THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 470/2020

In the matter between:

CAPITEC BANK HOLDINGS LIMITED	**FIRST APPELLANT**
CAPITEC BANK LIMITED	**SECOND APPELLANT**

and

CORAL LAGOON INVESTMENTS 194 (PTY) LTD	**FIRST RESPONDENT**
ASH BROOK INVESTMENTS 15 (PTY) LTD	**SECOND RESPONDENT**
THE TRANSNET SECOND DEFINED BENEFIT FUND	**THIRD RESPONDENT**
RORISANG BASADI INVESTMENTS (PTY) LTD	**FOURTH RESPONDENT**
LEMOSHANANG INVESTMENTS (PTY) LTD	**FIFTH RESPONDENT**

Neutral citation: *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99 (09 July 2021)

Coram: PONNAN, MAKGOKA, MBATHA JJA and GOOSEN and UNTERHALTER AJJA

Heard: 18 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 09 July 2021.

Summary: Contract – approach to interpretation – good faith – consent as a requirement for the sale of shares – past conduct as a guide to interpretation – parol evidence rule – good faith at common law – independent source of contractual obligation – orders requiring the grant of consent.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Vally J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraphs 4 – 8 of the order of the high court are set aside and replaced with the following:

‘2.1 The application under case number 30899/2019 is dismissed;

2.2 The applicants and the first and second Intervening Parties in case number 30899/2019 shall pay the costs of the first and second respondents, such costs to include the costs of two counsel, where so employed.’

JUDGMENT

Unterhalter AJA (Ponnan, Makgoka, Mbatha JJA and Goosen AJA concurring)

Introduction

[1] The first appellant, Capitec Bank Holdings Limited (Capitec Holdings), the first respondent, Coral Lagoon Investments 194 (Pty) Ltd (Coral), and the second respondent, Ash Brook Investments 16 (Pty) Ltd (Ash Brook), in December 2006, concluded a subscription of shares and shareholders agreement (the subscription agreement). Pursuant to the subscription agreement, Coral subscribed for, and Capitec Holdings issued, 10 million ordinary shares to Coral. Coral, in turn, was required to allot and issue shares to Ash Brook so as to constitute Ash Brook as the only ordinary shareholder of Coral. This was done. The object of the subscription agreement was, as its recital explains, to permit Capitec Holding to increase its black shareholding, and thereby fulfil its black empowerment obligations.

[2] Regiments Capital (Pty) Ltd (Regiments Capital) held a 59.82% interest in Ash Brook. On 8 August 2019, Regiments Capital, and various parties related to it (the Regiments Parties), Coral and the third respondent, the Transnet Second Defined Benefit Fund (the Fund), entered into a settlement agreement. The settlement agreement required Regiments Capital and the Regiments Fund Managers to pay the Fund a settlement amount of R500 million, together with interest, in settlement of the Fund's claims against the Regiments Parties. Those claims arose from litigation instituted by the Fund against the Regiments Parties. The Fund

alleged that the Regiments Parties had defrauded the Fund and sought to recover monies for the benefit of the Fund's members. The settlement amount was to be funded by the sale of 810 230 Capitec Holdings shares (the sale shares). The proceeds of the sale were to be used to discharge the settlement amount owing to the Fund, with the balance of the purchase price to be paid by the Fund to an account nominated by Coral.

[3] Among the suspensive conditions in the settlement agreement, clause 3.1.4 stipulated that 'the Capitec Consent having been duly obtained and executed'. The Capitec Consent was defined to mean 'the written agreement and consent of Capitec to the sale and purchase of the Sale Shares . . .'. This condition was stated to be for the sole benefit of the Regiments Parties and Coral.

[4] Coral and the Fund sought to obtain the consent of Capitec Holdings for the disposal of the sale shares by Coral. Correspondence between the parties ensued. The positions adopted by the parties will be considered in what follows. Capitec Holdings did not give its consent. On 2 September 2019, Coral and Ash Brook brought an urgent application in the Gauteng Division of the High Court, Johannesburg (the high court). They sought a declarator that the withholding by Capitec Holdings of its approval or consent for the disposal of the sale shares pursuant to the settlement agreement was unreasonable as contemplated in clause 13.7 of the subscription agreement and in breach of Capitec Holdings' duties of good faith in terms of clause 13.11 of the subscription agreement, alternatively, at common law. In addition, mandatory relief was sought, directing Capitec Holdings to give its approval or consent in terms of the settlement agreement. The Fund, cited as the third respondent in the application, brought a counter-application against Capitec Holdings for an

order that Capitec Holdings had no right under the subscription agreement to prevent Coral from selling the sale shares to the Fund.

[5] The predicate of Coral and Ash Brook's application was that Capitec Holdings was obliged to consent to the sale by Coral of the sale shares to the Fund. The counter-application of the Fund proceeded from a different premise: the sale by Coral of the sale shares to the Fund does not require the consent of Capitec Holdings in terms of the subscription agreement. Capitec Holdings opposed both applications. However, in doing so, Capitec Holdings acknowledged that Coral could sell its shares to anyone without securing the consent of Capitec Holding. That did not mean that Coral's sale of the sale shares was without consequence. Capitec Holdings contended that if the purchaser of the sale shares was not a qualifying black person (in terms of the applicable legislation), then Capitec Holdings enjoyed the right to require Coral to acquire an equal number of Capitec Holdings shares, to replace the sale shares it had sold, in terms of clause 8.3 of the subscription agreement.

[6] Two minority shareholders of Ash Brook, the fourth respondent, Rorisang Basadi Investments (Pty) Ltd (Rorisang) and the fifth respondent, Lemoshanang Investments (Pty) Ltd (Lemoshanang), were given leave by the high court to intervene. They supported the application of Coral and Ash Brook and the relief claimed by them.

[7] The applications were heard in the high court by Vally J. He found for Coral and Ash Brook and determined that Capitec Holding's refusal to consent to the sale of the sale shares was in breach of its contractual and common law duties of good faith and reasonableness and ordered Capitec Holdings to consent to the sale within two days of the grant of the

order. Capitec Holdings was also ordered to pay the costs of Coral and Ash Brook, and the costs of the Fund and the two intervening parties, Rorisang and Lemoshanang.

[8] Vally J refused Capitec Holdings leave to appeal these orders. This Court however granted leave. We were informed that as between Capitec Holdings and the Fund, the matter (including the question of costs) had become settled. This Court need not further consider the appeal against the costs order granted in favour of the Fund.

Mootness

[9] Coral, Ash Brook, Rorisang and Lemoshanang submitted to us that the decision of this Court will have no practical effect or result. In consequence, in terms of s 16(2)*(a)* of the Superior Court's Act 10 of 2013, the appeal should be dismissed.

[10] In order to decide the question of mootness, it is necessary to refer to certain evidence that formed part of an application by Capitec Holdings to adduce further evidence on appeal. The application was not opposed. And we granted the application. The evidence concerns transactions that occurred in November and December 2019, and their consequences.

[11] The judgment of the high court was handed down on 5 November 2019. Capitec Holdings was ordered to furnish its consent within two days. An application for leave to appeal was brought on 7 November 2019, which Vally J dismissed on 11 November 2019. On 13 November 2019, Capitec Holdings sought leave to appeal from this Court. Whilst that application was pending, Capitec Holdings learnt that the Fund and the Regiment Parties had entered into a fourth addendum to

the settlement agreement. This agreement, dated 19 November 2019 (the November 2019 transaction), required Coral to lend 810 228 Capitec Holdings shares to a wholly owned subsidiary of Regiments Capital, K2019495062 (Pty) Ltd (K2019). K2019 would then sell these shares to the Fund, and K2019 undertook to cede its rights to the proceeds of the sale to Coral.

[12] Capitec Holdings indicated that it considered the loan and sale of the shares to be a sham – the real transaction was the sale by Coral of the sale shares to the Fund. Since, in the opinion of Capitec Holdings, the majority of the beneficiaries of the Fund were white, on 3 December 2019, Capitec Holdings, in terms of clause 8.3 of the subscription agreement, requested Coral to reacquire 810 228 Capitec Holdings shares, to be registered in its name within 30 days. This Coral declined to do.

[13] In January 2020, The Fund wrote to Capitec Holdings to inform it that the parties to the settlement agreement would move the high court to have the settlement agreement, including the fourth addendum, made an order of court. Capitec Holdings took up the position that it was not a party to the settlement agreement; that it would not oppose the order sought, but that this constituted no waiver of its rights to appeal the order of the high court and to bring proceedings to compel Coral to reacquire 810 228 Capitec Holdings shares.

[14] On 17 July 2020, Meyer J made the settlement agreement, including the fourth addendum, an order of court. Capitec Holdings pursued its appeal to this Court, and on 7 January 2021 submitted its dispute with Coral to arbitration claiming that Coral was obliged to reacquire 810 228 Capitec Holdings shares.

[15] Coral and Ash Brook submitted that the appeal before this Court had become moot. The sale of shares to the Fund had taken place pursuant to the fourth addendum of the settlement agreement. This had occurred after the order of Vally J had been handed down, and without reliance upon this order. Rather, the Fund, Coral and Ash Brook, relying upon Capite Holdings' position that the sale of Capitec Holdings shares did not require its consent, proceeded with the sale, which had taken place. In consequence, it was submitted, the appeal was of no practical effect or result.

[16] Capitec Holdings resisted this submission. It contended that it had, in terms of clause 10 of the subscription agreement, submitted its dispute with Coral to arbitration. In the arbitration, Capitec Holdings seeks an award directing Coral to acquire and register the 810 228 Capitec Holdings shares in terms of clause 8.3 of the subscription agreement. If the orders of the high court were to stand, and this appeal dismissed for mootness, Coral and Ash Brook would enjoy a defence in the arbitration. The high court declared that Capitec Holdings was required to give its consent to the sale of the shares and ordered it to do so. This order, in effect, permitted the sale of shares to the Fund, without Capitec having recourse to compel Coral to reacquire the shares. The high court judgment rendered Capitec Holdings' claim in the arbitration *res judicata.* Hence, the appeal before this Court continued to have a practical effect because, if the appeal succeeded, it would preserve Capitec Holdings' claim in the arbitration.

[17] Counsel for Coral and Ash Brook disavowed any reliance upon the high court's order for the purposes of the arbitration. With that undertaking, so counsel submitted, the appeal was moot. Counsel for Capitec Holdings accepted the undertaking, but he submitted that the

disavowal did not result in mootness. This was so because, should Capitec Holdings prevail in the arbitration, Coral would be required to acquire 810 230 Capitec Holdings shares. These shares would remain subject to the subscription agreement. The high court's judgment would then stand as to the duties of Capitec Holdings to give its consent to the future sale of the shares held by Coral – the very matter that is appealed to this Court.

[18] Central to the appeal before us is the question as to how to interpret clause 8.3 of the subscription agreement. This provision governs the basis upon which Coral may sell its Capitec Holdings shares. The high court concluded that Capitec Holdings was in breach of a duty resting upon it to consent to the sale of these shares. Capitec Holdings contended on appeal that it owed no such duty. In my view, this remains a live dispute between the parties. If the award of the arbitrator requires Coral to acquire the same number of shares that it has sold, Coral and Capitec Holdings will return to the very position that gave raise to their original dispute – is Capitec Holdings required to consent to any future sale of Capitec Holdings shares by Coral? The high court imposed a duty on Capitec Holdings to do so. The arbitrator will not determine this issue because Coral and Ash Brook disavow the high court's judgment for the purposes of the arbitration and do not rely upon consent as the basis upon which the Fund purchased the sale shares. However, Coral and Ash Brook did not abandon the judgment of the high court. On the contrary, they have made every effort, in the course of this appeal, to support its reasoning and sustain the order made by the high court. In these circumstances, the high court's judgment at present determines the duties of Capitec Holdings should Coral decide to sell its shares. Whether the high court was correct to impose these duties upon Capitec Holdings will be resolved in the appeal before us.

[19] This Court has a discretion to entertain the merits of an appeal, even where the matter is moot.[1] Where a case poses a legal issue of importance for the future that requires adjudication, that may incline the court to hear the appeal. The appeal before us, for the reasons given, is of practical consequence. It is not moot. But even if it were, the interpretation of clause 8.3 is a legal issue of consequence for the future of the parties' commercial relationship. That would warrant the exercise of our discretion to hear the merits of the appeal. I accordingly decline to dismiss the appeal on the basis of mootness.

[20] Rorisang and Lemoshanang supported Coral and Ash Brook in their submission that the appeal was moot. They added one submission of their own. In December 2019, Ash Brook repurchased their shares and Rorisang and Lemoshanang ceased to be minority shareholders of Ash Brook. This was done without seeking the consent of Capitec Holdings. Accordingly, the very issue that had actuated Rorisang and Lemoshanang to intervene in the application before the high court had fallen away and the appeal, for this reason, had become moot.

[21] This submission cannot prevail. Rorisang and Lemoshanang did not, upon their intervention, seek independent relief from the high court in respect of their shareholding in Ash Brook. They intervened to support the relief sought by Coral and Ash Brook in respect of the sale shares. The orders granted by the high court concerned the sale by Coral of the sale shares to the Fund. Nor order was sought or made concerning the sale of Ash Brook shares by Rorisang and Lemoshanang. They opposed the grant of leave to appeal and filed heads of argument in this Court seeking to have

[1] *Qoboshiyane N O and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.

the appeal dismissed. Rorisang and Lemoshanang could have withdrawn when, as they contend, the appeal no longer affected their interests. They did not do so. The issue of mootness stands or falls on the case made for it by Coral and Ash Brook. I have found that Coral and Ash Brook have failed to make out a case for mootness. Accordingly, if the appeal remains live in respect of the principal litigants, there is no basis to rule that the appeal is moot as against Rorisang and Lemoshanang as intervenors.

The merits

[22] The issue that lies at the heart of this appeal is this: was Capitec Holdings' consent required before Coral could sell the sale shares to the Fund, and if it was, did Capitec Holdings owe duties of good faith and reasonableness to Coral, which Capitec Holdings breached in failing to consent to the sale?

[23] The high court found that Capitec Holdings' consent was required for the sale of shares to take place, and Capitec Holdings was in breach of its duties of good faith and reasonableness in failing to consent to the sale. As a result, the high court issued an order declaring that Capitec Holdings' refusal to consent to the sale was in breach of its contractual and common law duties of good faith. The high court, in addition, issued a *mandamus* requiring Capitec Holdings to grant its consent to the sale within two working days.

[24] The reasoning of the high court proceeded in the following way. Capitec Holdings had in the past required and granted its consent to sales by Coral of Capitec Holdings shares. Yet, in the proposed sale by Coral of the sale shares to the Fund, Capitec changed its stance. Capitec Holdings' position (in agreement with the Fund) was that its consent was not required

for Coral to sell the sale shares. However, Coral then faced the risk that Capitec Holdings would require Coral to repurchase an equivalent number of shares should Capitec Holdings form the opinion that the purchaser of the sale shares was not a qualifying black person. This change, without proper explanation, was a failure by Capitec to act in good faith. That breach, taken together with Coral's reasonable expectation that it should know whether it was running the risk of having to repurchase the same number of shares that it wished to sell, meant that, according to Vally J, 'justice can only be dispensed if the matter is approached on the basis that Capitec's consent is required for the sale'.

[25] Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*[2] offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself'.[3]

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13;[2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (*Endumeni*) para 18.
[3] *Endumeni* para 18.

[26] None of this would require repetition but for the fact that the judgment of the high court failed to make its point of departure the relevant provisions of the subscription agreement. *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* licence judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable.

[27] Clause 8.3 of the subscription agreement reads as follows:

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

The identification of the entities in square brackets is my addition.

[28] A plain reading of clause 8.3 indicates that the parties to the subscription agreement regulated the rights and obligations of Coral and Capitec Holdings, should it occur that Coral sold, in any of the ways referenced by that term as defined, any of the Capitec Holdings shares. The Capitec Holdings shares are defined to mean the 10 million ordinary shares for which Coral subscribed. Not every sale by Coral of these shares is caught by the provision. Rather, it is the sale of Capitec Holdings shares by Coral to an entity or person who, in the opinion of Capitec Holdings, does not comply with the Broad-Based Black Economic Empowerment Act 53 of 2003 (the BBBEE Act) and its Codes. Such a sale gives rise to rights enjoyed by Capitec Holdings and obligations that burden Coral. I

will style such a sale as ‘a demarcated sale’. Should Coral conclude a demarcated sale, Capitec Holdings enjoys the right to determine the number of Capitec Holdings shares sold and Coral has the obligation, within 30 days of being requested to do so by Capitec Holdings, to acquire an equal number of Capitec Holdings shares and cause such shares to be registered in its name.

[29] Nothing in the text of clause 8.3 constrains Coral from selling Capitec Holdings shares. If Coral does so, and the transaction is a demarcated sale, then Capitec Holdings may exercise its right to require Coral to acquire an equal number of Capitec Holdings shares. The consent of Capitec Holdings is not referenced in clause 8.3 as a requirement that must be met before Coral may conclude a demarcated sale. That the conclusion of a demarcated sale by Coral will have the consequence that Coral is burdened with the obligation to make whole its shareholding of Capitec Holdings shares does not make consent a requirement to conclude a designated sale. The text of clause 8.3 offers no indication that the consent of Capitec Holdings was required so as to permit Coral to sell the sale shares to the Fund.

[30] Nor does the context of clause 8.3, within the scheme of clause 8, disturb the plain meaning of clause 8.3. Clause 8 of the subscription agreement deals with three categories of shareholder: selling restrictions upon shareholders of Ash Brook (clauses 8.1 and 8.2), the consequences of sales by Coral of its shareholding in Capitec Holdings (clause 8.3), and the restraint upon Ash Brook selling its shares in Coral (clause 8.4). What it signifies is that the shareholders of Ash Brook are prohibited from selling their shares, except under conditions stipulated in clause 9.1. Clause 8.2 sets out the remedial consequences of a breach of this prohibition. The

introductory words of clause 9.1 reads as follows: 'No shareholder of [Ash Brook] ("BEE shareholder") shall sell . . . its shares in [Ash Brook], except under the conditions as set out below'. Clause 8.4 also prohibits Ash Brook from selling its shares in Coral, and provides for the remedial consequences of a breach. Clause 8.4 commences with the words, '[Ash Brook] may not sell . . . or in any other manner endeavour to dispose ("sell or sold") any of its shares in [Coral] '. By contrast, clause 8.3 contains no prohibition upon the sale by Coral of Capitec Holdings shares. Clause 8.3 simply specifies the consequences of such a sale when it is a demarcated sale.

[31] Clause 8 differentiates its treatment of the three types of shareholders. The shareholders of Ash Brook and Ash Brook as a shareholder of Coral are placed under a prohibition as to the sale of their shares. But Coral is not: Coral may sell its Capitec Holdings shares, but it must endure the consequences of doing so. Where the parties to the subscription agreement wished to prohibit a shareholder from selling its shares, this was made plain in clear language. Clause 8.3 contains no language of prohibition. Clause 8 as a whole provides context that clause 8.3 imports no requirement of consent.

[32] Counsel for Ash Brook and Coral submitted that, notwithstanding the text of clause 8.3, there was a textual basis in the subscription agreement that required Coral to procure Capitec Holdings' consent. Clauses 13.6 and 13.7 of the subscription agreement reads as follows:

'13.6 Save as otherwise herein provided, neither this Agreement nor any part, share or interest herein, nor any rights or obligations hereunder may be ceded, assigned, or otherwise transferred without the prior written consent of the other party.

13.7 Any consent or approval required to be given by any Party in terms of this Agreement will, unless specifically otherwise stated, not be unreasonably withheld.'

Counsel submitted that the sale by Coral of the sale shares to the Fund falls within the ambit of clause 13.6. Coral thus required the consent of Capitec Holdings which, in accordance with clause 13.7, could not be unreasonably withheld by Capitec Holdings.

[33] This submission cannot be sustained. First, clause 13.6 prohibits cession, assignment or transfer without prior written consent. To what does this prohibition have application? Clause 13.6 provides the answer. It is to the subscription agreement; any part, share or interest in the subscription agreement; and 'any rights or obligations hereunder'. The sale by Coral of the sale shares is not a cession, assignment or transfer of the subscription agreement or any part thereof. Coral did not cede any of its personal rights under the subscription agreement to the Fund. Nor did Coral assign or transfer its rights and obligations under the subscription agreement to the Fund. Coral sold the sale shares, comprising its shareholding of Capitec Holdings shares, to the Fund. This simply marks out the distinction between the subject matter of the sale, that is the sale shares, and the subject matter of a cession or assignment, that is the rights and obligations of Coral under the subscription agreement. Simply put, the submission fails to distinguish the sale of shares by Coral from the personal rights and obligations of Coral under the subscription agreement that regulate the sale of such shares. The sale of shares by Coral is not a cession of rights, nor an assignment of Coral's rights and obligations under the subscription agreement. The subject matter to which the prohibition in clause 13.6 has application does not apply to the sale shares. Hence no consent is required from Capitec Holdings, in terms of clause 13.6, so as to permit Coral to sell the sale shares to the Fund.

[34] Second, clause 13.6 commences with a savings provision: 'save as otherwise herein provided'. Assuming, *arguendo,* that the sale shares did fall within clause 13.6, the savings provision would apply. Clause 8, interpreted as I have explained, prohibits the sale of certain shares by Ash Brook and its shareholders and permits the sale by Coral of its Capitec Holdings shares. The conceptual structure of clause 8 works on the basis of a binary distinction between prohibition and permission. It has nothing to do with consent, and makes no mention whatever of consent. Clause 8.3 would thus fall within the savings provision of clause 13.6.

[35] Counsel for Ash Brook and Coral placed some emphasis on the manner in which Capitec Holdings had implemented the subscription agreement. Capitec Holdings had itself understood the subscription agreement to require its consent before Coral was permitted to make a demarcated sale. This, so it was submitted, was of interpretative significance in determining the meaning of clause 8.3. Reliance was placed on the decision of *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited (Comwezi).*[4]

[36] In *Comwezi,* this Court explained that, even in the absence of ambiguity, the conduct of the parties in implementing the agreement may provide clear evidence as to how reasonable persons of business construed a disputed provision in a contract. Capitec Holdings acknowledged that in two transactions, one in 2012 and the other in 2017, Capitec Holdings had consented to the sale by Coral of its Capitec Holdings shares.

[4] *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Limited* (*Comwezi*) [2012] ZASCA 126 para 15.

[37] In addition, in the correspondence that preceded the application that was brought in this case, Capitec Holdings and its attorneys contended that the proposed sale by Coral of the sale shares was prohibited and a breach of the subscription agreement, absent consent, which Capitec Holdings had declined to give. Coral and Ash Brook also rely upon passages in the answering affidavit of Capitec Holdings, as also an open offer made by Capitec Holding just prior to the commencement of the hearing before the high court. In the open offer, Capitec Holdings set out the basis upon which it would consent to sale by Coral of its Capitec Holdings shares. Capitec Holdings disputes that the passages in its affidavit and the open offer evidence any acknowledgment that its consent was required. Capitec Holdings contends that their stance in the answering affidavit was to disavow consent and the open offer should be understood as an attempt to settle the dispute, and not a reflection upon their construal of clause 8.3.

[38] Coral and Ash Brook contend that the manner in which the parties implemented the subscription agreement is relevant evidence as to what clause 8.3 means. This contention gives rise to an issue that has long troubled our courts, and those in other jurisdictions that draw upon the common law tradition. The issue is this. Under the expansive approach to interpretation laid down in *Endumeni*, extrinsic evidence is admissible to understand the meaning of the words used in a written contract. Such evidence may be relevant to the context within which the contract was concluded and its purpose, and this is so whether or not the text of the contract is ambiguous, either patently or latently. On the other hand, the parol evidence rule is an important principle that remains part of our law. Affirmed by this Court in *KPMG Chartered Accountants (SA) v Securefin Limited and Another (KPMG)* and *The City of Tshwane Metropolitan*

Municipality v Blair Atholl Homeowners Association (Blair Atholl),[5] the parol evidence or integration rule requires that, save in exceptional circumstances such as fraud or duress, where the parties to a contract have reduced their agreement to writing and assented to that writing as a complete and accurate integration of the contract, extrinsic evidence is inadmissible to contradict, add to or modify the contract. How do these principles cohabit?

[39] In the recent decision of *University of Johannesburg v Auckland Park Theological Seminary and Another (University of Johannesburg),*[6] the Constitutional Court affirmed that an expansive approach should be taken to the admissibility of extrinsic evidence of context and purpose, whether or not the words used in the contract are ambiguous, so as to determine what the parties to the contract intended. In a passage of some importance, the Constitutional Court sought to clarify the position as follows:

'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". 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". 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

[5] *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; [2009] 2 All SA 523 (SCA); 2009 (4) SA 399 (SCA) para 39; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* [2018] ZASCA 176; [2019] 1 All SA 291 (SCA); 2019 (3) SA 398 (SCA) paras 64-77.

[6] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13 (*Universisty of Johannesburg*).

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.'[7]

[40] This seeks to give a very wide remit to the admissibility of extrinisic evidence of context and purpose. Even if there is a reasonable disagreement as to whether the evidence is relevant to context, courts should incline to admit such evidence, not least because context is everything. The courts may then weigh this evidence when they undertake the interpretative exercise of considering text, context and purpose.

[41] The Constitutional Court in *University of Johannesburg* also recognised the parol evidence rule in our law. It sought to reconcile the generous admissibility of extrinsic evidence of context and purpose and the strictures of the parol evidence rule in the following way:

'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. . . .'[8]

[42] This reconciliation requires some reflection. It recalls one of the most important debates as to the foundations of the law of contract. Is the meaning of a contract to be understood on the basis of the subjective intentions of the parties to the contract or the objective manifestations of their consensus? The rationale of the parol evidence rule is based on the value of objectivism. Parties enter into written contracts that include

[7] *University of Johannesburg* para 68.
[8] Ibid para 92.

clauses affirming the writing to be the exclusive memorial of the parties' agreement so as to permit certainty as to the agreement, and avoid making every agreement the starting point of an evidential battle.

[43] Many courts have associated the parol evidence rule with the primacy of clear language in the interpretation of contracts. In *Trident Center v Connecticut General Life Insurance Co*,[9] a judge in the United States had this to say:

'Two decades ago the California Supreme Court in *Pacific Gas.* . . turned its back on the notion that a contract can ever have a plain meaning discernable by a court without resort to extrinsic evidence. The court reasoned that contractual obligations flow not from the words of the contract, but from the intention of the parties. . . Under *Pacific Gas*, it matters not how clearly a contract is written, nor how completely it is integrated, nor how carefully it is negotiated, nor how squarely it addresses the issue before the court: the contract cannot be rendered impervious to attack by parol evidence.'[10]

If then, on this view, a written contract has a plain meaning and the writing is the exclusive memorial of the contract, the parol evidence rule excludes extrinsic evidence that would alter, add to or vary that plain meaning.

[44] The opposing position, powerfully articulated by Corbin,[11] is this. The parol evidence rule simply reflects the agreement between the parties that the written document constitutes their exclusive agreement. It supersedes earlier agreements, whether written or oral, and excludes evidence of such agreements. The parol evidence rule is not a rule as to the admission of evidence for the purpose of interpretating the meaning of the written agreement that constitutes the parties' exclusive agreement. If the plain meaning of a contract is rejected conceptually or enjoys no primacy

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[9] *Trident Center v Connecticut General Life Insurance Co* 847 F.2d 564 (9th Circ.1988).
[10] Ibid at 568-70.
[11] A position articulated by A Corbin in *Corbin On Contracts* rev. ed. (1960) at 108-110 and strongly influential.

in the interpretative exercise, then extrinsic evidence as to meaning will enjoy a very considerable remit, and the parol evidence rule's exclusionary force will be greatly reduced.

[45] There is logical force in the observation that the identification of a contract is one thing, its meaning another. However, the practical consequence of this distinction is that the evidence excluded under the parol evidence rule as contradicting, adding to or varying the written contract is then admitted for the purpose of interpreting the contract. This has led some courts to seek a *via media*. Under this formulation, extrinsic evidence will only be admitted if the contract is reasonably susceptible of the meaning for which the evidence is tendered or amounts to objective evidence to show ambiguity.[12]

[46] The Constitutional Court has placed our law firmly within the realm defined by Corbin's position. The Constitutional Court has rejected the idea of the plain meaning of the text or its primacy, since words without context mean nothing, and context is everything. It has given a wide remit to the admission of extrinsic evidence as to context and purpose so as to interpret the meaning of a contract. Reasonable disagreements as to the relevance of such evidence should favour admitting the evidence and the weight of the evidence may then be considered.

[47] I offer a few observations, as to the implications of what the Constitutional Court has decided in *University of Johannesburg.* First, it is inevitable that extrinsic evidence that one litigant contends to have the effect of contradicting, altering or adding to the written contract, the other

[12] *AM International, Inc v Graphic Management Associates, Inc* 44 F.3d 572 (7th Circ. 1995).

litigant will characterise as extrinsic evidence relevant to the context or purpose of the written contract. Since the interpretative exercise affords the meaning yielded by text no priority and requires no ambiguity as to the meaning of the text to admit extrinsic evidence, the parol evidence rule is likely to become a residual rule that does little more than identify the written agreement, the meaning of which must be determined. That is so for an important reason. It is only possible to determine whether extrinsic evidence is contradicting, altering or adding to a written contract once the court has determined the meaning of that contract. Since meaning is ascertained by recourse to a wide-ranging engagement with the triad of text, context and purpose, extrinsic evidence may be admitted as relevant to context and purpose. It is this enquiry into relevance that will determine the admissibility of the evidence. Once this has taken place, the exclusionary force of the parol evidence rule is consigned to a rather residual role.

[48] Second, *University of Johannesburg* recognises that there are limits to the evidence that may be admitted as relevant to context and purpose. While the factual background known to the parties before the contract was concluded may be of assistance in the interpretation of the meaning of a contract, the courts' aversion to receiving evidence of the parties' prior negotiations and what they intended (outside cases of rectification) or understood the contract to mean should remain an important limitation on what may be said to be relevant to the context or purpose of the contract. *Blair Atholl* rightly warned of the laxity with which some courts have permited evidence that traverses what a witness considers a contract to mean. That is strictly a matter for the court. *Comwezi* is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made

it plain such evidence must be relevant to an objective determination of the meaning of the words used in the contract.[13]

[49] Third, *Endumeni* has become a ritualised incantation in many submissions before the courts. It is often used as an open-ended permission to pursue undisciplined and self-serving interpretations. Neither *Endumeni*, nor its reception in the Constitutional Court, most recently in *University of Johannesburg*, evince skepticism that the words and terms used in a contract have meaning.

[50] *Endumeni* simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

[51] Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to

[13] *Comwezi* para 15.

contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.

[52] What then is to be made of the reliance that Coral and Ash Brook have placed upon the manner in which Capitec Holdings has understood and implemented the subscription agreement? Since Capitec Holdings required and gave its consent to the prior transactions of Coral, that must surely, so it was contended, have significance for the interpretation of clause 8.3. So too, Coral and Ash Brook submitted, Capitec Holdings' initial stipulation for consent in respect of the sale of shares is of similar evidentiary import.

[53] The first issue that then arises is whether this evidence is admissible for the purpose of interpreting clause 8.3? Coral and Ash Brook rely on this extrinisic evidence as relevant context so as to interpet clause 8.3. *University of Johannesburg* renders this contention hard to resist for the reasons I have explained. Prior to this decision I should have been inclined to hold that since nothing in the text of clause 8.3, nor in clause 8, nor in the subscription agreement as a whole, provides any basis to conclude that Capitec Holdings' consent was required, the evidence that is sought to be admitted imports a requirement of consent, and thereby alter the clear terms of what the subscription provides. That is precisely what the parol evidence rule excludes from consideration. However, on my understanding of *University of Johannesburg*, since the text of an agreement enjoys no interpretational primacy, and the meaning of the text must be determined before a court can decide whether evidence seeks to alter the terms of that contract, the parol evidence rule does not govern admissibility. Rather, the question is whether the evidence is relevant to context so as to ascertain the meaning of the contract.

[54] In conformity with *University of Johannesburg,* I do think the evidence must be judged relevant and considered. How the parties to the subscription agreement conducted themselves after the conclusion of the agreement may have some relevance for the purpose of deciding upon the meaning of clause 8.3. Capitec Holdings certainly conducted itself after the conclusion of the subscription agreement, nothwithstanding its later change of heart, on the basis that its consent was required. That is evidence of some relevance to an objective interpretation of clause 8.3 because it may be probative, as suggested in *Comwezi,* as to how reasonable business people, situated as they were, and knowing what they did, construed clause 8.3. This finding is made in conformity with the *dicta* in *University of Johannesburg,* to which I have referred, that the test of relevance is deferential to reasonable differences as to admissibility and that weighing such evidence is to be preferred to excluding the evidence. In addition, since the evidence is claimed to be relevant to context and hence to the meaning of clause 8.3, contrary indications as to the meaning of the clause do not oust the consideration of this evidence.

[55] The evidence concerning Capitec Holdings' conduct that required Coral to obtain consent before it was permitted to make a demarcated sale is summarised above. That evidence makes it plain that Capitec Holdings thought that its consent was required and conducted itself on this basis. So too did Coral. However, Capitec Holdings then thought differently, prompted by the stance of the Fund. The Fund was not a party to the subscription agreement, but was an interested party, taking a commercial view of clause 8.3.

[56] Weighing this evidence, as I do, I cannot find that the conduct of Coral and Capitec Holdings after the conclusion of the subscription

agreement lends context to clause 8.3 that displaces the clear meaning of the clause derived from the text of the clause, understood in the context of the structure of the agreement as a whole, and its proclaimed purpose – the desire of Capitec Holdings to increase its black shareholding in conformity with the BBE Act and its codes. The conduct is equivocal. Capitec Holdings certainly acted on their understanding that clause 8.3 required its consent before Coral could conclude a demarcated sale. Coral had the same understanding. But Capitec Holdings changed its stance, based upon the position of the Fund. That a party has an understanding of its rights under a contract and then changes its stance may be cynical or it may be based on its better appreciation of the contract. This ultimately matters little because the weight of the evidence of its understanding of clause 8.3 does not displace the outcome of the interpretative exercise, set out above, which shows that the meaning of clause 8.3 imports no requirement that Capitec Holdings' consent is necessary for Coral to conclude a demarcated sale.

[57] Finally, counsel for Coral and Ash Brook placed some reliance upon what they contended was a business-like interpretation of clause 8.3. The high court's reasoning was to like effect. The commercial risk to Coral, so it was argued, of being burdened with a duty to repurchase Capitec Holdings shares upon making a designated sale was a risk no reasonable business would run. Prior consent would avoid this risk and give business efficacy to clause 8.3. This contention is unavailing. Clause 8.3 provides the mechanism by which Capitec Holdings sought to retain its black shareholding. Either Coral must sell its shares to a black purchaser or, if not, repurchase an equivalent number of shares, upon making a designated sale. That Capitec Holdings' wish to retain its black shareholding was commercially restrictive of Coral's freedom to dispose

of its shareholding does not make the restraint wanting for business good sense. As we shall see, Coral did not challenge the restraint as an affront to public policy. Clause 8.3 simply privileges the interests of Capitec Holdings. That was the bargain Coral and Ash Brook made. There is no reason why they should not be held to it.

[58] Nor is it the case that, because a sale by Coral of its Capitec Holdings shares to a black purchaser would not burden the black purchaser with the obligations of clause 8.3, there is reason to make prior consent a necessary importation so as to lend business efficacy to clause 8.3. That the burdens placed upon Coral in clause 8.3, so as to retain the black shareholding of Capitec Holdings, may not have been made transmissible in perpetuity, permitted Coral some freedom to dispose of its shares to a black purchaser. That clause 8.3 was not more rigorously restrictive, does not make the provision unbusinesslike.

[59] It follows that the high court was in error in finding that the subscription agreement required the consent of Capitec Holdings in order that Coral could proceed with the sale to the Fund. The high court proceeded from its assessment of the conduct of Capitec Holdings to its conclusion as to the contents of the subscription agreement. The analysis should have commenced with an interpretation of what the subscription agreement provided. Had the high court done so, the meaning of clause 8.3 would have become plain.

Good faith

[60] Having found, as I do, that the subscription agreement does not require that Capitec Holdings must consent to the sale by Coral of the sale shares to the Fund, that would ordinarily have sufficed to conclude that the

orders made by the high court cannot stand. However, the high court reasoned that Capitec Holdings was in ' . . . breach of its contractual as well as its common law duty of good faith to Coral Lagoon'. This want of good faith led the high court to adopt the following position, '. . . justice can only be dispensed if the matter is approached on the basis that Capitec's consent is required for the sale'. Since Capitec Holdings had not acted 'in a manner consonant with its duty of good faith and reasonable conduct towards Coral Lagoon', the high court imposed upon Capitec Holdings an order to provide the consent that, in the view of the high court, Capitec Holdings had impermissibly withheld.

[61] The respondents in this Court also relied upon the contention that Capitec Holdings failed to act in good faith and that, since good faith is a duty that underpins the subscription agreement and arises at common law, this too affords a basis upon which the orders of the high court may be sustained. It is to these issues that I now turn.

[62] Vally J, in the high court, relied upon his minority judgment in *Atlantis Property Holdings CC v Atlantis Excel Service Station CC (Atlantis Property)*[14] as the basis upon which the doctrine of good faith required Coral to secure Capitec Holdings' consent. This judgment offered an expansive interpretation as to how the Constitutional Court had, in various judgments, recognised the principle of good faith to ensure fairness in the law of contract. Whether the high court was at large to prefer its minority judgment in *Atlantis Property* for the purposes of its decision in the present case, is a question of precedent with which I need not be further concerned because the Constitutional Court has spoken decisively in

[6] *Atlantis Property Holdings CC v Atlantis Excel Service Station CC* 2019 (5) SA 443 (GP).

Beadica 231 CC and Others v Trustees, Oregon Trust and Others (Beadica)[15] as to how good faith figures in our law of contract.

[63] *Beadica* affirms the following. First, the principle that contracts freely and voluntarily entered into must be honoured remains central to the law of contract. This principle, often captured under the phrase freedom of contract, recognises that persons, through voluntary exchange, may freely take responsibility for the promises they make, and have their contracts enforced. Second, at common law, now infused with the values of the constitution, there are principles expressed in the detailed doctrines that make up the law of contract, that determine how freedom of contract is exercised and contracts are enforced. Third, one such doctrine concerns the enforcement of contract terms that offend against public policy. Both the scope of public policy and its application, to invalidate contract terms, should be undertaken with circumspection, but without timidity, in upholding fundamental constitutional values. Fourth, while good faith underlies the law of contract and informs its substantive rules, good faith and fairness are not substantive, free-standing principles to which direct recourse may be had so as to interfere with contractual bargains or decline to enforce contracts.

[64] *Beadica* provides an authoritative interpretation of the cases, both in this Court and in the Constitutional Court, that explain the role that good faith plays in the law of contract. The high court's reasoning based upon good faith, and the respondents' submissions in support of that reasoning, cannot survive the exposition in *Beadica*.

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[7] *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC).

[65] First, the high court's judgment and order is premised on the notion that Capitec Holdings was in breach of a contractual and common law duty of good faith. It is not entirely clear what conceptual distinction was sought to be drawn thereby. The law of contract is part of our common law. Good faith is one of a number of principles that inform the substantive rules that make up the law of contract. Good faith is not an abstract, self- standing duty that may be imposed upon a party as a matter of the law of contract so as to determine the terms upon which the parties to a contract will be taken to have agreed.

[66] Second, I recognise that a showing of good faith between contracting parties is a value that may figure in a court's consideration of what public policy demands, when a court is asked to consider whether the terms of a contract offend against public policy. That is a supervisory power the courts enjoy under the law of contract to ensure that the freedom of contract we recognise is not used as a private mechanism that vacates fundamental public values. But in the case before us, Coral and Ash Brook did not complain that clause 8.3 of the subscription agreement was to be struck as offensive to public policy. Good faith was not invoked for this purpose. Rather, as we have seen, they sought to have clause 8.3 interpreted to require the consent of Capitec Holdings.

[67] Third, insofar as recourse to good faith simply reflects the commonplace observation that good faith underpins all contracts, this way of casting the matter cannot yield the duty that the high court imposed upon Capitec Holdings. That we take parties to a contract to act in good faith is a norm of trust that informs many rules of the law of contract. It is also a norm that may be relevant as to how we interpret what the parties agreed. It is not a norm that can be utilised to decide what the parties should be

taken to have agreed and how they should act, in the interests of justice or fairness.

Yet that is what the high court did. As I have endeavoured to show, there is no interpretation of the subscription agreement that provides for the requirement of consent. The high court found that because Capitec Holdings had behaved in a contradictory way by holding out, on occasions, that its consent was required, and then asserting that it was not, justice required that the subscription agreement should be taken to require Capitec Holdings' consent. Whatever view is taken of Capitec Holdings' *volte face*, it does not permit a court to impose an agreement that the parties did not make – whether in the cause of good faith or justice or any other abstract principle or virtue.

[68] Nor could the high court take the further step, having conjured the requirement of consent, to then impose a duty upon Capitec Holdings to give its consent. The high court found Capitec Holdings' desire to hold Coral to the terms of clause 8.3, so as to retain Coral as an empowerment shareholder, unconvincing. It also found that Capitec Holdings was ethically compromised in seeking to retain Coral as a shareholder, when Regiments Capital, the majority shareholder of Ash Brook (Coral was a wholly owned subsidiary), had, with the other Regiments Parties, defrauded the Fund and was using the sale shares to make recompense to the Fund's pensioners. The judge's views on business ethics cannot signify to impute a duty that Capitec Holdings grant consent to a sale that the court considers a desirable outcome. Capitec Holdings enjoyed a contractual right to retain Coral as an empowerment shareholder. That was the bargain that Coral and Ash Brook had struck. That the world might be a better place if Coral were permitted to sell the sale shares without a repurchase

obligation, and thereby reimburse the Fund, is a judgment of no relevance to the contractual rights and duties of the parties.

[69] Finally, there was some debate before us as to whether Capitec Holdings had acknowledged that it owed a duty of good faith to Coral and Ash Brook, arising from the subscription agreement. The high court found this to be so, and Coral and Ash Brook sought to support this finding. Capitec Holdings denied that its affidavit made any such admission. It is unnecessary to resolve this dispute. If Capitec Holdings undertook a duty of good faith in the subscription agreement, what was the content of that duty? It could never entail that its consent was required when clause 8.3 did not so provide. And if Coral did not require Capitec Holdings' consent, Capitec Holdings could hardly be in breach of a duty to give consent that was not required of it.

[70] In sum, the ambitious efforts to use the concept of good faith to reengineer the subscription agreement so as to require Capitec Holdings' consent and then to find Capitec Holdings wanting for failing to give it cannot prevail. The subscription agreement, properly interpreted, contains no such provision. That Capitec Holdings wished to enforce its rights in terms of the subscription agreement cannot be held to be a breach of good faith. Nor can good faith be marshalled to require Capitec Holdings to give consent, when none was required of it. Ultimately, what Coral and Ash Brook were in reality seeking was a waiver by Capitec Holdings of its right to require Coral to repurchase the equivalent number of shares it wished to sell. Capitec Holdings had no obligation to do so, and invocations of good faith cannot alter that position.

Conclusion

[71] For these reasons, the appeal is upheld. There was no disagreement that the costs, including the costs of two counsel, should follow the result. As indicated, the counter-application brought by the Fund under case number 24805/17 was settled as between the Fund and Capitec Holdings. The costs orders thus lie against Coral and Ash Brook, and the intervenors, Rorisang and Lemoshanang, who opposed the appeal.

[72] The following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 Paragraphs 4 – 8 of the order of the high court are set aside and replaced with the following:

‘2.1 The application under case number 30899/2019 is dismissed;

2.2 The applicants and the first and second Intervening Parties in case number 30899/2019 shall pay the costs of the first and second respondents, such costs to include the costs of two counsel, where employed.’

D UNTERHALTER

ACTING JUDGE OF APPEAL

Appearances

For appellants:	A M Breitenbach SC, with him M Bishop and P Wainwright
Instructed by:	Van der Spuy & Partners, Cape Town Hill, McHardy & Herbst Inc., Bloemfontein
For 1st and 2nd respondents:	V Maleka SC, with him T Scott and M Salukazana
Instructed by:	Mkhabela Huntley Attorneys Inc., Sandton McIntyre Van der Post, Bloemfontein
For 4th and 5th respondents:	T J B Bokaba SC, with him K van Heerden and T Pooe
Instructed by:	Carol Coetzee & Associates, Fourways Mavuya Inc Attorneys, Bloemfontein