THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No: A460/2013

WCHC Case No: 12471/2012

In the matter between:

HYDE CONSTRUCTION CC **APPELLANT**

and

THE DEUCHAR FAMILY TRUST **FIRST RESPONDENT**

TERTIUS DU TOIT **SECOND RESPONDENT**

Coram: TRAVERSO DJP AND BOZALEK & ROGERS JJ

Heard: **30 JULY 2014**

Delivered: **11 AUGUST 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The appellant ('Hyde') appeals against a judgment of Blignault J in which he granted with costs an application by the first respondent ('the DFT') to have the second respondent ('Du Toit') removed as an arbitrator in terms of s 13(2) of the Arbitration Act 42 of 1965 ('the Act').

[2] The arbitration arises from a building contract concluded between the DFT (as employer) and Hyde (as contractor) in October 2007 in terms of which Hyde was to construct a house on a property owned by the DFT in Knysna. Disputes regarding the amount owed to Hyde arose by not later than December 2008. It is lamentable that, after more than five and a half years, our judgment, whatever it is, will not take the parties materially closer to a resolution of the real disputes between them.

[3] The issues in the removal application brought by the DFT in the court *a quo* case were broadly three, namely: (i) whether the DFT was properly before the court as a litigant; (ii) whether there was a removal procedure in the arbitration agreement which precluded the DFT from invoking s 13(2) of the Act; and (iii) whether there were grounds for Du Toit's removal. It is a remarkable feature of the removal application and the present appeal that by far the most attention was devoted by Hyde to the first two questions. Relatively little was said or could be said in support of an argument that it was appropriate for Du Toit to remain as the arbitrator.

The facts

[4] The DFT is a family trust. The trust deed stipulated that during the lifetime of the donor, Allan Deuchar, there should be no fewer than three trustees. As at 2007, when the DFT decided to have the house built, the trustees were Allan and Judy Deuchar and a professional trustee nominated by Maitland Trust Ltd. During May 2009 Maitland Trust Ltd resigned and the Deuchars' son and daughter were appointed to act as co-trustees with their parents. Letters of authority had previously been issued by the Master to Mr and Mrs Deuchar in terms of s 6(1) of the Trust

Property Control Act 57 of 1988, and similar letters were issued to the son and daughter upon their appointment.

[5] Clause 40(4) of the building contract between the DFT and Hyde provided that if one or other of the parties was dissatisfied with a determination of a dispute by the adjudicator, the dispute was to be resolved by an arbitrator appointed by the Association of Arbitrators (Southern Africa) ('the Association'). During May 2011 Hyde requested the Association to appoint an arbitrator. During July 2011 the Association appointed a Ms Van Zyl. On 6 January 2012 a pre-arbitration meeting was held. The DFT was represented by Mr and Mrs Deuchar and their then attorney Ms Yates. According to the minute of the meeting prepared by Van Zyl, the DFT questioned Van Zyl's 'jurisdiction', contending that an adjudication process had been completed and that Hyde had been fully reimbursed. Van Zyl responded that clause 40(4) of the building contract made provision for arbitration if one of the parties was dissatisfied with the adjudication (as Hyde apparently was).

[6] Van Zyl said that she had previously forwarded the proposed arbitration agreement to both parties but that only Hyde had signed. The DFT indicated that it did not agree that there should be arbitration and thus refused 'to acknowledge the arbitrator's agreement'. Van Zyl noted this comment but indicated that the arbitration would proceed. According to the minutes, she informed the parties that the rules to be followed in the arbitration would be the Standard Procedure Rules for the Conduct of Arbitrations 6th Ed, being rules issued by the Association ('the Rules').

[7] Rule 2 of the Rules states: 'Save as varied herein or, insofar as the provisions of the Arbitration Act are mandatory, the Act shall apply' [*sic*].

[8] Rule 9 contains a procedure for challenging the appointment of an arbitrator. A party to the arbitration may make written application to the Chairman of the Association to revoke an arbitrator's appointment and to appoint a new arbitrator if the existing arbitrator 'falls seriously ill, or becomes unable or unfit to act' or 'lacks the necessary independence' or 'for any other reason ought not to continue as Arbitrator (eg. lacks impartiality)'. The application must be made within ten days of the litigant becoming aware of the circumstances justifying removal. The Chairman

appoints a committee consisting of not fewer than three members to consider the removal application. The Association notifies the applicant of 'the relevant fee' to be lodged in order for the committee to consider the removal application. Failure to pay the fee within ten days renders the challenge 'invalid'. The committee may give directives regarding the costs of the challenge and, if the challenge is successful, the amount of fees and expenses to be paid for the outgoing arbitrator's services but may only give directions regarding the costs of the arbitration proceedings if the parties so agree.

[9] During February 2012 the DFT lodged an application in terms of Rule 9 for Van Zyl's removal. On 5 March 2012 she notified the parties that she was resigning as arbitrator without admitting any fault or failure on her part.

[10] On 20 March 2012 the Association appointed Du Toit as the new arbitrator. A pre-arbitration meeting took place before him on 17 April 2012. There is no minute of the meeting. By this stage the DFT appears to have accepted that clause 40(4) of the building contract entitled Hyde to proceed to arbitration. At the meeting a short arbitration agreement was signed. Clause 1 dealt with the arbitrator's fees and disbursements. In terms of clause 2 the parties consented 'to the procedures for the conduct of the arbitration as directed from time to time by the Arbitrator'. The agreement contained nothing else of relevance to the present case. A timetable for pleadings and other procedural steps was determined, and the hearing was scheduled to start on 2 July 2014.

[11] By the time of Du Toit's appointment the DFT had engaged Adv DJ Coetsee ('Coetsee') to represent them in the arbitration, and he was present at the meeting on 17 April 2012. The application which the DFT subsequently brought for Du Toit's removal arose from the fact that several years previously Coetsee had represented another client in proceedings in which Du Toit personally was the plaintiff. HJ Erasmus J, sitting on circuit, dismissed Du Toit's claim with costs in a judgment delivered on 27 March 2009. Coetsee and Du Toit recognised each other when they met on 17 April 2012. At that stage, according to the DFT, Coetsee was not concerned about Du Toit's role as arbitrator because he assumed that Du Toit had accepted the outcome of his case and that it was water under the bridge.

[12] Things changed after the meeting of 17 April 2012. On 3 May 2012 Du Toit served, in the circuit court proceedings, an application for condonation and for leave to appeal against the judgment of Erasmus J. The application contained a scathing attack on the propriety of Coetsee's conduct in the case. The DFT's legal representatives learnt of the existence of this application on 23 May 2012. On 29 May 2012 the DFT's attorneys wrote to Du Toit asking him to recuse himself. In a response dated 3 June 2012, Du Toit, apart from persisting in his attack on Coetsee, denied that he was disqualified. Somewhat curiously, he concluded his letter by stating that, if the DFT persisted in pursuing its attack in the High Court, he would not oppose it.

[13] On 6 June 2012 the DFT lodged with the Association an application for Du Toit's removal in terms of Rule 9. On 12 June 2012 the Association's secretary notified the DFT's attorneys that a committee had been appointed to consider the challenge and it was now necessary for the DFT to lodge R75 000 'as a deposit towards the fees of' the committee. In an email of 19 June 2012 the DFT's attorneys said that they and the DFT was 'quite perturbed' by the requested deposit, which to them seemed 'completely exorbitant'. They requested particulars of the computation of the fee. They asked whether the committee would have the power to make a costs order against Du Toit. They also referred to Practice Note 26 issued by the Association which they interpreted to mean that the DFT was not obliged to follow the Rule 9 procedure but could apply for Du Toit's removal in terms of s 13(2) of the Act .[1]

[14] On 21 June 2012 the Association's Chairman, Mr FC Blackie, responded. He pointed out that the challenge would need to be considered by three senior practitioners who were entitled to remuneration. The matter did not appear to be as straightforward as the previous request for Van Zyl's removal (where the requested fee had been R40 000). Mr Blackie said that there was nothing in the Rules which precluded a party from making an application to the High Court for removal in terms

[1] The DFT's attorneys' letter refers to s 32 of the Act. This was clearly erroneous, as the practice note in question correctly referred to s 13(2). Section 32 of the Act is not relevant to the removal of an arbitrator.

of s 13(2) of the Act[2] and he noted that Du Toit had indicated that such an application would not be opposed.

[15] On 25 June 2012 Hyde filed an opposing affidavit in the Rule 9 application together with heads of argument.

[16] On 26 June 2012 the 10-day period for the DFT to lodge the deposit of R75 000 expired. This meant, in terms of Rule 9.4, that its challenge became 'invalid'.

[17] According to the DFT, its decision to make application to the High Court for Du Toit's removal (and not to pursue the Rule 9 application to the Association) was made on the morning of Wednesday 27 June 2012 following a meeting with its legal representatives. At this stage the arbitration was still scheduled to begin on Monday 2 July 2012 although there had been correspondence as to whether the arbitration should be placed on hold pending resolution of Du Toit's appointment. On Friday 29 June 2012 the DFT's attorneys wrote to Hyde's attorneys asking whether they were in agreement that the arbitration could not start on 2 July 2012. In the early afternoon Hyde's attorneys replied, stating that Hyde did not agree to Du Toit's removal as arbitrator. Regarding the commencement of the arbitration, they said that they had previously suggested to Du Toit that the hearing start on 9 July 2012, with the preceding week to be used for perusal of bundles. They informed the DFT's attorneys that, if Du Toit declined to make such a direction, Hyde insisted that the arbitration proceed on the already scheduled date of 2 July 2012.

[18] Later on the afternoon of Friday 29 June 2012 Du Toit notified the legal representatives by email that he would be proceeding with the arbitration hearing at 10h00 on Monday 2 July 2012.

[19] On Sunday 1 July 2012 the DFT served an urgent application for hearing the following day. In this application the DFT sought Du Toit's removal in terms of s 13(2) and an urgent interdict to prohibit the arbitration from continuing pending a

[2] This letter perpetuated the erroneous reference to s 32 of the Act.

determination of the removal application. Unsurprisingly, in the circumstances, the arbitration did not proceed on Monday 2 July 2012.

[20] Hyde opposed the application for Du Toit's removal. Du Toit himself did not oppose, though he filed an explanatory affidavit in which, among other things, he made further remarks highly critical of Coetsee.

[21] On 6 July 2012 Binns-Ward J suspended the conduct of the arbitration pending determination of the removal application, with costs to stand over. The removal application was to be heard on 10 September 2012 but was postponed to 8 November 2012 because the DFT's legal representatives failed to file the requisite practice note. On 5 November 2012 Hyde filed supplementary answering papers in which it contended, on the basis of additional facts which it had discovered, that the DFT was not properly before the court. The hearing on 8 November 2012 was, as a result, postponed to 14 February 2013. The DFT filed supplementary replying papers on 1 February 2013.

[22] The matter was eventually argued before Blignault J on 14 February 2013. He delivered judgment on 12 April 2013, setting aside Du Toit's appointment, directing that he not be entitled to any remuneration for his services and ordering Hyde to pay the DFT's costs. Against these orders Hyde appeals with the leave of the court *a quo*. In his judgment granting leave, Blignault J said that it had been brought to his attention that the DFT had conceded its liability for the wasted costs of 10 September 2012. He thus amended the costs order by adding the qualification that the DFT was liable for Hyde's wasted costs relating to the proceedings on 10 September 2012.

The authority point

[23] Hyde's first point in the court *a quo* and on appeal, although put in various ways, is concerned with the question whether the DFT was properly before the court as an applicant.

[24] In the founding papers Mr Deuchar said that he and his wife were the only trustees and that they had resolved to bring the application. The statement that Mr and Mrs Deuchar were the only trustees was incorrect. This factual inaccuracy was ascertained by Hyde's attorneys upon investigations apparently made after the matter was postponed on 10 September 2012. These investigations led to the filing of the supplementary answering papers on 5 November 2012.

[25] In the supplementary replying papers, Mr Deuchar admitted that the statement in the founding affidavit was wrong. He explained the history of the trust and that he and his wife had decided during 2009 that they should bring their children in as co-trustees. He alleged that, by virtue of a resolution passed by the DFT as long ago as 21 June 2007 authorising him to sign all documents relating to the development of the property, he had been authorised *inter alia* to institute the removal application. (At that time, as noted, the trustees were Mr and Mrs Deuchar and the nominee of Maitland Trust Ltd.) In any event, so Mr Deuchar said, all the current trustees had ratified the institution of the proceedings by way of a resolution attached to his affidavit as annexure "G".

[26] Affidavits by Mrs Deuchar and the son and daughter were filed in confirmation. In her confirmatory affidavit, the daughter said that she had read her father's founding affidavit and confirmed the contents thereof. She continued:

'I confirm specifically that my brother and I consider the project of the building of the house to be my father's project and even though we are trustees, my father, with the assistance of my mother, has been in charge and has been responsible for the entire project, including the disputes that have arisen from the building contract. My brother and I are both fully aware of the disputes that have arisen between the trust and the builder as well as the arbitration proceedings and High Court proceedings that have emanated therefrom. We approve my father's decisions in all matters relating to the development of the property as is formally confirmed by the contents of the resolution, annexure "G".'

Her brother stated that he had read, and confirmed, the founding affidavit of his father and the confirmatory affidavit of his sister.

[27] Blignault J upheld all three grounds on which the DFT's counsel argued that the DFT was properly before the court, namely (i) that the institution of the

proceedings had been authorised by the resolution of 21 June 2007; (ii) that the son and daughter had tacitly authorised the institution of the proceedings; (iii) that any deficiency in authority had been cured by ratification.

[28] I do not find it necessary to determine the first two points. As to the first point, I am somewhat doubtful whether the resolution is sufficiently wide. As to the second point, it is unclear that the supplementary replying papers advanced the case that the institution of the proceedings had been tacitly authorised (as distinct from ratified). The daughter's affidavit, the relevant part of which I have quoted, indicates that by the time she made her affidavit she was aware of the disputes and the proceedings but she does not say that she was so aware at the time the proceedings were instituted. What the daughter says, coupled with the way in which the trust appears to have been administered, may, however, justify the inference that, even though the two children were not at the time aware that the legal proceedings had been instituted, they had authorised their parents in general to conduct the trust's affairs, at least insofar as they related to the Knysna project, as agents for all of them (cf *Land and Agricultural Bank of South Africa v Parker & Others* 2005 (2) SA 77 (SCA) para 37 and *Nieuwoudt & Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) para 23). Such a delegation would have been permissible in terms of clause 13.18 of the trust deed as amended in 1994.

[29] Be that as it may, I think Blignault J was right to uphold the ratification point. There is no doubt that, in general, proceedings which have been instituted in the name of a particular party but without the authority of those entitled to decide the matter on behalf of that party may be ratified (see, for example, *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A) at 180I-181C; *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) para 14). In the nature of things, when such a challenge is raised and the deficiency emerges, the ratification would need to be proved by way of supplementary papers, as occurred here (see *Baeck & Co SA (Pty) Ltd v Van Zummeren & Another* 1982 (2) SA 112 (W) at 119C-D).

[30] Mr Bruwer, who appeared for Hyde in the appeal (as he did in the court *a quo*), submitted that this general principle did not apply to trusts, at least not in the circumstances of the present case.

[31] Mr Bruwer referred us to the decisions in *Parker supra* and *Lupacchini NO & Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA), submitting that their effect was that the unauthorised institution of proceedings on behalf of a trust cannot be ratified by a subsequent decision of all the trustees. I do not think that these cases, properly understood, support Mr Bruwer's contention.

[32] In *Nieuwoudt supra* Harms JA said, in a judgment concurred in by the other members of the court, that the fact that trustees have to act jointly 'does not mean that the ordinary principles of the law of agency do not apply' (para 23). For example, he said, the trustees might expressly or impliedly authorise someone to act on their behalf and that person might be one of the trustees. Ratification is one of the ordinary principles of the law of agency. In principle, therefore, there appears to be no good reason why a decision taken ostensibly in the name of the trust by (say) two out of the four trustees should not subsequently be ratified by the full body of trustees. It is no objection that the original decision was unauthorised; that is always so where ratification comes into play. The principle that the trustees must act jointly is satisfied by the ratifying conduct of the full body of trustees. The position is in principle no different, to my mind, from the case where a decision is initially made on behalf of a company by (say) two out of four directors and the decision is subsequently ratified by the full board.

[33] *Parker* and *Lupacchini* do not bring this analysis of general agency principles into question. Those cases address the position which arises where the trust deed requires that there should be no fewer than a specified number of trustees and where, at the time the act which is sought to be attributed to the trust was performed, fewer than that number existed. Where that is the case, the trust lacks the capacity to act; it is not a problem of authority but capacity.

[34] Cameron JA in *Parker* dealt with this distinction in paras 10-14 under the heading 'A sub-minimum of trustees cannot bind the trust'. In that case the trust

deed required a minimum of three trustees. In para 11 he said that a provision in a trust deed requiring that a specified minimum number of trustees must hold office is a 'capacity-defining condition' and lays down a 'prerequisite that must be fulfilled before the trustee can be bound'. Where fewer trustees than the specified number are in office, 'the trust suffers from an incapacity that precludes action on its behalf'.

[35] Cameron JA did not specifically hold that in such circumstances there could be no 'ratification'. In relation to the three loan transactions which the bank was seeking to enforce, there was in fact no purported ratification because the evidence did not indicate that the Parkers' son (the third trustee) purported to ratify the first two loans (which had been concluded before his appointment) or was consulted in respect of the third loan (which was made after his appointment). By the time the bank wished to enforce the loans, it naturally suited the Parker family not to ratify the loans. The family was, however, hoist by its own petard, because Cameron JA found ('by happy symmetry', as he put it in para 39) that the trust's purported petition for leave to appeal and its appeal to the full bench had also been invalid because by then the trust again only had two trustees. Although a daughter was belatedly appointed to fill the vacancy, Cameron JA said in para 45 that, 'whether by design or oversight', no attempt at ratification was made after her appointment.

[36] Nevertheless, one can understand that, where a party does not have the capacity to act, a purported act in its name is a nullity and cannot be ratified. That this is so appears to me to have been confirmed in *Lupacchini*, to which I now turn.

[37] *Lupacchini* was again a case where fewer than the specified number of trustees existed at the relevant time. Although this is not specifically mentioned in the judgment of the Supreme Court of Appeal, it appears clearly from para 8 of the judgment of the trial court ([2008] ZAFSHC 7) and para 2 of the judgment of the full bench ([2009] ZAFSHC 82) that the trust deed required there to be not fewer than two trustees. Nugent JA commenced his judgment in *Lupacchini* by quoting from paras 10 and 11 of *Parker*, where the point was made that the existence of the specified minimum number of trustees is a capacity-defining condition. In para 13 he said that the true question in the case was 'not whether the trustees had a sufficient interest, but instead whether they were capable of suing or being sued at all'. And in

para 23 he said that *Parker* made it clear that 'legal proceedings commenced by persons who lack capacity to act for the trust are a nullity'.

[38] In *Lupacchini* two persons (Mr Gabrielle Lupacchini and Ms Conradie) purported to institute proceedings as trustees at a time when only Mr Lupacchini was a duly appointed trustee with letters of authority from the Master in terms of s 6(1) of the Trust Property Control Act. Letters of authority were only issued in favour of Ms Conradie several months after the institution of the proceedings.

[39] It was taken for granted, I think, in *Lupacchini* that if the specified minimum number of trustees (two) did not exist when the proceedings commenced, the proceedings were a nullity. The focus of attention in *Lupacchini* was not on this aspect but on whether Ms Conradie was a trustee when the proceedings were instituted, even though letters of authority had not yet been issued to her. If she was already a trustee despite the absence of letters of authority, the requisite number of trustees existed. The Supreme Court of Appeal upheld the decision of the full bench that action by a purported trustee who has not received letters of authority in terms of s 6(1) of the Trust Property Control Act is invalid, approving in this respect the decisions in *Simplex (Pty) Ltd v Van der Merwe NNO* 1996 (1) SA 111 (W) and *Van der Merwe v Van der Merwe en Andere* 2000 (2) SA 519 (C). The result was that, at the time the proceedings were instituted, there was only one trustee and the trust was thus incapable of acting altogether.

[40] It is apparent from *Lupacchini* that, where there is an incapacity to transact or to institute proceedings because of the absence of the specified minimum number of trustees, the transaction or the institution of the proceedings is a nullity and cannot be ratified. In *Lupacchini* itself, the second trustee, Ms Conradie, self-evidently continued to support the proceedings after she received her letters of authority but this was not regarded as saving the proceedings.[3] In *Simplex* (at 113F114G) and *Van der Merwe* (para 21), which Nugent JA cited with approval, it was specifically

[3] This would naturally not have precluded the two trustees from instituting a fresh action. The capacity point was probably pressed because, by the time it came to be argued in the court of first instance (August 2007) and decided (February 2008), the trust's claim for damages, which was alleged to have arisen from police raids conducted during 2003 (see he full bench judgment para 5), is likely to have become prescribed.

said that ratification could not apply in such circumstances. (In those two cases there was no duly appointed trustee at all at the time the relevant transactions were concluded.)

[41] I should perhaps add that I do not read *Lupacchini* and the cases it approved as holding that an act purportedly performed in the name of a trust is invalid merely because one of the purported trustees did not have letters of authority in terms of s 6(1) of the Trust Property Control Act. If, for example, a trust deed requires a minimum of three trustees and there are at least three trustees holding letters of authority from the Master, a decision by them would not be invalidated merely because a fourth person, who they mistakenly believed was a co-trustee, did not have letters of authority. The absence of letters of authority would mean that the fourth person's actions could not be taken into account in determining whether the trust had acted validly. This would not invalidate a unanimous decision of the other three trustees. So, for example, in *Lupacchini*, if the trust deed had permitted there to be only one trustee, the proceedings would not, I apprehend, have been held to be invalid merely because the one duly appointed trustee (Mr Lupacchini) was joined in the proceedings by a purported co-trustee (Ms Conradie). Non-compliance with s 6(1) becomes important where the question is whether there existed the specified minimum number of trustees at the time the action was taken. The non-compliance with s 6(1) invalidates the actions of the purported trustee who did not hold letters of authority. If this results in there being fewer than the specified number of trustees required for trust action, action by the remaining trustees (even though they hold letters of authority) is invalid not because of the violation of s 6(1) *per se* but because, as a result of the disqualification of one of the purported trustees, the remainder of the trustees lack capacity to act.

[42] In the present case there were four duly appointed trustees holding letters of authority from the Master at the time the legal proceedings were instituted. The trust deed required there to be a minimum of three. One is thus not dealing, as in *Parker* and *Lupacchini*, with an incapacity on the part of the trust to institute legal proceedings. The question is only one of authority and in principle, therefore, the unauthorised institution of the proceedings could be ratified.

[43] The only remaining point that need be considered on this part of the case is Mr Bruwer's contention that ratification can apply only to an act which the agent professed to perform on behalf of his principal. Mr Bruwer referred us, in support of this proposition, to *Caterers Ltd v Bell & Others* 1915 AD 698 at 710 and *Lazarus v Gorfinkal* 1988 (4) SA 123 (C) at 136C-D (and see, on the same point, Kerr *The Law of Agency* 4th Ed at 82-83 and De Villiers and Macintosh *The Law of Agency in South Africa* 3rd Ed (Silke) at 289-291 and cases there cited). Mr Bruwer submitted that, in the present case, Mr Deuchar only intended to act on behalf of himself and his wife, because he said in the founding affidavit that they were the only trustees. He thus did not purport to act for his two children in their capacity as trustees.

[44] The authorities cited by Mr Bruwer and the cases mentioned in the two textbooks dealt with contracts. A contract ostensibly concluded between A and B cannot through any process of ratification become a contract between A and C. C may only ratify the contract if B intended and professed to act not on his own behalf but on behalf of C. One is there concerned with a bilateral transaction founded on consensus.

[45] The question of authority in relation to legal proceedings is different, because one is not dealing with consensual transactions but with legal processes which are ultimately controlled by the court. One knows, for example, that if A institutes an action against B, the court might in appropriate circumstances grant an application for C to be substituted as the plaintiff or joined as a co-plaintiff to ensure that the true plaintiff is before the court (see *Page v Malcomess* 1922 EDL 284 at 285-286, where the court permitted a partnership to be substituted where the action had initially been instituted in the name of only one of the partners; *Mias de Klerk Boerdery (Edms) Bpk v Cole* 1986 (2) SA 284 (N), where a company was substituted in place of an individual when it emerged that property damaged in a fire had belonged to the company and not the individual; *Tecmed (Pty) Ltd v Nissho Iwai Corporation & Another* 2011 1) SA 35 (SCA) paras 12-14).[4]

[4] See also *Marais NO v Zoo Net Trading CC t/a Durr Estates* [2005] ZAECHC 20 where Froneman said, in a case where the magistrate had refused summary judgment because not all the trustees had been joined: 'The first concession counsel made was that, at best, success on appeal (without the benefit of the knowledge gained by the joinder application) would have resulted not in the summary judgment application being dismissed, but only in the matter being referred back to the court below in

[46] If, in the present case, the removal application had been instituted in the names of Mr and Mrs Deuchar *nomine officii*, I do not see why, when it later emerged that the son and daughter should have been cited as co-trustees, the court could not have permitted them to be joined. There were no considerations such as prescription which would have made the joinder inappropriate. The alternative, of refusing the joinder and requiring the full body of trustees to recommence proceedings, would have been an unattractive one which I cannot see would have been compelled by our substantive or procedural law. One would simply have been dealing with a combination of lack of authority and non-joinder, both of which are matters which can be remedied.

[47] As a fact, though, the removal application was not brought in the name of Mr and Mrs Deuchar *nomine officii*. The applicant was cited as the Deuchar Family Trust. Of course, a trust is not a juristic entity. Whether it is procedurally acceptable to cite a trust by name as a litigant, and whether in that regard rule 14 is applicable to trusts (as to which, see *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) at 265B-C), need not be decided, because no objection was ever taken in the court *a quo* or for that matter on appeal to this mode of citation. One commonly refers to a trust by name even though it is not a juristic entity. Given the legal character of a trust, the citation of a trust by name in litigation must, I think, be understood as a reference to the trustees for the time being of the trust, whoever they may be.

[48] It is so that Mr Deuchar erred in asserting in his founding affidavit that there were only two trustees. Nevertheless, the cited litigant was the Deuchar Family Trust, being a shorthand reference to the trustees for the time being. The factual error in the founding affidavit was brought to light, the additional trustees were named, and it was confirmed that they had ratified the proceedings. As I have said, if the mode of citation had been to name the trustees as applicants, there can be little doubt that, when the error came to light, application would have been made to

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order for the new trustees to be joined in the summary judgment proceedings. This is in line with the principle that a plea of non-joinder of necessary parties usually results in a postponement to enable their joinder, not in a final determination of the substantive merits of the litigation. This kind of approach is particularly appropriate in disputes about the proper citation of trustees where the trend is away from excessive formalism, to cutting to the quick in ensuring that the trust is properly represented or cited in court proceedings.

join the daughter and son as co-applicants. But since the applicant was simply cited as the trust by name, no such procedure was necessary.

[49] Apart from the fact that one is dealing in this case with ratification in relation to the institution of legal proceedings and not in relation to the conclusion of a contract, the present case is plainly distinguishable from the authorities mentioned by Mr Bruwer. Mr and Mrs Deuchar did not purport to institute proceedings in their personal capacities or on behalf of anyone else apart from the Deuchar Family Trust. They did not try to convert legal proceedings brought in the name of A into legal proceedings in the name of B.

[50] There is a case not mentioned by Mr Bruwer which might at first blush have provided supported his contention. I refer to the judgment of Streicher J (as he then was) in *Van der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W). That case is, however, distinguishable. There, one of three trustees (Van der Westhuizen) instituted proceedings citing himself *nomine officii* and alleging that he had been duly authorised by the other trustees to institute the action. One of the points taken by the defendant was that the action should have been instituted in the names of all of the trustees and that the other trustees could not in law give Van der Westhuizen *locus standi* to sue on behalf of the trust. Streicher J upheld this contention (at 494G-495E). Streicher J in any event found, on the facts, that the other trustees had not authorised Van der Westhuizen so to act (at 495F-496H).

[51] The learned judge proceeded to consider whether the matter had been remedied by a ratifying resolution passed by all the trustees. He held that, because Van der Westhuizen had chosen to institute proceedings in his own name on behalf of the trust, the deficiency could not be remedied by ratification in the absence of an amendment to the pleadings, an amendment which Van der Westhuizen apparently did not seek (496H-497E).

[52] The *Van der Westhuizen* case is distinguishable because in our matter Mr and Mrs Deuchar did not institute proceedings in their own name but in the name of the trust, and no point was taken as to that mode of citation. There was thus no need for an amendment.

The waiver point

[53] The next point, although it was again put in various different ways, is whether the DFT was precluded from invoking s 13(2) of the Arbitration Act because it had agreed to a different procedure. Mr Bruwer laid great emphasis on the need to respect choices made by contracting parties in relation to arbitration (see, in particular, the judgment of O'Regan ADCJ in *Luphano Mphaphuli & Associates Pty Ltd v Andrews & Another* 2009 (4) SA 529 (CC)).

[54] Two broad questions arise, namely (i) whether the parties did in fact conclude an agreement which they intended to be to the exclusion of s 13(2); and (ii) if so, whether this was a special case where the court *a quo* was, despite the general principle, justified in exercising its undoubted residual jurisdiction to decide the matter.

[55] In relation to the first of the questions just mentioned, there are two sub-questions, namely (i) whether the parties as a fact concluded an agreement which incorporated the Rules; and (ii) if so, whether the Rules, on a proper construction, exclude the operation of s 13(2).

[56] The question whether the parties in fact concluded an agreement which incorporated the Rules was not squarely canvassed in the papers. Hyde in its answering affidavit referred to the directions given by Van Zyl on 6 January 2012. Its further assertions regarding the exclusion of s 13(2) proceeded on the assumption that the parties were bound by the Rules, and the DFT in its replying papers seems to have responded on that basis. In his heads of argument, Mr Rosenberg SC for the DFT submitted, in a different context (namely, whether there had been good cause for the court *a quo* to entertain the application despite Rule 9), that it was to be borne in mind that the 'applicability' of the Rules arose in the first instance not from consensus between the parties but from a ruling by Ms Van Zyl.

[57] I am by no means satisfied that the parties concluded an arbitration agreement which incorporated the Rules. Neither clause 40(4) of the building contract nor the written arbitration agreement signed on 17 April 2012 incorporated

the Rules. I do not see how a direction given by Van Zyl at a pre-arbitration agreement could make the Rules, or at least Rule 9, part of the arbitration contract between the parties. Indeed, and whether for good reason or bad, the DFT said at the meeting on 6 January 2012 that it did not agree to the arbitration.

[58] A duly appointed arbitrator is empowered by s 14 of the Arbitration Act to give directions on various matters (the delivery of pleadings, discovery and the like) and these powers might be varied by the arbitration agreement. However, these are powers to give procedural directions with a view to the proper adjudication of the dispute. As at 6 January 2012 there was no contract between the parties which entitled their appointed arbitrator to prescribe to them the procedure to be followed if they wanted to remove her or anyone else as an arbitrator nor was that power conferred on Van Zyl by the Arbitration Act.

[59] It is true that after 6 January 2012 the DFT invoked Rule 9 on two occasions, first in relation to the removal of Van Zyl and then in relation to Du Toit's removal. This does not show, however, that Rule 9 was already part of the contract between the parties. The DFT's conduct is explicable, in my view, on the basis that, because the Association had appointed Van Zyl and because the Association had issued rules which proclaimed the circumstances in which the Association would remove one of their arbitrators and appoint a new one, the DFT saw itself as entitled to invoke the Rules. It is not a necessary inference that the DFT regarded Rule 9 as part of its contract with Hyde. (In the same way, a member of the public might invoke the rules of a professional association to pursue a complaint against a professional belonging to that body. This does not make a member of the public a party to the contract contained in the constitution and rules of the association.)

[60] However, and assuming in favour of Hyde that the arbitration agreement between the parties incorporated Rule 9, the question must still be answered whether, on a proper construction of the arbitration agreement as read with the Rules, Rule 9 was intended to lay down an exclusive procedure for the removal of the arbitrator. In relation to the main dispute and matters truly interlocutory to the proper adjudication of the main dispute, it will almost always be the intention of the parties to exclude recourse to the courts, whether they say so expressly or not.

Furthermore, where parties have agreed to refer a question of law for decision by an arbitrator, it will generally be inconsistent with that agreement to permit one of the parties to apply to court in terms of s 20(1) of the Arbitration Act to state the same question of law for opinion by the court (see *Telecordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SA) para 154).

[61] In relation to the removal of the arbitrator, on the other hand, the inference that a removal procedure provided for in the arbitration agreement is intended (in the absence of clear language) to be to the exclusion of the statutory right conferred by s 13(2) is less compelling.

[62] There was debate about the proper interpretation and effect of Rule 2. In my opinion, the word 'mandatory' in that rule refers to a statutory provision which, on a proper interpretation of the Arbitration Act, must be followed despite a contrary provision in an arbitration agreement, ie a peremptory statutory provision. Provisions of the Act which are not mandatory in this sense apply unless 'varied' by the Rules.

[63] I do not think that the removal procedure contained in s 13(2) can be described as 'mandatory' in this sense. In other words, I do not think it was the intention of the lawmaker that the only method by which an arbitrator can be removed is by application in terms of s 13(2). If s 13(2) were mandatory, a party to an arbitration would not be entitled to invoke a procedure of the kind laid down in Rule 9, even if it wished to do so.

[64] 'Mandatory' may perhaps have been used in a different sense, namely a statutory provision which could not in law be waived, even though use of an alternative private procedure was not impermissible. If that is the sense in which 'mandatory' is used, I doubt whether the statutory right conferred by s 13(2) is one which cannot be waived, at least where an adequate alternative private procedure is stipulated. A statutory provision which is laid down for individual benefit rather than in the public interest can generally be waived by the individual (*Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) para 15). In *Telecordia*, as noted, Harms JA considered that in general an agreement to refer a point of law to an arbitrator for a decision rendered recourse to the statutory procedure in s 20(1) impermissible. In

effect, the referral of the point of law for decision by an arbitrator constituted a waiver of the right to approach the court in terms of s 20(1). The same would apply to s 13(2). In the context of arbitration, waiver might not strictly be the correct term, because of the court's residual discretion to entertain the matter on good cause. I use 'waiver' here as meaning an agreement by which the parties intend to adopt a private procedure to the exclusion of the statutory procedure.

[65] Waiver is not presumed, and the onus rests on the party alleging it (here, Hyde). Clear proof is required of an intention to waive. The conduct from which waiver is inferred must be unequivocal, ie consistent with no other hypothesis (*Road Accident Fund v Mothupi supra* para 19). This brings me to a consideration of the word 'varied' in Rule 2.

[66] 'Varied' as used in Rule 2 appears to envisage a provision of the Rules which is inconsistent with a provision of the Act, because it is only in the case of inconsistency that the Rules could be expected to exclude rather than operate alongside the Act. So if it is contended that a particular rule has 'varied' the Act, one must examine the rule in question to ascertain whether its operation is inconsistent with the Act. Formulated with reference to the principles of waiver, the question is whether Rule 9 unequivocally manifests an intention to oust s 13(2) and that such an interpretation is consistent with no other hypothesis.

[67] Rule 9 does not state that it operates to the exclusion of s 13(2). It affords to a party the right to bring an application to the Association to appoint a committee to consider the removal of an arbitrator on specified grounds. It is probable that those grounds are as wide as those which a court could take into consideration in an application in terms of s 13(2) but this does not give rise to the necessary inference the Rule 9 procedure was mandatory and exclusive rather than permissive. As I have said, the matter with which Rule 9 deals, namely the removal of an arbitrator, is not concerned in any direct way with the arbitral dispute and matters truly interlocutory to the determination of the dispute, and therefore the natural inference that the parties intended to exclude the court's jurisdiction is not present. If a party fails to lodge the Rule 9 application or the relevant fee within the time limits laid down in the Rule, his right to challenge the arbitrator's appointment in terms of Rule

9 falls away. *Non constat* that he loses his right to approach the court in terms of s 13(2).

[68] On balance, therefore, I think Blignault J was right to find that Rule 9 was not inconsistent with the parallel operation of the Act and that it did not serve to exclude the operation of s 13(2).

[69] In any event, and if Rule 9 was intended to be exclusive, the court *a quo* was nevertheless in my view justified in exercising its residual jurisdiction to entertain the removal application. Even in relation to the main arbitral dispute, the court has the jurisdiction to determine the dispute on good cause shown (s 3(2) of the Act). For sound reasons of policy, many of which were rehearsed in the judgment of O'Regan ADCJ in *Mphaphuli supra*, a court will not lightly entertain a dispute which the parties have agreed to submit to arbitration. The party seeking to invoke the court's residual jurisdiction must make out a 'very strong case' or provide 'compelling reasons', though in *Universiteit van Stellenbosch v JA Louw (Edms) Bpk* 1983 (4) SA 321 (A) Galgut AJA thought it impossible and indeed undesirable to attempt to define with any degree of precision what would constitute a 'very strong case' (at 334A-B).

[70] Whether s 3(2) of the Arbitration Act strictly applied in the present case is not altogether clear. DFT was not seeking to set aside the arbitration agreement. Nor was it asking that Hyde's disputed claim under the building contract not be referred to arbitration or that the arbitration agreement should not have effect with reference to the arbitral dispute. Section 3(2) would only have been applicable if one viewed Rule 9 as referring to arbitration the separate dispute as to whether the appointed arbitrator should be removed. Be that as it may, the parties accepted that the court retained a residual discretion, despite any contrary stipulation in the arbitration agreement, to entertain the s 13(2) application on good cause.

[71] In assessing the question of good cause, I regard as an important consideration that the matter which the DFT asked the court to adjudicate was not the main dispute or a procedural matter truly ancillary to the determination of the main dispute but a more fundamental question as to the propriety of Du Toit's

continued role as the arbitrator. This was a legal question going to the fairness of the arbitration and on which the court could be expected to be at least as good a judge of the matter as the Association.

[72] While that would naturally not in itself suffice to justify a disregard by one of the litigants of an agreed procedure for removal, it is not a consideration which stands alone. A second consideration is that the Association's Chairman himself expressed the view, upon enquiry by the DFT, that the Rules did not preclude an application to court in terms of s 13(2). Now I accept Mr Bruwer's submission that the opinion of the Chairman cannot determine, and is indeed not even relevant to, the proper interpretation of the Rules. But when it comes to the question whether there was good cause for the court to entertain the s 13(2) application, it is of undoubted relevance that the DFT was given to understand by the Association that it did not regard its own rules as precluding such a challenge.

[73] One can understand why, if the DFT and its legal representatives were under the impression that Rule 9 was not exclusive, they preferred to approach the court in terms of s 13(2) rather than to seek the ruling of the Association in terms of Rule 9. The DFT believed, justifiably in my view, that it was obvious that Du Toit should be removed. However, in order to achieve this obvious outcome by way of Rule 9, the DFT was required to deposit a sum of R75 000 so that the matter could be considered be three senior professionals. This was undoubtedly a substantial amount in respect of what could legitimately have been regarded as a straightforward case. Furthermore, there were uncertainties, if the Rule 9 procedure were followed, about the fees it any to which Du Toit might be entitled. This was a matter which, if s 13(2) were invoked, the court could determine in terms of s 13(3).

[74] Furthermore, over the weekend of 30 June/1 July 2012 the DFT was faced with a position in which Du Toit had intimated an intention to proceed with the arbitration on Monday 2 July 2012. I accept that, if the DFT had by 26 June 2012 deposited the sum of R75 000 and shown an intention to proceed with the Rule 9 challenge, Du Toit would probably have held matters in abeyance. Nevertheless, and even if the DFT could be criticised for having not hitherto pursued the Rule 9 application to conclusion, the DFT's options narrowed considerably after Du Toit

informed the parties on Friday 29 June 2012 that he intended on the Monday to proceed with the arbitration. The institution of an urgent application in the court was probably the only realistic course apart perhaps from appearing at the arbitration on the Monday to again ask Du Toit to recuse himself (something it seems he was unlikely to do without the concurrence of Hyde).

[75] In the unusual circumstances of the case, therefore, I think the entertaining of the s 13(2) application was permissible. This conclusion is certainly not intended as any encouragement to litigants to resort to the courts where they have agreed to an arbitration procedure. The circumstances of this case are most unusual, as illustrated by the fact that neither counsel was able to refer us to any judgment in which a court had considered the applicability s 13(2) in the face of a different removal procedure laid down in the arbitration agreement.

The merits of Du Toit's removal

[76] The grounds for Du Toit's removal is the aspect on which the least need be said. I have nothing to add to the reasons given by Blignault J for his conclusion that Du Toit should be removed. These reasons, I hasten to add in fairness to Du Toit, are not concerned with his honesty and integrity but only with the manifest inappropriateness of his continuing to function as the arbitrator after expressing such strong criticisms of the DFT's counsel in relation to litigation in which he (Du Toit) was a litigant.

[77] As I have already mentioned, Mr Bruwer devoted very little attention to this question in his written argument and virtually none in oral argument. In fact, he acknowledged at the hearing that, if the DFT had persisted with the Rule 9 application, it would probably have succeeded. This renders the conduct of the proceedings in the court *a quo* and in this court all the more inexplicable.

Conclusion

[78] It follows that the appeal on the merits of the matter must fail.

[79] In regard to the costs in the court *a quo*, Blignault J corrected his order so as to provide that the DFT would be liable for the wasted costs of 10 September 2012. We raised with Mr Rosenberg whether the DFT should not also be responsible for the additional costs occasioned by the supplementary affidavits, given that Hyde raised legitimate questions in its supplementary papers concerning the authorisation of the proceedings. Mr Deuchar had made incorrect allegations in his founding affidavit, and, in the absence of the supplementary replying papers, the points raised by Hyde would probably have led to the dismissal of the application.

[80] Blignault J does not appear to have given consideration to the question whether the costs arising from the supplementary papers should be dealt differently from the main costs. I thus consider that we are at large to make an order which we regard as just. The DFT, should in my view, be responsible for the costs arising from the filing of the supplementary papers. The DFT must also pay the costs wasted by the postponement of 8 November 2012.

[81] Mr Rosenberg, when we put these matters to him, left the question of the costs of the supplementary papers in our hands but resisted an order for wasted costs in respect of 8 November 2012. It was clear, he said, that Hyde intended in any event to continue its opposition to the application, *inter alia* on the basis of a supposed lack of authority. That does not explain why the DFT should not pay the wasted costs of 8 November 2012. Hyde provided a reasonable explanation for only having discovered the true position in regard to the identity of the trustees in late October/early November 2012. The need for supplementary answering papers would not have existed if Mr Deuchar had not stated the matter inaccurately in his founding affidavit. And once Hyde raised these issues in its supplementary answering papers, the hearing on 8 November 2012 could not proceed because the DFT needed an opportunity to explain (and correct) the position.

[82] The limited success which Hyde will be achieving in regard to the court *a quo*'s costs order does not disentitle the DFT to its costs on appeal.

[83] I would thus make the following order:

(a) The appeal against paras (1) and (2) of the order of the court *a quo* is dismissed.

(b) Para (3) of the court *a quo*'s order is set aside and replaced with the following:

'(3) The Second Respondent is to pay Applicant's costs in respect of the application, save that Applicant shall pay the costs wasted by the postponements of 10 September 2012 and 8 November 2012 and shall also pay the costs associated with the filing of the supplementary answering and supplementary replying papers.'

(c) The appellant is to pay the first respondent's costs of appeal.

TRAVERSO DJP

[84] I concur. An order is made as proposed by Rogers J.

BOZALEK J

[85] I concur.

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TRAVERSO DJP

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BOZALEK J

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ROGERS J

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