REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: **325/2002**
Reportable

In the matter between:

WILLIAM JAMES NIEUWOUDT NO **FIRST APPELLANT**

TALITHA CECILIA NIEUWOUDT NO **SECOND APPELLANT**

and

VRYSTAAT MIELIES (EDMS) BEPERK **RESPONDENT**

CORAM: HARMS, FARLAM, BRAND, CLOETE JJA et VAN HEERDEN AJA

HEARD: 14 NOVEMBER 2003

DELIVERED: 28 NOVEMBER 2003

SUMMARY: Trusts and trustees – whether *Turquand* rule applicable.

JUDGMENT

FARLAM JA

[1] This is an appeal against a judgment of Van Coppenhagen J, sitting in the Orange Free State Provincial Division, in terms of which it was found that an agreement concluded between a close corporation and the appellants, in their capacities as trustees of a family business trust, was valid and enforceable and that the close corporation's rights had been ceded to the respondent. The judgment of the court *a quo* has been reported: see *Vrystaat Mielies (Edms) Bpk v Nieuwoudt en 'n Ander NNO* 2003(2) SA 262 (O).

[2] The agreement in question, which was concluded on 9 May 2001, was for the sale of 900 tons of yellow maize at R785-00 per ton, delivery to be effected during the period from 1 June 2002 to 31 July 2002. The deed of sale described the seller as 'JJ Boerdery Trust (James Nieuwoudt)' (James Nieuwoudt being the name by which the first appellant is known) and was signed by the first appellant above the word 'Verkoper'. The agreement was thereafter ceded on 25 January 2002 to the respondent.

[3] As appears from the dates of the contract and the date on which the maize was to be delivered, the contract was an advance contract, what was described in the papers as a 'vooruit-kontrak', concluded before the maize to be sold was planted and produced. By March 2002, when the respondent launched the application which terminated in the order now on appeal, the price of maize, which had earlier risen as high as R1 640-00 per ton, was R1 239-00 per ton, which may explain the stance taken by the appellants in this matter.

[4] On 20 February 2002 the respondent sent to the appellants by facsimile transmission a letter to which was attached a confirmation of the contract in which the appellants were requested to confirm in writing that they would respect the contract. In a letter sent to the respondent by the appellant's attorneys, it was stated that the trust did not intend implementing any deliveries because of the nullity of the alleged contract.

No reason was given for the assertion that the contract was a nullity.

[5] This reason was only forthcoming after the respondent had launched the present proceedings. In his opposing affidavit the first appellant annexed a copy of the trust deed of the family trust as well as a copy of the letter of authority issued by the Master of the High Court at Kimberley authorising the appellants to act as trustees of the trust. He pointed out that in terms of the trust deed, where there were only two trustees (as is the case), all decisions of trustees had to be unanimous. This provision of the trust deed notwithstanding, he did not have the second appellant's authorisation or approval to act on her behalf in signing the contract in question. He also said that, in so far as the contract stated that it contained the details of an agreement which had been telephonically or orally concluded between the close corporation and the trust, the second appellant had also not participated in the conclusion of any telephonic or oral agreement with the close corporation. He concluded this paragraph of his affidavit by stating that he had been advised that in view of the facts which I have summarized no binding agreement came into existence between the close corporation and the trust.

[6] Although there was nothing in the trust deed which prevented the trustees from delegating certain functions to one of their number or even to an outsider (cf *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 674 (T) at 680 I-J), the first appellant did not deal expressly in his affidavit with the question as to whether powers of management over the trust business had been delegated to him so as to enable the day to day business of the trust to be carried on. Nor did he state whether he told his co-trustee, the second appellant, of the contract he had signed as seller - although, as he stated elsewhere in his affidavit, it was never the intention that he should contract in his personal capacity - nor, if he did tell her, whether she had by words or conduct expressed agreement with what he had done or denied his authority to conclude the agreement.

[7] The second appellant contented herself with filing an affidavit confirming those parts of the first appellant's affidavit that applied to her.

[8] In reply the respondent sought to answer the defence raised by the appellants by saying that the representative of the close corporation (one Fourie) had at no stage been informed by the appellants that there were two trustees or that two trustees had to sign the contract and that the appellants had not given Fourie a copy of the trust deed. The respondent alleged further that the fact that only one trustee signed the contract did not provide a defence for the appellants. This was because, so it was averred, clause 23.4 of the trust deed provided that the trustees could empower one of their number to sign documents on their behalf, to implement any transaction in connection with the trust's affairs. It was said further that the respondent would not be in the position, nor was it

expected of it, to inquire into the internal prerequisites for authority, for example, a decision by the trustees. In this regard the respondent relied on the so-called *Turquand* rule, first laid down by the Court of the Queen's Bench and confirmed by the Exchequer Chamber in *The Royal British Bank v Turquand* (1856) 6 E & B 248(QB) and 327 (Exch. Ch.), which has been adopted by our courts as part of our company law (see *Legg and Co v Premier Tobacco Co* 1926 AD 132) and been held to apply also in cases involving trade unions (*Mine Workers' Union v Prinsloo* 1948 (3) SA 831 (A)) and municipalities (*Potchefstroomse Stadsraad v Kotze* 1960 (3) SA 616 (A)). A modern formulation of the rule, which was approved by Lord Simonds in *Morris v Kanssen* [1946] AC 459 at 474, is taken from *Halsbury's Laws of England,* 2 ed, vol 5, para 698 (see now 4 ed, reissue vol 7(1), para 980) and is in the following terms:

'Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed, and are not bound to inquire whether acts of internal management have been regular.'

The respondent contended, relying on the judgment of the Northern Cape Division in *Man Truck & Bus (SA) Ltd v Victor en Andere* 2001 (2) SA 562 (NC), that the *Turquand* rule applies to trusts. This contention was upheld by the learned judge in the court *a quo* and its correctness was debated before us.

[9] In my view, however, whether or not the *Turquand* rule should be applied to trusts, particularly business trusts - a matter on which I express no opinion - it cannot be applied in the present case. I say this because I am satisfied that clause 23.4 of the trust deed does not afford a foundation for the contention advanced in this regard by the respondent.

[10] Clause 23.4 (as far as is material) reads as follows:

'Die trustees kan een of meer van hulle magtig om alle dokumente vir amptelike doeleindes wat vir die administrasie van die trust en ter uitvoering van enige transaksie wat met die trust se sake verband hou, nodig is, namens die trustees te teken'.

[11] The clause clearly on its plain language applies only to the signing of documents for official purposes. It thus does not apply to the contract signed by the first appellant which was not for official purposes. It follows that no question of internal formalities, such as is dealt with by the *Turquand* rule, can be regarded as having arisen whereby an outsider who had concluded a contract with one of the trustees could assume that, in signing the contract, the trustee concerned had been empowered, as a matter of internal management, by his co-trustee to sign the contract.

[12] The matter does not end there, however. The parties were agreed that the decision in this case turned on the legal question as to whether the *Turquand* rule can apply to transactions concluded between a trust and a third party. It was accepted by both sides both in the court *a quo* and in the heads filed in the court that clause 23.4 would form a basis for the application in this case of the *Turquand* rule if, as a matter of law, the rule

applies to trusts. (In view of what in my opinion is the correct interpretation of this clause, it is not necessary to consider whether on the parties' interpretation thereof the *Turquand* rule would in any event have been applicable in the circumstances of this case.) Once it was pointed out to counsel that they and the court *a quo* had all proceeded on an incorrect interpretation of clause 23.4, counsel for the respondent requested that this Court order that the case be referred for trial in terms of Uniform Rule 6(5)(g) with a direction that the respondent file its declaration within fifteen days of this Court's order.

[13] I considered whether the appeal should not be dismissed on the ground that the first appellant did not specifically deny that he was authorised by his co-trustee, the second appellant, to conclude the contract on behalf of the trust. I have, however, come to the conclusion that such a course should not be followed, particularly as the respondent's own counsel eventually applied for a reference to trial in terms of Rule (6)(5)(g), as I have said.

[14] In my view the appeal must succeed with costs and the order which is to be substituted for the order of the court *a quo* should provide for a reference to trial in terms of Rule 6(5)(g), as applied for by the respondent's counsel.

[15] The following order is made:

1. The appeal succeeds with costs.

2. The order made in the court *a quo* is set aside and replaced by the following order:

    1. The application is referred for trial in terms of Rule 6(5)(g) with the notice of motion to stand as a single summons and the notice of intention to oppose as notice of intention to defend.

    2. The applicant is to deliver its declaration within 15 days and the further proceedings will be governed by the Uniform Rules of Court.

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IG FARLAM

JUDGE OF APPEAL

CONCURRING
HARMS JA
BRAND JA
CLOETE JA
VAN HEERDEN AJA

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In the matter between:

W J NIEUWOUDT **Appellant**

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VRYSTAAT MIELIES (EDMS) BEPERK **Respondent**

Coram: HARMS, FARLAM, BRAND, CLOETE JJA AND VAN HEERDEN AJA
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J U D G M E N T

HARMS JA/

HARMS JA:
[16] This case raises a troubling aspect about business trusts. Trustees have to act jointly unless the trust deed provides otherwise and trust deeds seldom do. The principle works well in the traditional trust setting where trustees hold property on behalf of beneficiaries or where the trust is a charitable one.

[17] The trust deed in this case is typical of a newer type of trust where someone, probably for estate planning purposes or to escape the constraints imposed by corporate law, forms a trust while everything else remains as before. Mr Nieuwoudt, the first appellant, was the trust donor. He and his wife, the second appellant, were the first trustees and still are the only trustees. They are the only income beneficiaries. Only he can appoint further trustees. The trust may conduct business, in particular that of farming. One wonders how the farming operations are conducted given the fact that the trustees have to act jointly. And one can only speculate as to whether Mr Nieuwoudt has a copy of the trust deed and the Master's appointment at hand when ordinary trust business is being conducted or whether Mrs Nieuwoudt accompanies him whenever any transaction has to be concluded. Maybe the appellants will be able to explain all this in due course. Mr Nieuwoudt would then also have the opportunity of explaining why he did not disclose the terms of the trust deed and the existence of his co-trustee to the other party.

[18] What is troubling is the fact that there is no central register for trusts or trustees as one has in respect of companies and close corporations. A member of the public who to wishes do business with a trust will first have to determine where the trust deed was filed. (We know that in this case it is in Kimberley but if the trust had been formed before the new provincial borders were drawn it might have been in Pretoria.) Having found the correct Master's office, the said member of the public would have to make an application to the Master for permission to inspect the trust deed, something the Master in the exercise of his or her discretion may refuse. Section 18 of the Trust Property Control Act 57 of 1988 provides as follows:

'Subject to the provisions of section 5 (2) of the Administration of Estates Act, 1965 (Act 66 of 1965), regarding the documents in connection with the estate of a deceased person, the Master shall upon written request and payment of the prescribed fee furnish a certified copy of any document under his control relating to trust property to a trustee, his surety or his representative or any other person who in the opinion of the Master has sufficient interest in such document.'

[19] Whether knowledge of the contents of a trust deed should be attributed in law to the public seems to me to be less than obvious. An underlying principle of company law and the Turquand rule, namely that a person who deals with a company is bound by the limitations contained in the memorandum and articles of association because these documents are accessible to the public, is consequently difficult to apply to trusts.

[20] Nevertheless, as Van Dijkhorst J convincingly explained in *Coetzee v Peet Smith Trust en Andere* 2003 (5) SA 647 (T), all this does not justify a departure from the principle that trustees have to act jointly. And one should not believe, as Cameron et al *Honore's South African Law of Trusts* 5 ed para 198 point out, that the ambit of authority conferred by a trust deed is a matter of 'internal management' with which outsiders need not concern themselves.

[21] The trust deed in this case provided that if there are two trustees, they have to act jointly but if there are more than two the majority vote counts. Whether both trustees have acted in a particular manner is not a matter of internal management but rather one determining the scope of their authority. Whether, on the facts of the case, the issue in *Man Truck & Bus (SA) Ltd v Victor en Andere* 2001 (2) SA 562 (NC) concerned the ambit of authority (as Cameron et al *loc cit* suggest) or a matter of internal management need not be considered.

[22] What does need to be emphasised is that even if the Turquand rule is extended to business trusts, and even if a trust deed were to provide that the trustees could delegate their powers to one of their number, the Turquand rule would without more be of no assistance to third parties. This is because a third party would not be entitled to assume, merely from the fact that one trustee can be authorised to exercise the powers of all of them, that such authorization has in fact been given: *Legg & Co v Premier Tobacco Co* 1926 AD 132 139; *Wolpert v Uitzigt Properties (Pty) Limited & Others* 1961 (2) SA 257 (W) 262G-263F; *Tuckers Land & Development Corporation v Perpellief* 1978 (2) SA 11 (T) 15A-H.

[23] However, as mentioned by Farlam JA, the fact that trustees have to act jointly does not mean that the ordinary principles of the law of agency do not apply. The trustees may expressly or impliedly authorise someone to act on their behalf and that person may be one of the trustees. There is no reason why a third party may not act on the ostensible authority of one of the trustees, but whether a particular trustee has the ostensible authority to act on behalf of the other trustees is a matter of fact and not one of law.

[24] This case should consequently serve as a warning to everyone who deals with a trust to be careful. Although someone in the position of the first appellant may be personally liable for a breach of a warranty of authority, this may, depending on the circumstances, be of little solace.

[25] The appeal has to succeed because the respondent misinterpreted the trust deed for the reasons set out in Farlam JA's judgment with which I agree.

L T C HARMS
JUDGE OF APPEAL

CONCURRED:
FARLAM JA
BRAND JA
CLOETE JA
VAN HEERDEN AJA