Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case Number: 466/2022

Heard on: 22/4/2022
Delivered on: 08 /08/2023

In the matter between:

GEMINI MOON TRADING 64 (PTY) LTD **APPLICANT**

v

DAWID KRUIPER LOCAL MUNICIPALITY **RESPONDENT**

JUDGMENT

RAMAEPADI AJ

INTRODUCTION

[1] This matter was initially brought by way of urgency in terms of Rule 6(12) of the Uniform Rules of Court. In terms of the Notice of Motion, the applicant (Gemini Moon Trading 64 (Pty) Ltd ‘’*Gemini Moon”*) sought an order *inter alia*:

1.1 That the application be heard as one of urgency and that the normal requirements pertaining to the Rules and formalities of Court be dispensed with and that the application be dealt with in terms of Rule 6(12) insofar as it pertains to urgency.

1.2 That the respondent (Dawid Kruiper Local Municipality ‘’the *Municipality’’*) be liable and responsible for the maintenance, repair and service and associated costs of all the basic services, including the electrical infrastructure already installed by the applicant in respect of Phases 1A and 1B as from the following dates:

1.2.1 On Phase 1A as from 7 September 2015;

1.2.2 On Phase 1B as from 18 July 2016.

1.3 The respondent be ordered to rectify its financial records to correctly reflect the liability of the applicant in terms of the following Erven in the Bella Rosa suburb:

1.3.1 Open Spaces /Parks Erven:
Erven 21279 / 21058 / 211040 / 21230

1.3.2 Transferred Erven:

Erven 24775 / 24770 / 24768 / 24769 / 24778 / 24740 /24735/ 24756 / 21228 / 21202 / 21219 / 21221

1.3.3 La Vina / La Roca ‘’Mother Erven’’:
Erven 21277 / 21278

1.3.4 La Vina / La Roca ‘’Streets Erven’’:
Erven 24758 / 247586

1.4 Rectification of the account as per Prayer 3 shall be done and completed within 10 days as from date of the granting of the order.

[2] Gemini Moon also seeks the costs of the application to be paid by the Municipality on attorney and own client scale.

[3] The application came before my brother Nxumalo J on 11 March 2022 who made the following orders by agreement between the parties:

3.1 The application is postponed to 22 April 2022;

3.2 The respondent’s late delivery of its answering affidavit is hereby condoned;

3.3 The respondent is hereby directed to deliver its supplementary affidavit on or before 25 March 2022;

3.4 The applicant shall deliver its replying affidavit, if any, on or before 1 April 2022;

3.5 The parties shall then file their heads of argument in terms of the Practice Directives;

3.6 The costs shall stand over for later adjudication.

[4] The matter then came before me in the opposed motion court roll of 22 April 2022. At that stage, the Municipality had already filed its supplementary answering affidavit, and Gemini Moon had in turn, delivered the replying affidavit. Both parties had also delivered their respective heads of argument in the matter.

[5] In the founding papers, Gemini Moon had presented wide-ranging disputes, ranging from the interpretation of paragraph 10.2 of the Sale Agreement to rectification of various disputed accounts for electricity consumption on the development.

[6] In the answering papers, the Municipality had also raised multiple issues, which it contended fall for determination by the Court. These are:

6.1 whether the Body Corporates of the two developments (*i.e*, *La Roca*, and *La Vina*) have a direct and substantial interest in the relief claimed and should have been joined?

6.2 the determination of the party, if any, to be liable for the costs occasioned by the appearances before the Court on 11 March 2022.

6.3 the interpretation to be given to clause 10.2 of the Sale Agreement, and the respective rights and obligations flowing therefrom.

6.4 whether the relief claimed by Gemini Moon is vague and/or incompetent of being granted?

6.5 whether Gemini Moon is entitled to the mandatory / interdictory relief on the basis that it had no alternative remedies?

[7] However, at the hearing of the matter the parties agreed that the issue relating to the disputed accounts for electricity consumption on the development should be dealt with by means of *extra curiae* dispute resolution mechanism. Accordingly, all that remains of the case are four (4) issues.

7.1 First, the proper interpretation of paragraph 10.2 of the Sale Agreement;

7.2 Second, whether the Body Corporates of the two developments, *viz La Roca*, and *Lavina*, have a direct and substantial interest in the relief claimed and should have been joined?

7.3 Third, whether the Municipality should be liable and responsible for the maintenance, repair and service and the associated costs of all the basic services, including the electrical infrastructure already installed on the development by Gemini Moon in respect of Phase 1A as from 7 September 2015 and, Phase 1B as from 18 July 2016; and

7.4 Fourth, the costs of the application inclusive of the reserved costs for the appearances on 11 March 2022.

[8] In the discussion below, I deal with each of the issues summarised above. Before doing so, it is necessary to set out a brief background of the matter as well as the genesis of the dispute between the parties.

PERTINENT BACKGROUND

[9] The following background facts emerge from the affidavits filed on behalf of the parties and are mainly common cause, not necessarily in the sense that they have been agreed to by both parties, but in sense that they have not been seriously disputed.

9.1 Prior to July 2014 the Municipality was the owner of Erf 21052, then in extent measuring approximately 32945,2 square metres, situated at Aubrey Beukes Street, Upington (‘’the *property*’’). The property was registered as a suburb with the office of the Surveyor General in terms of the Northern Cape Planning and Development Act, 7 of 1989 (‘’the Town Planning Scheme’’) for Upington. This had the implications that the Municipality was responsible for the installation, maintenance and upkeep of the basic services of the suburb such as water, sewerage, refuse removal, streetlights, green areas/public spaces/parks, electricity and storm water culverts (‘’the basic services’’).

9.2 On 3 July 2014 the Municipality sold the property to Gemini Moon in terms of a Sale Agreement. Notwithstanding the Municipality’s obligations under the Town Planning Scheme for the installation and maintenance of the basic infrastructure on the property, in terms of the Sale Agreement, Gemini Moon assumed responsibility for the installation of the basic services on the property.

9.3 Pursuant to the Sale Agreement and subsequent transfer of the property to Gemini Moon, Gemini Moon installed the basic services for both Phases 1A and 1B of the development.

9.4 Thereafter,

9.4.1 on 3 September 2015, a practical completion inspection was conducted by Gemini Moon's consulting engineer, in respect of the practical completion of the basic services for Phase 1A. At the conclusion of the inspection, a certificate of practical completion along with a final completion list was issued by the engineer. The list reflected items to be concluded before a certificate of Final Completion could be issued.

9.4.2 on 4 September 2015, Gemini Moon's consulting engineer conducted a further practical completion inspection pursuant to which, the engineer issued a further practical completion certificate in respect of Phase 1A, subject to completion of a further list of defects.

9.4.3 on 7 September 2015 a final completion inspection was conducted and a certificate of final completion in respect of Phase 1A was issued by Gemini Moon's consulting engineer.

9.4.4 on 12 May 2016, a practical completion inspection was conducted by Gemini Moon's consulting engineer in respect of completion of the basic services for Phase 1B. After the

inspection, a certificate of practical completion together with a list of defects, was issued by Gemini Moon's consulting engineer.

9.4.5 on 18 July 2016 a final completion inspection was conducted by Gemini Moon's consulting engineer in respect of the final completion of the basic services for Phase 1B. After the inspection, Gemini Moon's consulting engineer issued a certificate of final completion of the basic services for Phase 1B.

9.5 On 29 July 2016, the previous director of civil services in the Municipality (Mr. JE De Kock) forwarded a letter to Gemini Moon's consulting engineer (Mr. Johan Van Schalkwyk). The letter reads, in relevant part as follows:

''With reference to the Certificate of Practical Completion issued on 4 September 2015…the following:

After inspecting the installed civil engineering services (sewer, water, storm water, ducts and roads) of Phase 1A of the Bella Rosa Development in November 2015, the Khara Hais Municipality hereby confirms that the services as indicated on the approved design drawings were inspected and approved by Khara Hais Municipality."

9.6 However, in respect of the electrical infrastructure on the property, the Municipality has refused to assume responsibility for the service including the maintenance thereof. In an attempt to resolve

the dispute relating to the electrical infrastructure on the property, on 7 May 2018 Gemini Moon addressed a letter to the Municipality for the attention of Mr A Snyders. The letter reads, in relevant part, as follows:

> *''<u>Electrical Infrastructure Installation</u>*
> *The major issue related to the above item relates to whose takes responsibility for services. Hennie Auret refused outright to accept responsibility and take over services despite it being a condition of the concluded sale agreement. There was no legitimate factual basis for this stance.*
>
> *<u>Clause 10.2 of the sale agreement specifically refers</u>:*
> *''Die verkoper onderneem dat wanneer die verkoper die sertifikaat van voltooing van die installasie van die grootmaat dienste van enige fase vanaf die koper se ingeniuer ontvang, die verkoper vanaf sodanige datum aanspreeklik sal wees vir die diens, onderhoud, instandhouding en herstel van die dienste ten opsigte van sodanige fase. Die verkoper onderneem en bevestig dat dit terselfde tyd die verkoper onderverdeelings en munisipale belastings sertifikate sal uitreik ten opsigte van sodanige voltooide fase"*
>
> *This clause makes the installed services in totality, the sole responsibility of Dawid Kruiper Municipality…"*

9.7 Then, with regard to the defects completion, the letter records the following:

‘’We refer to meeting on site with yourself and C Mouton in respect of defects. We confirm as per our meeting that we wish to resolve as speedily as possible. In this respect we request that you confirm:

1. *Exactly what defects you record as outstanding on Phase 1 A & Phase 1 B respectively.*
2. *The exact lock specifically for kiosks as discussed as well as Dawik Kruiper Municipality’s recommended supplier.*

We will escalate this with the relevant consultant and contractors
to have resolved.

We are mindful of the revenue deficit you are experiencing in respect of streetlighting on Phase 1 B and therefore would have no objection to the streetlights not being operational until such time the first units are completed for occupation.

The following needs to be part of the thought process going forward as well.

- *In light of impasse of responsibility of electrical services Geminin Moon Trading 64 Pty Ltd has and continues to insure the installed equipment in terms of their contractors all risk policy. This cost is being borne by Gemini Moon Trading 64 Pty Ltd.*

- *Monies were paid to Dawid Kuiper Municipality albeit under duress.*

- *An account has and continues to be rendered for electrical services for which Gemini Moon Trading 64 Pty Ltd is not liable and the subsequent legal action is prejudicial.*

- *Gemini Moon Trading 64 Pty Ltd has despite this continued to engage in a non-hostile manner in an attempt to resolve.*

The rollout of the development is phased, so we consider it a fundamental principle that we have a clear and fair relationship with all stakeholders. In light of this we remain committed to achieving an equitable resolution for both parties…"

9.8 The Municipality responded by letter dated 10 December 2018 wherein it disputed its liability to take over responsibility for the electrical infrastructure installed on the property, as well as the maintenance and repair thereof. The Municipality contended that in terms of the Sale Agreement, its obligation to take over responsibility for the electrical infrastructure installed on the property, as well as the maintenance and repair thereof would only arise after a final inspection was conducted and a certificate of completion was issued after all the defects have been rectified. The letter reads, in relevant part as follows:

''TERUGVOER VANAF ELEKTRO-MEGANIESE DIENSTE

Tydens die vergadering gehou op 13 September 2018, is die munisipaliteit se senior bestuur, deur die verteenwoordiger

van die ontwikkelaar, gewys daarop dat die Sertifikaat van voltooing, wat voorheen deur die direkteur van Elektromeganiese Dienste versoek wel bestaan. Die direkteur het daarna gevra waarom die drie partye, nl:

1. *Ontwikkelaar*
2. *Knotrakteur*
3. *Munisipaliteit*

nie almal verteenwoordig is deur hul handtekeninge op die sertifikaat nie. Dit moet daarop gelet word dat die Sertifikaat van Praktiese Voltooing, wel al drie partye se handtekeninge bevat, en dat hierdie sertifikaat dui op n finale inspeksie deur al drie partye, waarna die Sertifikaat van Voltooing dan gefinaliseer kan word, indien al die gebreke reggemakk is.

Dit is dus die mening van die Direkteur van Elekto-Meganiese Dienste, en was okk die van sy voorganger, Mnr Auret, dat die ontwikkeling nog nie oorhandig is nie, volgens die koopkontrakooreenkoms wat dui op die Sertifikaat van Voltooing…"

9.9 On 22 August 2019 Gemini Moon's attorneys (CJ Willemse Muller & Babinsky Attorneys) replied to the Municipality's letter of 10 December 2018 in which the attorneys maintained their stance that in terms of the Sale Agreement the Municipality is liable for the bulk services of the relevant phases as from the date of issue of the certificate of practical completion by Gemini Moon's appointed engineer. The letter reads in relevant part, as follows:

‘’To recall the essence of the dispute between client and the municipality, it remains the contention of client that they are not liable for the outstanding account in respect of electricity consumption for the streetlights (‘’disputed account”), in the Bella Rosa suburb (‘’suburb”), as the liability for the services in the suburb, including the services in respect of the disputed account, have already reverted back to the municipality, as per clause 10 of the sale agreement (‘’agreement”), that was concluded between the parties, and this clause 10 states, if translated directly from Afrikaans to English as follows:

> *‘’The seller undertakes, that when the seller receives the certificate of completion of the bulk services of any phase, from the engineer of the purchaser, the seller as from such date to be responsible for the service, maintenance and repair of the services in respect of such completed phase…”*

It is unequivocally evident from the above excerpt of the sale agreement, that the municipality is liable for the bulk services of the relevant phases, which includes the electricity consumption as from date of issue of the certificate of practical completion by the engineer of the client.

In contention to our client’s stance, namely that the municipality is liable for the disputed account, the municipality per their letter of December 2018 acknowledges that the certificate of completion was issued,

but the municipality raised the query, as to why all the parties, namely the developer, contractor and municipality have not signed off in acceptance of this certificate of completion?

Client takes notice of the stance by the municipality as to why the municipality has not taken over the liability for services of the suburb as per their correspondence of 10 December 2018 in that;

- *The practical completion certificate reflects the signatures of all parties, and*

- *The subsequent final completion certificate does not reflect all the signatures, and therefore the municipality contends that it is not valid, consequently the municipality refuse to accept liability for the installed services, and*

- *No specific dates regarding practical completion is recorded.*

In response to the above-mentioned stance of the municipality, as set out in the letter of 10 December 2018, namely that the ‘’development has not yet been handed over to the municipality”, hence the reason why the municipality is not liable for the bulk services of the suburb, including the disputed account, it is the contention of our client to respond thereto as follows:

- *There is no contractual reference in the agreement as to the definition and process of the ‘’handing over of the development”;*

- *There is no contractual requirement in the agreement that the above-mentioned three parties must sign off on the certificate of practical completion or final certificate of completion;*

- *There is no contractual requirement in the agreement that the municipality must consent to the handover of the development…”*

9.10 In conclusion, the Municipality was requested to confirm by close of business on 30 August 2019 that it will as from date of issue of the final certificate of completion, accept liability for the bulk services of the suburb in respect of phase 1A and 1B and will rectify the disputed account and related costs failing which, Gemini Moon would approach the Court for appropriate relief.

THE INTERPRETATIVE DISPUTE

[10] Clause 10.2 of the Sale Agreement reads as follows:

‘’die VERKOPER onderneem dat wanneer die VERKOPER die sertifikaat vir die voltooing van die instellasie van die grootmaat dienste van enige fase vanaf die KOPER se ingennieur ontvang, die VERKOPER vanaf sodanige datum aanspreeklik sal wees vir

die diens, onderhoud, instandhouding en herset van die dienste ten opsigte van dodanige voltooide fase. Die VERKOPER onderneem en bevestig dat dit terselfde tyd die VERKOPER onderverdelings en munisipale belasting seertifikate sal uitreik ten opsigte van sodanige voltooide fase."

[11] Loosely translated, clause 10.2 provides that:

''The seller undertakes that when the seller receives the certificate of completion of the bulk services of any phase from the engineer of the purchaser, the seller as from such date shall be responsible for the service, maintenance and repair of the services in respect of such completed phase…''

[12] The interpretative dispute between the parties turns on a fine narrow point. It turns, in particular, on the meaning of the phrase *''die sertifikaat vir die voltooing van die instellasie van die grootmaat dienste"*.

12.1 Gemini Moon contends that the '*sertifikaat vir voltooing*' referred to in clause 10.2 of the Sale Agreement refers to the certificate of practical completion issued by Gemini Moon's consulting engineer. It contends that in terms of clause 10.2 of the Sale Agreement, the certificate of practical completion issued by the responsible engineer is the only requirement to confirm that the services had been installed as per approved design.[1]

12.2 The Municipality contends differently. It contends that the '*sertifikaat vir voltooing'* referred to in clause 10.2 of the Sale

[1] FA p10 para 5.2.8

Agreement, refers to the final completion certificate issued after a final inspection was held between the parties, and signed off so as to comply with the Municipality's standards, but not a mere practical completion certificate.[2] It contends that clause 10.2 cannot be interpreted to mean that the Municipality should be amenable or required to take over as its own, the electrical infrastructure installed in the development, when that infrastructure does not meet with the absolute satisfaction of the Municipality and comply with the Municipality's standards.

[13] In its heads of argument, Gemini Moon made it clear that the declaratory relief sought in prayer 2 of the notice of motion is only with effect from the dates the final completion certificates were issued.

THE PROPER INTERPRETATION OF CLAUSE 10.2

[14] The proper approach to interpretation of written instruments whether it be contract, legislation or some other written instrument was explained by Wallis JA in *Endumeni,*[3] *as follows*:

> ''[*18] …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*

[2] SAA p217 para 27
[3] Natal Joint Municipal Pension Fund v Endumeni Local Municipality 2012 (4) SA 593 (SCA) ''*Endumeni*"

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.

[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Donges NO and Another; Bhana v Donges NO and Another,[4] *namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should*

[4] 1950 (4) SA 653 (A) at 662G-663A

> *now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere...”*

[15] The approach in *Endumeni* has been embraced by our courts as the proper approach to interpretation of written instruments. An examination of the passages referred to above will immediately reveal that *Endumeni* has brought about a radical departure from the position previously adopted by the SCA in *Rane Investments Trust*,[5] and *Coopers*[6], which was that context could be resorted to only if there was ambiguity in the language of the contract under interpretation. That is no longer the position.

[16] The current position articulated in *Endumeni* is that from the outset, one considers the context and the language together with neither predominating over the other.[7] *Endumeni* offers a useful 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.

[17] Despite its apparent expansive approach to interpretation, *Capitec*[8] made clear that *Endumeni* should not be construed as 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 should *Endumeni* be understood as a ‘*licence for judicial*

[5]Rane Investments Trust v Commissioner, South African Revenue Service 2003 (6) SA 332 (SCA) at para 26
[6]Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 (A) at 768C-E
[7]Endumeni at para 19
[8]Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA)

interpretation that imports meaning into a contract so as to make it a better contract, or one that is ethically preferable'.[9] The inevitable point of departure is the language of the provision itself.[10]

[18] It is on the backdrop of the above case-law that I embark on the task of interpretating clause 10.2 of the Sale Agreement. As I have already indicated above, the point of departure is the language of the provision itself.

[19] An examination of clause 10.2 of the Sale Agreement will immediately reveal that:

19.1 there is nothing in the text of clause 10.2 which requires a final completion certificate to be issued before the Municipality can take over the responsibility for the maintenance and repair of the electrical infrastructure on the development. A certificate of final completion is not a requirement that must be met before the Municipality assumes responsibility for the maintenance and repair of the electrical infrastructure. The text of clause 10.2 offers no indication that a certificate of final completion was required before the Municipality assumes responsibility for the maintenance and repair of the electrical infrastructure.

19.2 Nor does the text of clause 10.2 requires the installed electrical infrastructure to meet the absolute satisfaction and standards of the Municipality, before the Municipality assumes responsibility for the maintenance and repair of the electrical installations in the development. The text of clause 10.2 offers no indication that

[9]Id at para 26
[10]Endumeni at para 18

> signing off-of the installation so as to comply with the Municipality's standards was required before the Municipality assumes responsibility for the maintenance and repair of the electrical installations on the development.

[20] It is the latter aspect that takes particular significance in this case. This is for the reason that Gemini Moon does not rely on the certificates of practical completion for the declaration it seeks in the notice of motion. It relies, instead, on the certificates of final completion issued by its consulting engineer. For purposes of this case, it is, therefore, neither here nor there whether the agreement requires a practical completion certificate, or a final completion certificate before the Municipality's obligations under clause 10.2 of the Sale Agreement is triggered.

[21] Suffice it to say that clause 10.2 of the Sale Agreement imposes an obligation on the Municipality to take over responsibility for the maintenance and repair of the electrical installations once Gemini Moon's appointed engineer has issued a certificate of practical completion indicating that the services have been successfully completed. This is common cause between the parties. Both parties agree that *'die sertifikaat vir die voltooing'* refers to a certificate of practical completion.

[22] Counsel for the Municipality urged the court not to interpret the phrase *'die sertifikaat vir die voltooing'* in isolation. He argued, instead, that the court should interpret the phrase contextually and having regard to the purpose of the agreement. He submitted that despite the plain ordinary meaning of the phrase *'die sertifikaat vir die voltooing'* in clause 10.2, on no reasonable interpretation can the phrase be interpreted to mean that the Municipality becomes responsible for the services as soon as an initial

certificate of practical completion is issued, which certificate includes a list of defects still to be corrected. He contended that the context within which the word ‘’*sertifikaat*’’ was used in clause 10.2 supports instead, the notion of a final certificate of completion issued after a final inspection was held and the Municipality was absolutely satisfied that the installation meets the Municipality’s standards, in order to trigger the passing of rights and obligations.

[23] That context, so it was argued, includes:

23.1 The purpose of ‘’*die sertifikaat*’’ referred to in clause 10.2 of the Sale Agreement. He argued that ‘’*die sertifikaat*’’ in clause 10.2 signifies the time when the Municipality is to take over the services, and that this can only be after the services have been completed and meets the Municipality’s standards. He argued that if it were not so, then the Municipality would be forced to take over an incomplete or defective system.

23.2 The specific certification included in the practical completion certificate where it is certified that a certificate of completion can only be issued after a final inspection had been held.

[24] This, so it was submitted, was of interpretative significance in determining the meaning of clause 10.2 of the Sale Agreement. In support of this submission Adv Olivier on behalf of the Municipality placed reliance on paragraph [12] of the SCA decision in *Bothma.* [11]

[25] In *Bothma*, the SCA explained that:

[11]Bothma-Bato Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk 2014 (2) SA 494 (SCA)

> ‘’*Whilst the starting point remains the words of the document, which are the only relevant medium, through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away interpretation is no longer a process that occurs in states but is ‘essentially one unitary exercise*.’’

[26] When relying *inter alia*, on the purpose of the certificate referred to in clause 10.2 of the Sale Agreement, and the need for the Municipality to be satisfied that the electrical installation meets the Municipality’s standards, in essence what the Municipality was doing, was to import extrinsic evidence in aid of ascertain the meaning of clause 10.2 of the Sale Agreement.

[27] Adv Grobler SC appearing for Gemini Moon urged me to disregard the Municipality’s evidence pertaining to the intention of the parties in the agreement. His argument as I understand it, is that the Municipality may not tender any evidence that is extrinsic to the agreement itself so as to avoid the obligations that the contract bestowed upon it. In support of this argument, Adv Grobler SC referred this court to the following passage in in *KPMG Chartered Accounts*:[12]

[12]KPMG Chartered Accountants SA v Securefin Ltd and Another 2009 (4) SA 399 (SCA)

> *‘’First, the integration rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. <u>If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning</u>. Second, the interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for the witness. Third, the rules about admissibility of evidence in this regard, do not depend on the nature of the document, whether statute, contract or patent. Fourth, to the extent that evidence may be admissible to contextualise the document to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible. The time has arrived for us to accept that there is no merit in trying to distinguish between ‘background circumstances’ and ‘surrounding circumstances’. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms ‘context, or ‘factual matrix’ ought to suffice.”*[13]

[28] The parol evidence or integration rule explained above is often misunderstood to be an absolute bar to the admission of extrinsic evidence when interpreting a document which was intended to provide a complete memorial of a jural act. That is not so.

[29] Contrary to popular belief, the parol evidence rule is not an absolute bar to the admission of extrinsic evidence in aid of interpretation of contracts. There are instances in which extrinsic evidence of context and purpose may be admitted to determine what the parties intended. This was

[13] KPMG para 39

recently made clear by the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and Another*.[14] In that case – *University of Johannesburg* the Constitutional Court adopted an expansive approach to the admissibility of extrinsic evidence of context and purpose, even where the words used in the contract are not ambiguous, so as to determine what the parties to the contract intended. The Constitutional Court explained the position relating to the admissibility of extrinsic evidence 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 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.”*[15]

[14] 2021 (6) SA 1 (CC) ‘’*University of Johannesburg”*
[15] University of Johannesburg para 68

[30] An examination of the passage referred to above will immediately reveal that University of Johannesburg, seeks to expand the scope of admissibility of extrinsic evidence of context and purpose. This is so even if there is disagreement as to whether the evidence is relevant to context. In such instances, courts should be inclined to admit such evidence. It is after admitting the evidence, that the court may then weigh this evidence when it undertakes the interpretative exercise of considering text, context and purpose.

[31] In recognition of the parol evidence rule, the Constitutional Court in University of Johannesburg sought to reconcile the generous admissibility of extrinsic evidence of context and purpose with the restriction imposed by the parol evidence rule. The Court said:

> ‘*’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….*’’[16]

[32] Thus, University of Johannesburg draws an important distinction between extrinsic evidence that seeks to vary, contradict or add to an agreement on the one hand, and extrinsic evidence as to context on the other hand, that is adduced to assist the Court in interpreting the terms of an agreement. The former is clearly impermissible, whereas the latter may.

[16]University of Johannesburg at para 92

[33] In *University of Johannesburg*, the Constitutional Court rejected the conception of the so-called plain meaning of a text or its primacy. The Court made clear that since words without context mean nothing, then context is everything. This has given a wide ambit to the admission of extrinsic evidence as to context and purpose to assist a court in interpreting the meaning of a contract. In such cases, disagreements about the relevance of the evidence in question should generally favour the admission of such evidence, without necessarily deciding on the weight to be attached to the evidence.

[34] In *Capitec*,[17] the SCA made the following important observations about the implications of what the Constitutional Court has decided in *University of Johannesburg*.

34.1 *''First, it is inevitable that extrinsic evidence that one litigant contends as having the effect of contradicting, altering or adding to the written contract, the other litigant will characterise as extrinsic evidence relevant to the context or purpose of the written contract. Since 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-*

[17] Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA) ''*Capitec"*

ranging engagement with the trial 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.

34.2 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 court's 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 permitted 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, 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.[18]

34.3 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

[18]Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd [2012] ZASCA 126 para 15 ‘’*Comwezi*”

interpretations. Neither Endumeni, nor its reception in the Constitutional Court, most recently in University of Johannesburg, evince skepticism that the words used in a contract have meaning.

34.4 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 also 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.

34.4 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 contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text."[19]

[35] What then is to be made of the Municipality's reliance on the evidence that the Municipality must be satisfied that the electrical infrastructure

[19]Capitec paras 47-51

meets the Municipality's standards. The question that immediately arises is whether such evidence is relevant to the context or purpose of the Sale Agreement and in particular, clause 10.2 thereof or, whether is it evidence that seeks to contradict, alter, or add to the agreement.

[36] The evidence that the Municipality had to be satisfied that the electrical infrastructure meets the standards of the Municipality, is not evidence that is relevant to context. Nor, is it evidence relevant to the purpose of the agreement. As already demonstrated above, the text of clause 10.2 of the Sale Agreement offers no indication that the Municipality had to be satisfied that the electrical infrastructure meets the Municipality's standards before the Municipality assumes responsibility for the maintenance and repair of the electrical infrastructure on the development.

[37] Once it is so, then it follows that the evidence about the Municipality being satisfied that the electrical infrastructure meets the standards of the Municipality, is evidence that seeks to alter the Sale Agreement by introducing into the agreement an additional requirement (that the Municipality must be satisfied that the electrical infrastructure meets its standards), which is not part of the text of clause 10.2 of the Sale Agreement. That is precisely what the parol evidence rule excludes from consideration.

[38] I agree with the submission by Adv Grobler SC that the Municipality's evidence as to the intention of the parties is impermissible precisely because that is strictly a matter for the Court.

[39] In the result, I conclude that properly interpreted, clause 10.2 of the Sale Agreement simply imposes an obligation on the Municipality to take over responsibility for the maintenance and repair of the electrical installations once Gemini Moon's consulting engineer has issued a certificate of practical completion indicating that the services have been successfully completed. This interpretation is consistent with the text of clause 10.2 of the Sale Agreement. As already indicated, the text of clause 10.2 offers no indication that the Municipality had to be satisfied with the installed electrical infrastructure and that such infrastructure must meet the standards set by the Municipality.

[40] Nor does the context of clause 10.2, within the scheme of clause 10, disturb the plain meaning of clause 10.2 referred to in paragraph [39] of this judgment.

THE NON-JOINDER

[41] The non-joinder point is posited on the premise that the two developments – La Vina and La Roca, are sectional title schemes contemplated in section 36 of the Sectional Titles Act, No. 95 of 1986 (''the Sectional Titles Act''). The body corporates of the two developments, so it is argued, are responsible for the enforcement of the rules and for the control, administration, and management of the common property for the benefit of all owners.[20]

[42] The non-joinder point was squarely raised in the Municipality's opposing affidavit dated 10 March 2022. The Municipality argues that the body corporates of the two developments – La Vina and La Roca would, in

[20] S2(5) of the Sectional Titles Scheme Management Act, 8 of 2011

terms of section 2(7)(c) of the Sectional Titles Scheme Management Act be liable for payment of the municipal rates and taxes on the common property of the two developments. For this reason, so it is argued, the body corporates of the two developments have a direct and substantial interest in the relief claimed in the notice of motion and should have been joined as parties in this application.

[43] Gemini Moon does not deny that the two complexes are sectional title schemes and that the provisions of the Sectional Titles Management Act and in particular, section 2(7)(c) thereof finds application.

[44] Gemini Moon's defence to the non-joinder point as I understand it, is that there is no prejudice to the body corporates of the two complexes that would require that they should be joined as parties to this application. I agree.

[45] It is now well established that the 'direct and substantial interest' which is required for the purpose of joinder does not refer to a mere financial interest which is only an indirect interest in the litigation.[21] In *New Garden*, the Court made clear that it is the extent to which any order might prejudice the person sought to be joined which is the criterion by which to test whether such person has a direct and substantial interest.[22] Such an interest was referred to in several cases as a legal interest in the subject matter of the action which could be prejudicially affected by the judgment of the court.

[21]See for example, New Garden Cities Incorporated Association not for Gain v Adhikarie 1998 (3) SA 626 (C) para 10 ' '*New Garden"*
[22]See also

[46] This application was brought for purposes *inter alia*, of compelling the Municipality to comply with its obligations under the Sale Agreement and, to rectify its financial records. The interest (if any) which the body corporates of the two complexes may have in this litigation will only be of a financial. The Municipality implicitly accepts this, hence its reliance on section 2(7)(c) of the Sectional Titles Scheme Management Act. Clearly, this is not a legal interest in the subject matter of the litigation which could be prejudiced by the judgment in this application.

[47] Once it is so, then it follows that the non-joinder point is unmeritorious and is accordingly dismissed.

THE COSTS OF 11 MARCH 2022

[48] Though the court did not decide the urgency of this application at the hearing of 11 March 2022, the Court nevertheless saw it fit to postpone the application and issued directives on the filing of further affidavits.

[49] It is significant that in its supplementary opposing affidavit, the Municipality complains about the inability to consult adequately with its officials in order to prepare an opposing affidavit on all aspects of Gemini Moon's case.

[50] By postponing the application on 11 March 2022 and giving the Municipality an opportunity to file a supplementary opposing affidavit, the Court must have accepted that the application deserved to be heard as soon as the matter was ripe, and all the affidavits and heads of argument filed. Had that not been the case, the Court should have struck the matter

from the roll for lack of urgency. In essence, therefore, the question of urgency was implicitly decided by the Court on the 11th of March 2022.

[51] In the result, it is not necessary for this Court at this stage, to revisit the question as to whether this application was urgent when it was launched in March 2022. I repeat that for the Court to postpone this application on 11 March 2022 instead of striking it from the urgent roll, the Court must have found that there was an element of urgency which warranted the matter to be heard in the not-so-distant future. The fact that the application was postponed on 11 March 2022 does not mean that the application was not urgent. Rather, what that means is that the urgency of the matter was not such that the matter had to be heard there and then. There are degrees of urgency.

[52] What is significant though, is that the application was triggered by a moratorium imposed by the Municipality on or about 22 February 2022, when it advised Gemini Moon that the Municipality was not going to process and/or consider approval of the subdivision, consolidation and rezoning applications of Gemini Moon until the arrear liability of Gemini Moon in respect of Erf 21279 was resolved.

[53] It is common cause on the papers that despite Gemini Moon's repeated requests urging the Municipality to uplift the moratorium, at the date of launching this application the moratorium remained in place and there was no indication from the Municipality that the moratorium would be uplifted. Instead, the Municipality had imposed a further moratorium on the approval of the building plans and the issuing of occupational certificates.

[54] Surely, the moratorium had financial implications for Gemini Moon's business and its ability to continue with its normal business activities. This is not seriously disputed by the Municipality. The Municipality's argument, instead, is that the moratorium (which is denied by the Municipality) does not create urgency because Gemini Moon had attempted over several years to resolve the dispute amicably. The Municipality also denies having imposed a moratorium as alleged by Gemini Moon. Save to deny having imposed a moratorium as alleged by Gemini Moon, the Municipality has not placed any facts before the Court to explain why a moratorium would have been justified in the circumstances.

[55] I am persuaded based on the evidence before the Court that a moratorium in the terms alleged by Gemini Moon was indeed imposed. I am further persuaded that the moratorium had continuing financial implications on the business of Gemini Moon and its ability to continue with its business. In the circumstances, Gemini Moon was entitled to approach the Court for relief on an urgent basis to prevent further harm.

[56] The fact that the Municipality has made an about turn and decided to uplift the moratorium, supports Gemini Moon's case that it was entitled to approach the Court on an urgent basis to compel the Municipality to uplift the moratorium.

[57] Though it was not argued before the Court, nor has it been explicitly set out in the papers, it is possible that the moratorium was imposed in an attempt to recover the amounts which according to the Municipality was owing by Gemini Moon. The Municipality, therefore, might have implemented the moratorium as part of its debt collection and revenue

management. There may be circumstances in which a municipality may implement such measures as part of its debt collection and revenue management. But since the Municipality denies having imposed a moratorium as alleged by Gemini Moon, it is not necessary for this Court to pronounce on whether the Municipality would have been justified to implement the moratorium.

[58] Suffice to say that without any explanation by the Municipality for imposing the moratorium on Gemini Moon, Gemini Moon was entitled to approach the court on an urgent basis for the relief sought in the notice of motion.

[59] In the result, Gemini Moon is entitled to the costs occasioned by the appearance on 11 March 2022.

CONCLUSION

[60] In the result, I make the following order:

60.1 The Municipality is declared responsible in contract for the maintenance, repair, service and associated costs of all basic services, including the electrical infrastructure already installed by Gemini Moon in respect of Phase 1A and 1B on the property known as Erf 21052 – in extent approximately 32945,2 square metres situated at Ds Aubrey Beukes Street, Upington, 8810 – as from the following dates:

60.1.1 On Phase 1A as from 7 September 2015; and

60.1.2 On Phase 1B as from 18 July 2016.

60.2 Gemini Moon is ordered to declare a formal dispute with the Municipality concerning charges the Municipality has levied in relation to the erven described in paras 3.1 to 3.4 of the Notice of Motion, forming part of the Bella Rosa suburb, such dispute to include any amount Gemini Moon has overpaid for infrastructure maintenance in relation to the property and after the date mentioned in para 1 of this order.

60.3 Geminin Moon is to so declare this dispute within 15 days.

60.4 The Municipality is ordered to formally acknowledge receipt of such a declared dispute, and within 21 days thereafter, to either correct Gemini Moon's account in relation to the erven in question as Gemini Moon requires or formally inform the Gemini Moon of the refusal of the corrections Gemini Moon so seeks (either in whole or in part).

60.5 Should Gemini Moon so wish, it may refer any remaining dispute between the parties to formal mediation, alternatively arbitration, or whatever dispute resolution mechanism that the Municipality's debt collection policy allows for, within 10 days thereafter.

60.6 The Municipality is ordered to take all necessary steps to have the dispute Gemini Moon so declares ventilated through the dispute resolution mechanisms created in its debt collection policy, within three months thereafter.

60.7 The Municipality is to submit to this court a report within six months, of the outcome of this declared dispute, save that should Gemini Moon declare a dispute as is ordered in para 2, this obligation shall lapse.

60.8 The Municipality is ordered to pay the costs of this proceedings, such costs to include the costs of 11 March 2022.

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RAMAEPADI AJ
NORTHERN CAPE DIVISION

For the applicant:	Adv S Grobler SC
Instructed by:	Engelsman Magabane Inc.
For the respondent:	Adv J Olivier
Instructed by:	Haarhoffs Inc.