THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 106/2018

In the matter between:

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY **APPELLANT**

and

BLAIR ATHOLL HOMEOWNERS ASSOCIATION **RESPONDENT**

Neutral Citation: *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (106/2018) [2018] ZASCA 176 (3 December 2018)

Coram: Navsa ADP, Swain and Dambuza JJA and Mokgohloa and Mothle AJJA

Heard: 7 November 2018

Delivered: 3 December 2018

Summary: Separation of issues in terms of Uniform rule 33(4) – repeated warnings that careful thought should be given to a separation of issues, and that convenience and expedition should be the object, not heeded – when issues are inextricably linked a full ventilation of all the issues is more often than not the better course and might ultimately prove expeditious and provide finality – interpretation of an Engineering Services Agreement – foundational principles of interpretation often ignored – recent experience showing that written text unjustifiably relegated – extensive inadmissible extrinsic evidence wrongly allowed – parol evidence rule still part of our law – not for witnesses to interpret document – court's task – evidence of negotiations inadmissible.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Murphy J sitting as court of first instance).

1 The appeal is upheld with costs including the costs of two counsel and the issues that remain, beyond that dealt with in para 2 of this order, are remitted to the court below for further hearing.

2 The order of the court below is set aside and substituted with the following:

'1. It is declared that the reference in clause 6.16.1 of the Engineering Services Agreement to the "normal rate of a municipality" is not a reference to tariff 6 of the Tshwane Schedule of Tariffs, attached as annexure "C" to its declaration.

2. Costs of proceedings thus far are reserved, pending final determination of the outstanding issues.'

JUDGMENT

Navsa ADP and Mothle AJA (Swain and Dambuza JJA and Mokgohloa AJA concurring):

[1] Right at the outset, even before litigation commenced, the essential dispute between the parties was about which of a range of tariffs the appellant, the City of Tshwane Metropolitan Municipality (the City), a local authority operating in terms of the Local Government: Municipal Structures Act 117 of 1998 (the Structures Act) and the Local Government: Municipal Systems Act 32 of 2000 (the Systems Act), could charge the respondent, the Blair Atholl Homeowners Association (the Association), for the water it supplies to a housing estate which the latter administers. The court below, the Gauteng Division of the High Court, Pretoria, after the parties had agreed thereto and purportedly acting in terms of rule 33(4) of the Uniform Rules of Court, made an order of separation which, as will become clear, will have the effect that the essential issue remains unresolved.

[2] Careful thought should be given to a separation of issues and the issues to be tried separately have to be clearly circumscribed in order to avoid confusion. A decision on a separate issue should be dispositive of a portion of the relief claimed and essentially should serve expedition rather than cause delay in the resolution of the principal issue. In this case the order of separation will have the latter rather than the former result. These are all aspects to which we shall revert later in this judgment. The background to the appeal is set out hereafter.

[3] During 2003 and 2004, Mr Robert Wray (Wray), the directing mind of Wraypex (Pty) Limited (the developer), started formulating plans to develop a township near Lanseria Airport, comprising a residential golfing estate. At that stage the land envisaged for the development fell outside of the City's priority development areas. It was located outside the urban development edge. The development was to comprise four extensions, the greater part of which was located within the City's jurisdiction and the remainder within the jurisdiction of Mogale City. A major problem encountered by the developer was that, because the land was situated outside of the urban edge and beyond priority areas, the City was not yet supplying water to that area nor was it in contemplation in the immediate future. The developer, through Mr James Croswell of Croswell Engineers, entered into discussions with the City to resolve this difficulty and to attempt to persuade the City to facilitate the development of the proposed township by providing water and other municipal services to the area.

[4] Pursuant to discussions, the developer submitted a Development Scheme Report to the City for approval and suggested that it was prepared to make arrangements with the Rand Water Board for direct bulk water supply and intended to arrange a package plant type sewage works to cater for the development. The approach to Rand Water did not bear fruit. Thus, the water supply had to be provided by the City.[1]

[5] The City was only prepared to provide water to the area on the basis that the developer fund the construction of a 20 kilometre water pipeline that would enable

[1] A local authority appears to have ultimate authority in relation to the supply of water. In this regard see s 6 read with s 1 of the Water Services Act 108 of 1997.

the water to be supplied to the new development. It also required the developer to construct an internal and external reservoir and a sewage package plant. This would all have to be done within engineering specifications set by the City. In the discussions between the City and those representing the developer's interests it was envisaged that a non-profit company would be registered in terms of s 21 of the Companies Act 61 of 1973 (the Companies Act),[2] which would take over the developer's rights and obligations. It was also envisaged that the s 21 company would be responsible for the maintenance of the internal reservoir, the sewage package plant and the internal water reticulation network. That company would then apply for a metered connection from the City and would arrange for individual homeowners within the estate to pay for their water consumption. Internal water reticulation and maintenance thereof would also be tended to by the s 21 company to be formed.

[6] After extended discussions and exchanges of written communications as well as several drafts of a contemplated written agreement, an Engineering Services Agreement (the ESA), central to the present dispute, was concluded in February 2006. The ESA gave rise to the incorporation of the Association, which was registered, in terms of s 21 of the Companies Act 61 of 1973 (the Companies Act), as the contemplated non-profit s 21 company.

[7] The City made a financial contribution to the expansion of the diameter of the 20 kilometre water pipeline in order for it to supply other developments along the route. It also undertook, after the completion of the pipeline, to maintain it as well as to maintain the external reservoir. It was also envisaged by the parties that Mogale

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[2] The relevant parts of s 21 of the Companies Act 61 of 1973 provides:
'(1) Any association –
(a) formed or to be formed for any lawful purpose;
(b) having the main object of promoting religion, arts, sciences, education, charity, recreation, or any other cultural or social activity or communal or group interest;
(c) which intends to apply its profits (if any) or other income in promoting its said main object;
(d) which prohibits the payment of any dividend to its members; and
(e) which complies with the requirements of this section in respect to its formation and registration,
may be incorporated as a company limited by guarantee.'
See also s 8 of the Companies Act 71 of 2008 read with Schedule 1 thereof and see P Delport *Henochsberg on the Companies Act 71 of 2008* vol 1, Service Issue 17 at 54(6) – 54(7).

City Municipality would benefit from the installation of the water pipeline in that it would be able to tap into the water supply south of the estate.

[8] We now turn to the salient parts of the ESA. The preamble reads as follows:

'WHEREAS the applicant is the owner of the property; and

WHEREAS the applicant has applied for the establishment of the township on the property; and

WHEREAS the township is totally outside a priority area with no water and sewerage services available; and

WHEREAS the Municipality is willing to approve the Services Scheme of the proposed township subject to the conditions contained herein.'

[9] The ESA recorded that the developer would be responsible for the installation and construction of internal services in accordance with specifications. It provided for the registration of the s 21 company and the transfer thereto of rights and obligations from the developer.

[10] The material parts of clause 4.2.1 of the ESA are set out hereafter:

'The property (and township) is not located within a service priority area of the Municipality. The Municipality has accordingly agreed that the Applicant, at the exclusive cost of the Applicant; except as otherwise provided for herein, provide such external services necessary for the effective functioning of the internal services of the township in accordance with the Municipal Engineer's standards and criteria . . . .'

[11] The relevant parts of clause 4.2.4 provides:

'4.2.4 Further to paragraph 4.2.1 hereof it is recorded that Municipality will not provide, supply or install external services to the Township. The Municipality does however agree:

4.2.4.1 To support the construction of an on site sewage package plant designed and constructed to the approval of Municipality and the Department of Water Affairs and to permit the Applicant and thereafter the Section 21 Company to own, maintain and operate said plant in perpetuity. The operation of this package plant shall be done by a suitably qualified operator, approved by the Municipal Engineer.

4.2.4.2 To support the construction of a bulk water supply line from point A on the attached plant to the "Blair Atholl Reservoir" situated on Portion 2 of the farm Vlakfontein 494-JQ at the Applicant's expense (subject to 4.2.3.4) on a route agreed to by the Municipal Engineer and to the Principle and Standards of the Municipal Engineer.'

[12] The ESA provided for maintenance by the City of the external water pipeline. Clause 4.2.4.6 provided that the City would 'take over and accept ongoing professional responsibility for the bulk water pipeline upon the expiry of the defects liability period'. In line with the City's undertaking referred to above, the ESA provided for the City to accept responsibility for 'the external reservoir'. Clause 4.2.5 reads as follows:

'It is recorded that the external water pipeline and the appurtenant reservoir has been, at the request of the Municipal Engineer, sized to provide water beyond the identified demand for the Township and the proposed Monaghan Country Estate.'

[13] Clause 6 of the ESA was relied on heavily by the Association in support of its case in relation to the separated issue, which we will come to in due course. It provided for the Association, as successor to the developer, to take over responsibility for the maintenance of all internal services, including water, sewage, roads and storm water at their own cost.

[14] Clauses 6.14 and 6.15 of the ESA provides:

'6.14 To enable the Owners Association to maintain the services, it is a requirement that a trust fund must be created for this purpose, and a fixed amount be deposited by every owner into the fund every month. This amount must be determined during a General meeting of all the owners and should be escalated every year.

6.15 Municipality hereby agrees that the Section 21 Company may levy a charge on the owners or residents of the Township to meet the cost of operating, maintaining, repairing and possible replacement of their internal Services, booster pump station and package plant.'

[15] The critical clause in relation to the separated issue, is 6.16, which reads as follows:

'*In recognition* of the acceptance of responsibility by the Section 21 Company of the duties normally performed by the Municipality, the Municipality agrees to:

6.16.1 Supply water to the Section 21 Company at the normal rate of the Municipality.

6.16.2 Not raise a sewerage charge (basic charge).' (Our emphasis.)

[16] The external and internal services as described above were constructed and installed. The housing estate was developed and individual homeowners started taking occupation. Water meters were installed at the housing estate. Initially, there were disputes regarding the accuracy of meter readings. The greater dispute that arose was in relation to the rate at which the Association was billed.

[17] At this stage it is necessary to set out the scale of rates applied by the City within its area of jurisdiction in relation to the supply of water that was set by a resolution of the City and contained in a notice issued in terms of s 75A(3) of the Local Government: Municipal Systems Act 32 of 2000.[3] We refer only to the details of relevant rates and not to those that are clearly inapplicable:

'**SCHEDULE**

WATER TARIFF

PART I

A. CHARGES FOR THE SUPPLY OF WATER

1. SCALE A: AGRICULTURAL HOLDINGS AND FARM PORTIONS FOR RESIDENTIAL PURPOSES EXCLUDING CONSUMERS UNDER SCALE C

. . .

2. SCALE B: SINGLE DWELLING-HOUSES (metered separately by the Municipality and excluding dwelling-houses from which an unregistered business is run)

This scale is applicable to conventional metering, pre-paid yard metering, assumed and shared consumption billing.

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[3] Section 75A(3) of the Local Government: Municipal Systems Act 32 of 2000 reads as follows:

'(3) After a resolution contemplated in subsection (2) has been passed, the municipal manager must, without delay –

(a) conspicuously display a copy of the resolution for a period of at least 30 days at the main administrative office of the municipality and at such other places within the municipality to which the public has access as the municipal manager may determine;

(b) publish in a newspaper of general circulation in the municipality a notice stating –

(i) that a resolution as contemplated in subsection (2) has been passed by the council;

(ii) that a copy of the resolution is available for public inspection during office hours at the main administrative office of the municipality and at the other places specified in the notice; and

(iii) the date on which the determination will come into operation; and

(c) seek to convey the information referred to in paragraph *(b)* to the local community by means of radio broadcasts covering the area of the municipality.'

(a) The tariff applicable to a consumer in a dwelling-house for water consumed since the previous meter reading is as follows:

		Per kℓ R
(i)	0 to 6 kℓ per 30 days' period (200 ℓ a day)	5,13
(ii)	7 to 12 kℓ per 30 days' period	5,30
(iii)	13 to 18 kℓ per 30 day's period	5,70
(iv)	19 to 24 kℓ per 30 day's period	6,10
(v)	25 to 30 kℓ per 30 day's period	6,10
(vi)	31 to 42 kℓ per 30 day's period	6,10
(vii)	43 to 72 kℓ per 30 day's period	6,80
(viii)	More than 72 kℓ per 30 day's period	8,00

Provided that the quantity of water consumed in (i) above be rebated at 100%. Provided further that in the case of duet houses not metered separately, the applicable kℓ in (i) to (vii) be increased by 100 %.

3. SCALE C: FLATS, TOWN HOUSES AND OTHER SECTIONAL TITLE DEVELOPMENTS ON STANDS WITH MORE THAN TWO DWELLINGS (not metered separately by the Metropolitan Municipality)

. . .

4. SCALE D: ALL CONSUMERS WHO DO NOT FALL UNDER SCALE A, B, C AND E

(a) The tariff applicable to a consumer for water consumed since the previous meter reading is as follows:

(i)	0 – 10 000 kP per 30 days' period	6,10
(ii)	10 001 – 100 000 kP per 30 days' period	5,80
(iii)	More than 100 000 kP per 30 days' period	5,50

The new uniform non-residential tariff structure will be phased in for Scale F users and other bulk users currently receiving special discounts for the next two years with an overall discount of 10% and 5% respectively.

5. SCALE E: HOMES FOR THE AGED AND RETIREMENT CENTRES

. . .

6. BULK WATER SUPPLY TO OTHER MUNICIPALITIES

(a) A quantity charge for water supplied since the previous meter reading according to the applicable Rand Water tariff including the Water Research Fund levy, plus 10% administrative charge or as per agreement.'

[18] The City started billing the Association under Scale D, with the intention of later switching to Scale B, when all the stands in the township would be fully occupied. Scale D is marginally more advantageous than Scale B and the Association was adamant that it was only liable to pay the rate under tariff 6 which states that it is for 'bulk water supply to other municipalities'.

[19] The Association took up the attitude that tariff 6 was specifically agreed to prior to the conclusion of the ESA and that in any event, contextually, the normal rate in relation to the supply of water to the estate would be tariff 6. In this regard they pointed to the fact that they had assumed the responsibilities of a municipality and that the Association was therefore *like* a municipality and was entitled to the bulk rate for municipalities. In support of that contention, they relied on the introductory words of clause 6.16, set out in para 15 above, which specifically notes that the rate agreed was '[i]n recognition of the acceptance of the duties normally performed by the Municipality'.

[20] The dispute concerning the application of the scale of the tariffs and payment for the water supply endured for a period of two years. Whilst the dispute raged, the Association did not pay its water consumption bill. During 2010 the City interrupted the water supply to the estate, which led to an urgent approach to court by the Association, which in turn led to an interim agreement regarding water supply, but did not settle the dispute concerning the rate at which the estate was to be billed.

[21] Subsequently, the Association applied to the court below for an order in the following terms:
(a) Declaring that the reference in clause 6.16.1 of the ESA to the 'normal rate of the Municipality' is a reference to the normal rate charged for bulk water supply to other local governments as contemplated in paragraph 6 of annexure C to the declaration.
(b) That the City is directed to render accounts to the Association in accordance with the bulk charge rate as provided for in its schedule of tariffs.

[22] The matter initially came before Preller J on an urgent basis. It appears that a number of years passed before he made an order in the following terms:
'1. The matter is referred to trial unless the parties agree to refer it to arbitration.

2. The applicants are to institute the action within 20 court days after the date of this order.
3. Pending the finalization of the action the applicants are to pay for water supplied to the township of Blair Atholl at the rate of bulk supply to the Respondent plus 10%.
4. The question of costs of this application is referred to the court hearing the action between the parties.'

[23] In January 2015 the Association, as plaintiff, filed a declaration in which it sought an order, essentially in the terms set out in para 21 above, but, additionally, in the alternative, sought an order for rectification of the ESA by the insertion of the word 'bulk' between the words 'normal' and 'rate' in clause 6.16.1. At this stage, it is necessary to have regard to material parts of the City's plea. The City, in opposing the action in relation to the merits denied, inter alia, that any of its officials was authorised to 'conclude [any] agreement with [the developer] regarding a special rate in terms of which [the City] would supply water to [the developer]'. Furthermore, the City stated:

'21.3 In amplification of the aforementioned denial the Defendant further pleads the following:-

21.3.1 on or about 3 February 2006, which is the date on which the *Engineering Service Agreement* was concluded, the determination of charges payable by any consumer to the Defendant for the supply of water, was as per the charges reflected in Annexure "CTM2", a copy of which is attached hereto.

21.3.2 *Ex facie* Annexure "CTM2":

a) no provision is made for a "normal bulk rate";

b) provision is made only for a category of "**bulk water supply to other municipalities**"; and

21.3.3 other than the February 2006 *Engineering Service Agreement* concluded between Defendant and Second Plaintiff, there has never been any agreement on an amendment of any provision, including the provisions of clause 6.16.1, of the *Engineering Service Agreement*, which defined First Plaintiff as "a municipality" for the purpose of charges payable to the Defendant for the supply of water as per tariffs provided for in Annexure "CTM2".

21.4 The category "**bulk water supply to other municipalities**" as provided for Annexure "CTM2" was applicable on 30 September 2006 (which is the date on which the First Plaintiff was incorporated) and remains applicable to date.'

[24] The City also filed a counterclaim in which it sought, first, payment of amounts which it contended were due in terms of Scale D. It sought payment of R4 101 725.60 and R8 672 844.70. It also sought declaratory orders in the following terms:

'1.1 that the Defendant was entitled in terms of the *Water Supply By-laws*, read together with the *Debt Collections and Credit Control By-laws* and the *Systems Act*, to restrict the supply of water to the First Plaintiff's premises on the lawful basis that the First Plaintiff was, on or about the 3rd of December 2010, in arrears with its accounts; and

1.2 that the Defendant is entitled in terms of the *Water Supply By-laws*, read together with the *Debt Collection and Credit Control By-laws* and the *Systems Act*, to restrict the supply of water to the First Plaintiff on the lawful basis that the First Plaintiff remains currently in arrears with its accounts.'

[25] In its plea to the counterclaim, the Association, inter alia, stated the following:

'5.3 Alternatively, the provisions of clause 3 of the Water Supply By-laws (Notice 801 of 2003) covered the special arrangements entered into in respect of clause [6.16.1] of the Engineering Services Agreement.

5.4 To the extent that the Water Supply By-laws and the Debt Collection By-laws and the Credit Control By-laws read together with the Debt Collection and Credit Control Policy, published in the Provincial Gazette dated 27 February 2002, purport to exclude the provision of water at the normal bulk rates of the Municipality to the Blair Atholl community as intended in the said clause 16.1.1, which is denied, they are:

5.4.1 Inconsistent with Part 1 of Chapter 8 of the Municipal Systems Act 32 of 2000, in particular sections 74(2)(a) and (d), which require that a tariff policy on the levying of fees for municipal services must reflect, at a minimum, certain principles, including that:

5.4.1.1 users of municipal services should be treated equitably in the application of tariffs; and

5.4.1.2 tariffs must reflect the costs reasonably associated with rendering the service, including capital, operating, maintenance, administration and replacement costs, and interest charges.

5.4.2 Inconsistent with Part 2 of Chapter 8 of the Municipal Systems Act 32 of 2000, in particular section 76(b), which authorizes a municipality to provide municipal services through an external mechanism by entering into a service delivery agreement with, *inter alia*, a community based organisation or other non-governmental organisation legally competent to enter into such agreement, or any other institution, entity or person legally competent to operate a business activity.

5.4.3 Unconstitutional and invalid in that they violate the constitutional principle of legality upheld in section 1(c) of the Constitution.'

[26] As can be seen, in line with what is stated in the opening paragraph of this judgment, the essential dispute between the parties related to the rate at which the Association was to be billed for its water supply. In essence, the dispute centred on the parties' differing views on the interpretation of clause 6.16 of the ESA. The dispute was about whether the words 'normal rate' was the 'bulk rate for municipalities' or one of the other categories on the scale of tariffs. The legality of the clause, in the event of a finding that it was the latter rather than the former, was also an issue.

[27] Before us, it appears that the matter was decided on a separated issue, namely, an interpretation of clause 6.16 and consequently which of the categories referred to in the scale of rates applied. No order of separation was made at the commencement of proceedings and there was no order at that time that the remaining issues were to stand over. We will, later in this judgment, deal in greater detail with this aspect. For the moment, suffice to say that a trial, ostensibly on the separated issue, ensued.

[28] The trial was conducted before Murphy J. Croswell, referred to earlier, was the only witness to testify on behalf of the Association. As the Association's consulting engineer, he was intimately involved in the negotiations and discussions that led to the conclusion of the ESA. He testified that the City's standard agreement was adapted to the specific needs of this development. He explained how he and others contributed to the details and specifics contained therein. Croswell described how there was a series of draft agreements exchanged between the parties and that the finalisation of the ESA took several months. Croswell's evidence was led, ostensibly, on the basis of providing context to the conclusion of the ESA.

[29] Insofar as clause 6.16 was concerned, he testified that he insisted upon its inclusion and that it was clearly understood that 'the normal rate of the municipality' would be the bulk rate. The following question was put to Croswell under cross-examination:

‘But what does normal rate mean? --- Normal rate means one of these rates. That is all it means.
Good okay. --- Okay.
You have always understood normal rates to mean that? --- To mean a bulk rate. I mean we had [been] discussing from the day that the Council said they cannot supply water, we had [been] discussing bulk rates.’
The admissibility of Croswell’s testimony in this regard is an aspect to which we will revert later in this judgment.

[30] In respect of his insistence that clause 6.16 be included in the ESA, he pointed to an arrow he had made, in manuscript, in the margin alongside tariff 6 in the draft that had served before the parties’ representatives during negotiations leading up to the conclusion of the ESA. This, he explained, was to highlight that it was an issue that was raised, discussed and agreed upon.

[31] Croswell recalled that the meeting at which the rate was discussed was acrimonious and that Wray, his principal at the time, had stormed out during the discussions and had to be calmed down. Under cross-examination, Croswell was referred to his earlier evidence by way of affidavit in which he had indicated that it was not necessary to rectify the agreement by inserting the word ‘bulk’ between the words ‘normal’ and ‘rate’. He testified that it was not necessary to rectify the agreement as sought in the alternative by the Association because all the parties understood it to be the ‘bulk rate’. From that stage onwards the rectification initially sought by the Association was abandoned.

[32] Significantly, though, Croswell, later, contrary to his earlier testimony referred to in para 29 above, under cross-examination, conceded that the issue of the applicable rate ‘was not resolved’.

[33] The City led the evidence of two witnesses, namely, Mr Frans Mouton (Mouton) and Mr Ansen Lamprecht (Lamprecht). At the time of the conclusion of the ESA, Mouton was the Director for Water and Sanitation Planning. His duties included the determination of infrastructural requirements in line with the City’s planning policies. He testified that the Finance Department of the City provided guidelines for

the application of the scale of tariffs. Mouton also testified that he had attended a meeting during April 2005 at which other officials of the City were present and that Croswell and someone else representing the developer were also in attendance. He recalled that the developer had asked for a special rate to be applied in respect of the supply of water to the Association. Mouton was adamant that the developer was told emphatically that they could not comply with the request as the City was bound by its approved tariffs.

[34] According to Mouton, the developer had called for a tariff that would be in line with the bulk rate for municipalities, namely the Rand Water Board rate plus ten per cent. Mouton testified that the developer was told that no exceptions would be admitted in relation to the approved rates. He insisted that this was a consistent stance adopted by the City. He and the City officials considered themselves bound by the the Systems Act, the Constitution and other applicable statutory prescripts. In respect of whether a switch could be made from Scale D to Scale B, Mouton testified that it could be done, but that a specific process had to be followed in order for that to occur. He did not elaborate.

[35] When Mouton was cross-examined, he was challenged on his memory in relation to the number of years that had passed since the meeting he had testified about. He could not recall an incident in which Croswell's principal had stormed out. Although Mouton was sketchy on detail, he was unmoved on the question of whether a concession on the rates had been made and the consistency of the City's position in relation to the application of rates.

[36] For reasons that will become clear, it is necessary to record that when Mouton testified in-chief, he was, in effect, asked to interpret clause 6.16 and was asked what he understood by 'normal rate'. At that stage there was rightly an objection but counsel on behalf of the City continued with that line of questioning. Although counsel tried to disguise the fact that he was asking about the agreement, he nevertheless went on to ask what Mouton considered as the 'normal rate'. That question was allowed.

[37] Counsel on behalf of the Association, in cross-examining Mouton, asked about clause 6 and the meaning of 'normal rate'. A little later, counsel for the Association, once again, attempted to have Mouton interpret clause 6.16. Subsequently, the following exchange, which is instructive, took place between counsel and the court:

'MR STRYDOM: M'Lord my learned friend … [incomplete]. I have asked in evidence-in-chief when I asked him about the contract and he objected he said, no, leave that out. You are not supposed to ask this witness about the contract because he cannot testify about it. He was not party to the contract. There is no evidence that links him to the contract and the question of the interpretation of the contract is to be left to the court. That was my learned friend's submission.

Now in cross-examination he reads from the contract and he asks what does this mean "recognition" and he reads the sentence. Now all of a sudden the witness must then come and give an interpretation of the contract.

COURT: Yes.

MR STRYDOM: So he is blowing hot and cold as far as this is concerned.

COURT: What is good for the [geese] is good for the gander.

MR STRYDOM: He has already made up his bed and he must stick to it.

COURT: Yes.

MR LUDERITZ: No, no, my learned friend is mistaken.

COURT: Yes.

MR LUDERITZ: Firstly I am not asking the witness to interpret the agreement. I am trying to establish what the words "normal rate" would mean. The evidence was that the discussion at the meeting, if that version is to be accepted, is that mention was made of the words "normal rate". What I am debating with the witness is what would be the normal rate in the context of a given set of facts. The given set of facts where it is common cause that … [incomplete]. Let us not call it the homeowners association let us call it B is rendering all of the services that a municipality would ordinarily render such as another municipality by way of example Mogale City.'

[38] Lamprecht, a civil engineer, testified that he was an engineering consultant with the City at the time of the conclusion of the ESA. He knew both Wray and Croswell. He testified that it was the City's preference to supply water to consumers directly, rather than doing it through the Rand Water Board. Discussions took place about the manner in which this could be done. When the developer agreed to pay for

the installation of the water pipeline, the City agreed to take over the maintenance and to supply water.

[39] Lamprecht recalled the meeting at which Mouton was present. He testified that the developer had undertaken to maintain internal services. Lamprecht further testified that either Croswell or Wray asked for a special municipal tariff. He could not recall the incident involving Wray storming out of the meeting.

[40] According to Lamprecht, the municipal officials informed the developer that they could not agree to a special tariff and could not deviate from the approved tariffs. Lamprecht was involved in finalising the ESA. He was as adamant as Mouton that the City was consistent in applying and adhering to its scale of tariffs set out in para 17 above. Like Mouton, Lamprecht was subjected to cross-examination on the accuracy of his memory of events.

[41] Lamprecht, too, testified about the meaning to be attributed to certain words in the ESA. He was asked in-chief:

'Now I am not going to go into the detail of the contract but what does normal rate mean to you? I am talking in general; I am not talking about the contract now. --- Well that is the only rates that the Council has, is a set of rates to provide water to consumers it is approved by the City Council every year with the budget and it is promulgated in the provincial gazette.'

A little later, he was referred specifically to clause 6.16 and was asked what the 'normal rate' meant.

[42] An objection followed and counsel on behalf of the Association engaged the court and said the following:

'MR LUDERITZ: M'Lord the case that we are advancing M'Lord, is premised on a reasonable interpretation of the clause. Now that debate takes place in the context of the words in recognition of the acceptance of responsibility by the section 21 company of the duties normally performed by the municipality, the municipality agrees to. Now the municipality agrees to do two things, it agrees not to raise a sewerage charge and it agrees not to supply water to the section 21 company at the normal rate. So there is, on a factual level, a clear correlation between the meaning to be attributed to the words normal rate and the introductory part which says in recognition of. Because what the clause contemplates is a *quid pro quo*, and what one needs to understand is what is the *quid* and what is the *pro*,

and the rate, the normal rate is informed by the *quid* and it is that that I am exploring with the witness, and what is the meaning and his understanding of the words "in consideration for".

. . .

COURT: Ja so you factually, you are factually interrogating the motive for the clause being in the agreement and you would say to me that is relevant and falls into the context of the background and surrounding circumstances of the agreement.'

The court went on to allow the question.

[43] In respect of the introductory words to clause 6.16, Lamprecht testified that this was due to the wording of the standard agreements used and adapted by the City. Mr Lamprecht would not concede that the Association could be treated as a municipality for the purposes of the tariff to be applied. However, counsel on behalf of the Association relied upon a concession made by Mouton, namely, that the Association had assumed a number of obligations that would normally fall to a local authority.

[44] Murphy J construed this to mean that there was a concession by Mouton that if no municipal services were rendered by the City, 'then the normal tariff for the supply of water in bulk from point A to point B is Rate 6'. The court below considered Mouton's concession, that the tariffs in scales A to E were the costs reasonably associated with the rendering of municipal services by the City, including operating costs, maintenance, administration and replacement costs as well as interest charges, to mean that he accepted that the City rendered no specific service to the Association, yet sought to charge for it.

[45] The court below considered Lamprecht's evidence not to exclude the possibility that tariff 6 applied. Murphy J held it against Lamprecht that his recollection of a meeting that occurred twelve years ago was vague. The following paragraphs of the judgment of the court below contain the court's reasoning and conclusion in relation to clause 6.16:

'The plaintiff submits that the only possible, sustainable, reasonable and businesslike interpretation applicable to clause 6.16.1 was that the reference to "normal rate" was a reference to the bulk rate, Rate 6. This is a normal rate of the defendant and not a special rate, payable by municipalities to the defendant for the bulk supply of water when the

defendant renders no other services than the supply of bulk water. Such an interpretation, the plaintiff submits, is the only one that accords with the ESA read as a whole, the common cause facts, the prevailing factual matrix and the specific context in which the ESA was negotiated and concluded. The interpretation is consistent with the idea that the defendant's capital expenditure and operating costs are capped by the limited services it renders to the estate, being only in respect of the bulk supply.

Any other interpretation, the plaintiff submits, would render the introductory words in clause 6.16 superfluous within the context of the water supply rates. The bulk rate was evidently intended and was explicitly justified as being "in recognition of the acceptance of responsibility" by the plaintiff of the duties normally performed by the municipality. It was precisely because the defendant recognised that the plaintiff would assume responsibility for the municipal functions that it agreed to a *quid pro quo* in the form of supplying the estate bulk water at the normal rate it supplied other municipalities. In short, "normal rate" means the normal rate paid by municipalities to the defendant for bulk water supply – Rate 6. Any other interpretation would mean that no recognition is given to the fact that the plaintiff is responsible for rendering duties normally performed by the municipality and the defendant is in fact supplying water to another municipality, Mogale City.

The defendant submits that the normal rate intended was only one of those that could apply to a consumer that is not a municipality and that could only be Scale D (being the catch-all category when the other scales are inapplicable), which applies when the consumer does not fall into the categories of Scales A (agricultural), B (single dwellings), C (sectional titles) or E (retirement homes). It is common cause that the estate does not fall into scale A, B, C or E and it is not a municipality. Thus, the defendant submits, the plaintiff could only be supplied at the rate under Scale D.

I agree with the plaintiff's interpretation. Both the language and the purpose of clause 6.16.1 reflect an intention to offer a *quid pro quo* in exchange for the plaintiff assuming responsibility for the duties normally performed by the defendant which is consistent with the entire tenor of the ESA as a whole.

A requirement to pay according to Scale D would not offer any consideration (*quid*) for the assumption of the duties of the municipality (*quo*). If the intention was that the plaintiff would pay what it ordinarily would be expected to pay under the scale typically applicable, there would have been no need to introduce clause 6.16 with language recognising the abnormal or exceptional nature of the arrangement. The predicate of the clause is exceptionality or uniqueness, justifying a departure from the norm, in this case allowing a body which is not a municipality to exceptionally benefit from the bulk rate paid by a municipality because it is performing the functions of a municipality. It is the obvious businesslike interpretation flowing from the language used and the intra-textual context of the ESA as a whole.

The interpretation is supported furthermore by the fact that such charges (the Rand Water tariff plus 10%) will not be punitive and will be commensurate with the costs of the services rendered, as required by sections 74 and 76 of the Systems Act and the policy in terms of which local governments determine applicable rates. The interpretation favoured by the defendant, on the other hand, will result in the residents of the estate being charged twice and paying the defendant for services not rendered by it but in fact provided to them by the plaintiff. It is the plaintiff that operates, maintains, repairs and replaces the infrastructure, not the defendant. It is the plaintiff which carries the risk of bad debts or damage, not the defendant. The application of Scale D would compensate the defendant for this expenditure and risk without it bearing it. Payment under Scale D will unjustifiably enrich the defendant. The patently obvious purpose of clause 6.16 was to avoid this unjustified enrichment by putting the plaintiff on the same footing as other bodies supplied by the defendant with bulk water without providing the other services or expenditures normally recouped by the other tariffs.

The plaintiff is therefore entitled to the declaration it seeks. There is accordingly no need to grant an order in relation to the prayers for rectification or invalidity.'

[46] The court below made the following order:

'[1.] It is ordered in terms of rule 33(4) that the question of the interpretation of clause 6.16 of the Engineering Services Agreement is to be separately decided from the defendant's counterclaim.

[2.] It is declared that the reference in clause 6.16.1 of the Engineering Services Agreement to the "normal rate of the Municipality" is a reference to the normal rate charged for bulk water supply to other local governments as contemplated in paragraph 6 of annexure C to the declaration.

[3.] The defendant is directed to render accounts to the plaintiff in accordance with the bulk charge rate as provided for in its schedule of tariffs.

[4.] The defendant's counterclaims are postponed *sine die*.

[5.] The defendant is to pay the costs of the action, such costs to include the costs of employing two counsel.'

[47] At the outset of proceedings before us, we enquired of counsel whether an order in terms of rule 33(4) had been made at the commencement of proceedings in the court below. We also enquired whether the order was at the instance of the court or the parties. There was nothing in the record before us which answered either of those questions. Counsel informed the court that no such order was made by the

court below at the commencement of proceedings but that there had been agreement between counsel, that the issue identified in the order made by the court below at the time of the delivery of the judgment, be adjudicated separately. This did not appear from the record. Counsel informed us that there was a pre-trial minute which recorded that fact. The record did not contain the pre-trial minute nor could counsel produce it. Strikingly, as shown in the preceding paragraph, the court below made an order, purportedly in terms of rule 33(4), for the first time when the judgment was delivered.

[48] Rule 33(4) reads as follows:

'If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'

[49] In D E van Loggerenberg *Erasmus Superior Court Practice* (2016) 2 ed at D1-436, the author states the following:

'The entitlement to seek the separation of issues was created in the rules so that an alleged *lacuna* in the plaintiff's case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. The purpose is to determine the plaintiff's claim without the costs and delays of a full trial.' (Footnote omitted.)

[50] At D1-436 *op cit* the following is stated:

'The procedure is aimed at facilitating the convenient and expeditious disposal of litigation. The word "convenient" within the context of the subrule conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness. It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.' (Footnotes omitted.)

[51] This court has repeatedly warned that, when a decision is called for in terms of rule 33(4), it should be a carefully considered one. In *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA), para 3, the following was said:

‘Before turning to the substance of the appeal, it is appropriate to make a few remarks about separating issues. Rule 33(4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed as facilitating the convenient and expeditious disposal of litigation. It should not be assumed that that result is always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a whole that it will be possible properly to determine whether it is convenient to try an issue separately.’

[52] In *Consolidated News Agencies (Pty) Ltd (In Liquidation) v Mobile Telephone Networks (Pty) Ltd & another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA) paras 90-91, the court said the following:

‘This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.

In the present case counsel for both parties informed us that notwithstanding a decision in this matter a number of issues would still be outstanding. Not all of the remaining issues were identified, nor do they appear to have occupied the mind of the court below.’

As will appear from the conclusions reached by us and what is stated later, the circumstances set out in para 91 of *Consolidated News Agencies,* pertains to the present case.

[53] From what follows later in this judgment it is clear that insufficient thought by counsel and the court below was given to whether rule 33(4) should be resorted to and applied. Piecemeal litigation which defeats the object of rule 33(4) and consequent piecemeal appeals are equally to be eschewed.

[54] Before us, counsel agreed that, in the event of a decision on the interpretation of clause 6.16 against the Association, the constitutional and statutory challenge as to the non-application by the City of the bulk rate was very much alive and a decision

in relation thereto would be required. Furthermore, there is a dispute between the parties concerning the City's pleadings, namely, whether they properly raise the issue of the legality of an agreement by the City on a bulk rate to an entity other than a municipality. Put differently, whether the City's pleadings, properly construed, challenge the legality of an agreement outside of rates approved by the City within statutory and policy boundaries. From our description of the pleadings set out above, they certainly do not do so clearly or elegantly, but they do appear to do so obliquely. Counsel were agreed that it was not an issue which the court below, in terms of the separated issue, was called upon to adjudicate. They were adamant that all the court below had been called upon to do was to interpret clause 6.16 and that the question of the legality of the tariff was not to be adjudicated. What is contained in this paragraph supports the conclusion that the question of separation in terms of Rule 33(4) was not given careful consideration. The issues raised in the pleadings in the court below were inextricably linked. A full ventilation of all the issues would have led to expedition and finality. The conclusions reached later in this judgment prove that the separation resorted to by the parties and sanctioned by the court below will ultimately have the opposite effect.

[55] Before turning to the interpretation of the ESA and the admissibility of evidence in relation thereto, we pause to make the observations set out in this and a number of successive paragraphs. Academics have written fairly frequently about the schizoid nature of the South African approach to interpretation of contracts. It has been said that there has been vacillation between the approach that seeks to establish the common intention of the parties to a contract and that of establishing the meaning of words used by the parties.[4] The question repeatedly asked is whether we have a subjective or objective approach to interpreting written agreements. The objective approach has been to deduce the intention of the parties from their 'common stated intention', whilst a subjective approach is one that is focused on the parties' intention rather than on the words they employed.

[4] See the cases referred to by F Myburgh 'Thomas Kuhn's structure of scientific revolutions, paradigm shifts, and crises: Analysing recent changes in the approach to contractual interpretation in South African Law' *SALJ* (2017) 134.

[56] The more subjective approach favours a more liberal attitude to the admission of evidence from which, so it is argued, the intention of the parties can be determined. This approach, if carried through to its logical conclusion, might ultimately lead to the admission of direct evidence of what the parties intended and what they meant by the words used. A strict objective approach focuses principally on the written text. The difference of approach is demonstrated by authors on the law of contract who assume contesting positions. In an earlier edition of *Christie*[5] the following is stated at 215:

'The key to understanding the modern law is the concept of the common intention of the parties, which may be a very different thing from the actual intention locked up in the mind of each party at the time of contracting, and even more different from what, after a dispute has arisen, each party honestly or dishonestly maintains his intention then to have been.'

For the author, the 'intention of the parties' meant their 'common stated intention'.[6] This enquiry encompassed their intention as expressed in the words used in the contract. In a more recent edition of *Christie*,[7] with reference to the decision of this court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the following is stated at 241:

'[T]he approach is *objective* in that it entails attributing meaning to the words used by the parties as they would be understood in context by a reasonable reader.' (Emphasis in original.)

[57] Kerr, on the other hand states the following:

'The adoption by some of the theory that a court is not concerned with the parties' intention, only with what the words they chose mean to others who did not choose them, and who did not make the contract. This . . . is the most unacceptable theory of contract.'[8]

[58] For a discussion on the two approaches, see D Hutchinson et al *The Law of Contract in South Africa* (2012) 2 ed at 271 *et seq*. Commentators have referred to a number of judgments of this court which they assert vacillate between the two approaches and some of which, according to them, are, at times, internally

[5] R H Christie and G B Bradfield *Christie's The Law of Contract in South Africa* (2011) 6 ed.
[6] Ibid 215.
[7] G D Bradfield *Christie's Law of Contract in South Africa* (2016) 7 ed.
[8] A J Kerr *The Principles of the Law of Contract* (2002) 6 ed at 401.

contradictory. [9] Commentators also refer to the respective influences of Roman-Dutch and English Law.[10]

[59] The English approach is set out by Lord Hodge in *Wood v Capita Insurance Ltd* [2017] UKSC 24, para 10:

'The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381 (1383H-1385D) and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations.'

At para 3 of *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, Lord Hoffmann said the following:

'The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.'

The English approach to interpretation has been described as a unitary exercise.[11]

[60] It is unrealistic to expect of this court or, indeed, of any court, pronouncements that will end theoretical debates that have raged over many decades and settle for all time, terminology that will obviate confusion. No practical purpose is served by promoting one of the aforesaid approaches above the other,

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[9] See F Myburgh 'Thomas Kuhn's structure of scientific revolutions, paradigm shifts, and crises: Analysing recent changes in the approach to contractual interpretation in South African Law' *SALJ* (2017) 134 at 514 and also C Lewis 'Interpretation of Contracts' in R Zimmerman and D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) ed at 195-210.

[10] See F Myburgh, *op cit*, at 522 where the following appears:

'For example, there was an ongoing debate whether a contract was based on the concurring intentions of the parties (under influence of Roman-Dutch law) or rather on a reasonable reliance that a contract had been concluded (the influence of English law).'

[11] Lord Clarke SCJ in *Rainy Sky SA & others v Kookmin Bank* [2011] UKSC 50, para 21 and *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), para 19.

nor is any purpose served by considering whether this court has more recently adopted a revolutionary approach to interpretation, as compared to its prior practice.

[61] It is fair to say that this court has navigated away from a narrow peering at words in an agreement and has repeatedly stated that words in a document must not be considered in isolation. It has repeatedly been emphatic that a restrictive consideration of words without regard to context has to be avoided.[12] It is also correct that the distinction between context and background circumstances has been jettisoned.[13] This court, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA), stated that the purpose of the provision being interpreted is also encompassed in the enquiry. The words have to be interpreted sensibly and not have an un-business-like result. These factors have to be considered holistically, akin to the unitary approach.

[62] Since this court's decision in *Endumeni*, we are seeing a spate of cases in which evidence is allowed to be led in trial courts beyond the ambit of what is set out in the preceding paragraph. We are increasingly seeing witnesses testifying about the meaning to be attributed to words in legislation and in written agreements.[14] That is true of the present case in which, in addition, evidence was led about negotiations leading up to the conclusions of the ESA.

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[12] See *Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C where the following is stated:
'Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel.'
'What, of course, has to be accepted, is that, when the meaning of words in a contract has to be interpreted, the words cannot simply be cut out and pasted on a clean sheet of paper and to then evaluate what their meaning should be. In my view, it goes without saying that one has to look at the relevant words, taking into account the context and purpose of the contract, as well as the contract as a cohesive whole.' (My translation.)
See also *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 767H-I.

[13] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA), at 409I-410A.

[14] In this court term, for example, in *The Provincial Government of the Western Cape: Department of Social Development v Craig Charles Barley & others* (1220/2017) [2018] ZASCA 166 (30 November 2018), a witness testified at length in relation to the interpretation of legislation and his understanding of the meaning of provisions of the applicable statutory regime. A preceding expert notice to that effect was filed. See paras 15-18.

[63] This court has consistently stated that in the interpretation exercise the point of departure is the language of the document in question. Without the written text there would be no interpretive exercise. In cases of this nature, the written text is what is presented as the basis for a justiciable issue. No practical purpose is served by further debate about whether evidence by the parties about what they intended or understood the words to mean serves the purpose of properly arriving at a decision on what the parties intended as contended for by those who favour a subjective approach, nor is it in juxtaposition helpful to continue to debate the correctness of the assertion that it will only lead to self-serving statements by the contesting parties. Courts are called upon to adjudicate in cases where these is *dissénsus*. As a matter of policy, courts have chosen to keep the admission of evidence within manageable bounds. This court has seen too many cases of extensive, inconclusive and inadmissible evidence being led. That trend, disturbingly, in on the rise.

[64] This court's more recent experience has shown increasingly that the written text is being relegated and extensive inadmissible evidence has been led. The pendulum has swung too far. It is necessary to reconsider the foundational principles set out in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA). In *KPMG* this court was concerned about the extent of evidence led in relation to the interpretation of written texts. This is apparent from para 38 in which the following appears:

'Much of the evidence dealt with the interpretation of the verification contract. Indeed, each party called an expert on the issue and they testified for about 14 days on the interpretation of the contract. The factual witnesses, too, spent most of their time dealing with interpretation issues. The parties were able to create a record consisting of 6600 pages of evidence and exhibits. It is difficult to understand why the trial judge permitted the evidence or the cross-examination or overruled the objection to the leading of some of the evidence. Obviously, courts are fully justified in ignoring provisionally objections to evidence if those objections interfere with the flow of the case. It is different if a substantive objection is raised which could affect the scope of the evidence that will follow. In such a case a court should decide the issue and not postpone it. It is accordingly necessary to say something about the role of evidence and, more particularly, expert evidence in matters concerning interpretation.'

[65] The next paragraph in *KPMG* is of particular importance.

'First, the integration (or parol evidence) rule remains part of our law.[15] However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, 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*" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstance" 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. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd & another* 2008 (6) SA 654 (SCA) para 7.).' (Our emphasis.)

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[15] The essence of the parol evidence rule, is explained in G B Bradfield *Christie's Law of Contract in South Africa* (2016) 7 ed at 226 as follows:
'Despite its difficulties, it serves the important purposes of ensuring that where the parties have decided that their contract should be recorded in writing and that such contract shall be the sole, complete record of their agreement, their decision will be respected, and the resulting document, or documents, will be accepted as the sole evidence of the terms of the contract.'
At page 228, the rule is qualified as follows:
'One does not need a very fertile imagination to see how, necessary as the rule is, it can lead to injustice if rigorously applied, by excluding evidence of what the parties really agreed. It has therefore been the courts' constant endeavour to prevent the rule being used as an engine of fraud by a party who knows full well that the written contract does not represent the true agreement. In the nature of things, this endeavour to achieve a fair result without destroying the advantages inherent in written contracts has led to some decisions that are difficult to reconcile. Perhaps the best way to look at the rule is to see it as a backstop that comes into operation only in the absence of some more dominant rule, giving way to the rules concerning misrepresentation, fraud, duress, undue influence, illegality or failure to comply with the terms of a statute, mistake, and rectification. If it did not do so, none of these rules would apply to written contracts, which would be absurd. In all such cases, of course, the burden is on a party who has signed a written contract to displace the maxim *caveat subscriptor* by proving lack of the necessary *animus*.'
For a useful discussion on the parol evidence rule, including criticisms relating to its application and exceptions thereto, see S W J van der Merwe et al *Contract General Principles* (2012) 4ed at 148 et seq.

[66] The idea expressed in *Delmas* and in *KPMG*, that extrinsic evidence should be used as conservatively as possible, has been criticised.[16] Insofar as the admonition to use extrinsic evidence as conservatively as possible is concerned, this court, in *KPMG* was intent on ensuring that extrinsic evidence to contextualise a document was just that, and did not extend beyond established parameters. It is clear that our courts have never permitted parties to testify about how they understood the words used in written text. The parol evidence rule, as expounded by Corbett JA in *Johnsons v Leal* 1980 (3) SA 927 (A) at 943B, namely, to prevent a party from altering, by the production of extrinsic evidence, the recorded terms of a contract in order to rely upon the altered contract, continues to be a part of our law.[17] As explained by *Christie* 7 ed at 227, in *Marquard & Co v Bicard* 1921 AD 366 at 373, Solomon JA adopted one of the best-known English formulations of the rule as follows:

'The rule of the law of evidence upon which he relies is nowhere more clearly stated than by Lord Denman in the well-known case of *Goss v Nugent* (5 B & Ad 54): - "By the general rules of the common law if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made or during its preparation, so as to add to or subtract from or in any manner to vary or qualify the written contract".'

As stated above, English law maintains the position that evidence of negotiations is inadmissible. More about this later.

[67] In *KPMG*, at para 40, this court, in dealing with the admissibility of expert evidence in relation to the interpretation of documents, said the following:

'[T]he undesirable practice keeps growing and courts make no effort to curtail it. An expert may be asked relevant questions based on assumptions or hypotheses put by counsel as to the meaning of a document. The witness may not be asked what the document means to him or her. The witness (expert or otherwise) may also not be cross-examined on the meaning of the document or the validity of the hypothesis about its meaning. Dealing with an argument that a particular construction of a document did not conform to the evidence, Aldous LJ quite rightly responded with, "So what?" (*Scanvaegt International A/S v Pelcombe Ltd* 1998 EWCA Civ 436). All this was sadly and at some cost ignored by all.'

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[16] F Myburg *op cit* at 528-532. It is also at odds with the view of Kerr.
[17] Notwithstanding the criticisms referred to in fn 11.

[68] In *KPMG* this court, as we are now, was expressing judicial frustration at how hitherto recognised inadmissible evidence, which, in any event, is invariably inconclusive, was being led in support of a party's contentions in relation to written text. The criticism set out above, in our view, is unjustified.

[69] Before us it was not suggested that the foundational principles set out in *KPMG* no longer apply or should be abandoned. Nor is such a suggestion sustainable. Those principles continue to be applicable. *Endumeni*, at 603F, reaffirmed those principles and did not detract from them.[18]

[70] Returning to the facts of the present case, one is constrained to accept that for as long as the claim for rectification was extant, extrinsic evidence contradicting the written text could be led. In this regard, see S W J van der Merwe et al *Contract General Principles* (2012) 4 ed at para 5.6 at 153, et seq. See also G D Bradfield *Christie's Law of Contract in South Africa* (2016) 7 ed at 384-385. However, as pointed out above, at a particular moment of Croswell's cross-examination it was quite clear that the claim for rectification was abandoned. Before us, counsel on behalf of the Association accepted that this was so.

[71] As appears from the evidence set out earlier, witnesses who testified were wrongly asked about how they understood parts of the ESA and, in particular, clause 6.16. They were repeatedly asked to interpret parts of the agreement. That notwithstanding, there was acceptable evidence that provided context to the ESA.[19] Clause 6.16 has to be interpreted in relation to the other material clauses and with regard to the factual matrix underlying its conclusion, including its purpose. It has to be interpreted sensibly with a business-like result. We will, in due course, deal with the admissibility of evidence concerning negotiations and the exchanges between the parties during that process.

[72] The evidence concerning the history of how the development originated and the manner in which the infrastructure, both externally and internally, came about as

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[18] With reference to *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) and the authorities there collected.

[19] In relation to the approach to be followed in applying extrinsic evidence regarding context when the language of a document is ambiguous, see *Coopers and Lybrand* op cit fn 4, at 768C-E.

well as how the City was persuaded to provide water services, is material. It was established that the City was willing to supply water services to the development on the condition that certain infrastructural costs were met by the developer. Much was sought to be made of this fact in justifying the contention that it would only be fair and it made business sense to conclude that the 'normal rate' referred to in clause 6.16 was the bulk rate for municipalities. Against that, for contextual purposes, one has to take into account that the City's insistence, at the outset, that in order for it to provide water services the developer would have to pay for infrastructural costs was justifiable, on the basis that the development was located beyond the urban edge and the City's priority area. In addition, it is not insignificant that the City undertook to maintain the pipeline and the external reservoir, after they had been installed.

[73] It is true that the introductory words to clause 6.16, namely, 'in recognition of the acceptance of responsibility by the s 21 company of the duties normally performed by the Municipality. . .', is superficially problematic for the City. It implies that there was a *quid pro quo*, and provides some impetus to the contention on behalf of the Association that a reduced rate was such a *quid pro quo*. This, however, ignores what is set out in the preceding paragraphs, and that the City did relent to some degree and did not impose a sewage charge. Furthermore, one has to bear in mind the evidence of Croswell that the ESA was ultimately an adaptation of a standard form contract. That has relevance and might explain why clause 6.16 is not a model of precision.

[74] The reasoning by Murphy J, based on the submissions on behalf of the Association, did not give adequate consideration to the words 'normal rate of the municipality'. On the contrary, the reasoning and conclusions have the effect of negating those words. Far from the City's contention on the interpretation of clause 6.16 leading to a non-practical or absurd result, it makes sense that one would, in deciding which of the City's approved rates applied to the development, look to which of the categories within the rate of tariffs is the one that fits. Simply put, one would look to see which of the categories is factually applicable.

[75] The high-water mark of the Association is that tariff 6 applies because it installed the relevant infrastructure and it is therefore 'like a municipality'. There is no

such category of consumer and to force individual house owners, who are the ultimate consumers, into that category is a distortion.

[76] Insofar as the admissibility of evidence in relation to negotiations is concerned, this court has recently, in *Van Aardt v Galway* 2012 (2) SA 312 (SCA), para 9, with reference to *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A) at 991, reaffirmed that evidence of the intention of the parties of their prior negotiations is inadmissible. In *Delmas Milling Co. Ltd v Du Plessis* 1955 (3) SA 447 (A), at 454, the court excluded, as a general rule, reference to 'actual' negotiations and 'similar statements'. It is true that at 455A-C there is a suggestion that 'conceivably', in contractual cases where, after regard is had to surrounding circumstances, the ambiguity in a written text persisted, one could have regard to what passed between the parties. It must be understood that this statement followed on what was understood to be admissible in relation to testamentary documents. It is also true that in *Coopers & Lybrandt & others v Bryant* 1995 (3) SA 761 (A), at 768D-E, the passage from *Delmas* at 455A-C is cited as support for the view that evidence of negotiations could, in the face of enduring ambiguity, be admitted.[20]

[77] In our view, *Van Aardt* and *Van Wyk* should be followed. It would be in line with the parol evidence rule which we imported and have maintained and it is consonant with the modern approach to interpretation of contracts in English law, the development of which mirrors developments in our law. Allowing evidence in relation to negotiations will see further extensive evidence being led and will have the effect of minimising the words the parties have chosen to employ. *Endumeni* rightly emphasises the significance of the words the parties have chosen to record their agreement, though not above context.[21] Permitting evidence of negotiations will lead to further uncertainty. The words, as an objective measure, are elevated above the partisan positions of parties in negotiations and litigation.

[78] For the reasons set out above, it follows that the question of interpretation is answered in favour of the City and that the appeal therefore has to be upheld. In

[20] This of course find support by commentators in favour of the subjective approach – like Myburgh and Kerr.
[21] See 603F-604A and 604E-F.

respect of costs it is, in our view, proper to make no order in relation thereto. There are remaining issues, including the constitutional statutory challenge by the Association and the City's counterclaim in relation to the amounts which it claims is owing, based on the tariff it contends is applicable. There is the related question of whether Scale B or Scale D should be applied. A costs order, comprising all the costs incurred up until that point, should redound to the benefit of the ultimately successful party.

[79] Lastly, we initially considered reserving the costs of the present appeal but, upon reflection, it appears to us to be just to award the City the costs.

[80] The following order is made:

1 The appeal is upheld with costs including the costs of two counsel and the issues that remain, beyond that dealt with in para 2 of this order, are remitted to the court below for further hearing.

2 The order of the court below is set aside and substituted with the following:

'1. It is declared that the reference in clause 6.16.1 of the Engineering Services Agreement to the "normal rate of a municipality" is not a reference to tariff 6 of the Tshwane Schedule of Tariffs, attached as annexure "C" to its declaration.

2. Costs of proceedings thus far are reserved, pending final determination of the outstanding issues.'

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M S Navsa

Acting Deputy President

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S P Mothle

Acting Judge of Appeal

Appearances:

For the Appellant:	T Strydom SC (with him T Mkhwanazi)
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For the Respondent	K W Lüderitz SC (with him G W Amm)
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