Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd

2013 6 SA 520 (SCA)

Redefining the rules for the admissibility of evidence in the interpretation of contracts

1 Introduction

Any contractual dispute invariably requires an interpretation of the contract concerned to determine the obligations of the parties involved. The interpretation of any contract necessarily begins with a question regarding the sources which parties, their lawyers and presiding officers

in court or arbitration may consider to ascertain the nature, scope, extent, meaning and practical implications of that contract. This in turn raises the question of the admissibility of evidence in the interpretation of contracts.

The rules relating to the admissibility of evidence in the interpretation of contracts have for decades perplexed lawyers and clients who seek legal advice with regard to contractual disputes. For more than half a century, the courts have not assisted much in resolving some of this confusion, but sometimes even added to the confusion by misapplication of the rules or the introduction of terminology that was vague and confusing.

Fortunately, in the past five years, the Supreme Court of Appeal, beginning with the landmark ruling of Harms DP in *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523 (SCA) par 39), has begun to unravel the web of mystery surrounding the admissibility of evidence that may be used in the interpretation of contracts. The case of *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) is the latest case in which the Supreme Court of Appeal has now given further clarity on the rules relating to the admissibility of evidence to assist with the interpretation of contracts. While it is a pity that the Supreme Court of Appeal has not seen the need in any of the cases dealing with contractual disputes, to provide a complete restatement of the rules relating to the admissibility of evidence in the interpretation of contracts, the rules that can now be extracted from recent case law turn out to be quite clear and simple once one sifts through all the chaff. The judgment in *Dexgroup* is another important step in this regard.

2 Facts

In 2007 Trustco Group purchased all the issued shares in Trustco Financial Services, together with certain claims and loan accounts, from Dexgroup. The purchase price was the amount of R65 million. This was payable by means of an initial payment of R20 million, with the balance payable annually over four years by way of the issue of shares in Trustco Holdings. The number of shares that would make up each annual payment was calculated proportionately in accordance with the annual net profit after tax of Trustco Financial Services and certain subsidiaries. The total value of the shares issued in this regard would not exceed R45 million (521A-D).

The contract also provided that Trustco Group had to make a banking facility of up to R30 million available to Trustco Financial Services so that Trustco Financial Services and its subsidiaries could fund their day to day operations. Trustco Group made the facility available through Absa Bank. Dexgroup had to ensure that the banking facility was settled by 31 March 2011 or as soon as the profit targets for the issue of all the shares in Trustco Holdings were attained (521H-522C).

In April 2009 Brokernet, a subsidiary of Trustco Financial Services, paid an amount of R17 million into the Absa facility and thereby reduced the balance due on that facility to zero. However, Brokernet obtained the funds to make the payment from insurance premiums which it had collected on behalf of Clarendon Transport Underwriters and Brokernet remained liable to Clarendon to account for those premiums. In addition, Trustco Financial Services and its subsidiaries still required a bank facility to function and Trustco Group had to reinstate the facility (522C-F).

Dexgroup argued that that the banking facility had been repaid and that it was consequently entitled to receive the shares in Trustco Holdings to settle the outstanding balance of the purchase price (521E-F). Trustco Group argued that Dexgroup had not ensured repayment of the bank facility and disputed the duty to deliver the remaining shares (522F).

Dexgroup and Trustco Group then submitted the dispute to arbitration and the arbitrator ruled that the bank facility had not been properly repaid and that Dexgroup was consequently also not entitled to the remaining shares. The arbitrator dismissed Dexgroup's claim and upheld a counterclaim by Trustco Group (522G-H).

Dexgroup took the ruling of the arbitrator on review to the South Gauteng High Court in Johannesburg on the grounds that the arbitrator committed a gross irregularity or exceeded his powers as contemplated in section 33(1) of the Arbitration Act 42 of 1965. Dexgroup challenged the ruling of the arbitrator on three grounds. Firstly, Dexgroup argued that the pleadings at the arbitration did not allege that the repayment of the banking facility by Brokernet involved theft, misuse of trust money or a breach of fiduciary duty. Cross-examination that suggested this irretrievably tainted the proceedings before the arbitrator (524A-B). Secondly, Dexgroup argued that the central question for determination by the arbitrator was the proper interpretation of the sale agreement and in particular what the contract meant when it stipulated that Dexgroup had to ensure that the banking facility was repaid. In this regard Dexgroup further argued that the arbitrator did not construe the text of the contract, but sought to understand the contract within its proper commercial setting. (522I-524C.) Dexgroup also argued that the clause dealing with repayment of the bank facility was clear and therefore it was impermissible for the arbitrator to consider any extrinsic evidence to provide the context against which the contract was to be interpreted. The result was that the arbitrator relied on inadmissible evidence to interpret the relevant clause of the contract. (525FG.) Consequently the arbitrator's approach to the interpretation of the contract and the admissibility of evidence in that regard was flawed and resulted in an irregularity (524BC). Thirdly, Dexgroup argued that the approach followed by the arbitrator improperly extended the scope of the arbitration beyond its permissible limits (524C).

The South Gauteng High Court rejected the challenge to the arbitrator's ruling on all three grounds. Dexgroup then took the matter on appeal to the Supreme Court of Appeal (520I-521A).

3 Judgment

In a unanimous judgment, the Supreme Court of Appeal concluded that "the appeal was bound to fail on the facts" and dismissed the appeal on all three grounds raised by Dexgroup. As such, the judgment is of little significance in so far as it relates to review of arbitration proceedings and the rulings made by arbitrators.

However, the judgment on the second issue relating to the interpretation of the sale agreement and the admissibility of evidence to assist with the interpretation makes for some interesting reading. Wallis JA explained (525G-526C) that:

> "[I]t was submitted that the arbitrator was bound by 'the well-established rule that a contract must be interpreted by construing its plain words' and that it is only in cases of ambiguity or uncertainty that an arbitrator can take account of surrounding circumstances 'or its so-called factual matrix'. It is surprising to find such a submission being made in the light of the developments in the interpretation of written documents reflected in *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* and *Natal Joint Municipal Pension Fund v Endumeni Municipality*. These cases make it clear that in interpreting any document the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset. The approach of the arbitrator cannot be faulted in this regard".

4 Discussion

A distinction is traditionally made between two apparently related rules that limit the admissibility of extrinsic evidence in the interpretation of contracts (Christie *The Law of Contract in South Africa* (2011) 200 *et seq*). Firstly, there is the so-called "parol evidence rule" or integration rule which provides that once a contract has been reduced to writing, the writing is in general viewed as the exclusive memorial of the transaction and no evidence is admissible to prove the terms of the contract (*Johnston v Leal* 1980 3 SA 927 (A); *Affirmative Portfolios CC v Transnet LTD t/a Metrorail* 2009 1 SA 196 (SCA)). The other rule, which is often referred to as the "golden rule of interpretation" (*Coopers & Lybrand v Bryant* 1995 3 SA 751 (A)), provides that the ordinary meaning of the words in a written contract must be followed and that no evidence is admissible to prove the meaning of the terms contained in a written contract (*Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A)). This distinction seems vague and is often confusing.

However, a careful analysis of the process of interpretation can go a long way to explain the difference in scope between these two rules.

Interpretation of any legal instrument, whether it is legislation, a contract, a will, a receipt, a promissory note or even a judgment of a court or any other legal instrument, essentially entails four distinguishable, but interrelated elements (Burrows *Interpretation of Documents* (1946); see my discussion "A Proposed Systematic Approach to the Interpretation of Legal Instruments" 2001 *The Judicial Officer* 127; see also Du Plessis *Re-Interpretation of Statutes* (2002) ix):

(i) Classification: The legal nature of the instrument is determined. In other words, is there a valid contract and if so, is a specific nominate contract or is it just generically a contract? As far as this element is concerned, any relevant evidence is admissible to determine whether an instrument is indeed a contract, whether it is a valid contract and whether it is a specific nominate contract (*Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC* 2013 3 SA 426 (SCA) 432F *et seq*).

(ii) Concretisation: The extent of the text which is contained in the written instrument and which sets out the written and unwritten terms of the contract, is determined. The question is therefore, which words, expressions, sentences and terms constitute the text of the contract and which words, expressions, sentences and terms are external to the contract and therefore not part of its text? Here the integration rule provides that if the writing is a complete integration of the agreement between the parties, extrinsic evidence is not admissible to add to, vary or detract from terms of the contract (*Johnston v Leal* 1980 3 SA 927 (A)). If the writing is an incomplete integration of the agreement between the parties, extrinsic evidence to supplement the terms of the contract is admissible (*Baker Tilly (a firm) v Makar* [2010] EWCA Civ 1411), but evidence to vary or detract from the written terms is still inadmissible. (See also Ågren *Demistifying the Parol Evidence Rule: An Analysis of the Parol Evidence Rule in American Contract Jurisprudence and the Lack thereof in the CISG* (LLM dissertation 2009 Lund) 19 *et seq*).

(iii) Interpretation: The meaning of the words, expressions, sentences and terms which constitute the text of the contract, is determined. Since all words or expressions have multiple meanings, and since meaning is always dependent on context, a court must establish the correct meaning which can be ascribed to each word or expression which is contained in a contract. Although our courts have long applied the golden rule of interpetation and held that, save in the case of ambiguity, evidence is inadmissible to guide the court in determining the meanings of the words or expressions contained in a contract (*Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A)), this is an aspect of the law of contract which has undergone radical change over the past decade (*KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523 (SCA)). It is this development of our law of contract which is again highlighted in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) and which will be discussed in more detail below.

(iv) Application: The meaning of the text is applied to the facts of the case at hand (or at least to hypothetical facts) to ascertain the practical effect of the instrument. When the meaning of the word or expressions is applied, it becomes necessary to determine the parties, goods, services

> and other factual matters to which the contract relate. Obviously, the starting point is the description given in the contract itself, but any relevant evidence can also be presented to assist in relating the description contained in the contract, with the factual state of affairs (*Richter v Bloemfontein Town Council* 1922 AD 57; *Headermans (Vryburg) (Pty) Limited v Ping Bai* [1997] 2 All SA 371 (A) 376e *et seq*; *Van Wyk v Rottcher's Saw Mills (Pty) Ltd* 1948 (1) SA 983 (A)).

(See also my discussion of *Zeeman v De Wet NO* 2012 6 SA 1 (HHA) in "Die toelaatbaarheid van ekstrinsieke getuienis by die uitleg van kontrakte" 2013 *TSAR* 805).

On the basis of the analysis above, the rules relating to the admissibility of extrinsic evidence in the interpretation of contracts can be discussed more fully.

Firstly, the integration rule restricts the evidence which is admissible to prove the terms or content of a contract. In *Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd* 1941 AD 43 Watermeyer JA explained (47):

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

(See also *Affirmative Portfolios CC v Transnet LTD t/a Metrorail* 2009 1 SA 196 (SCA).)

When a transaction is reduced to writing and integrated into a written instrument, evidence of any other statements, negotiations, mental reservations or other facts relating to that transaction, becomes inadmissible to determine the extent of the words, expressions, sentences and terms which constitute the text of the contract. In general, no words, expressions, sentences or terms may be added to the text, no words, expressions, sentences or terms may be replaced with other words, expressions, sentences or terms and no words, expressions, sentences or terms may be omitted from the contract.

The challenge to the arbitrator's ruling in *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd* 2013 6 SA 520 (SCA) did not address this rule. When the arbitrator considered the extrinsic evidence which gave rise to the second issue in dispute, the arbitrator did not rely on the evidence to add, vary or omit any words, expressions, sentences or terms in the contract. The arbitrator considered the evidence to provide clarity on the meaning of the terms. The second issue in dispute therefore relates to the so-called "golden rule of interpretation".

The golden rule of interpretation has, over the past six decades, undergone substantial development in South Africa. To fully understand this development, it is necessary to take a tour through the history and

consider the various landmark cases in which this rule was applied in South Africa since the 1950s.

In *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A) the court laid down three successive rules relating to the admissibility of extrinsic evidence to contradict the plain meaning of the words. The first so-called *Delmas* rule holds that the plain meaning of the words should be followed and uncertainties should as far as possible be eliminated by means of linguistic treatment. If it is not possible to clear an uncertainty by means of linguistic treatment, the second *Delmas* rule states that extrinsic evidence of the broad background against which the contract was concluded, is admissible to clear that uncertainty. Such extrinsic evidence, however, does not include direct evidence of the parties' intention. Only if the evidence under the second *Delmas* rule does not provide clarity and there is an ambiguity, does the third *Delmas* rule provide that direct evidence of the parties' intention, such as what was said during negotiations, is admissible (Kerr *The Principles of the Law of Contract* (2002) 352 *et seq*).

Since words do not exist in isolation, but are dependent on some context or another (Kerr 404 *et seq*) the distinction made between the first and second *Delmas* rules tended to be problematic. To make sense of the words, expressions, sentences and terms that constitute a contract, a court must understand the context of those words, expressions, sentences and terms. The first Delmas rule disregarded context.

As a result, the first *Delmas* rule was soon reconsidered by the Appellate Division. In *Haviland Estates v McMaster* 1969 2 SA 312 (A) the court effectively wiped out the distinction between the first and second *Delmas* rules and held that extrinsic evidence of the background circumstances was always admissible to place the court as near as possible in the position of the parties at the time of conclusion of the contract. However, extrinsic evidence was still inadmissible for any purpose other than explaining the broad context in which the contract was concluded. This seemed to settle the matter, so that evidence to explain the broad context in which the contract was concluded, was admissible to make sense of the words, expressions, sentences and terms that constitute a written contract. But any evidence which gave a clear indication of the parties' intention, was only admissible if there was an ambiguity in any of the words, expressions, sentences or terms that constitute the contract.

However, in *Coopers & Lybrand and others v Bryant* 1995 3 SA 751 (A), the Appellate Division found it necessary to revisit the admissibility of extrinsic evidence to ascertain the meaning of a contract. Joubert JA, in giving the judgment of the court, stated (768A-E) that:

> "The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract ...

(2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted ...

(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions".

This signalled a further deviation from the strict linguistic approach laid down in *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 (A). It confirmed that there was no longer any distinction between the first and second *Delmas* rules. But the court to some extent also seemed to redefine the third *Delmas* rule by apparently suggesting that the introduction of a mere uncertainty concerning the meaning of any of the words, expressions, sentences or terms that constitute the contract, might suffice to find that the contract was ambiguous and therefore, to render extrinsic evidence relating to the intention of the parties, admissible (Otto "Die Aanwending van 'Background Circumstances' en 'Surrounding Circumstances' by die Uitleg van Kontrakte" 1997 *De Jure* 144).

However, by differentiating between "background circumstances" and "surrounding circumstances" and by failing to explain this distinction in any clear terms, this judgment provided anything but clarity on the admissibility of extrinsic evidence and introduced a substantial source for disputes to arise.

The Supreme Court of Appeal tried to make a bit more sense of the rules relating to the admissibility of extrinsic evidence to ascertain the meaning of a contract in *Van der Westhuizen v Arnold* [2002] 4 All SA 331 (SCA). Lewis AJA (as she then was) explained (538):

> "[T]hat the formalistic approach to the interpretation of contracts, one that precludes recourse to extrinsic evidence on what the parties intended in the absence of ambiguity or uncertainty, has been criticised by this Court, which has recently questioned whether the principle is justifiable ... On the other hand, it is trite that even where the wording of a provision is such that its meaning seems plain to a court, evidence of 'background circumstances' is admissible for the purpose of construing its meaning".

Eventually in *KPMG Chartered Accountants (SA) v Securefin Ltd* [2009] 2 All SA 523 (SCA) the Supreme Court of Appeal at last seemed to bring clarity on the admissibility of extrinsic evidence in the interpretation of contracts. Harms DP explained (par 39):

> "First, the integration (or parol evidence) rule remains part of our law… 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".

While Harms DP expressly stated that he was not in any way detracting from the integration rule, his rejection of the distinction between "background circumstances" and "surrounding circumstances" also implied, as far as the admissibility of evidence is concerned, a rejection of the distinction between terms which are clear and unambiguous on the one hand, and terms which are ambiguous on the other hand, as made in *Coopers & Lybrand and others v Bryant* 1995 3 SA 751 (A) 768A-E. Consequently, it seemed that when it came to the admissibility of evidence to determine the meaning of terms in a contract, the existence of ambiguity no longer had any bearing on the admissibility of evidence to prove the meaning of the terms in a contract.

However, not everybody was convinced. Hutchinson and Pretorius (Law of Contract (2012) 260) dismissed the statement by Harms DP as a mere *obiter* remark and warned that it was by no means certain that the Supreme Court of Appeal was ready to deviate from the established rules relating to the admissibility of evidence. (For a contrary view, see my analysis of the judgment in "Background Circumstances, Surrounding Circumstances and the Interpretation of Contracts" 2009 *TSAR* 767. See also Wallis "What's in a word? Interpretation through the eyes of ordinary readers" 2010 *SALJ* 673 674).

Fortunately, the Supreme Court of Appeal wasted little time to provide clarity on this issue. In case after case on the law of contract, the Supreme Court of Appeal has relied on the judgment of Harms DP in *KPMG* to explain the admissibility of evidence to assist in ascertaining the meaning of the words, expressions, sentences or terms that constitute the contract under consideration. (See *Grobler v Oosthuizen* 2009 5 SA 500 (SCA); *Representatives of Lloyd's v Classic Sailing Adventures (Pty) Ltd* 2010 5 SA 90 (SCA); *Ekhuruleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 2 SA 498 (SCA); *Zeeman v De Wet* 2012 6 SA 1 (SCA); *Scholtz v Scholtz* 2012 5 SA 230 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA); *Gusha v Road Accident Fund* 2012 2 SA 371 (SCA); *Van Aardt v Galway* 2012 2 SA 312 (SCA); *Potgieter v Potgieter* 2012 1 SA 637 (SCA); *Picbel Groep Voorsorgfonds v Somerville* 2013 5 SA 496 (SCA); *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 5 SA 1 (SCA); *Absa Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC* 2013 3 SA 426 (SCA)). And in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC), even the Constitutional Court weighed in and cited the judgment by Harms DP in *KPMG* with apparent approval.

The judgment in *Dexgroup* is yet another instance where the Supreme Court of Appeal has now given further clarity on the admissibility of extrinsic evidence in the interpretation of contracts. In view of the cases listed above in which the judgment in *KPMG* have been followed, one can

only, as Wallis JA apparently did in *Dexgroup*, shake your head in disbelief when counsel argue that extrinsic evidence to determine the meaning of words or expressions in a contract, is only admissible if there is an ambiguity (525G). Apart from putting the legal development introduced by Harms DP in *KPMG* beyond question, the judgment in *Dexgroup* also provides further clarity on the law relating to the admissibility of extrinsic evidence in the interpretation of contracts as it now stands.

When Wallis JA stresses that, whenever a contract must be interpreted, "the starting point is inevitably the language of the document" (526A), he is not merely indicating that one should read the document concerned – he is posting a reminder that the integration rule entrenches the language of the document and prohibits evidence to add to, vary or detract from that language. And then he gives further direction when he adds (526B) that any contract:

> "[F]alls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration and the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset".

This makes two issues clear. Firstly, the demise of the old golden rule of interpretation is now beyond doubt. Extrinsic evidence is now admissible from the outset to assist a court in determining the meaning of the words, expressions, sentences and terms that constitute the contract. Such evidence no longer constitutes a secondary source which can be considered to clear up uncertainties or ambiguities. It constitutes, together with the text of the instrument, a primary source which should be used from the outset to ascertain the meaning of the words, expressions, sentences and terms that constitute the contract. Secondly, the demise of the old golden rule of interpretation by no means signals a free-for-all in which all possible evidence can now be submitted in an attempt to sway a court towards a particular meaning. Wallis JA stressed that the evidence must relate to the "context, the apparent purpose to which it is directed and the material known to those responsible for its production".

This brings to mind the judgment of Traynor CJ in the Californian case of *Pacific Gas & Electrical Company v GW Thomas Drayage & Rigging Company Inc* 40 ALR 3d 1373, where he explained that the test to determine whether evidence is admissible to prove the meaning of a contract, is not whether the contract appears on the face of it, to be clear and unambiguous, but whether the evidence is relevant to prove a meaning which the words or expressions in the contract can reasonably have. (See *Telkom Directory Services (Pty) Ltd v Kern* [2011] 1 All SA 593 (SCA), where the contract stipulated that the law of California applied and the court therefore had to apply the ratio in *Pacific Gas*.)

In *Walker v Redhouse* [2007] 4 All SA 1217 (SCA), Lewis JA explained (par 15) that "Redhouse argues … that the word 'any' ... does not cover injuries sustained ..." She then held (par 19) that:

> "Redhouse nonetheless contends that the wording of the indemnity in issue in this case does not cover liability for injury caused in abnormal circumstances not contemplated by the parties: It is not injury 'from any cause whatsoever'. In my view, this interpretation strains the wording of the indemnity. It requires words to be read in which limit the causes of injury. There is nothing to suggest that this was the intention of either of the parties".

In other words, extrinsic evidence will in the first instance only be admissible if it is submitted to prove a meaning which can reasonably be ascribed to the text as it stands. In *Durban's Water Wonderland (Pty) Ltd v Botha* 1999 1 SA 982 (SCA) Scott JA held (989H-I) that "the alternative meaning upon which reliance is placed… must be one to which the language is fairly susceptible; it must not be fanciful or remote". (See also *Viv's Tippers (Edms) Bpk v Pha Phama Staff Services (Edms) Bpk* 2010 4 SA 455 (SCA) 463C *et seq*).

In addition, the law of evidence provides that evidence is only admissible if it is relevant (Zeffert & Paizes *Essential Evidence* (2010) 75 *et seq*). Because contracts are based on consensus and because the purpose of interpretation is to determine the (collective) intention of the parties (*Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd* 1980 1 SA 796 (A) 803G-H, 804C; *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 1 SA 493 (SCA) 496F-G), evidence is generally only relevant if it tends to prove what the consensus and collective intention of the parties were at the time when the contract was concluded. Evidence to prove the individual intention of a party is therefore mostly irrelevant and therefore inadmissible. That is why Wallis JA emphasised that the evidence should relate to "the context, the purpose [of the term] … and the material known to those responsible for its production" (or the "background to the preparation and production of the document").

However, because it is often very difficult to prove actual consensus, contracts often come into being on the basis of quasi mutual assent (Christie (2011) 26 *et seq*). In such circumstances, evidence of the individual intention of a party can indeed be relevant to determine to what extent there is quasi mutual assent and how it affects the meaning of the words, expressions, sentences or terms in the contract (*Be Bop a Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 3 SA 327 (SCA) 332B *et seq*).

5 Conclusion

If there was any doubt after *KPMG* that the Supreme Court of Appeal intended to amend the existing law on the admissibility of extrinsic evidence in the interpretation of contracts, that doubt has now been completely dispelled. The judgment in *Dexgroup* makes it patently clear that extrinsic evidence to prove the meaning of the words, expressions,

sentences and terms that constitute the contract, is admissible from the outset irrespective of whether there is any uncertainty or ambiguity in the text – as long as the evidence concerned points to a meaning which the text can reasonably have and the evidence is relevant to prove the common intention of the parties. But the judgment also makes it clear that the starting point is the language of the document and the parol evidence rule still prevents evidence to add to, detract from or modify the words contained in the document.

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