[72] The intention to repudiate is thus determined objectively. The test is whether the cedent acted in a manner that would lead a reasonable person in the position of the innocent party to believe that they do not intend to fulfil, or completely fulfil, their part of the contract.[73]

[72] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2000] ZASCA 81; 2001 (2) SA 284 (SCA) (*Datacolor*) at para 16.

[73] Id.

[105] Would a reasonable person in the position of UJ have thought that proper performance in terms of the contract would not be forthcoming as a result of ATS's words or conduct? A court, in making this assessment must take heed of the "background material and circumstances that should have weighed with the innocent party".[74] It is important to bear in mind that repudiation ought not be lightly presumed.[75]

[106] The relationship between the parties in this matter centred on the provision of tertiary education by both UJ and ATS and the provision of land by UJ to ATS for the latter's project of providing tertiary education on the leased premises. This is evident from the lease agreement, properly interpreted in its context, as discussed above. The type of performance reasonably expected at the conclusion of the contract was that ATS would establish an institution of higher learning on the leased premises, which was intended by the parties to be used for purposes relating to tertiary education. The motivation to the Minister expressly stated that ATS planned to establish a theological college, an institution of higher learning, on the property. It cannot be disputed that the establishment of a theological college constituted a ground upon which the application by UJ, and the subsequent approval by the Minister, was based.

[107] The cession of the rights to use and occupy the leased premises to another not only meant that ATS would be unable to build and establish a theological college on the property as the parties had intended at the conclusion of the lease agreement, but also that clause 8 of the lease would be incapable of being complied with at all by ATS once it had divested itself of the right to use the property.

[108] As a result, given the very personal nature of the lease and the use of property right in particular, it was reasonable of UJ to believe that through its conduct of ceding the rights to another institution which would be unable to use the land in accordance with how the lease required it to be used, ATS intended to no longer be bound by the

[74] Id at para 20.

[75] Id at para 18.

lease agreement. The cession of the rights under the lease agreement to Wamjay therefore amounted to a repudiation of the lease agreement by ATS.

Was UJ entitled to cancel the contract?

[109] Before a party to a contract may cancel a contract by "accepting" the repudiation of the contract by the other, the repudiation must be material and of a sufficiently serious nature to warrant rescission. In *Datacolor*, the Supreme Court of Appeal said that "[w]hether the innocent party will be entitled to resile from the agreement will ultimately depend on the nature and the degree of the impending non- or malperformance".[76]

[110] In *Hovis*,[77] the Appellate Division held that a repudiation of the entire contract will always entitle the innocent party to rescind the entire contract and if the debtor refuses to perform at all, or rejects the contract, the creditor may forthwith terminate the contract. On the other hand, if only a part of a divisible performance is repudiated, the creditor may rescind that part only.[78]

[111] In this case, the conduct by ATS was of the nature that ATS could no longer establish an institute of higher education on the land. This was the reason for which the lease agreement was concluded. It not only formed part of the negotiations between the parties, but it also formed part of the motivation to the Minister, for the approval of the lease. Since Wamjay does not provide, or intend to provide, tertiary education, the cession means that the property will not be used as intended. In my view, the repudiation by ATS is of a serious nature. It defeats the entire purpose for which the contract was entered into. Where the breach is of this fundamental nature, the innocent party is entitled to cancel the contract. The cession of rights is tantamount to an unequivocal intimation on the part of ATS that it no longer wanted to perform or be

[76] Id at para 17.

[77] *Tuckers Land and Development Corporation v Hovis* 1980 1 SA 645 (A).

[78] *Nash v Golden Dumps (Pty) Limited* [1985] ZASCA 6; 1985 (3) SA 1 (A) at 23F-G.

bound by an essential part of the lease agreement (to use the land to establish an institute of higher education or related purpose). UJ was justified in cancelling the agreement upon accepting the repudiation.

[112] I now briefly touch on the defences raised by the respondents, although neither of these were adequately ventilated at the hearing.

Defences of waiver and estoppel raised by the respondents

[113] It is trite that a waiver "is the renunciation of a right".[79] Determining the intention to waive a right is an objective test, which must be judged by its outward manifestations and adjudged from the perspective of the reasonable person standing in the shoes of the other party.[80] No one is presumed to have waived their rights and so the conduct from which waiver is inferred must be so unequivocal that it can be consistent with no other hypothesis.[81]

[114] In *Lufuno Mphaphuli*, this Court held:

> "Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish."[82]

[79] *Botha (now Griessel) v Finanscredit (Pty) Ltd* [1989] ZASCA 56; 1989 (3) SA 773 (A) at 792B-D.

[80] *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) at para 16.

[81] Id at para 19.

[82] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews* [2009] ZACC 6; 2009 (4) SA 529 (CC); 2009 (6) BCLR 527 (CC) at para 81.

[115] In the light of this strict test for proving a waiver, I am of the view that the respondents have not overcome the hurdle of showing that there is no other conceivable hypothesis to draw from UJ's temporary sale of the leased premises than that UJ intended to abandon its right to ever rely on the personal nature of the lease in subsequent instances where ATS purported to pass on its right to use the property under the lease agreement to another. The personal nature of the rights, existing as it did from the conclusion of the lease agreement, is not alterable by the later conduct of the parties. And I am not convinced that this is an instance where UJ clearly and unequivocally waived its right to ever rely on this fact.

[116] Turning now to the respondents' second defence, is there any merit in the defence of estoppel?

[117] In *Aris Enterprises (Finance)*, Corbett JA outlined the concept of estoppel as follows:

> "The essence of the doctrine of estoppel by representation is that a person is precluded, [in other words,] estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice. The representation may be made in words, i.e. expressly, or it may be made by conduct, including silence or inaction, i.e. tacitly; and in general it must relate to an existing fact."[83]

[118] Thus, where one party has a reasonable belief in a misrepresentation made by the other party and relies thereon to his own detriment, the former may hold the latter to the misrepresentation and prevent the party who made the misrepresentation from relying on the true state of affairs. However, a party may only rely on estoppel if the reasonable person on the street would also have been misled by the conduct on which the estoppel is founded.[84]

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[83] *Aris Enterprises (Finance) v Protea Assurance* 1981 (3) SA 274 (A) at 291D-E.

[84] Rabie *The Law of Estoppel in South Africa* 1 ed (Butterworths Publishers (Pty) Ltd, Durban 1997) at 53.

[119] Because of the heavy burden of proof on the party raising estoppel, I am not convinced that ATS has shown that it relied upon a representation by UJ when concluding the cession agreement that would give rise to this Court estopping UJ from asserting its rights. The faint passing reliance by ATS on UJ's temporary sale of the property does not discharge this heavy burden.

[120] In my view, both the defences of waiver and estoppel are "last chance" attempts by the respondents not to be held responsible for unlawfully attempting to cede rights that were non-transferable, and, in doing so, profiteering handsomely by ceding rights in the lease, in the case of ATS, where that agreement had been concluded as a result of UJ wanting to extend a helping hand to a partner provider of tertiary education.

Conclusion

[121] In conclusion, I hold that UJ must succeed in this matter. The Supreme Court of Appeal erred in refusing to admit contextual evidence relevant to the proper interpretation of the lease agreement and in concluding that that agreement was not *delectus personae*. The circumstances attendant to the conclusion of the lease agreement and the terms of the agreement, properly construed, quite evidently indicate that the rights therein were of a personal nature and therefore not freely cedable. In ceding the rights to Wamjay, ATS repudiated the agreement and this repudiation was of a sufficiently serious manner – preventing the entire purpose of the lease from continuing – to justify UJ's subsequent cancellation of that agreement.

[122] I see no reason why costs should not follow the result.

Order

[123] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.

3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "The appeal is dismissed with costs."

4. The respondents are ordered jointly and severally to pay the costs of the applicant in this Court, including the costs of two counsel.

For the Applicant:	A Cockrell SC, A R G Mundell SC and N Khumalo instructed by Webber Wentzel
For the Respondents:	G Kairinos SC instructed by WP Steyn Attorneys