IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 8160/07

DATE:10/12/2009

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
..... DATE	..... SIGNATURE

In the matter between:

MORLITE INDUSTRIES CC First Applicant

ZUNAID AZIZ MOTI Second Applicant

and

MICHAEL VAN DER NEST N.O. First Respondent

SASOL CHEMICAL INDUSTRIES LIMITED

Second Respondent

SASOL WAX (SA) (PTY) LIMITED Third Respondent

JUDGMENT

WILLIS J:

[1] This is an application, brought in terms of section 33(1) (b) of the Arbitration Act, No 42 of 1965 ('the Arbitration Act"), to review and set aside an award by an arbitrator on the grounds that he lacked jurisdiction to make the award which he did on 27 January 2009. The parties have, in various different proceedings, been referred to as plaintiff, defendants, claimants, applicants and respondents. In some of these proceedings, the present applicants have been the respondents. In order to avoid confusion, I shall adopt, with slight modifications, the terms used by counsel during argument. I shall refer to the applicants in this application collectively as "the alleged debtors", the first respondent as "the arbitrator", the second respondent as "Sasol Chemicals" and the third respondent as "Sasol Wax".

[2] Sasol Wax, as plaintiff, instituted an action against the applicants, as first and second defendants, under case number 19482/2005 in this court on 30 August 2005. The claim for some R6 million is based on large quantities of metric tonnes of both solid and liquid wax allegedly ordered by one of the alleged debtors. The other debtor, Zunaid Moti, allegedly is liable as surety for this debt. The trial was set down for hearing on 9 October 2007. On or shortly before 1 October 2007, Sasol Wax and the alleged debtors entered into an agreement to refer the dispute which formed the subject-matter of the High Court action to arbitration. The agreement is contained in two documents dated 28 September 2007 and 1 October 2008 respectively. The first letter contains, *inter alia*, a list of four senior counsel whom Webber Wentzel Bowens, Sasol Wax's attorneys proposed to Stuart Harris Attorneys, the alleged debtors' attorneys as arbitrators. Among those names is that of the arbitrator in the matter. The second letter, also sent from Sasol Wax's attorneys to the attorneys acting for the alleged debtors refers pertinently to the aforesaid action instituted in the then Witwatersrand Local Division and confirms the agreement to refer that dispute to arbitration. It is common cause that a valid and binding arbitration agreement between Sasol Wax and the alleged debtors came into existence by reason of these two letters, even though neither document was signed on behalf of the alleged debtors. Counsel for both sides relied on *Fassler, Kamstra & Holmes v Stallion Group of Companies (Pty) Ltd*[1] and *Mervis Brothers v Interior Acoustics and Another* [2] to support this contention. In the *Mervis Brothers* case Leveson J, delivering the unanimous judgment of the full bench said:

[1] 1992 (3) SA 825 (W) at 828B-H

[2] 1999 (3) SA 607 (W) at 610D-G

> In terms of s 1 of the Arbitration Act 42 of 1965, an agreement providing for reference of a dispute to arbitration is required to be in writing. Generally such a provision postulates signature by both parties. However, a document may constitute an agreement in writing even though it is signed by only one party. That the signature of one party is lacking does not matter, depending on the circumstances of the case. The test is whether the parties have deliberately intended to record their agreement in writing and have shown that the document so produced constitutes the agreement between them. [3]

It is common cause that in terms of this arbitration agreement, Sasol Wax undertook to "remove the matter from the Witwatersrand Local Division's trial roll" "on or before 4 October 2007".

[3] A "pre-arbitration meeting" took place 25 January 2008. The meeting was attended by the arbitrator. A minute of that meeting was signed by the attorneys acting for "the claimant" and the attorneys acting for "the defendants". This minute records that the meeting was also attended, *inter alia*, by Mr René Jordaan, as "Legal Adviser: Sasol Chemical Industries Limited" (i.e. he was there as a representative of Sasol Chemicals and not of Sasol Wax). The minute records that "Mr Jordaan explained that the Claimant, formerly known as Sasol Wax (Pty) Limited, is now Sasol Wax, a Division of Sasol Chemical Industries Limited". Elsewhere, toward the very end, the minute records that:

> It was agreed that the parties would formalise the arbitration agreement into a single document incorporating the two letters from Webber Wentzel Bowens to Stuart Harris Attorneys dated 28 September and 1 October 2007 as well

[3] At 610D-F.

> as any other terms agreed at the meeting, and including the timetable in an annexure.

It is common cause that no such "formalising" of the arbitration agreement was ever done. It is not even apparent, from the papers before me, that the alleged debtors confirmed in writing , as they were required to do, in terms of the arbitration agreement between Sasol Wax and the alleged debtors their choice of the arbitrator as arbitrator. The case turns on whether the minute of the "pre-arbitration meeting" constitutes a legally enforceable agreement to substitute Sasol Chemicals for Sasol Wax as the claimant in the otherwise identical claim against the alleged debtors.

[4] Notwithstanding the failure to follow up on the pre-arbitration minute by "formalising" the arbitration agreement, there was an exchange of "pleadings". There was a statement of claim by the claimant and a statement of defence by the alleged debtors. The claimant was cited as Sasol Chemicals and not Sasol Wax.

[5] Subsequently, the alleged debtors amended their statement of defence in order to plead that Sasol Chemicals had no right to claim payment from them, since Sasol Wax's claim against the first applicant could not have been ceded to Sasol Chemicals without the first applicant's written consent, which consent had not been provided. To meet this difficulty, Sasol Chemicals sought to amend its statement of claim by introducing Sasol Wax as a second claimant. The alleged debtors objected to the proposed amendment. The critical aspect of the objection by the alleged debtors was that Sasol Wax was not a party to the arbitration agreement now in existence, and that the alleged debtors had not consented to Sasol Wax's inclusion as such a claimant.

[6] It is common cause that the arbitrator has been placed in an invidious position. His integrity remains unquestioned. The arbitrator recognized in his award that any ruling he made on the ambit of his jurisdiction would not create jurisdiction in circumstances where none existed, and that an aggrieved party was entitled to challenge such a finding in the High Court. The arbitrator stated in his award:

> I am therefore required to make a finding regarding jurisdiction that is expressly provisional. It is a finding that neither creates nor destroys jurisdiction. The appropriate remedy available to all parties is to approach the High Court for an appropriate order.

He granted "Sasol Wax's application to amend the statement of claim". It is this order which the alleged debtors now seek to review. The arbitrator has agreed to abide the decision of this court. He has, however, addressed a letter to the parties, which he requested be brought to the attention of the court in which he has pointed out, correctly, that whether the court sets aside his award or dismisses the application will not solve his considerable difficulties which include the question of whether Sasol Chemicals is properly before him as a party to the arbitration. The problem indeed cannot be resolved in binary code.

[7] One might well ask why it is that the parties have not sensibly agreed to avoid this skirmish through the simple expedient of drawing up a formal agreement to regularise the position. The reason lies in the fact that the alleged debtors have disclosed that they intend to raise a defence that Sasol Wax's claim against them, having arisen in 2005 has now prescribed. Their reasoning appears to be the following:

> (i) The arbitration agreement entered into between Sasol Wax and them in October 2007 was in

substitution of the High Court action – therefore the High Court action, having been superseded, no longer exists;

(ii) There was a legally binding arbitration agreement entered into between Sasol Chemicals and them at the "pre-arbitration meeting" held on 25 January 2008 which was in substitution of the agreement between Sasol Wax and them – therefore there is no arbitration agreement in existence between Sasol Wax and them;

(iii) As there is no High Court action or continuing arbitration agreement in existence between Sasol Wax and the alleged debtors and no valid claim against them by Sasol Chemicals and the claim arose in 2005, it has now prescribed.

Among the questions that arise is this: were Sasol Chemicals and Sasol Wax, having taken a dip in arbitration proceedings, caught bathing without their swimsuits on when the tide went out?[4]

[4] The imagery has been shamelessly cribbed and adapted from Benjamin Disraeli's speech in the House of Commons on 28 February 1845 in which he said "The right honourable gentleman (Sir Robert Peel) caught the Whigs bathing and walked away with their clothes".

[8] Mr *Robinson* who, together with Mr *Wilson*, appears for the alleged debtors, has emphasised the well-known words of Selikowitz J in *Goodwin Stable Trust v Duohex (Pty) Limited and Another*[5] 1998 (4) SA 606 (C) at 616A-B, "the arbitrator cannot determine his/her own jurisdiction". He also referred to *Gutsche Family Investments (Pty) Limited and Others v Mettle Equity Group (Pty) Limited and Others*[6] decided in the Supreme Court of South Africa ("the SCA"). He also submitted that it is trite that if an arbitrator decides to investigate his own jurisdiction and incorrectly determines that he has jurisdiction and thereafter make an award, he thereby exceeds his powers as envisaged in terms of section 33(1)(b) of the Arbitration Act and his award falls to be set aside on that basis alone. He also referred to *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk*[7] and *Johannesburg Municipality v Transvaal Cold Storage Ltd*[8]. Mr *Robinson* submitted that the review in this case is the third type of review identified in the case of *Johannesburg Consolidated Investment Co v Johannesburg Town Council*[9] where the court can:

> enter upon and decide the matter *de novo*. It possesses not only the powers of a court of review in the legal sense, but it has the functions of a Court of appeal with additional privileges of being able, after setting aside the decision arrived at . . . to deal with the matter upon fresh evidence.

As was said in the *Goodwin Stable Trust* case:

> Jurisdiction either exists or it does not. Jurisdiction cannot arise simply because applicant fails to prove that the jurisdictional requirements are absent. . . .

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[5] 1998 (4) SA 606 (C) at 616A-B

[6] 2007 (5) SA 491 (SCA) at paras 13-14.

[7] 1968 (1) SA 7 (C) at 13G and 14B–F

[8] 1904 TS 722 at 732

[9] 1903 TS 111

> The position regarding the incidence of the onus in an application such as the present one is analogous to that which is applied when an application is made to set aside an order which was obtained ex parte. In cases such as the present, the claimant commences arbitration proceedings. The respondent in those proceedings contends that there is no arbitration agreement or that there is arbitrable issue. The arbitrator cannot determine his/her own jurisdiction (citations omitted). The respondent in the arbitration is thus compelled to approach the Court to set aside the arbitration proceedings. This he does by launching an application on notice. The respondent in the application before the Court cannot, in my view, merely by having launched arbitration proceedings, secure a more advantageous position than it would have had if the applicant had been able to deny the arbitrator's jurisdiction in response to the claimant's statement of claim asserting that the arbitrator has jurisdiction to decide the issue.[10]

Accordingly, the alleged debtors contend that the arbitrator does not have jurisdiction to reintroduce Sasol Wax as a claimant in the arbitration proceedings, which, so they submitted is what the amendment application sought to do.

[9] Mr *Fagan*, who appeared for both Sasol Chemicals and Sasol Wax, had no real answer to this "jurisdiction point". He contended that the arbitrator did have jurisdiction over Sasol Wax (because, so he argued, the arbitration agreement entered into between Sasol Wax and the alleged debtors had not been superseded) but did not have jurisdiction over Sasol Chemicals (because the "pre-arbitration meeting" did not, in his submission, result in a legally enforceable arbitration agreement substituting Sasol Chemicals for Sasol Wax as the party who would be claimant against the alleged debtors). The fact of the matter is that for quite some time the legal representatives of

[10] At 615E to 616B

Sasol Chemicals and the alleged debtors and indeed the arbitrator himself thought they were engaged in an arbitration between Sasol Chemicals and the alleged debtors and not between Sasol Wax and the alleged debtors. The alleged debtors contend that this remains the true position. My firm view is that if indeed the arbitration was between Sasol Chemicals and the alleged debtors, Mr *Robinson* is correct, on the basis of clear and well-established authority, that the arbitrator had no jurisdiction to add Sasol Wax as a party, precisely because he could only acquire such jurisdiction if all the affected parties agreed thereto. This, of course, did not happen. The critical question is therefore, as I have said above, whether the minute of the "pre-arbitration meeting" constitutes a legally enforceable agreement to substitute Sasol Chemicals for Sasol Wax as the claimant in an otherwise identical claim against the alleged debtors. I shall now consider this aspect.

[10] Mr *Robinson* has submitted that "the only reasonable inference to be drawn" is that Sasol Chemicals "was, at the pre-arbitration meeting substituted for Sasol Wax as the claimant and as the counter-party to the arbitration agreement with the applicants (i.e. the alleged debtors)."

The following observations need to be made:

> (i) Implicit in this submission (i.e. that the substitution of Sasol Chemicals for Sasol Wax as claimant is one of inference), is the recognition that it does not appear from a plain reading of the minute of the "pre-arbitration meeting" that Sasol Chemicals was indeed by written agreement between the parties substituted for Sasol Wax as a party;
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> (ii) The actual substitution of Sasol Chemicals or Sasol Wax as the claimant does not appear from this minute, although the intention ultimately so to do to do may well have been apparent;

> (iii) The agreement to "formalise the arbitration agreement" later indicates clearly, in my view, that the minute was an agreement as to process only and not as to any substantive aspects pertaining to the arbitration (and whether it was Sasol Chemicals or Sasol Wax which had the claim against the alleged debtors would, *par excellence*, be a matter of substantive importance – indeed, the alleged debtors application in this matter is premised upon such a supposition);
> (iv) Even if I am wrong in concluding that the minute constituted an agreement as to process only, any agreement relating to the substitution of Sasol Chemicals for Sasol Wax was merely provisional, pending the formalising of the arbitration agreement;
> (v) Sasol Wax was not represented at the "pre-arbitration meeting" and therefore could not, in the minute upon which the alleged debtors now rely, have agreed to abandon its claim against them.

Section 3(1) of the Arbitration Act reads as follows:

> Unless the agreement otherwise provided, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.

I agree with Mr *Fagan* that this section together with the definition of an "arbitration agreement" in section 1 of the Arbitration Act requires that, in order for Sasol Wax to have abandoned its claim in the arbitration in favour of Sasol Chemicals, this would have to have been recorded in writing. This was not done. As has been noted above, section 1 of the Arbitration Act requires that an arbitration agreement be a "written agreement". A substitution of a party necessarily brings a new party into the arbitration. It seems axiomatic that this entails a

new and different agreement at least in respect of who the parties to it are, precisely because the parties are different. Accordingly, to constitute an arbitration agreement as between these different parties, that agreement, too, must be a written one in order to qualify as an arbitration agreement in terms of the Arbitration Act. Accordingly, the arbitration agreement between Sasol Wax and the alleged debtors still stands. The minute of the "pre-arbitration meeting" does not constitute a legally enforceable agreement to substitute Sasol Chemicals for Sasol Wax as the claimant in the claim against the alleged debtors.

[11] Mr *Robinson* went further. He submitted that where a written arbitration agreement complies with the provisions of section 1 of the Act, there is no need for a separate written agreement to reflect a substitution of parties therein, and that none has ever been required in the various cases on substitution in arbitration agreements. He relied on the following cases: *Oakland Metal Co Ltd v D. Benaim & Co. Ltd*;[11] *Unisys v Eastern Counties*;[12] *SEB Trygg Liv Holding Aktiebolag v Manches and Others*;[13] *Harper Versicherungs AG v Indemnity Marine Assurance Co Ltd and Others*.[14] There is no reported South African case that supports this submission. This is hardly surprising in view of what I have said in immediately preceding paragraph. The cases to which Mr *Robinson* referred to advance this submission are drawn from the law reports of England. During the course of argument, I expressed my astonishment that it could be true that, in England, substitution of the parties requires no written agreement to this effect. Arbitration has grown exponentially around the globe in recent decades. London is one of the leading centres for arbitration in the world. Not infrequently, many millions of British pounds sterling are at stake in a single arbitration. London's status as a much favoured financial and arbitration centre is attributable, at least in part, to its hard–earned reputation for reliability, predictability and probity. It hardly makes sense to put this reputation at risk when it can be avoided by the simple expedient of requiring all substantive variations to an arbitration agreement to be recorded in writing. I have perused these cases from England carefully. I am unable to find any support for the intriguing contention by Mr *Robinson* that where an arbitration agreement complies with the provisions of section 1 of the Arbitration Act,

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[11] [1953] 2 QB 261 at 262-63

[12] [1991] 1 Lloyds LR 539 at 560-62

[13] [2005] 2 All ER (Comm) 38 at paras [50]-[55]

[14] [2006] 2 All ER (Comm) 225 at paras 39-47

there is no need for a separate written agreement to reflect a substitution of the parties therein and that none has ever been required in the various cases on substitution in arbitration agreements. The *Harper Versicherungs* and the *SEB Trygg Liv Holding* case bear some superficial resemblance to this one but both those cases deal with a misnomer. In the *Harper Versicherungs* case Tomlinson J followed the decision in the *SEB Trygg Liv Holding* case, which was a Court of Appeal decision in which it was held that where there has been "simply an error in naming" a party to arbitration proceedings, "the proceedings were not a nullity and the error can, inappropriate circumstances, be corrected". It is certainly not the case of the alleged debtors in this matter that the claimant was simply an error in naming the claimant. On the contrary, they allege that Sasol Chemicals is a different party from Sasol Wax and that the liabilities, if any, of the alleged debtors to Sasol Chemicals, on the one hand and Sasol Wax, on the other, stand on a completely different footing from each other. Substitution of one party for another is an entirely different matter from substituting one name for another in respect of the same party. I have already expressed the view that the provisions of the Arbitration Act are clear enough as to the requirement that the substitution of one party for another in arbitration proceedings requires the written consent of all the parties affected thereby. Even if the Act is not clear, the case law upon which Mr *Robinson* has relies to contend that "there is no need for a separate written agreement to reflect a substitution of parties therein" seems to suggest the very opposite.

[12] There is yet another difficulty with the proposition that the parties could have entered into a binding oral agreement to substitute Sasol Chemicals for Sasol Wax in the arbitration. In the founding affidavit to the present application the alleged debtors aver as follows:

> 15 A pre-arbitration meeting was held before the arbitrator on 25 January 2008. However, no representative from Sasol Wax attended the meeting. Instead, the meeting was attended by a Mr René Jordaan, who described himself as a legal adviser to SCI ("Sasol Chemicals"), and who indicated that the claimant in the arbitration proceedings was no longer Sasol Wax but rather the Sasol Wax division of SCI. This is reflected in paragraphs 3 and 5.2 of the minute of the pre-arbitration meeting, a copy of which is attached hereto marked "**FA4**".
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> 16 It followed from this that the legal representatives representing the claimant at the pre-arbitration meeting were representing SCI ("Sasol Chemicals") and not Sasol Wax, and they did nothing to suggest the contrary. I refer again in this regard to the confirmatory affidavit of Mr Harris attached hereto.
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> 17 The applicants had no knowledge at that stage of the nature of the alleged transaction between Sasol Wax and SCI ("Sasol Chemicals"), or whether Sasol Wax's alleged claims against the applicants had been validly transferred to SCI. The applicants however understood and accepted that SCI had been substituted for Sasol Wax as the counterparty to the arbitration agreement and that the arbitration proceedings would continue on that basis.

Mr Shawn Van der Meulen, an attorney practising at Weber Wentzel Bowens, who attended this "pre-arbitration meeting", has deposed to the answering affidavit filed in this application on behalf of both Sasol Chemicals and Sasol Wax. In response to paragraph 17 of the alleged debtor's affidavit immediately above, Mr Van Der Meulen says as follows:

> **Ad paragraph 17**

> 20.1 I cannot speak to the knowledge of Mr Moti, but do not dispute this for the purposes of these proceedings.
> 20.2 I deny that there was a substitution of SCI for Sasol Wax as the counterparty to the arbitration agreement with the applicants.

The answer of Sasol Chemicals and Sasol Wax to the alleged debtors' averments in paragraph 17 of their founding affidavit is reasonably capable only of the following understanding: Sasol Chemicals and Sasol Wax do not dispute the first sentence of the alleged debtors' allegation, *viz.* that they may have been unaware of the restructuring within the Sasol Group but deny that there was a substitution of Sasol Chemicals for Sasol Wax as the counterparty to the arbitration agreement with the alleged debtors at the pre-arbitration meeting. It seems to me that the alleged debtors are confronted with a "*Plascon-Evans* situation". They are seeking relief which, if successful, will be final in effect. They are seeking relief in motion proceedings. Insofar as disputes of fact are concerned, the time-honoured rules set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*[15] and as qualified in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*[16] are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are of bald or uncreditworthy, or the respondent's version raises fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected. These rules have been re-affirmed in innumerable cases. A recent example of some prominence

[15] 1957 (4) SA 234 (C) at 235E-G

[16] 1984 (3) SA 623 (A) at 634H-635C.

was the case of *National Director of Public Prosecutions v Zuma*[17]. The denial by Sasol Wax and Sasol Chemicals that there was a substitution of Sasol Chemicals for Sasol Wax as the counterparty to the arbitration agreement with the alleged debtors at the pre-arbitration meeting cannot, merely on the papers before me, be rejected and must stand as the factual basis upon which this application is to be determined.

[13] In terms of section 33(2) of the Arbitration Act, an application in terms of section 33(1) thereof is required to be made "within six weeks after the publication of the award to the parties . . .". In terms of section 38 of the Arbitration Act, the court may, however, extend any period of time fixed by or under the Act, whether or not such period has expired, "on good cause shown". The time periods referred to in section 38 include the six-week period referred to in section 33(2) of the Act.[18] In this case, the award in question was handed down on 27 January 2009. The review application should therefore, in terms of section 33(2) of the Act, have been instituted by 10 March 2009. It was, however, launched some five weeks thereafter, on 14 April 2009. The alleged debtors have applied for an order extending the time period for the filing of the review application to 14 April 2009. Sasol Chemicals and Sasol Wax have, very sensibly, agreed that it would be in the interests of the parties that the court should focus on the substantive merits of the application rather than on whether to condone the fact that the application is "out of time". The application for an extension of time within which to bring the application is granted.

[14] Section 3(2) of the Arbitration Act confers upon the court a discretion, on the application of a party to an arbitration agreement,

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[17] (573/08) [2009] ZASCA 1 (12 Jan 2009) at para [26].

[18] See, *Coetzee v Paltex 1995 (Pty) Ltd* 2003 (1) SA 78 (C) at 92J; *Kroon Meule CC v Wittstock t/a J D Distributors* 1999 (3) SA 866 (E) at 874H.

to intervene in the arbitration proceedings, on good cause shown. At common law a court also has such a discretion.[19] This discretion is to be exercised sparingly and only when there is a "very strong case".[20] Nowadays, we would probably be inclined to use the words "compelling reasons". In view of the *cri de Coeur* by the arbitrator that the parties approach this court "for an appropriate order", it seems that a proper exercise of the court's discretion would be to make an order that sets out the position for the parties with clarity. It seems to me that, against the background of facts in this case there are compelling reasons to do so. All parties are seeking an "appropriate order" in this case. Mr *Fagan* submitted that would indeed be most welcome if the court were to provide some guidance. In view of the history of the matter, this guidance will be concretized in a court order.

[15] In view of the fact that the court will make what it considers to be an "appropriate order", I consider it proper to deal, very briefly, with the question of prescription raised by the alleged debtors. It should be noted that, in the letter from Sasol Wax's attorneys to the attorneys acting for the alleged debtors dated 1 October 2007, Sasol Wax undertook to "procure" that the trial action be "removed from the trial roll" rather than to withdraw the action. This was wise indeed. Although the trial action may have become dormant as a result of the agreement to refer the dispute to arbitration, it did not become entirely extinguished. In any event, the court's finding that the minute of the pre-arbitration meeting did not result in the substitution of Sasol Chemicals for Sasol Wax as the counterparty to the arbitration agreement also has the consequence that the claim of Sasol Wax against the alleged debtors has not become prescribed.

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[19] See, *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 375; *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 504H; *Universiteit van Stellenbosch v J A Louw* 1983 (4) SA 321 (A) at 333G

[20] *The Rhodesian Railways Ltd v Mackintosh* (*supra*) at 375; *Universiteit van Stellenbosch v J A Louw* (supra) at 334A

[16] Insofar as costs are concerned, both parties bear some of the blame for the fact that this debacle has played out as it has in this matter: had the terms of the arbitration agreement been formalised, as the parties had mutually agreed to do, the present difficulties would not, in all probability, have arisen. Both sides have enjoyed a measure of success. Neither side has been entirely successful. The arbitration has still to run its course. A proper exercise of the court's discretion in regard to costs, is, it seems to me, to make the costs of this application costs in the arbitration.

[17] In the view to which I have come in this matter, the arbitration proceedings between Sasol Chemicals and the alleged debtors were a nullity. Therefore, technically, references to this arbitration and perhaps even to the arbitrator should therefore be within inverted commas. It would seem unduly pedantic to do so in this judgment.

[18] The following is the order of the court:

(a) The award made by the arbitrator (the first respondent) on 27 January 2009 is reviewed and set aside;

(b) There is no arbitration agreement in existence between Sasol Chemicals (the second respondent) and the alleged debtors (the first and second applicants);

(c) There is, and remains until its consensual cancellation, a valid arbitration agreement entered into between Sasol Wax (the third respondent) and the alleged debtors (the first and second applicants) on or about 1 October 2007;

(d) Unless the alleged debtors (the applicants) gave a written indication to Sasol Wax (the third respondent) of its choice or arbitrator, there has been no valid appointment of the

arbitrator (the first respondent) in the arbitration dispute between the alleged debtors (the applicants) and Sasol Wax (the third respondent);

(e) In the event that the alleged debtors (the applicants) gave no written indication to Sasol Wax (the third respondent) of its choice or arbitrator, they the alleged debtors (i.e. the applicants in this application) may appoint as arbitrator any of the persons listed as acceptable arbitrators (including the first respondent) in the letter sent by the attorneys acting for Sasol Wax (the third respondent) to the attorneys acting for the alleged debtors (the applicants) on 28 September 2007;

(f) In the event that the alleged debtors (the applicants) fail to agree on any of the persons referred to in the aforesaid letter of 28 September 2007 to act as arbitrator, the parties (i.e. the alleged debtors and Sasol Wax) are given until 15 January 2010 to agree among themselves as to who else the arbitrator should be;

(g) In the event that the alleged debtors (the applicants) and Sasol Wax (the third respondent) fail to agree by 15 January 2010 as to who the arbitrator should be, the arbitrator shall be appointed by the Chairperson of the Johannesburg Bar Council upon the written request of either the alleged debtors (the applicants) or Sasol Wax (the third respondent), to be made by 20 January 2010 and the appointment of an arbitrator by the Chairperson of the Johannesburg Bar Council shall be final and binding upon shall be final and binding upon the alleged debtors (the applicants) and Sasol Wax (the third respondent).

(h) The aforesaid written request for the appointment of an

arbitrator should be submitted by either the alleged debtors (the applicants) or Sasol Wax (the third respondent) to the Chairperson of the Johannesburg Bar Council by no later than 20 January 2010.

(i) The claim of Sasol Wax (the third respondent) against the alleged debtors (the applicants) appearing in case number 19482/2005 in this court has not prescribed.

(j) The costs in this application, which shall include the costs of two counsel, are to be costs in the arbitration to which the alleged debtors (the applicants) and Sasol Wax (the third respondent) agreed on or about 1 October 2007.

DATED AT JOHANNESBURG THIS 10th DAY OF DECEMBER, 2009

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicants: *P.G. Robinson SC* (with him, *J. Wilson*)
Counsel for the Second and Third Respondents: *E. Fagan SC*

Attorneys for the Applicants: Stuart Harris
Attorneys for the Second and Third Respondents: Webber Wentzel Bowens

Date of hearing: 1 December 2009

Date of judgment: 10 December 2009